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REPORTS OF CASES

DECIDED BETWEEN

JULY 17, 1987 and DECEMBER 3, 1987

IN THE

Supreme Court of Nebraska

VOLUME CCXXVI

TRINA SOLLARS

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By Trina Sollars, 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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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. BA-005: **Bar Application on Appeal of Theobald.** By order of the court, Nebraska State Bar Commission ruling affirmed; application of Theobald denied.

No. 82-293: **Gottsch v. Churchill.** By order of the court, case dismissed pursuant to order to show cause issued on October 26, 1987.

No. 83-810: **First National Bank & Trust v. Lewandowski.** By order of the court, case dismissed pursuant to order to show cause issued on October 26, 1987.

No. 86-037: **In re Conservatorship of Koelling.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-181: **Todd v. Todd.** Stipulation allowed; appeal dismissed.

No. 86-241: **Weiner v. State ex rel. Real Estate Commission.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. 86-300: **Grand Island Mall v. Shirley.** Stay of bankruptcy lifted; motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 86-448, 86-449: **Kuhlman v. Grimminger.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-485: **Dinnel v. Todd.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 86-535: **Burney v. Settles.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-664: **White v. Schrack.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 86-803: **Center State Bank v. Dana, Larson, Roubal & Assoc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-827: **Hansen v. Hansen.** Stipulation of settlement approved; cause remanded to the district court with directions

to dismiss.

No. 86-903: **Ward v. Ward.** Stipulation allowed; appeal dismissed.

No. 86-912: **Jenkins v. State.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-977: **State v. Rosenkrans.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-994: **In re Interest of Crawford.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. 86-1004: **McGowen v. Smith.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 86-1022: **Farmland Industries, Inc. v. State Board of Equalization.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-1033: **Midwest Bridge and Constr. v. Village of Brainard.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-1036: **Federal Land Bank of Omaha v. Nelson.** By order of the court, stay of bankruptcy lifted. Stipulation allowed; appeal dismissed.

No. 86-1040: **State v. Meints.** Judgment affirmed; see Rule 7A.

No. 86-1053: **Commercial State Bank of Wausa v. Rosberg.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 86-1073: **State v. Nottlemann.** Judgment affirmed; see Rule 7A.

No. 86-1077: **Taylor v. Travelers Insurance Co.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 86-1081: **State v. Sager.** Judgment affirmed; see Rule 7A.

No. 86-1089: **George v. Georges.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-001: **O'Donnell v. Bruckman Rubber.** Stipulation

allowed; appeal dismissed with prejudice.

No. 87-002: **Hansen v. Hansen.** Stipulation of settlement approved; cause remanded to the district court with directions to dismiss.

No. 87-040: **State v. Morse.** Judgment affirmed; see Rule 7A.

No. 87-041: **State v. Ross.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-053: **State v. Shaddy.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-091: **Hansen v. Weddington.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-109: **Pegram v. Mahar.** Stipulation allowed; appeal dismissed.

No. 87-114: **Dederman v. Hopco, Inc.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-115: **State v. Scott.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 87-118: **The Travelers Insurance Co. v. Wynne.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-121: **State v. Boner.** Stipulation allowed; appeal dismissed.

No. 87-133: **Johnson v. Haley.** Joint motion of the parties to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 87-144: **State v. Derby.** Motion of appellee for summary affirmance or dismissal denied; count I of information set aside; matter remanded to trial court for postconviction evidentiary hearing on count II.

No. 87-153: **Sladek v. Clearwater Development Co.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-164: **State v. Zimmerman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-172: **State v. Green.** Judgment affirmed; see Rule 7A.

No. 87-173: **State v. Moore.** Judgment affirmed; see Rule

7A.

No. 87-187: **Lacy v. Young.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-202: **State v. Tvrdy.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-207: **State v. Lewis.** Judgment affirmed; see Rule 7A.

No. 87-208: **State v. Vaughn.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-210: **Haas v. Haas.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-215: **State of Iowa ex rel. Crawford v. Andrews.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-225: **Weigel v. Nebraska Food Corp.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-227: **Lutes v. Rinne.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-230: **State v. Turner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-234: **State v. Thomas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-242: **State v. Lawson.** Judgment affirmed; see Rule 7A.

No. 87-243: **State v. Brown.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-244: **State v. Lehman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-247: **State v. Scarborough.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-251: **Regency Homes Assn. v. Theisen.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-269: **Theel v. George A. Hormel & Co.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-270: **Hurt v. Hurt.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice; each party to pay own costs.

No. 87-277: **State v. Randall.** Judgment affirmed; see Rule 7A.

No. 87-278: **State v. Smith.** Judgment affirmed; see Rule 7A.

No. 87-279: **State v. Darling.** By order of the court, appeal dismissed for failure to file briefs.

Nos. 87-285, 87-286, 87-360: **State v. Schneider.** Judgment affirmed; see Rule 7A(1).

No. 87-287: **State v. Raszler.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-288: **Luna v. Grammer.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-290: **Spilinek v. Jacobsen.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-291: **State v. Kline.** Judgment affirmed; see Rule 7A.

No. 87-292: **State v. Pendley.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-293: **State v. Purdy.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-300: **Norwest Bank Nebraska v. Yager.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-306: **State v. Gibson.** Judgment affirmed; see Rule 7A.

No. 87-313: **State v. Schafer.** Judgment affirmed; see Rule 7A.

No. 87-317: **Racicky v. J.I. Case Co.** Stipulation allowed; appeal dismissed.

No. 87-318: **Bittner v. Hinky Dinky Stores.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-320: **State v. Shaffer.** Judgment affirmed; see Rule 7A.

No. 87-328: **State v. Holthaus.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-341: **State v. Colter.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-347: **Mortensen v. Lynch.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-351: **Wood v. Gering National Co.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-355: **State v. Erb.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-356: **Wittmersehouse v. Noonan.** Stipulation allowed; appeal dismissed.

No. 87-361: **State v. Mahan.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-365: **Harris v. Orr.** By order of the court, appeal dismissed for lack of jurisdiction.

No. 87-367: **State v. Erb.** Stipulation allowed; appeal dismissed.

No. 87-369: **State v. Utigard.** By order of the court, judgment affirmed; see Rule 7A.

No. 87-377: **Langan v. Douglas & Lomason Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-378: **Department of Banking & Finance v. Zelen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-381: **State v. Belford.** Judgment affirmed; see Rule 7A.

No. 87-384: **Jefferson v. Dept. of Motor Vehicles.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-394: **Grand Island Post No. 53 v. Rasmussen.** Stipulation allowed; appeal dismissed.

No. 87-396: **State v. Winters.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-397: **State v. Walker.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-398: **State v. Caldwell.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-399: **State v. Caldwell.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-400: **State v. Petet.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-401: **Price v. Baker's Supermarkets.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-405: **County of Douglas v. Godinez.** Stipulation allowed; appeal dismissed at cost of appellant.

Nos. 87-408, 87-429, 87-431: **Aupperle Plumbing and Heating v. Lecher Constr. Co.** Stipulation allowed; appeal dismissed.

No. 87-409: **In re Estate of Stubbert.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-415: **State v. Mercer.** Judgment affirmed; see Rule 7A.

No. 87-416: **State v. Mercer.** Judgment affirmed; see Rule 7A.

No. 87-418: **Milos v. Milos.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-419: **Ellis v. Jensen.** Stipulation allowed; appeal dismissed.

No. 87-420: **State v. Hill.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-421: **State v. Scott.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-423: **State v. Smith.** Judgment affirmed; see Rule 7A.

No. 87-424: **State v. Smith.** Judgment affirmed; see Rule 7A.

No. 87-428: **Witherspoon v. Sides Constr. Co.** By order of the court, appeal dismissed for lack of a final order as to both

appellants.

No. 87-432: **Frickel v. Campbell's Soup Co.** Stipulation allowed; appeal dismissed.

No. 87-436: **State v. Hass.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-437: **State v. Templeton.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-440: **State v. Cole.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 87-441: **Schukert v. Westerbuhr.** Stipulation allowed; appeal dismissed without prejudice.

No. 87-444: **State v. Schoffner.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-445: **State v. Holthus.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-447: **State v. Winslow.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-448: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-453: **Sommerhalder v. Breckel.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-457: **State v. Addison.** Judgment affirmed; see Rule 7A.

No. 87-459: **State v. Jackson.** Judgment affirmed; see Rule 7A.

No. 87-461: **Beeler v. City of Omaha.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-463: **Yellow Boy v. Dept. of Social Services.** Stipulation allowed; appeal dismissed.

No. 87-465: **State v. Reyes.** Judgment affirmed; see Rule 7A.

No. 87-470: **State v. Pearce.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-472: **Schroeder v. Mettenbrink.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-473: **In re Estate of Mettenbrink.** Stipulation allowed; appeal dismissed.

No. 87-478: **DeKay v. Spilger.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-484: **Carter v. Gunter.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-485: **State v. Chrans.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-487: **Sioux City Foundry Co. v. Black.** Stipulation allowed; appeal dismissed.

No. 87-488: **State v. Markley.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-489: **State v. Smith.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-490: **State v. McCain.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-493: **Martin v. State ex rel. Real Estate Commission.** By order of the court, appeal dismissed.

No. 87-496: **Weatherly v. Wilson.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-502: **State v. Stacy.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-505: **State v. Sohl.** Judgment affirmed; see Rule 7A(1).

No. 87-508: **State v. Mason.** Stipulation allowed; appeal dismissed.

No. 87-509: **Rolling v. Rolling.** By order of the court, appeal

dismissed; see Rule 7A.

No. 87-512: **State v. O'Donnell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-514: **State v. Soule.** Judgment affirmed; see Rule 7A(1).

No. 87-519: **Adams Bank & Trust v. Wilson.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-525: **State v. Morimoto.** Judgment affirmed; see Rule 7A.

No. 87-526: **State v. Russell.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-527: **Smith Z Two Bar, Ltd. v. Dept. of Roads.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-532: **Widga v. Sandell.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-533: **Farmland Service Co-op v. Martin.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 87-535: **State v. Divine.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-538: **State v. Whigham.** Judgment affirmed; see Rule 7A.

No. 87-541: **Pickering v. Pickering.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-548: **Pauly v. Uhrich.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-549: **Scottsbluff Production Credit Assn. v. Jessen.** Stipulation allowed; appeal dismissed.

No. 87-550: **Dieter v. Hand.** Stipulation allowed; appeal dismissed.

No. 87-554: **State v. Thompson.** Judgment affirmed; see Rule 7A(1).

No. 87-557: **State v. Bye.** Judgment affirmed; see Rule 7A.

No. 87-558: **State v. Roberts.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to

withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-565: **Whiteley v. Whiteley.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-566: **State v. Lee.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-568: **State v. Thompson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-570: **Old Orchard West Merchants Assn. v. Richman Gordman Stores.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-575: **Digilio v. Wilkinson Manufacturing Co.** Stipulation allowed; appeal dismissed.

No. 87-578: **Hansen v. Rodgers.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-581: **Beeman v. Lacey.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-583: **Voyles v. Johnson.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-585: **State v. Dement.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-586: **State v. Brown.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-588: **State v. Bills.** Judgment affirmed; see Rule 7A(1).

No. 87-593: **Burney v. Settles.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-594: **State ex rel. Rees v. Rees.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-600: **State v. Ham.** Judgment affirmed; see Rule 7A.

No. 87-603: **Bahr v. Bahr.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-604: **Sires v. Love.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-614: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-616: **In re Estate of Carlson.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 87-617: **State v. Hodyc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-619: **Rudolf v. Yenney.** Motion of appellant to approve stipulation overruled; motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-621: **State v. Outhouse.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-622: **State v. Brown.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-623: **State v. Lyncook.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-625: **State v. Schweigart.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-638: **State v. Prothman.** Motion of appellee for summary affirmance overruled; judgment affirmed; see Rule 7A(1).

No. 87-639: **Bourg v. Bourg.** Stipulation allowed; appeal dismissed.

No. 87-640: **State v. Liss.** Stipulation allowed; appeal dismissed.

No. 87-643: **State v. Cox.** Judgment affirmed; see Rule 7A.

No. 87-644: **State v. Mason.** Stipulation allowed; appeal dismissed.

No. 87-646: **State v. Bruce.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-650: **Failla v. Failla.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 87-652: **Hoskins-Western-Sonderegger v. Royal Ins. Co.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-653: **McMillion v. 24-Hour Nautilus.** Stipulation allowed; appeal dismissed.

No. 87-660: **Webster v. Egland.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-663: **Pinkston v. State.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-667: **Fox Valley Construction v. Vann.** Appeal dismissed per stipulation.

No. 87-672: **State v. Durand.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-673: **State v. Grayson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-683: **In re Estate of Wilde.** Stipulation allowed; appeal dismissed.

No. 87-686: **Crowley v. Vitek.** Stipulation allowed; appeal dismissed.

No. 87-687: **State v. Young.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-688: **State v. Coleman.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-689: **State v. Felder.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-700: **Porcupine Feeders, Inc. v. Monfort of Colorado, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 87-702: **State v. Gagne.** Appeal dismissed. See Rule 7A(2).

No. 87-709: **State v. Kozal.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-712: **State v. Barzar.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 87-718: **State v. DeJaynes.** By order of the court, appeal dismissed for failure to file briefs.

No. 87-721: **State v. Ybarra.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-724: **Rassman v. Department of Correctional Services.** Appeal dismissed. See Rule 7A(2).

No. 87-725: **State v. Hill.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-726: **State v. Haynes.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-728: **State v. Hembertt.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-731: **Stiefel v. Homes Enterprises, Inc.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-732: **Pearson v. Red Lion Inn.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-738: **Wilkie v. Broomhall.** Joint motion to dismiss appeal sustained; stipulation of settlement approved.

No. 87-739: **Majors v. Majors.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-756: **State v. Sibert.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-763: **Franco v. IBP, inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-764: **Phillips Investment Company v. Fitchett.** Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. 87-768: **State v. Severeid.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-769: **State v. Durand.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-772: **Wright v. Madonna Professional Care Center.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-774: **State v. Pierce.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-781: **Pinkleman v. Silvey.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-785: **Specht v. Block.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 87-786: **State v. Turen.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-787: **Ulrich v. Mid-Plains Technical Community College Area.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-804: **State v. Lamb.** Stipulation allowed; appeal dismissed.

No. 87-805: **Boyd v. Boyd.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-808: **Tilden Bank v. Schapmann.** Stipulation allowed; appeal dismissed.

No. 87-812: **Howard v. Howard.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 87-813: **Mata v. Rodriguez.** Stipulation allowed; appeal dismissed with prejudice.

No. 87-818: **Rutledge v. Rutledge.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-820: **Felt v. New Tower Hotel Court, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 87-840: **Myers v. Accent Service Co., Inc.** Stipulation allowed; appeal dismissed.

No. 87-847: **Antoniak v. Vanderkolk.** Stipulation allowed; appeal dismissed.

No. 87-854: **Hake v. Hake.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 87-855: **Pickinpough v. Burlington Northern Railroad.** Stipulation allowed; appeal dismissed.

No. 87-862: **In re Valuation of Scotts Bluff County v. Board of Equalization.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 87-870: **State v. Pena.** Stipulation allowed; appeal dismissed.

No. 87-871: **State v. Reed.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 87-893: **Vice v. German Mutual Insurance Assn.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 87-904: **In re Application of Bud Moore, Inc. v. Engel.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

THELMA BELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF LINNIE EARLY, DECEASED, APPELLANT, V. WILLIAMS CARE CENTER, INC., A NEBRASKA CORPORATION, APPELLEE.

409 N.W.2d 294

Filed July 17, 1987. No. 85-502.

1. **Expert Witnesses.** The admission of opinion testimony of an expert is generally discretionary with the trial court.
2. **Verdicts: Evidence: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict, it must be considered most favorably to the successful party and every controverted fact resolved in such party's favor, giving the benefit of inferences reasonably deducible from it.
3. **Verdicts: Juries: Appeal and Error.** A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party.

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

Charles I. Scudder, for appellant.

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

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

GRANT, J.

Plaintiff-appellant, Thelma Bell, the daughter of Linnie Early, was appointed personal representative of the estate of Linnie Early. She brought this action in Douglas County District Court against the defendant-appellee, Williams Care Center, Inc., a Nebraska corporation, doing business as Williams Care Manor, a nursing home. Plaintiff's second amended petition set out three causes of action. The first alleged that the wrongful death of decedent was caused by

negligence of defendant in its failure to properly care for the decedent, a patient in defendant's nursing home. The second cause of action prayed for damages for decedent's medical and funeral expenses, and the third cause of action sought general damages for the pain and suffering of the decedent from the time defendant's alleged improper care began on December 9, 1981, to Linnie Early's death on March 20, 1982.

The defendant's answer to plaintiff's second amended petition generally denied the allegations of the petition and affirmatively alleged that in any and all treatment rendered to decedent, defendant exercised that degree of skill and care expected of a nursing home treating patients in Omaha, Douglas County, Nebraska, or similar communities.

At the conclusion of plaintiff's evidence, the trial court sustained defendant's motion to dismiss as to plaintiff's first cause of action seeking damages for wrongful death and as to the portion of plaintiff's second cause of action seeking damages for decedent's funeral expenses. Plaintiff has not assigned any error in this ruling. The issues raised in plaintiff's third cause of action for decedent's pain and suffering and in her second cause of action for related medical damages were apparently submitted to the jury. The jury instructions are not before us, but the record shows the plaintiff had no objections to the instructions as submitted.

After jury trial, a verdict was apparently returned and judgment entered for the defendant. The verdict is not in the record before us, but a journal entry shows the overruling of plaintiff's motion for new trial. Plaintiff timely appealed. In this court plaintiff assigns two errors, which together with subparts present the following errors: (1) The trial court erred in not sustaining plaintiff's motion for a new trial because "[t]he verdict of the jury was not sustained by sufficient evidence and was contrary to the overwhelming evidence of the Appellant" and the verdict must have resulted from passion, prejudice, or mistake, or from the misconduct of defendant's counsel in "intentionally injecting the issue of race into the jury's consideration"; and (2) the trial court erred "in allowing two of Appelle's [sic] expert witnesses to render opinions on an inadequate and insufficient foundation." We affirm.

The record shows the following. In October of 1980, the decedent, Linnie Early, age 62, became a resident of the Williams Care Manor, owned by defendant. Prior to entering the nursing home, the decedent had been hospitalized and was in need of 24-hour-a-day care. Dr. Kemp, a general practitioner, was decedent's physician from approximately 1962 to the time of her death. He submitted a physician's report on decedent's condition at the time of decedent's entering defendant's nursing home. That report listed the decedent's primary diagnosis at that time as "CVA [with] left side paralysis" and secondary diagnosis as "Hypertension [and] Diabetes." Dr. Kemp testified that CVA is a "cerebral vascular accident . . . . [I]t's like a stroke . . . ." The record shows decedent's CVA occurred approximately 10 or 11 years prior to her entering defendant's nursing home.

A nurse's aide, who worked for the defendant and cared for the decedent, and decedent's husband testified that the decedent had received a cut on her left great toe during a toenail reduction by a podiatrist brought to the home by defendant on December 9, 1981. Neither of the witnesses had seen the act of cutting. The husband testified that when he visited the decedent the next day, on December 10, 1981, the decedent told him "[t]hat doctor cut my toe . . . . I cried and cried." The husband testified further that he observed a bandage on decedent's left great toe, that he saw decedent almost every day after that, and that the decedent complained of pain in her foot.

The nurse's aide testified that she did not work on December 9, 1981, but that on December 10 the decedent complained to her that the "toe doctor" had cut her toe, and she removed a white gauze bandage from decedent's toe and observed a "deep puncture-type cut" with "drainage coming from it." The aide further testified that on December 29, 1981, decedent's bandage was removed and part of the skin of decedent's toe was removed with the bandage, and that a nurse in charge, a licensed practical nurse at defendant's nursing home, had to use scissors to cut the bandage and the skin off.

Thelma Bell testified that she observed a white gauze bandage on decedent's left toe sometime between December 9 and December 25, 1981.

The podiatrist who did the toenail reduction on decedent on December 9, 1981, stated that he did not recall that the decedent's skin was broken during the procedure and that he did not remember the patient's complaining of injury, nor did he remember applying any antiseptic or bandage to the patient.

The L.P.N. in charge testified that on December 29, 1981, she was called over to observe a wound on decedent's left great toe for the first time and that she called Dr. Kemp immediately. On December 31, 1981, Dr. Kemp saw decedent. He testified that decedent's left great toe had an area of healthy, granulated tissue and looked like skin had come off but could possibly be healed. He further testified that there did not appear to be a knife cut or laceration on the toe.

On January 18, 1982, the L.P.N. reported that "[r]esident has pain in Great [left] toe - broken area healed but area between toes appears damp and tip of toe appears dark." She testified that between December 31, 1981, and January 18, 1982, the red open area of the toe had filled in and "looked really great, and we were feeling pretty good that, being that she was a diabetic . . . it's going to be okay." The decedent was seen by Dr. Kemp on January 18, 1982, at which time he noted that decedent's toe looked like there might be some early infection or gangrene setting in. Dr. Kemp admitted the decedent to Lutheran Medical Center.

On January 22, 1982, the decedent underwent an arteriogram to measure the blood flow to the decedent's legs. That test showed a 90-percent obstruction in the left, common iliac artery, indicating that the blood supply to decedent's left leg was markedly diminished. On February 1, 1982, in an attempt to improve the blood supply to decedent's leg and "in order to save what remains of her left foot," Dr. Feldhaus, a vascular surgeon, performed a femoral artery graft and bypass. This operation was not successful in improving the blood flow to decedent's leg. On February 15, 1982, Dr. Donahue, a general surgeon, amputated the gangrenous first and second toes of the decedent's left foot. Dr. Donahue testified that, at that time, there was "practically no blood at all going into the distal end of the foot." On March 8, 1982, prior to surgery scheduled for March 9, decedent suffered a heart attack.

On March 18, 1982, after decedent's heart problems stabilized, Dr. Donahue performed an above-the-knee amputation on decedent's left leg, with no complications noted. Thereafter, the decedent developed "urinary kidney shutdown" and died of "cardiac arrest" on March 20, 1982.

At the trial, Dr. Donahue and Dr. Smith, a vascular surgeon, were called as witnesses by the defendant. Each doctor testified that the cause of decedent's gangrene was a lack of blood supply to decedent's foot due to blockages in the arteries to decedent's leg. Dr. Donahue testified that a "few small breaks" he saw on decedent's toe were breaks in the skin that were mildly infected and that "there was no relationship whatsoever" between that condition and the amputation. Dr. Smith testified that, in his opinion, it was unlikely that there could have been a cut on decedent's toe on December 9, 1981, because if there had been, a "roaring" infection would have been present on December 29, and there was no such infection present.

Dr. Recker was called as a witness by the plaintiff. He testified he was an endocrinologist, a doctor who studies diseases of the glandular system and treats them, along with diabetes. Dr. Recker testified that the alleged cut on decedent's toe on December 9, 1981, and the subsequent onset of gangrene were related. His testimony was premised on the circumstantial evidence that decedent's great toe had been cut on December 9, 1981. He had no personal knowledge if such a cut had occurred.

We first consider plaintiff's assignment of error that the trial court erred in allowing two of defendant's expert witnesses to render opinions on an inadequate and insufficient foundation. Plaintiff asserts that the court erred in permitting Drs. Donahue and Smith, who were called as witnesses by defendant, to testify, when there was inadequate foundation for their qualifications as experts.

Plaintiff objected to the testimony of Dr. Donahue, stating to the trial court:

> [T]here's a lack of foundation in regard to the basis of the question.
>
> In other words, the basis is just general medical knowledge; and I object to it on the grounds that we have an endocrinologist here give testimony, and the basis there

> was an examination of the complete records, and the deposition of [the nurse's aide].

Plaintiff's objection to Dr. Donahue's testimony was properly overruled, whether the objection be considered as being based on the witness' alleged lack of qualifications as an expert or upon a lack of foundation. The record shows that Dr. Donahue had been a surgeon for 32 years and during that time had performed approximately four to six amputations each year. The record further shows that Dr. Donahue was the treating surgeon and had observed Linnie Early since January of 1982.

Dr. Smith had been a general surgeon for 21 years, with a specialty in vascular surgery. Plaintiff did not object to either the qualifications of or the factual basis of the opinions stated by Dr. Smith.

The admission of opinion testimony of an expert is generally discretionary with the trial court. *Bernadt v. Suburban Air, Inc.*, 221 Neb. 537, 378 N.W.2d 852 (1985). Without specific objection to the qualifications of a witness as an expert, admission of opinion testimony of an expert is not an abuse of the trial court's discretion. See *Bernadt v. Suburban Air, Inc., supra*. There was no error in permitting Drs. Donahue and Smith to testify.

Plaintiff also contends that the verdict should be vacated and a new trial granted because the verdict was influenced by misconduct of defendant's attorney in injecting the issue of race into the jury's consideration. The background on this issue was that the decedent was black, as were the owners of the defendant's nursing home. This contention is based on defendant's counsel's question to Burdine Williams, one of the stockholders in the defendant corporation, as follows: "Q. Are most of your patients black or white? A. We have all type." Plaintiff did not object to this question, did not ask for a mistrial, and first raised this issue of attorney misconduct in her amended motion for new trial. Not only has plaintiff failed to properly preserve the question, but the record does not show, in any way, that the question was prejudicial to the plaintiff. This assignment of error is without merit.

In determining the sufficiency of the evidence to sustain a

verdict, it must be considered most favorably to the successful party and every controverted fact resolved in such party's favor, giving the benefit of inferences reasonably deducible from it. *Duncza v. Gottschalk*, 218 Neb. 879, 359 N.W.2d 813 (1984). A jury verdict may not be set aside unless clearly wrong, and it is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party. *Vacek v. Ames*, 221 Neb. 333, 377 N.W.2d 86 (1985). The evidence before the jury was clearly sufficient to support a verdict for defendant. This assignment of error is without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

SESOSTRIS TEMPLE GOLDEN DUNES, AN UNINCORPORATED ASSOCIATION, APPELLANT, V. JAMES SCHUMAN, DOING BUSINESS AS BLUE ENGINEERING, APPELLEE.

409 N.W.2d 298

Filed July 17, 1987. No. 85-696.

1. **Damages: Proof.** The party seeking recovery has the burden of proving damages with as much certainty as the case permits.
2. **Trial: Damages.** The evidence must be sufficient to allow the trier of fact to estimate damages with a reasonable degree of certainty and exactness.
3. **Uniform Commercial Code: Appeal and Error.** Where a case has been tried on the theory that the Uniform Commercial Code is applicable, upon appeal it will be decided upon the same theory.
4. **Jury Instructions.** Where it appears that the trial court's response to a question from the jury could not result in prejudice to any of the parties, the presence of the parties or their counsel is unnecessary.
5. **Actions: Contracts.** Whenever a person has possession of money to which in equity and good conscience another is entitled, a suit lies for money had and received. In such a case the law implies a promise by the former to pay such money to the latter.

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

T.J. Hallinan of Law Offices of Cobb & Hallinan, P.C., for appellant.

Hal W. Anderson of Berry, Anderson, Creager & Wittstruck, for appellee.

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

BOSLAUGH, J.

This action arises out of a dispute concerning an oral agreement between the plaintiff, Sesostris Temple Golden Dunes, an unincorporated association, and the defendant, James Schuman, doing business as Blue Engineering, for the design and manufacture of certain parts for dune buggies.

The case was tried for 4 days on the plaintiff's third amended petition, the defendant's amended answer, and the plaintiff's reply.

The third amended petition alleged the defendant agreed to supply all material and manufacture the running gear for 10 dune buggies for $3,500. Since the dune buggies were to be used in parades and competitions, they were to be identical. Because the defendant failed to supply all materials as agreed, the plaintiff was required to supply parts costing $1,619.03. Because of poor workmanship the plaintiff was required to purchase additional parts costing $991.11. The plaintiff's damages amounted to $2,610.14.

A second cause of action alleged the defendant had overcharged the plaintiff $5,169.65.

The answer alleged the agreement was for the manufacture of a chassis with front hubs, steering gear, and gocart disk brakes; that the parts supplied were identical except that the use of black pipe as required by the plaintiff may have resulted in some deviation; that additional costs were incurred because of changes made by the plaintiff, which the defendant agreed to supply on the basis of cost plus labor; that some parts specified by the plaintiff were inferior in quality, resulting in additional costs; and that the plaintiff waived any claim for defects by accepting the product and not giving the defendant an opportunity to correct alleged defects.

A counterclaim alleged there was $1,680 due the defendant for extra time and labor as a result of modifications to the specifications and of discussions with the plaintiff concerning

changes and modifications to the specifications.

The reply amounted to a general denial of the allegations of the answer and counterclaim.

Before trial the plaintiff filed a motion in limine to exclude evidence of money received by its members from the sale of some of the dune buggies and to exclude the date the petition had been filed. Plaintiff's motion was sustained as to the sales, but not as to the date the petition was filed.

The jury found for the defendant on plaintiff's first cause of action, for the plaintiff on its second cause of action in the amount of $212.76, and for plaintiff on defendant's counterclaim. This appeal followed.

The plaintiff has assigned as error the trial court's denial of its motion in limine to exclude evidence as to the date the petition was filed; the trial court's failure to advise and consult with the attorneys concerning written questions from the jury; the trial court's failure to instruct the jury as to theories or issues supported by the evidence; the failure to submit special interrogatories or a special verdict form to the jury; the giving of certain instructions; and the prohibiting of argument that the frames were to be, but were not, identical.

The plaintiff did not brief the assignments of error concerning the motion in limine, the failure to instruct that there was a contract which did not require the defendant to supply parts, the failure to submit special interrogatories or a special verdict form, and the giving of instruction No. 13. Accordingly, those assignments of error will not be considered. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). See, also, *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987).

The testimony at trial was conflicting, and the facts concerning the terms of the oral agreement and alleged subsequent modifications are disputed. The evidence was sufficient to support the verdict. It is unnecessary to summarize the evidence in detail or to discuss the many conflicts in the testimony.

The plaintiff first argues that the trial court erred in failing to instruct the jury that the contract required the construction of identical vehicles. Plaintiff argues that theory was presented by the pleadings and supported by competent evidence, and its

omission was prejudicial error. The defendant responds the trial court properly omitted such an instruction because the plaintiff failed to allege any damages resulted from the defendant's alleged failure to construct identical buggies.

Instruction No. 2 did not set forth the plaintiff's allegation that the buggies were not identical, the allegation that the defendant had been made aware the buggies were to be identical, or that the defendant affirmatively alleged the buggies were in fact identical because the manufactured parts were built "on a jig," which ensured that all parts would be identical. The defendant had also alleged that any variations had been caused by the plaintiff. The president of the plaintiff, Harry Hartley, testified he informed the defendant, at their first meeting, that the buggies would be used in competition and had to be identical. On cross-examination, the defendant admitted that Hartley had so informed him. The trial court refused to give the requested instruction on the ground the issue was not relevant, because there was no evidence presented upon which the jury could base an award of monetary damages. Although there was evidence the defendant had been notified the buggies were not identical, there was no evidence of any damages suffered as a consequence.

The party seeking recovery has the burden of proving damages with as much certainty as the case permits. *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 377 N.W.2d 98 (1985). Such evidence must be sufficient to allow the trier of fact to estimate damages with a reasonable degree of certainty and exactness. *Kahl v. Frederick*, 224 Neb. 212, 397 N.W.2d 46 (1986). Since there was no evidence of any loss of value caused by the defendant's alleged failure to produce identical frames, there was no issue to be submitted to the jury.

The plaintiff next contends that instructions Nos. 2 and 14 were erroneous, because the Uniform Commercial Code was not applicable.

The defendant responds the court properly instructed the jury, because article 2 of the Uniform Commercial Code was applicable to the transaction, as the dune buggy frames were "goods" as defined by the code.

The record shows the parties tried the case on the theory that

article 2 of the Nebraska Uniform Commercial Code was applicable. The defendant's amended answer affirmatively alleged the plaintiff had failed to give reasonable and timely notice of the defects and time to correct the defects. The third amended petition alleged the plaintiff had given notice of the defects within a reasonable time but the defendant had failed to correct them. There was conflicting evidence concerning notice of the defects given by the plaintiff, and the defendant's attempts to correct them. Further, the plaintiff did not object to instruction No. 14, which was drawn from Neb. U.C.C. § 2-609 (Reissue 1980) and stated that a buyer must notify the seller of a breach within a reasonable time after its discovery, and the burden is on the buyer to establish such a breach. Plaintiff also failed to object to that portion of instruction No. 2 which stated the plaintiff had to prove that it had given reasonable notice to the defendant of the alleged breaches.

The transaction in question was a mixed one; a sale of goods as defined by Neb. U.C.C. § 2-105 (Reissue 1980), and a sale of services. However, it is clear the parties tried the case on the theory that article 2 of the U.C.C. applied. Accordingly, we make no independent analysis of the issue and assume, without deciding, that article 2 applies to the transaction. See, *Hammond v. Streeter,* 225 Neb. 491, 406 N.W.2d 633 (1987); *O'Keefe Elevator v. Second Ave. Properties,* 216 Neb. 170, 343 N.W.2d 54 (1984); *Kearney Clinic Bldg. Corp. v. Weaver,* 211 Neb. 499, 319 N.W.2d 95 (1982).

The plaintiff next argues that the trial court erred in failing to notify counsel of the questions submitted by the jury during deliberation, which resulted in prejudice to the plaintiff. The trial court responded to the jury's requests by stating, "Reread the instructions. The answers to your questions can be found there."

The plaintiff argues that the verdict clearly indicates prejudice resulted from the court's failure to inform counsel of the jury's questions. In particular, the plaintiff argues the $212.76 which the jury awarded as a refund of overcharges must have been obtained by adding together the amounts charged by the defendant to install motor braces, bearings, and throttle cable, incurred after delivery. Plaintiff argues these

charges should have been awarded under its first cause of action, which alleged a failure to perform in a workmanlike manner. The plaintiff argues that counsel should have been given an opportunity to draft clearer instructions or submit a special verdict form.

The defendant responds that there was no prejudice to the plaintiff, because the verdict does not evidence confusion.

The questions submitted by the jury were as follows:

> First Cause of Action pg 4
>
> C. Effect of Findings first paragraph —
>
> Does this mean that if we do not find for the Plaintiff unanimously on all 5 propositions that we find in favor of the defendant?
>
> First Cause of Action pg 3
>
> B. Burden of Proof —
>
> (1.) Can we find that there was an agreement between Plaintiff & Defendant for Defendant to manufacture Dune Buggies, but not address the specifics of the contract i.e. that defendant was to supply all materials?
>
> Second Cause of Action pg 4
>
> Is consideration of Second Cause of Action contingent on finding in favor of Plaintiff in First Cause of Action?
>
> Can we find for the Defendant in First Cause and for the Plaintiff in Second Cause?

The trial court gave the following instructions. Instruction No. 2 stated the plaintiff's allegations that the parties had entered into an oral contract in which the defendant agreed to manufacture the running gear and supply all material for 10 dune buggies for $350 per unit. It further stated that the plaintiff alleged the defendant had failed to provide required materials, forcing the plaintiff to provide them at a cost of $1,619.03. It also stated that the plaintiff alleged the defendant had failed to perform in a workmanlike manner, in that the buggies failed to operate properly for their intended purpose and required the plaintiff to purchase additional parts at a cost of $991.11. It also stated that the plaintiff alleged that proper notice of the defects had been given to the defendant, and claimed damages in the amount of $2,610.14 for the breach.

Instruction No. 2 also set out the defendant's answer. This

included allegations the defendant had agreed to manufacture a chassis with front hubs, steering gear, and disk brakes; the provision for specific materials, but not all materials; and that the plaintiff had made substantial changes in its requests, which the defendant agreed to supply on the basis of cost of parts plus labor. It also stated the defendant denied a failure to perform in a workmanlike manner and that the plaintiff had failed to provide reasonable notice.

The instruction also contained the plaintiff's burden of proof. The jury was instructed that, on the first cause of action, the plaintiff had to prove, by a preponderance of the evidence, all of the following:

1. That the parties had entered into an oral contract in September 1978, in which the defendant had agreed to supply all material and manufacture the running gear for 10 dune buggies for $350 per unit;

2. that plaintiff had performed its duties under the contract;

3. that the defendant had failed to provide materials as agreed and failed to perform in a workmanlike manner;

4. that plaintiff gave notice to the defendant within a reasonable time after discovering the alleged breaches; and

5. that as a result of the breach the plaintiff sustained damages.

The jury was instructed that if the plaintiff failed to prove any one or more of the propositions set forth above, the verdict would be for the defendant.

As to the second cause of action, the jury was instructed that the plaintiff was seeking to recover overcharges in the amount of $5,169.65 and that to recover that amount the plaintiff had to prove:

1. That the defendant had received money from the plaintiff;

2. that the defendant retained possession of the money; and

3. that the defendant "in justice and fairness" ought to refund it.

The jury was further instructed that if the plaintiff failed to establish any of those elements by a preponderance of evidence, the verdict should be for the defendant.

The jury was instructed, in instruction No. 16, to award damages to the plaintiff on the second cause of action in an

amount which would "fairly and reasonably" compensate the plaintiff for any damages in excess of the contract price. As to damages on the first cause of action, instruction No. 15 instructed the jury to consider the cost of materials provided by the plaintiff and the cost of repairs due to the defendant's failure to perform in a workmanlike manner.

The jury's first question regarding the instructions was whether the jury had to find for the plaintiff on all five propositions in order to find in favor of the plaintiff on the first cause of action. This question was clearly answered by instruction No. 2, part I(C), which instructed the jury that the plaintiff had to establish all five propositions in order to prevail.

The second question was whether the jury could find for the plaintiff on a portion of instruction No. 2, part I(B)1, that there was a contract, but not make a finding as to its terms. That question was also answered by the instruction, which clearly stated the jury must find in favor of the plaintiff as to both the existence of the contract and its terms.

The third question was whether consideration of the second cause of action was contingent on a finding in favor of the plaintiff on the first cause of action. A fair reading of instruction No. 2 reveals the jury was instructed separately on each cause of action, and no contingency was expressed or implied.

The fourth question was whether the jury could find in favor of the defendant on the first cause of action and for the plaintiff on the second cause of action. The jury was instructed separately on each cause of action, and in the "effect of findings" portions of the instruction the trial court clearly stated that the jury could find in favor of either party.

In *In re Estate of Corbett*, 211 Neb. 335, 318 N.W.2d 720 (1982), we held it was error to instruct a jury, after it had retired to deliberate, out of the presence of the parties and their counsel, but if it clearly appears prejudice did not and could not flow from such error, there was no ground for reversal. In this case the trial court did not further instruct the jury but responded that the questions could be answered by rereading the instructions, and the instructions did answer the questions.

The trial court's response to the jury's questions did not prejudice the plaintiff, because the jury's questions pertained to portions of the jury instructions which had not been objected to at trial, and did not relate to the calculation of damages. The assignment of error is overruled.

The plaintiff's final contention is that the trial court erred in instructing the jury on the second cause of action. Specifically, the plaintiff argues instruction No. 16 instructed the jury to fix an amount that would fairly and reasonably compensate the plaintiff for any overcharge, while the language in instruction No. 2 spoke in terms of "justice and fairness." The plaintiff claims this effectively changed the action from one for a sum certain to an equitable action.

At the conference on jury instructions the court stated:

> The Court is convinced that the second cause of action is an action at law. However, my research has indicated that the proper elements of an action for money retained such as is pled in the second cause of action is as set forth in paragraphs 1, 2, and 3 of the burden of proof on page 5 of Instruction 2 and that even though the language justice and fairness sounds like equity, that this is still a law action and that it should be submitted to the jury on that language.

The plaintiff argues that the use of such language permitted the jury to incorrectly interpose equitable considerations, and constituted an abuse of discretion.

The plaintiff's representative, Harry Hartley, testified that the amount of damages sought to be recovered on the second cause of action included "all costs up to receiving the cars in addition to the motion [sic] plates, gussets and bearings being installed." For the installation of the motor plates or braces and bearings the defendant required the plaintiff to pay $180 and required $32.76 for throttle cable, which was delivered after the plaintiff had taken delivery of the buggies and had made its final payment. The jury may have concluded that the defendant overcharged the plaintiff for these items, because there was evidence the defendant was informed at the time of delivery that a motor brace would be required to ensure that the buggies would perform and the throttle cable was required but it had

not yet been delivered to the defendant. The jury could have found that since these parts should have been provided by the defendant for the original contract price, the defendant should refund $212.76. These were issues of fact which were within the province of the jury. *Chirnside v. Lincoln Tel. & Tel. Co.*, 224 Neb. 784, 401 N.W.2d 489 (1987).

The plaintiff's argument that the language used by the trial court was improper is also unpersuasive. Whenever a person has possession of money to which in equity and good conscience another is entitled, a suit lies for money had and received. In such a case the law implies a promise by the former to pay such money to the latter. *Village of Morrill v. Roosevelt P.P. Dist.*, 215 Neb. 41, 337 N.W.2d 125 (1983); *Barker v. Wardens & Vestrymen of St. Barnabas Church*, 171 Neb. 574, 106 N.W.2d 858 (1961).

The judgment of the trial court is affirmed.

AFFIRMED.

PROFESSIONAL RECRUITERS, INC., APPELLANT, V. JAMES H. OLIVER ET AL., APPELLEES.

409 N.W.2d 304

Filed July 17, 1987. No. 85-741.

1. **Uniform Commercial Code: Statute of Frauds.** The Nebraska Uniform Commercial Code's statute of frauds governing contracts for the sale of personal property and goods does not apply to agreements for personal services.
2. **Jury Instructions: Appeal and Error.** It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Reversed and remanded for a new trial.

Daniel W. Ryberg, for appellant.

Kenneth C. Fritzler of Ross, Schroeder & Fritzler, for appellees.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from the district court for Hall County. Appellant, Professional Recruiters, Inc., brought suit in the district court against the appellees, James H. Oliver, The Ravenna Bank, Inc., and Bank of Doniphan, Inc., for fraudulent inducement, interference with the business relationship, and, in the alternative, for unjust enrichment. The demurrer of the Bank of Doniphan on the cause of action for unjust enrichment was sustained. All parties' motions for summary judgment were denied. At trial the jury returned a verdict for the appellees. The appellant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial was also denied. This appeal follows.

In December of 1983 a representative of Professional Recruiters, Inc., contacted George Wanitschke of the Bank of Doniphan, inquiring as to whether his bank had an opening for a banking officer. Wanitschke stated that the bank was looking for someone, and the two agreed to combine efforts to fill the position. Professional Recruiters forwarded to Wanitschke a copy of the company's service agreement, including a fee structure, a company brochure, the candidate's resume, and a candidate referral sheet.

Later in the month Wanitschke interviewed the candidate and decided that the chairman of the board, appellee James Oliver, would have to interview the candidate before a decision to hire him could be reached. According to Wanitschke, Oliver had the ultimate hiring decision. According to Oliver, who sits on the boards of both the Bank of Doniphan and The Ravenna Bank, Oliver interviewed the candidate and offered him a choice to work for either the Bank of Doniphan or The Ravenna Bank. The candidate was ultimately hired by The Ravenna Bank.

Professional Recruiters contacted the appellees several times in an attempt to secure payment, but was unsuccessful. It subsequently brought suit in district court.

On appeal Professional Recruiters assigns as error that the

district court erred in giving an instruction on the Uniform Commercial Code statute of frauds, in not granting the appellant's motion for a directed verdict, in overruling the motion for new trial, and in refusing certain instructions.

Addressing the appellant's first assignment of error only, that is, that the district court incorrectly instructed the jury, over objection, concerning the Nebraska Uniform Commercial Code statute of frauds, the following instruction, in pertinent part, was given to the jury:

> ORAL AGREEMENT AND STATUTE OF FRAUDS
>
> You are instructed that the Statute of Frauds of this state provides:
>
> ". . . a contract for the sale of goods for the price of Five Hundred Dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . ."
>
> ". . . a contract for the sale of personal property is not enforceable by way of action or defense beyond Five Thousand Dollars . . . unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought . . . ."

This instruction was taken verbatim from the Uniform Commercial Code statute of frauds for personal property and goods, Neb. U.C.C. §§ 1-206 and 2-201 (Reissue 1980).

The agreement between the appellant and the appellees did not involve personal property or goods. The plain language of these statutes and the definitional statute makes clear that these statutes do not apply to agreements for the performance of a service. Neb. U.C.C. § 2-105 (Reissue 1980).

Our cases have held that it is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error. *State v. Clayburn*, 223 Neb. 333, 389 N.W.2d 314 (1986); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983); *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981). The district court did not instruct the jury on the law

of the case and, therefore, committed prejudicial error. In view of this disposition, the remaining assignments will not be discussed. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

RITA TUMA, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT AND RONALD E. SORENSEN, NEBRASKA COMMISSIONER OF LABOR, APPELLEES.

409 N.W.2d 306

Filed July 17, 1987. No. 86-102.

1. **Employment Security Law: Appeal and Error.** Appeals under the provisions of Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984) are reviewed de novo on the record made in the district court. It is the duty of this court to retry the issues of fact involved in the findings complained of and to reach an independent conclusion.
2. **Employment Security Law.** Neb. Rev. Stat. § 48-628(b) (Reissue 1984) requires that misconduct for which a disqualification from receiving unemployment benefits may result must be committed in connection with the employee's work.
3. _____. Failure to cooperate with an employer which is attempting to furnish a smoke-free environment by a good faith trial and error method constitutes misconduct in connection with the employee's work sufficient to disqualify the employee from receiving unemployment compensation benefits.
4. _____. Failure to furnish medical justification for prolonged absences from employment, when an employee has stated that such justification will be furnished, constitutes misconduct in connection with the employee's work sufficient to disqualify the employee from receiving unemployment compensation benefits.

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

David R. Stickman of Stern, Swanson & Stickman, for appellant.

Thomas F. Hoarty, Jr., of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee Omaha Public Power District.

Laureen Van Norman, for appellee Sorensen.

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

GRANT, J.

The claimant, Rita Tuma, appeals from an order of the district court for Douglas County affirming a decision of the Nebraska Department of Labor Appeal Tribunal. The tribunal had reversed an award by a department claims deputy awarding unemployment compensation benefits to claimant. The tribunal held that claimant's conduct constituted misconduct within the meaning of the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984), sufficient to bar claimant from receiving unemployment compensation benefits until after a waiting period. Claimant had been terminated from her employment as a stenographer with Omaha Public Power District for misconduct. Claimant has appealed to this court, alleging as error "[t]he holding of the district court that Ms. Tuma's failure to provide a statement from her physician that Ms. Tuma should not immediately return to a smoke-filled work environment detrimental to her health constitutes misconduct in connection with the claimant's work justifying a disqualification from employment benefits . . ."

Appeals under the provisions of §§ 48-601 to 48-669 are reviewed de novo on the record made in the district court. It is the duty of this court to retry the issues of fact involved in the findings complained of and to reach an independent conclusion. *Smith v. Sorensen,* 222 Neb. 599, 386 N.W.2d 5 (1986); *School Dist. No. 21 v. Ochoa,* 216 Neb. 191, 342 N.W.2d 665 (1984). Bearing this in mind, we must decide whether claimant's conduct constituted misconduct within the meaning of the Nebraska Employment Security Law. Pursuant to § 48-628(b) a claimant may be disqualified for benefits if he or she has been discharged for misconduct connected with his or her work. The term "misconduct" itself is not defined in the statute. This court has defined the term to include

> " 'behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate

> violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.' . . ."

Smith v. Sorensen, supra at 603, 386 N.W.2d at 8; *McCorison v. City of Lincoln*, 215 Neb. 474, 339 N.W.2d 294 (1983); *Stuart v. Omaha Porkers*, 213 Neb. 838, 331 N.W.2d 544 (1983).

The record shows that on June 4, 1984, claimant began working as a stenographer for appellee Omaha Public Power District (O.P.P.D.). At the time of trial, an examining physician's report of an examination in 1984 was introduced, showing that claimant had related to him "a history of rather severe hypersensitivity to cigarette smoke."

The claimant worked in an open office area. Before November 1, 1984, she worked at a desk in the middle of the area. In the area then were nine persons who smoked. A diagram of the room showed four smokers in the open area itself, somewhat near claimant's desk. On October 29, 1984, claimant first indicated to her supervisor that she was having problems caused by smoking in the office area. The supervisor referred the problem to the O.P.P.D. employee relations department. The supervisor and members of that department had a meeting and decided to move claimant's desk and create a nonsmoking area. They also discussed the situation with the building manager, who arranged for a check of the airflow in the office and the installation of an extra return air duct to pull air away from the area of claimant's desk. The supervisor informed claimant the next day that the company was working on the problem. The layout of the office where claimant worked was changed immediately.

After November 1, 1984, a nonsmoking area, consisting of about one-half of the office, was created, and claimant's desk was moved and located in that area. O.P.P.D. changed the positioning of desks in the open office area to allow claimant to have a desk as far away as possible from the other workers who smoked. The nearest smoker's desk was more than 20 feet from claimant's. No-smoking signs and an ashtray were placed near

the area where claimant worked. Airflow was checked. A cold-air duct was installed on December 5, 1984. The last date that claimant was in the work area was December 6, 1984.

On December 5, 1984, Tuma was seen by her doctor, Dr. Wallace E. Duff. He prescribed some antibiotics for her condition. The following day Tuma had her husband obtain a statement from the physician's office that recommended she remain away from work for a period of 10 days, and after delivering it to her supervisor, Joyce Finnell, she left work.

Subsequently, Finnell telephoned Tuma and told her that O.P.P.D. wanted her to see a physician of its choice. On December 10, 1984, claimant was examined by Dr. Ronald W. Olnhausen. Dr. Olnhausen reported to O.P.P.D.:

> As long as she [Tuma] has symptoms from the exposure to cigarette smoke, she will probably not be able to work in surroundings in which there is a significant amount of exposure. The amount of exposure that she would tolerate could only be determined by trial and error. Certainly there is a pre-existing history of allergy and hypersensitivity which may be a predisposing factor in her current difficulties. It is my feeling that she could return to work immediately if she were in a smoke-free environment.

On December 17, 1984, Tuma again saw Dr. Duff. Claimant did not submit any report from Dr. Duff concerning this visit. Claimant did write a letter, dated December 17, 1984, which her O.P.P.D. supervisor received on December 26. In the letter claimant said that she had seen Dr. Duff on that day and that he advised her "that since there were still unhealed bleeding points and ulcerations and because there have been no steps taken to remedy the smoke pollution in the office area, I should not return to work for at least 4 weeks . . . ." In his deposition testimony, Dr. Duff testified that he did not even know if claimant worked in an office. Dr. Duff further testified that after his December 17, 1984, examination, he determined "by physical examination she was better and subjectively she seemed to be better." At the hearings on this matter, claimant submitted a note on Dr. Duff's stationery dated December 26, 1984, and apparently signed by a nurse, stating that claimant

should not return to work for 4 weeks. In Dr. Duff's testimony, however, he did not testify concerning any such recommendation. Dr. Duff testified that he did not remember a specific discussion with claimant on December 17, 1984, concerning her returning to work.

Tuma called Finnell and informed her that she could not return to work for an additional 4 weeks. On December 21, 1984, O.P.P.D. sent Tuma a letter, which she received on December 22 and which read as follows:

> Dear Ms. Tuma:
>
> The District has taken all necessary steps to provide a work environment which is in compliance with the Nebraska Clean Indoor Air Act and which provides you a safe and satisfactory work area.
>
> Therefore, you are expected to be at work on Friday, December 28, at 8:00 a.m. In the event that you do not report for work as required herein, the District will conclude that you are no longer interested in retaining your position and that you have voluntarily terminated your employment.

The record shows the following medical letters received in evidence. On December 6, 1984, Dr. Duff wrote to claimant's personal doctor and to her attorney: "We do plan to follow her closely and will see if we can determine if, in fact, she can survive in the present atmosphere she is working in."

The physician who examined claimant on December 10, 1984, submitted a report stating in part:

> As long as she [Tuma] has symptoms from the exposure to cigarette smoke, she will probably not be able to work in surroundings in which there is a significant amount of exposure. The amount of exposure that she would tolerate could only be determined by trial and error.

The evidence shows that O.P.P.D. was trying to furnish claimant a smoke-free area. As stated above, the office where claimant worked was changed so as to designate approximately one-half of the office as a nonsmoking area. An air duct was installed to withdraw the air near the smokers' desks, but claimant did not return to work at any time to determine its effect on the situation.

The record shows that claimant did not even attempt to work in the improved environment. The record also shows that claimant could work on the very day she was ordered to return to work at O.P.P.D. On that day, December 28, 1984, claimant filed a claim for unemployment benefits. Section 48-627(c) provides that a person receiving such benefits must be able to work and available for work. In her application for benefits, claimant answered the question, "Do you have any reasons which would prevent you from accepting immediate employment (i.e. . . . health . . .) if so, explain," by saying, "no — as long as it was in a smoke free area." (Emphasis in original.)

We find that O.P.P.D. was attempting to furnish claimant a "smoke free area." Claimant did not choose to cooperate with her employer's efforts to keep her employed. Such an attitude demonstrates a complete disregard of the employer's interests in getting work done in a difficult situation for all concerned. Failure to cooperate with an employer which is attempting to furnish a smoke-free environment by a good faith trial and error method constitutes misconduct in connection with the employee's work sufficient to disqualify the employee from receiving unemployment compensation benefits.

Insofar as the district court found that claimant was guilty of misconduct in that she did not furnish medical information which she told O.P.P.D. substantiated the requirement that she remain off work for an additional 4 weeks after December 17, 1984, we also agree with the district court. Claimant informed her supervisor that she would furnish medical information from Dr. Duff. The facts, as set out above, show that claimant did not, at any time, have a report from Dr. Duff stating she should not return to work for 4 weeks after December 17, 1984. Claimant's letter of December 17, 1984, so stating, is not supported by any evidence from Dr. Duff.

We further determine, as did the district court, that failure to furnish medical justification for prolonged absences from employment, when an employee has stated that such justification will be furnished, constituted misconduct in connection with her work sufficient to justify a denial of unemployment compensation benefits. The decision of the

district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must vigorously dissent from the majority in this case. I do so because the majority opinion is wrong both as a matter of fact and as a matter of law. The majority has now concluded that an employee who refuses to let his or her employer experiment with the employee's health on a trial and error basis, albeit in good faith, is guilty of willful misconduct so as to deny the employee unemployment compensation benefits. It is, to me, significant that the majority is unable to cite any authority in support of that rule of law. I suspect that the majority's inability to do so is due to the fact that there is no precedent for such a rule. An employer may be entitled to ask an employee to "give all" in the sense of supporting the employer's work; it strikes me that it is too much to demand that the employee must likewise experiment with his or her health for the benefit of the employer.

This court has consistently held that the Employment Security Law is to be liberally construed in order that its beneficent purpose of paying benefits to involuntarily unemployed workers may be accomplished, see *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985), and further that these beneficent purposes are not served by a strained construction of the statutes which will deny an unemployed worker the benefits of the act. See *Hanlon v. Bodin*, 209 Neb. 169, 306 N.W.2d 858 (1981). Notwithstanding that fact, the majority, while ignoring the recognized rules of law, now holds that an employee who is unwilling to permit his or her employer to experiment with the employee's health is guilty of willful misconduct.

The question of what constitutes misconduct has been defined by this court. We have defined the term to include behavior which evidences

> " '(1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or

> intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.' . . ."

Smith v. Sorensen, 222 Neb. 599, 603, 386 N.W.2d 5, 8 (1986); *McCorison v. City of Lincoln*, 215 Neb. 474, 339 N.W.2d 294 (1983); *Stuart v. Omaha Porkers*, 213 Neb. 838, 331 N.W.2d 544 (1983). While absenteeism can constitute "misconduct" under the statutes if the absences are without notice or unexcused or are continued despite warnings from the employer, *McCorison v. City of Lincoln, supra*, it is not considered misconduct to follow the advice of a treating physician and remain absent from work. See *Pacific Northwest Bell Tel. v. Employment Div.*, 37 Or. App. 843, 588 P.2d 654 (1978).

Unless it can be said that in some manner Ms. Tuma deliberately violated some rule, I am unable to find any evidence to support a finding that her termination was due to misconduct.

O.P.P.D. concedes that Ms. Tuma was being treated by a physician and had been ordered not to return to work for 4 weeks. Ms. Tuma's supervisor, Ms. Finnell, testified that she was fully aware of the nature of Ms. Tuma's illness and the reason why she did not return to work. Ms. Finnell testified as follows:

> Q. So, is it fair to say that, regardless of whether there was a doctor's statement or not, you as her supervisor at the Omaha Public Power District were fully aware of the nature of her illness and the reason why she did not return to work; is that correct?
>
> A. Yes.
>
> Q. And you had relayed that information on to your superiors at OPPD; is that correct?
>
> A. Yes.
>
> Q. So there could be no question that your business knew exactly why she was not there?
>
> A. Yes.

And while Ms. Tuma did not send a medical statement to O.P.P.D., she did in fact write to it. Ms. Finnell testified in that regard as follows:

> Q. All right. So, at least, as far as that conversation on

the 17th goes, there is no question that she did tell you she was going to send a letter; and she did, in fact, send the letter, didn't she?

A. Yes.

Q. You received the letter; is that correct?

A. I received that letter on the 22nd.

Q. The letter purports to be from Rita Tuma, does it not?

A. Yes.

Q. And the letter contains the information which she told you on the telephone, whether it be reading verbatim or told you, either way it contained that very information, didn't it?

A. Yes.

Q. You were aware when you received the letter, at least through her anyway, that she had seen the doctor and that she did have damage to her nasal tissue, and that he had advised her that there were unhealed, bleeding points because there had been no steps to remedy the pollution in the air, and that she should not return to work for four weeks?

You were at least — true or not, you were at least aware of that information from the letter; is that correct?

A. Yes.

Furthermore, while the majority makes a great deal out of the fact that Ms. Tuma failed to provide a letter from her physician, the evidence is clear that the company did not ask at any time for such a letter, nor did it have any rule requiring such a letter. Ms. Finnell testified as follows:

Q. Now, would I be correct in assuming that as a supervisor for her or any employee, part of your job would be to provide them instruction when they need a particular document or when they need something; is that correct?

A. Yes.

Q. Isn't it true, Miss Finnell, that you had never, at any time, told Ms. Tuma that "You need a statement from and signed by a physician in order to be excused from work"; isn't that true?

A. That's true.

Q. As a matter of fact, based upon your testimony at the prior hearing, one of your answers was: "Ms. Tuma called me to tell me that she had seen her doctor and that he had suggested that she take another four weeks off because of her condition. I questioned the four weeks, and she explained her medical problem to me over the phone, and then she volunteered to give me a letter."

A. Yes.

Q. That's your testimony; is that correct?

A. Yes.

Q. And you did receive a letter from her?

A. Yes.

Q. You as her supervisor never, at any time, told her or asked her to send a doctor's statement; isn't that correct?

A. That's correct. I assumed —

Q. You assumed?

A. Yes.

. . . .

Q. You assumed; is that correct?

A. She had provided me with one earlier. When she mentioned getting a letter to that effect, I assumed that it would be just like the one I had already received.

Q. But as her supervisor you never told her, "Look, Rita, in order for you to be gone for a time like four weeks, we're going to have to have some kind of medical substantiation"; you never told her that, did you?

A. No.

Q. And, to your knowledge, neither did anybody else from OPPD?

A. No.

This is supported by the testimony of Ms. Tuma, who testified on direct examination as follows:

Q. Now, with that what did you do with that information?

A. I contacted my attorney, and then I contacted Joyce Finnell. I read her a letter that I had composed and typed myself and told her that I would be sending her a copy of that letter in the mail.

I told her if she needed additional information she should contact my attorney *or the doctor*.

Q. Now, was this on the 17th of December?

A. Yes.

Q. Did you tell Miss Finnell — what did you tell her exactly?

A. The letter, which is in the Bill of Exceptions, I just read that to her.

Q. This Joyce Finnell is the same person you referred to earlier; is that correct?

A. Yes.

Q. And you had talked to her extensively concerning the problems you had been having; is that right?

A. Yes.

Q. Did you tell her on that day what Dr. Duff had advised you to do?

A. Yes.

Q. What, if anything, did Miss Finnell ask you to do at that time?

A. Nothing.

(Emphasis supplied.)

While there may be some dispute about the conversation between Ms. Tuma and her supervisor, there is no dispute that Ms. Tuma was not aware that a physician's statement was required or that if she did not provide such a statement she would be discharged. While the majority contends that Ms. Tuma's behavior was detrimental to her employer's interest and constituted misconduct, the evidence shows without dispute that Ms. Tuma was following her doctor's orders. The majority points out that Dr. Duff did not specifically recall the conversation, yet nowhere did Dr. Duff deny that he was treating Ms. Tuma or that he had instructed her that she must remain in a smoke-free environment. Had O.P.P.D. wanted something more than Ms. Tuma's letter, it should have made that request. To have expected Ms. Tuma to know that she was to send a letter from a physician and that upon failure to do so she would be considered to have terminated her employment was not reasonable under the facts.

The majority attempts to create the impression that Dr. Duff

did not recall treating Ms. Tuma; nevertheless, he testified by deposition with regard to these matters. His testimony is as follows: "When she came back and she still hadn't totally healed up I said, 'It seems to me if you continue to be exposed to whatever you are being exposed to, it might be detrimental and you might consider altering your environment.' " He further testified in his deposition that the trial and error suggested by O.P.P.D.'s physician could only be done after Ms. Tuma's nose was normal again. It had not yet reached that point.

This is not a case in which the employer was uncertain as to the extent and the nature of the injury. O.P.P.D.'s own physician sent a letter to O.P.P.D. supporting Dr. Duff's diagnosis of Ms. Tuma's condition. The letter, as noted by the majority, said:

> As long as she [Tuma] has symptoms from the exposure to cigarette smoke, she will probably not be able to work in surroundings in which there is a significant amount of exposure. The amount of exposure that she would tolerate could only be determined by trial and error. Certainly there is a pre-existing history of allergy and hypersensitivity which may be a predisposing factor in her current difficulties. It is my feeling that she could return to work immediately if she were in a smoke-free environment.

Yet, as noted by the majority, it is conceded by everyone that she was not going to be in a smoke-free environment. Nevertheless, the majority suggests that because she was not willing to continue bleeding, she was guilty of willful misconduct.

Furthermore, the facts do not support the position taken by the majority. The testimony is uncontroverted that by moving the desks the situation was not improved, but rather became worse. That was the reason O.P.P.D. considered the additional duct. The evidence is further clear that the additional duct was no real solution. Finally, the evidence is clear that she was never told that the change had been made. Ms. Finnell was asked:

> Q- Did you ever advise Mrs. Tuma that there was a — a change in the- - -
>
> A- The air-flow?
>
> Q- - - -air — air-flow system?

A- Between the time when it was installed and the time she left. She was only in the office for three hours and I didn't have a chance to do that.

Ms. Tuma was never made aware that any changes were made, and no one bothered to explain to her what the changes were or how they might improve the situation. Furthermore, the record is devoid of any evidence to indicate that the changes would have made any difference. All that Ms. Tuma knew is that if she returned to work, she would continue to suffer from bleeding.

Lastly, action taken by O.P.P.D. did not comply with the requirements of the Nebraska Clean Indoor Air Act, as suggested in the letter from O.P.P.D. to Ms. Tuma or as suggested by the majority. Neb. Rev. Stat. § 71-5702 (Reissue 1986) specifically provides: "The purpose of sections 71-5701 to 71-5713 is to protect the public health, comfort, and environment by *prohibiting smoking* in public places and at public meetings except in designated smoking areas." (Emphasis supplied.) Under the provisions of Neb. Rev. Stat. § 71-5704 (Reissue 1986), this work area was clearly a public place within the meaning of the act. It was not appropriate for O.P.P.D. to designate the nonsmoking area; rather, it was necessary for O.P.P.D. to designate a limited smoking area. Even then, "Where smoking areas are designated, existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoke in adjacent nonsmoking areas." Neb. Rev. Stat. § 71-5708 (Reissue 1986). Finally, Neb. Rev. Stat. § 71-5709 (Reissue 1986) provides:

> The proprietor or other person in charge of a public place shall make reasonable efforts to *prevent smoking* in the public place by:
>
> (1) Posting appropriate signs;
>
> (2) Arranging seating to provide a smoke-free area;
>
> (3) Asking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke; or
>
> (4) Any other means which may be appropriate.

(Emphasis supplied.)

The evidence is clear that no arrangements were made to

provide a smoke-free area, nor were employees asked to refrain from smoking.

While O.P.P.D. may have been justified in discharging Ms. Tuma because of its inability to provide her with a safe place to work, its inability to do so did not justify its discharging her and claiming that the discharge was for misconduct on her part so as to deprive her of unemployment compensation benefits.

While Ms. Tuma obviously cannot obtain much comfort from our decision in this case, perhaps she can find solace in the haunting song from Jerome Kern:

They asked me how I knew
My true love was true?
I of course replied,
"Something here inside,
Cannot be denied."
. . . Smoke gets in your eyes.

STATE OF NEBRASKA, APPELLEE, V. THOMAS EDWARD NESBITT, APPELLANT.

409 N.W.2d 314

Filed July 17, 1987. No. 86-400.

1. **Evidence: Trial: Appeal and Error.** The admission of evidence is largely left to the sound discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion.
2. **Evidence: Trial.** Relevant evidence is to be excluded only if there is a danger of unfair prejudice, confusion, misleading the jury, undue delay, waste of time, or needless accumulation of evidence.
3. **Circumstantial Evidence: Convictions.** Circumstantial evidence is sufficient to support a conviction if the evidence and any reasonable inferences which can be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt.
4. **Convictions: Appeal and Error.** When reviewing the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh evidence. Such matters are for the trier of fact and must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the conviction.

5. **Motions for Mistrial: Appeal and Error.** The decision to grant a motion for mistrial is squarely within the sound discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion.

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

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

Robert M. Spire, Attorney General, and Lynne Fritz, for appellee.

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

WHITE, J.

This is an appeal from the district court for Douglas County. The appellant, Thomas Edward Nesbitt, was convicted by jury verdict of murder in the first degree and sentenced to a term of life imprisonment in the Nebraska Penal and Correctional Complex. On appeal the appellant alleges as error that the trial court improperly permitted the introduction of evidence concerning an alleged prior sexual assault, that the district court incorrectly overruled the appellant's motions to dismiss the case at the close of the State's case and at the close of all the evidence, and that the district court incorrectly overruled the defense's motion for mistrial due to prosecutorial misconduct.

The relevant facts are as follows. During the early morning hours of November 30, 1975, Gayla Jorgensen answered a phone call from Kathleen Ray, a former high school classmate, inviting Jorgensen and her cotenant, Mary Kay Harmer, to a party. The party was described as a "housewarming party" with a group of their schoolmates. Sometime later that morning Ray and another woman, later identified as Brigitte Kohlert, arrived at the women's apartment and persuaded Harmer to accompany them to the party. Jorgensen declined the invitation. Ray testified that the three women drove to 2619 North 15th Street, a house which she shared with the appellant.

Ray and Kohlert stated they left the "party" shortly after arriving, leaving Harmer and the appellant alone. Ray stated that as she was leaving the Nesbitt house she passed Wayne

Bieber on his way to appellant's house. Bieber was described at trial as a friend and next door neighbor of Nesbitt's. Bieber stated that he was not at the party and remained home that night. Ray went back and forth between Nesbitt's house and Bieber's house throughout the night. Ray went back to the house twice during the morning, but did not go inside.

The appellant was the only person who testified as to what happened at the party. Nesbitt testified that Bieber, Ray, and Kohlert remained at the party for some time, with Ray and Kohlert leaving to go next door. Bieber left for a while and later returned. At some point during the morning, according to Nesbitt, the deceased went to the bathroom and did not return. Nesbitt went to check and discovered Harmer lying on the floor in a pool of vomit. Nesbitt stated he knew she was dead. He testified that he did not call the authorities because he could not trust them.

There is testimony from both Ray and Bieber that the appellant appeared upset. Ray said that he asked her what Harmer would do if she were raped, and she told him Harmer would call the police. Nesbitt also asked her if she could "handle it" if the "Feds" were involved. Bieber stated that the appellant told him he might have "fucked up," and the two discussed whether Harmer should be let go or killed.

Ray testified that the appellant burned throw rugs, and Bieber testified that he burned clothing at Nesbitt's request. Ray stated that Nesbitt had cleaned the house later that day and asked her to clean also. Ray said that she cleaned up what she thought was blood in front of the refrigerator, which Nesbitt told her resulted from a bloody nose the deceased suffered. Ray also told a police officer that Nesbitt pointed to a stain on the shower curtain, telling her it was blood. Bieber said that he had smelled starter fluid in the house that morning and that Nesbitt requested him to find lye that afternoon, although Bieber stated they had no lye and Nesbitt stated he did not pour any such substance on the body.

Ray was told to say that Harmer had been at their house the night before, but was gone when they awoke in the morning. Ray said she was told by Nesbitt, "Let's just say she died of an overdose."

According to Nesbitt, Harmer's clothing was removed to obscure her identification, and the body was stored, wrapped in a carpet, in Bieber's garage until the remains were dumped in an Owens Landing manhole. Owens Landing is a partially developed housing subdivision near Carter Lake, Iowa. An engineering crew found the remains 9 years later.

At trial forensic experts testified that they were unable to determine the cause of death. Holes in the skull suggest bullet holes, but the specific characteristics associated with bullet holes are not present. Etchings on the teeth and skull suggest a caustic substance was poured on the head while tissue was still present. The sludge samples taken from the manhole revealed high calcium and pH levels, which are consistent with caustic alkaline substances such as lye.

Appellant's first assignment of error alleges that the trial court abused its discretion in permitting the State to introduce evidence as to a prior uncharged sexual assault allegedly committed by the appellant. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The evidence at issue is the testimony of Michele McKeever. McKeever testified that she was abducted by the appellant from the parking lot of her place of employment on November 11, 1974. She related that Nesbitt took her to one house, then to another house, identified as 2619 North 15th Street, where she was raped at least twice by the appellant. She was threatened with death should she report the incident, was forced to point out the locations of her family's homes, and was told they, too, would be killed. McKeever stated that she escaped the next morning.

Defense counsel objected on the ground that the probative value of the testimony was outweighed by its prejudicial effect. After a hearing out of the presence of the jury, a limiting instruction was given by the trial judge to the effect that the

testimony of McKeever may only be considered for the purposes set out in § 27-404(2). The appellant now argues that the State is suggesting that if McKeever was assaulted, so, too, was Harmer, pointing specifically to the statement made by the prosecution during closing argument that the deceased went through the same thing McKeever suffered.

The admission of evidence is largely left to the sound discretion of the trial court and will not be overruled on appeal absent a showing of an abuse of discretion. *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987). Section 27-404(2) is an inclusionary rule of evidence permitting the use of relevant other crimes, wrongs, or acts for the purposes enumerated therein.

In *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981), we were faced with this issue in the context of a murder case not unlike the case at hand. There, the deceased's skeletal remains were discovered some years after her disappearance. Evidence of prior assaults by the defendant was admitted pursuant to § 27-404(2). The evidence was admitted to show similarities in the method of operation, identity, knowledge by the defendant of the area in which the remains were found, scheme, and plan. The evidence showed that the appellant used the same methods and took one of his victims quite near the spot where the deceased's remains were discovered. *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986), is another murder case in which the appellant's prior assault was admitted under § 27-404(2). The similarities which made the prior assault probative include the appellant's strangulation of both victims and the context within which each assault took place. Each woman was, at the time of the assault, married to the appellant, and in each instance the woman was attempting to end the relationship. The evidence of the prior assault was admitted as being probative of the issues of intent and method.

Here, the district court found the testimony of McKeever was relevant under § 27-404(2) to show location, scheme, plan, and motives. Briefly, both women were taken to Nesbitt's home, and both were alone with the appellant. Nesbitt was obviously concerned about the authorities being told of McKeever's assault, as evidenced by his intimidation of the

victim. The testimony of Bieber and Ray makes apparent that he was concerned what Harmer would do if she were raped, and whether Ray could "handle it" if the authorities questioned her. In the McKeever case Nesbitt stopped at the home of another person and spoke with him for a few minutes before going to Nesbitt's house. Bieber and Nesbitt both testify to conversing with other people in order to be advised on what course of action to pursue.

The appellant argues that the probative value of McKeever's testimony is outweighed by its prejudicial effect on him. While the admission of evidence is largely left to the sound discretion of the trial judge, it is subject to the overriding concerns of Neb. Rev. Stat. § 27-403 (Reissue 1985), which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The testimony of McKeever is relevant. Relevant evidence is to be excluded only if there is a danger of unfair prejudice, confusion, misleading the jury, undue delay, waste of time, or needless accumulation of evidence. *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986). We cannot say that the appellant was unfairly prejudiced by the introduction of McKeever's testimony, and the admission of the evidence was not an abuse of discretion. *State v. Wilson, supra; State v. Kern, supra.*

Appellant's brief argues that the McKeever assault was uncharged conduct. We find this distinction to be irrelevant. The statute makes no such distinction, and uncharged conduct has previously been admitted under § 27-404(2). See, *State v. Kern, supra; State v. Ellis, supra; State v. Swiney*, 179 Neb. 230, 137 N.W.2d 808 (1965). This assignment of error is meritless.

Nesbitt next assigns as error that the trial court erred in failing to grant the defense's motions to dismiss at the close of the State's case and at the close of all the evidence, on the ground that the State failed to prove its case by showing that the decedent met her death feloniously at the hands of the defendant. We agree that there is no direct evidence as to how

Harmer died. However, circumstantial evidence is sufficient to support a conviction if the evidence and any reasonable inferences which can be drawn from the evidence establish the defendant's guilt beyond a reasonable doubt. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987); *State v. Kane*, 224 Neb. 245, 397 N.W.2d 628 (1986).

The appellant relies heavily on the case of *Reyes v. State*, 151 Neb. 636, 38 N.W.2d 539 (1949). There, the defendant's second degree murder conviction was overturned on appeal on the ground that the State did not show that the deceased met her death as a result of the criminal actions of Reyes. The deceased met her death after jumping out of the defendant's car. This court held that there was no evidence to suggest that the injuries were feloniously inflicted and the conviction must be reversed. The *Reyes* case may be distinguished from this case on the basis that in *Reyes* evidence from the autopsy showed no evidence of a struggle; in short, no evidence that the deceased met her death feloniously. Here, the evidence suggests the deceased met her death feloniously, at the hands of the appellant, as opposed to *Reyes*, where the autopsy provided evidence to suggest the deceased did not meet her death at the hands of the defendant.

Although the evidence here is circumstantial, circumstantial evidence is entitled to be treated the same as direct evidence, and the State does not have the burden of disproving every hypothesis but that of guilt in order to sustain a conviction based upon circumstantial evidence. *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981).

The appellant's brief also calls attention to the alleged contradictions in the testimony of McKeever. To that we only note that the conflicts in evidence and the credibility of witnesses are issues for the trier of fact. *Donnelson, supra.*

Taking a view of the evidence most favorable to the State, the evidence, if believed, would tend to prove that Nesbitt was a member of a semisecret society, the Hell's Angels, and that before and after the death of Harmer he used aliases, worked sparsely, and had on hand quantities of various controlled substances. Nesbitt lived off the income of Ray's two jobs and identified her as his "old lady." The evidence suggests that the women associated with Hell's Angels were referred to as "old

ladies" or "sweeties." An "old lady" was a woman who had a long-term relationship with a Hell's Angel and who took care of the home and supported the Hell's Angel so he would be free to attend to club business. The Hell's Angels distrusted all law enforcement personnel and did not discuss Angels' business even with their old ladies. The evidence suggests that "sweeties" were women with no long-term relationship with an Angel, and were often picked up for an evening solely for sexual purposes. The evidence suggests sweeties were often at Hell's Angels' parties and that the victim was a sweetie. "Party" is a term used to describe events at which drugs were freely available and used.

The jury could infer that Harmer was called to the party at appellant's request for purposes of sexual gratification and that the identity of the group and the location were withheld from her at Nesbitt's suggestion. Drugs were furnished to the victim and a sexual assault or at least an attempt was made. The victim was struck to "keep her in line," and sometime during the orgy she died. A strong inference arises from the testimony of Bieber and Ray that a motive for her killing was concealment of the assault. Nesbitt scrupulously cleaned the house, requiring Ray to help him, and burned or had burned the victim's clothes and throw rugs in the house. The nude, dead body was stored in a garage for about 36 hours until it could be hidden in an unused manhole in a remote area. Thereafter, a caustic substance was poured over her body to hasten decomposition and hinder identification. The State proved motive, opportunity, and a skeleton of a victim who obviously met death in a nonnormal manner.

In summary, there was sufficient evidence introduced at trial, if believed by the jury, to establish the elements of the crime of murder in the first degree, and the trial court's denials of the defense's motions to dismiss were without error. *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986). When reviewing the sufficiency of the evidence, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of the explanations, or weigh evidence. Such matters are for the trier of fact and must be sustained if, taking the view of the evidence most favorable to the State, there is sufficient evidence to support the

conviction.

Appellant's third and final assignment of error alleges that the district court erred in failing to grant the defense's motion for mistrial on the grounds of prosecutorial misconduct. At trial the State attempted to elicit testimony concerning sexual assaults Nesbitt may have committed on Ray during their relationship. The prosecution asked Ray if she was ever sexually assaulted by the appellant. Defense counsel objected, and the question was answered in the judge's chambers, out of the hearing of the jury. The jury was properly admonished to disregard the question and not to try to speculate as to what the answer to the question may have been. Defense counsel's motion for mistrial was denied.

As the appellee's brief notes, the decision to grant a motion for mistrial is squarely within the sound discretion of the trial court and will be upheld on appeal absent a showing of abuse of discretion. *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986). Appellant argues that it was the State's intent to elicit inadmissible testimony. Regardless of the State's intent, we cannot say the appellant was prejudiced by the question. The answer was given out of the presence of the jury, and the jury was properly admonished. This assignment of error is without merit.

AFFIRMED.

KRIVOSHA, C.J., concurs in the result.

STATE OF NEBRASKA, APPELLANT, V. ALDEN JENSEN, APPELLEE.
409 N.W.2d 319

Filed July 17, 1987. No. 86-811.

1. **Criminal Law: Prosecuting Attorneys: Appeal and Error.** Neb. Rev. Stat. § 29-2315.01 (Reissue 1985), which allows the county attorney to appeal any ruling or decision of the court made during the prosecution of a cause, does not permit review of issues upon which no ruling was made.
2. **Criminal Law: Obscenity: Minors.** The act of appearing in an obscene film depicting children is prohibited by Neb. Rev. Stat. § 28-1463 (Reissue 1979).

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

Michael G. Heavican, Lancaster County Attorney, and Jan W. Sharp, for appellant.

Peter K. Blakeslee, for appellee.

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

WHITE, J.

The State of Nebraska appeals from the order of the district court for Lancaster County finding the appellee, Alden Jensen, not guilty of violating Neb. Rev. Stat. § 28-1463 (Reissue 1979). The appeal is authorized by Neb. Rev. Stat. §§ 29-2315.01 et seq. (Reissue 1985), which allow the county attorney to take exception to a ruling or decision of the trial court.

The facts upon which the charge against Jensen was based were contained in a stipulation of facts received into evidence by the court, including a videotape portraying the defendant. The stipulation entered into by the parties established that Alden Jensen's date of birth was November 5, 1952, and that sometime between December 1 and December 31, 1983, he appeared in a segment of a videotape that had been filmed by another adult male named Gerald High. The segment that the defendant appeared in also contained pictures of a male juvenile who was 14 years of age at the time of the taping.

The scene, in the early stages of the tape, portrays the defendant lying on a bed and smoking while completely nude. During that segment the male juvenile also appears completely naked, cavorting about the bed with some type of sword. Although there are not overt sexual acts taking place in the scene containing the defendant, there are a number of closeups of the defendant's genital area at times when his penis is tucked between his legs.

The stipulation entered into by the parties further establishes that the film contains numerous scenes of juveniles under the age of 16, as well as adults, engaging in various acts of sexual conduct including masturbation, masturbation of others, fellatio, and anal intercourse. There is no plot or story line in

the film, which displays nude and seminude individuals and contains scenes of sexual activity between juveniles under the age of 16 in film segments, some of which appear prior to the scene portraying the defendant.

The videotape was filmed in segments over a period of time by High at a residence in Lincoln, Lancaster County, Nebraska. The stipulation established that Jensen had viewed the earlier film segments that appear on the tape prior to his appearance and that he was aware of the nature of those film segments prior to the filming of the scenes that he appeared in.

During the period of time between December 1 and December 31, 1983, Jensen viewed the completed videotape in its entirety and told High that he wanted a copy of the film for his own use. At that time Jensen brought his own Beta videocassette recorder to High's residence and High's videocassette recorder was connected to Jensen's videocassette recorder so that a complete copy could be made of the above-described film. Jensen was present when the recording was made, and he watched part of the film during the taping. Jensen told Detective Sorensen of the Lincoln Police Department that at the time the above-described copy was made he was aware that the film portrayed children under the age of 16 engaging in sexual contact with other children.

The district court found the stipulations listed above to be the facts of the case and further found that the videotape, as a whole, was obscene and that § 28-1463 was not unconstitutionally vague as applied. The court framed the issue as follows:

> The fundamental issue is whether the conduct of the defendant comes within the prohibitions of [Neb. Rev. Stat. § 28-1463 (Reissue 1979)]. In other words, does appearing nude in a video tape with a youngster under the age of sixteen, who is also nude, constitute actions which can be said to "make, publish, present, direct, create, provide or in any manner generate" obscene material?

The court concluded that the statute did not make criminal the act of appearing in an obscene film and found the defendant not guilty as charged.

The State complains on appeal that the district court erred in

finding the defendant not guilty of generating obscenity. It urges us to find, first, that the statute prohibits appearing in films such as the one in evidence in this case; second, that copying the film violated the statute; and, third, that the defendant should have been found guilty of aiding and abetting filmmaker High.

Section 29-2315.01 allows the county attorney to "take exception to any ruling or decision of the court made during the prosecution of a cause . . . ." We note at the outset that the court made no rulings or decisions concerning whether Jensen's act of copying the film violated the statute, or whether Jensen aided and abetted High. Under the language of the statute these issues are not subject to review by this court.

We observe that § 28-1463 has been amended since the defendant was charged. See Neb. Rev. Stat. § 28-1463.03 (Reissue 1985). Both the new and the old sections utilize similar sets of verbs in describing the action prohibited. Compare § 28-1463.03 ("It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate . . .") and § 28-1463 ("It shall be unlawful for a person to make, publish, present, direct, create, provide, or in any manner generate . . ."). The 1979 statute prohibits generating "any obscene material which has as one of its participants or portrayed observers a child . . . ." § 28-1463. The 1985 amended statute drops the references to obscenity and makes illegal generating "any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." § 28-1463.03. Neb. Rev. Stat. § 28-1463.02 (Reissue 1985) defines the terms "visual depiction" and "sexually explicit conduct." It now appears that discussing the acts of the defendant in terms of whether what he did was obscene or not is precedentially moot and will not serve to clarify future prosecutions, since the Legislature has now abandoned that phraseology. However, we do feel the issue of whether appearing in a film constitutes making, publishing, directing, creating, providing, or in any manner generating a film is one that should be addressed.

The district court held that the language used in the statute applies to one who produces or distributes the obscene

material" and not to those appearing in the film. We disagree. Subsections (2) of both the 1979 and the 1985 statutes specifically address distribution. Subsection (1) of § 28-1463 uses the verbs "make, publish, . . . direct, create, provide, or in any manner generate," and in light of the separate subsection dealing with distribution, the opinion of the district court as to the limited application of the statute cannot stand. It is clear that the Legislature intended the statute to be thorough, exhaustive, and to describe all the activity involved in generating child pornography.

Webster's Third New International Dictionary, Unabridged (1981) provides the following definitions of the words in the statute:

make: to cause to exist, occur, or appear; to favor the growth or occurrence of; to carry out; perform.

publish: to place before the public; to produce for publication; to reproduce for public consumption.

direct: to show or point out the way; to guide and supervise; to train and lead performances.

create: to bring into existence; to make out of nothing and for the first time.

provide: to supply what is needed; equip.

generate: to cause to be; to propagate.

The trial court erred in limiting the effect of the statute to production and distribution. If the Legislature intended those areas to be the only ones prohibited by the statute, the language could have been so drafted. The definitions listed demonstrate that the statute covers more conduct than that of standing behind the camera. The contribution of Jensen to the film was to supply a not insignificant part to an admittedly obscene whole. In so doing he violated the statute.

EXCEPTION SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD MASILKO, APPELLANT.

409 N.W.2d 322

Filed July 17, 1987. No. 86-875.

1. **Criminal Law: Right to Counsel: Words and Phrases.** Neb. Rev. Stat. § 29-1804.04 (Reissue 1985) defines "indigent" to mean "the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."
2. **Criminal Law: Right to Counsel.** In determining whether a criminal defendant is indigent as the term is used in Neb. Rev. Stat. § 29-1804.04 (Reissue 1985), the trial court must consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.
3. **Constitutional Law: Criminal Law: Sentences: Jury Trials.** An offense for which the maximum penalty is imprisonment for more than 6 months is a serious offense for which the accused is constitutionally entitled to a jury trial.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Reversed and remanded with direction.

Jerry Matthews, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

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

KRIVOSHA, C.J.

The appellant, Richard Masilko, was initially charged in a two-count complaint. Count I charged him with third degree assault in violation of Neb. Rev. Stat. § 28-310 (Reissue 1985). This is a Class I misdemeanor, punishable by up to 1 year's imprisonment, a $1,000 fine, or both. See Neb. Rev. Stat. § 28-106(1) (Reissue 1985). Count II charged Masilko with criminal mischief in violation of Neb. Rev. Stat. § 28-519 (Reissue 1985). Because the value of the property involved was less than $100, this is a Class III misdemeanor, punishable by up to 3 months' imprisonment, a $500 fine, or both. See § 28-106(1). Masilko requested the appointment of counsel, and the county court for Sheridan County, Nebraska, granted his request and appointed the public defender to represent him.

Thereafter, a hearing was held to determine whether Masilko was in fact indigent and entitled to the services of the public defender.

Following that hearing, the county court determined that Masilko was not indigent and denied the motion for the appointment of counsel, setting the matter for trial on March 26, 1986. On March 26, Masilko appeared without counsel and informed the court that he was not ready to proceed, stating that he had been attempting to obtain an attorney but had not been able to procure one because of his financial status. The State then produced additional evidence on the issue of indigence, and Masilko was permitted to testify on his own behalf. The court overruled Masilko's reapplication for court-appointed counsel and ordered the trial to proceed forthwith.

It was not until this moment that Masilko was afforded an opportunity to enter pleas to the charges. At this time he entered pleas of not guilty to both of the earlier counts, and, since the complaint had been amended to include it, he also pleaded not guilty on a count of procuring alcoholic liquor for a minor, in violation of Neb. Rev. Stat. § 53-180 (Reissue 1984). This is a Class I misdemeanor, punishable by up to 1 year's imprisonment, a fine of $1,000 or both. See § 28-106(1).

Following trial to the bench, the court took the case under advisement and on April 2, 1986, found Masilko guilty on all three counts. On appeal to the district court for Sheridan County, Nebraska, the decision of the county court was affirmed. It is from this order which Masilko now appeals to this court, maintaining that (1) the county court erred in not appointing counsel for Masilko, and (2) the county court erred in denying Masilko's right to trial by jury. Masilko also maintains that the court should have granted his request for a continuance. Because we believe that the county court was in error in not appointing counsel for Masilko and in not affording him trial by jury, we need not address the issue of the continuance.

Turning first to the question of the appointment of counsel, Neb. Rev. Stat. § 29-1804.03 (Reissue 1985) provides in part: "(3) It shall also be the duty of the public defender to represent

all indigent persons charged with misdemeanor offenses punishable by imprisonment, when appointed by the court." Neb. Rev. Stat. § 29-1804.04 (Reissue 1985) defines "indigent" to mean "the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family."

We have held that

> [i]n determining whether a criminal defendant is indigent as the term is used in § 29-1804.04, the trial court must consider the seriousness of the offense; the defendant's income; the availability to the defendant of other resources, including real and personal property, bank accounts, Social Security, and unemployment or other benefits; normal living expenses; outstanding debts; and the number and age of dependents.

State v. Lafler, 224 Neb. 613, 615, 399 N.W.2d 808, 811 (1987). Furthermore, we recently held in *State v. Richter,* 225 Neb. 837, 842, 408 N.W.2d 717, 720 (1987), that "[w]hile a situation where expenses exceed income, considered by itself, may or may not constitute indigency of a defendant in a criminal case, an unintended absence of income and lack of property may be considered in determining whether a defendant is an indigent entitled to court-appointed counsel." We further said in *Richter* at 842, 408 N.W.2d at 720:

> In Richter's case, we are not oblivious to, and cannot disregard, Richter's bankruptcy proceedings, his service-related disability affecting earning capacity, and unavailability of retained counsel in view of the attorney fee and retainer demanded for representation of Richter. Richter's family situation needs no further elaboration as factors bearing upon the question of indigency in the present appeal. Based upon the foregoing circumstances, as well as the factors enunciated in *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985), which were mandated in *State v. Lafler, supra*, the record demonstrates that Richter was indigent at the time of his trial in 1984. Whether Richter may have been imprudent in his fiscal management is irrelevant to the determination of indigency in this case.

We concluded in *Richter* by saying at 842-43, 408 N.W.2d at 720:

> If an adequate and properly presented defense to a charge may result in acquittal or exoneration from imprisonment after a defendant's conviction, representation by counsel is a rather substantial right of an accused. Without the benefit of counsel in such a serious situation as confronted Richter, including prospective incarceration, it is difficult, if not impossible, to conclude that a just result was obtained in Richter's 1984 trial and disposition of the charge against him. Consequently, we find there has been an abuse of discretion regarding determination of Richter's indigency and his request for court-appointed counsel.

In the instant case, the evidence discloses that while Masilko had some assets and was on occasion employed, it was clear from the evidence that his ability to obtain private counsel was at best marginal, and apparently impossible. Masilko's affidavit of indigency indicated that he is married and has a 3-year-old daughter. He listed his income as $50 and stated that he owned a 1964 Chevrolet automobile, having no value. He further listed in his affidavit that he had no money on his person or in the bank, and no receivables. He indicated that he had monthly expenses of about $500.

At the hearing held to determine whether in fact Masilko was indigent, evidence was produced indicating that he had a 15-percent permanent partial disability for which he had received a lump-sum settlement of some $3,000 in 1979. There was no indication as to what became of that money. It further developed that his wife was employed as a schoolteacher, earning between $11,500 and $12,000 per year. With regard to the matter of employment, the evidence indicated that Masilko worked as a day laborer for a James Taylor, who, according to Masilko, paid directly to Masilko a total of $200 from January 16 to February 26. While the evidence disclosed that Masilko did own clothing, carpentry tools, furniture, and equipment, no value on the property was established. It seems fairly clear, however, that even a sale of the property was not likely to produce much, if any, funds. His wife owned a 1982 Mazda

automobile in her name and her mother's name, and also owned a 12-speed bicycle. Masilko owned a 1982 Honda motorcycle, in which there appeared to be an equity of perhaps $100.

As we read the statutes involved in matters of this nature, we are of the opinion that the act creating the court's authority to appoint a public defender to represent an individual charged with either a felony or a misdemeanor punishable by imprisonment does not require an individual charged with an offense punishable by imprisonment to sell all of his or her assets before he or she may be considered indigent and entitled to the appointment of the public defender. Specifically, § 29-1804.04 provides that one is not required to prejudice one's financial ability to provide economic necessities for oneself or one's family in order to be determined indigent. Obviously, the purpose of the act is not to impose upon the public the obligation of providing counsel for one who has the means to provide for himself or herself; on the other hand, it seems fairly obvious that the act does not require one charged with a crime entitling the defendant to counsel to virtually dispose of all of his or her assets in order to obtain counsel. From the record in this case, it is apparent that Masilko would have been required to sell virtually all of his assets in order to hire counsel. Such a sale would have prejudiced his ability to provide economic necessities for himself. This we do not believe he is required to do. It appears to us that, considering all the factors listed in *State v. Lafler*, 224 Neb. 613, 399 N.W.2d 808 (1987), the county court was in error in not permitting the public defender to represent Masilko. It is therefore necessary that we reverse and remand this matter with directions to appoint the public defender to represent Masilko, and order a retrial of the charges.

In view of the fact that the matter is being remanded for trial, it is appropriate for us to comment on the question of granting Masilko a trial by jury. On two of the counts, the one involving third degree assault and the one involving procuring alcoholic liquor for a minor, Masilko could be sentenced to up to 1 year's imprisonment. These, therefore, constitute serious offenses entitling Masilko to a jury trial. As we observed in *State v. Lafler, supra*, an offense for which the maximum penalty is

Unless on remand Masilko intelligently and knowingly waives his constitutional right to a jury trial on the charges of assault in the third degree and procuring alcohol for a minor, the county court must afford Masilko a jury trial. Also, because Masilko requested a trial by jury, pursuant to Neb. Rev. Stat. § 24-536 (Reissue 1985) and within 10 days of entering his plea on the charge of criminal mischief, he is entitled to a jury trial on that charge as well.

In view of the fact that the matter is now being remanded for trial to a jury after appointment of counsel, we need not consider the issue of whether the trial court erred in not granting Masilko a continuance. The judgment of the district court is reversed and the cause remanded with instructions to remand the matter to the county court for Sheridan County, Nebraska, for trial in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

MILLARD RURAL FIRE PROTECTION DISTRICT NO. 1, APPELLANT, V. CITY OF OMAHA, NEBRASKA, APPELLEE.

409 N.W.2d 574

Filed July 24, 1987. No. 85-826.

1. **Annexation: Fire Protection Districts: Municipal Corporations.** If either a fire protection district organized under Neb. Rev. Stat. §§ 35-501 et seq. (Reissue 1984) or a municipality seeks a judicial adjustment of matters arising out of annexation by a municipality, proceedings under Neb. Rev. Stat. § 31-766 (Reissue 1984) must be commenced as soon as it becomes evident that an agreed adjustment cannot be reached.
2. **Declaratory Judgments.** In a declaratory judgment action involving the determination of issues of fact, such issues may be tried and determined as in other civil actions.
3. **Declaratory Judgments: Equity: Appeal and Error.** In an appeal of a declaratory judgment in an equity case, the Supreme Court reviews the trial court's findings of fact de novo on the record.

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

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Charles K. Bunger, for appellee.

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

PER CURIAM.

Millard Rural Fire Protection District No. 1 (district) appeals from an order of the district court for Douglas County decreeing the rights, duties, and obligations of the parties regarding the City of Omaha's annexation of property formerly located within the district. We affirm.

The district was organized on March 27, 1952, as a rural fire protection district under the provisions of Neb. Rev. Stat. §§ 35-501 et seq. (Reissue 1952). The original boundaries of the district lie in both Douglas and Sarpy Counties along the western edge of Omaha. The district, which is served by the Millard Volunteer Fire Department, operates two fire stations with eight units of firefighting equipment and four rescue units. The facilities and equipment used by the volunteer fire department are provided by the district, which pays for all expenses incurred in the operation and maintenance of the fire and rescue service, as well as the training of volunteer firefighters.

The operation of the district is funded primarily by revenue raised from an annual tax levied on all real property located in the district. The district had incurred no bond debt to finance its operation until August of 1981, when it issued $890,000 of bonds in order to purchase new equipment and build a fire station. In June of 1983, the district had a second bond issue totaling $2 million, used in part to redeem the remaining bonds outstanding from the first issue and in part to purchase additional equipment and complete the new fire station.

During the period from 1968 to 1984, the city annexed several parcels of land located within the boundaries of the district. As the parcels of land were annexed by the city, they were taken into the jurisdictional limits of the city, removing them from the boundaries of the district and lessening the district's tax base from which to draw tax revenue. When an area is annexed by the city, the city assumes all responsibility for

providing fire protection and related services to that area.

Through 1981, neither the city nor the district made any attempt to negotiate an agreement regarding an adjustment of matters growing out of or connected with the numerous annexations. In April of 1982, attorneys for the district sent a letter to the city requesting that a meeting be held for the purpose of discussing a pro rata assumption by the City of Omaha of the bonded indebtedness of the district. The district and the city met in June and November of 1982 to discuss the annexations by the city and the city's assumption of a percentage of the district's bonded indebtedness. The city made a settlement offer to the district in August of 1983, which was apparently rejected by the district. The district filed a petition in the district court for Douglas County in February of 1984 and an amended petition in December of 1984, pursuant to Neb. Rev. Stat. § 31-766 (Reissue 1984), requesting a declaratory judgment determining the rights, duties, and responsibilities of the parties with respect to the annexed areas. See Neb. Rev. Stat. § 25-21,149 (Reissue 1985). The city answered the district's amended petition, alleging that the district's cause of action was barred by the statute of limitations.

At trial, Terry Jaros, secretary-treasurer for the district, testified that the annexations of areas from the district did not result in a reduction in the district's expenses because the majority of the expenses are fixed or ongoing expenses. Orlan Jurgenson, fire chief of the Millard Volunteer Fire Department, also testified that the annexations had no effect on the department's requirements for manpower, equipment, and fire stations, and there had been no material reduction in the expense of providing fire and rescue services after the annexations. Horton Dahlquist, chief of the City of Omaha Fire Division, was called as a witness for the city and testified that as the size of the fire protection district becomes smaller because of annexations, less equipment and personnel would be needed for fire protection. However, Dahlquist was not sure that the district's need for equipment and firefighters had actually decreased.

In attempting to establish the amount of recovery from the city, the district introduced into evidence schedules prepared by

a certified public accounting firm, outlining the expenses incurred by the district for the fiscal years 1969 through 1984. A percentage was then obtained for each fiscal year by dividing the cumulative annexations by the total tax base plus cumulative annexations. The percentage was then multiplied by the total expenditures of the district for the following fiscal year to obtain the amount of damages for each year. The total combined damages for all years amounted to $360,945.65.

Terence Leaders, who was employed in the city finance department for 16 years and was directly responsible for annexations for 14 years, testified for the city. Leaders contested the method used by the district for calculating any amount due after annexation and outlined the method used by the city to calculate the percentage of bonded indebtedness which the city proposed to assume because of the annexations. Leaders disagreed with the district's method, which failed to include the value of property located in Sarpy County in computing the district's tax base, failed to consider the capital and liquid assets available to the district, and incorrectly considered a compounded effect of the annexations in arriving at its cumulative annexation percentage.

In determining the amount of debt to be assumed by the city as a result of the annexations, the city first calculated the net debt of the district outstanding by subtracting the district's liquid assets (cash and investments) from the amount of the outstanding liabilities (notes payable and bonds payable) of the district. Next, the city calculated the total value of the district's tax base, considering the value of land located in both Douglas and Sarpy Counties. A percentage of valuation was then calculated, dividing the value of the property annexed for each year by the total taxable valuation of the district for each corresponding year. That percentage was applied to the net debt outstanding for each year to arrive at the amount of net debt related to each annexation which was to be assumed by the city. Leaders testified that, although this was the first time the city had negotiated with a fire protection district regarding annexation of a district's property, the method used by the city in calculating the net debt to be assumed was the same procedure used by the city in adjusting the indebtedness

assumed upon partial annexation of a sanitary and improvement district. According to Leaders, the method used was the industry standard and "is simply taking a pro rata share of the outstanding debt of the District as each annexation occurs."

The district court found that each separate annexation gave rise to a separate claim pursuant to § 31-766 and that all claims arising prior to February 10, 1980, were barred by the applicable statutes of limitations. The district court also made the following findings:

> 4. The fire protection and emergency service provided by the Defendant to such annexed areas is a "liability" assumed by the Defendant pursuant to Section 31-766, Nebraska Revised Statutes.
>
> 5. In connection with each such annexation, the incremental reduction of the Plaintiff's tax base, as it relates to producing revenue for operation and maintenance, is balanced or off-set by the corresponding incremental assumption of liability by the Defendant through its assumption of fire protection and emergency service responsibility.
>
> 6. In connection with each such annexation, the incremental reduction of the Plaintiff's tax base, as it relates to producing revenue for repayment of indebtedness, is balanced by the corresponding assumption by the Defendant of a pro-rata share of such indebtedness. An equitable means of determining such pro-rata share is to take the amount of the Plaintiff's net debt times the percentage of valuation of the Plaintiff's territory annexed. This formula must be applied separately for each annexation.
>
> 7. The method of defining and computing the division of assets and liability outlined in paragraphs 5 and 6, hereinabove, is the method accepted through common usage and practice in Douglas County by affected parties in connection with partial annexations pursuant to Section 31-766, Nebraska Revised Statutes.

The district court ordered that "the Defendant pay the Plaintiff the sum of $11,346.47 in connection with such

annexations occurring from 1980 through 1983. Any claims by Plaintiff for monies from Defendant for such annexations occurring before 1980 are now and forever barred."

The district appeals and assigns error to each of the district court's specific findings.

Section 31-766 provides in relevant part:

> If only a part of the territory within any sanitary and improvement district, any road improvement district, or any fire protection district is annexed by a city or village, the . . . fire protection district . . . and the city or village acting through its governing body *may* agree between themselves as to the equitable division of the assets, liabilities, maintenance, or other obligations of the district for a change in the boundaries of the district so as to exclude the portion annexed by the city or village or *may* agree upon a merger of the district with the city or village. . . . If the district and city or village do not agree upon the proper adjustment of all matters growing out of the annexation of a part of the territory located within the district, either the district or the annexing city or village *may* apply to the district court of the county where the major portion of the district is located for an adjustment of all matters growing out of or in any way connected with the annexation of such territory, and after a hearing thereon the court may enter an order or decree fixing the rights, duties, and obligations of the parties . . . .

(Emphasis supplied.)

Concerning an action commenced under § 31-766, we stated in *City of Bellevue v. Eastern Sarpy County S. F. P. Dist.*, 180 Neb. 340, 343, 143 N.W.2d 62, 64 (1966): "The authority conferred upon the district court by section 31-766 . . . is to adjust matters growing out of the annexation. The statute contemplates that the annexation shall be complete at the time the application is filed." See, also, *Webber v. City of Scottsbluff*, 187 Neb. 282, 188 N.W.2d 814 (1971). The validity of an annexation by a city or village of property located within a fire protection district or sanitary and improvement district does not depend upon compliance with § 31-766. See *Webber v. City of Scottsbluff, supra*. However, § 31-766 "obviously

contemplates a prompt division of the assets and liabilities of the district and the exclusion of the portion annexed from further control by the district," *Sanitary & Improvement Dist. v. City of Ralston*, 182 Neb. 63, 70, 152 N.W.2d 111, 115 (1967), and, if an adjustment of matters arising out of the annexation is sought, either the district or the city must institute proceedings under § 31-766 as soon as it becomes evident that an agreed adjustment cannot be reached. See *Abernathy v. City of Omaha*, 183 Neb. 660, 163 N.W.2d 579 (1968), where we stated that § 31-766 must be construed in the light of Neb. Rev. Stat. §§ 31-764 and 31-765 (Reissue 1984). Section 31-765 provides that a merger of a district and a city or village shall be effective 30 days after the effective date of an ordinance annexing all of the territory within a district. Section 31-764 provides that the trustees of a district shall submit to the city a written accounting of all assets and liabilities of the district within 30 days of the effective date of the merger of the annexed district and the city. We have recognized, therefore, that an action brought under § 31-766 must be commenced within a reasonable time after the annexation of part of a district by a city.

This action was brought in the form of a declaratory judgment to determine the rights, duties, and responsibilities of the parties with respect to the annexed areas. In *OB-GYN v. Blue Cross*, 219 Neb. 199, 202, 361 N.W.2d 550, 553 (1985), we noted that "a declaratory judgment action is sui generis and may involve questions of both law and equity. *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983)." See, also, *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 318 N.W.2d 70 (1982). In a declaratory judgment action involving the determination of issues of fact, such issues may be tried and determined as in other civil actions. Neb. Rev. Stat. § 25-21,157 (Reissue 1985); *OB-GYN v. Blue Cross, supra; Larutan Corp. v. Magnolia Homes Manuf. Co.*, 190 Neb. 425, 209 N.W.2d 177 (1973). All declaratory judgment orders and decrees may be reviewed as other orders, judgments, and decrees. Neb. Rev. Stat. § 25-21,155 (Reissue 1985); *OB-GYN v. Blue Cross, supra*. In an appeal of a declaratory judgment action concerning an equity case, the Supreme Court reviews

the trial court's findings of fact de novo on the record. Neb. Rev. Stat. § 25-1925 (Reissue 1985); *OB-GYN v. Blue Cross, supra*. With regard to questions of law involved in an appeal, the Supreme Court has the obligation to reach independent conclusions with respect to those questions. *OB-GYN v. Blue Cross, supra; Ranger Division v. Bayne*, 214 Neb. 251, 333 N.W.2d 891 (1983).

For an assignment of error, the district claims that the district court erred in finding that the statute of limitations barred the district's claims arising prior to 1980. The statute of limitations, if applicable, may be raised and relied on in an equity action. See, *Cape Co. v. Wiebe*, 196 Neb. 204, 241 N.W.2d 830 (1976); *Campbell v. Kirby*, 195 Neb. 610, 239 N.W.2d 792 (1976); *Uptegrove v. Elsasser*, 161 Neb. 527, 74 N.W.2d 61 (1955); *Abels v. Bennett*, 158 Neb. 699, 64 N.W.2d 481 (1954); *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 259 N.W. 630 (1935). A defendant may raise any appropriate defense available, whether it be legal or equitable, in any case. *Department of Banking, Receiver v. Wilken*, 217 Neb. 796, 352 N.W.2d 145 (1984); *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982); *Wischmann v. Raikes*, 168 Neb. 728, 97 N.W.2d 551 (1959); *Kelly v. Kannarr*, 118 Neb. 472, 225 N.W. 230 (1929). This rule follows from the fact that Nebraska has abolished all distinctions between actions at law and suits in equity and in their place established one form of action denominated a "civil action." See, Neb. Rev. Stat. § 25-101 (Reissue 1985); *Wischmann v. Raikes, supra*.

Neb. Rev. Stat. § 25-204 (Reissue 1985) states: "Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued." The district court found that Neb. Rev. Stat. §§ 25-206, 25-207, and 25-212 (Reissue 1985) were applicable and each barred any claim of the district prior to 1980. Section 25-206 provides: "An action upon a contract, not in writing, expressed or implied, *or an action upon a liability created by statute*, other than a forfeiture or penalty, can only be brought within four years." (Emphasis supplied.) Section 25-207 provides in part: "The following actions can only be brought within four years: . . . (3) an action for the injury to the

rights of the plaintiff, not arising on contract, and not hereinafter enumerated . . . ." Section 25-212 provides: "An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued." No matter which of the above sections is applied to an action commenced under § 31-766, the action must be commenced within 4 years after the effective date of the annexation ordinance. The present action was commenced by the district on February 10, 1984. Therefore, all the district's annexation claims arising prior to February 10, 1980, were barred. The district court did not err in so determining.

The district also assigns as error the district court's findings regarding the division of the assets, liabilities, maintenance, and other obligations of the district. In essence, the district argues that the city should not only have to assume a percentage of the district's bond debt relating to the annexed areas, but should also be required to assume a percentage of the district's ongoing operation and maintenance expenses relating to the entire district. The district ignores the fact that the city has assumed full responsibility for the maintenance and operation of fire and rescue services for the areas annexed by the city. Although the annexation of areas from the district does remove property from the district's tax base, the record shows that the actual value of property in Douglas County remaining within the district rose from approximately $132 million in 1968 to approximately $751 million in 1984. Based on our de novo review of the record, under the circumstances we find that the method of adjustment proposed by the city, that is, a pro rata assumption of the net bonded indebtedness of the district relating to the percentage of valuation of the annexed property, along with assumption of responsibility for providing fire and rescue services to the annexed areas, results in an equitable division of the assets, liabilities, maintenance, and other obligations of the district. In this regard, we reach the same conclusion as that of the district court, and, finding no errors in the record, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS RYAN, APPELLANT.

409 N.W.2d 579

Filed July 24, 1987. No. 86-477.

1. **Juvenile Courts: Jurisdiction: Waiver.** In deciding whether to grant a requested waiver of jurisdiction and transfer of the proceedings to the juvenile court, the trial court must carefully consider the juvenile's request in the light of the statute.
2. _____: _____: _____. Neb. Rev. Stat. §§ 43-276 (Reissue 1984) and 29-1816 (Reissue 1985) involve a balancing test, namely, public protection and societal security weighed against practical and not problematical rehabilitation, in determining whether there should be a waiver of jurisdiction in criminal proceedings with a transfer to the juvenile court.
3. **Sentences.** The probability of success and the duration of rehabilitative treatment must be considered in determining the manner and location of detention.
4. **Photographs: Juries.** Gruesomeness by itself is not a sufficient reason to keep photographs from the jury, if the probative value of the photographs outweighs the possible prejudice to one accused of a crime.
5. **Evidence: Witnesses: Trial.** The admissibility of evidence, preliminary questions concerning the qualification of a person to be a witness, and the existence of a privilege are issues to be determined by the court.
6. **Evidence: Appeal and Error.** The admission or exclusion of evidence is a matter within the sound discretion of the trial court and will be upheld absent an abuse of discretion.
7. **Evidence: Words and Phrases.** Relevant evidence is evidence having any tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without such evidence.
8. **Jury Instructions: Appeal and Error.** The failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal.
9. _____: _____. All of the instructions must be read as a whole, and if the instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.
10. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.

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

Rodney J. Rehm of Rehm & Bartling, and, on brief, Victor Faesser, for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

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

BOSLAUGH, J.

The defendant, Dennis Ryan, was charged with first degree murder in the torture death of James Thimm. Thimm died on or about April 30, 1985, as the result of being physically abused for several days before his death.

The defendant's father, Michael Ryan, who will be referred to as Ryan, was the leader of a group or cult that was living on a farm near Rulo in Richardson County, Nebraska. The defendant and Thimm were members of the group, but Thimm had fallen out of favor and had been demoted to the status of a "slave." Ryan decided that Thimm should be tortured and then killed, and directed the men living at the farm, including the defendant, in the abuse of Thimm.

The information against the defendant was filed on September 18, 1985. At his arraignment on October 8, 1985, he pleaded not guilty. A motion to waive jurisdiction to the juvenile court was filed on November 27, 1985, together with a notice of intent to rely upon the defenses of insanity or diminished capacity.

The motion to waive jurisdiction to the juvenile court was overruled on December 18, 1985. On the same day the defendant's case was consolidated with the cases of the defendant's father and Timothy Haverkamp and a change of venue granted to Douglas County, Nebraska.

Jury selection commenced February 24, 1986; trial began March 10 and was concluded on April 10. The jury returned a verdict of guilty of second degree murder, and the defendant was sentenced to life imprisonment.

On appeal the defendant has set forth seven assignments of error on six issues. The defendant contends the trial court erred in failing to grant his motion to waive jurisdiction to the juvenile court, in receiving into evidence various photographs, in excluding certain testimony, in sustaining his codefendant's objections to the introduction of two depositions, in refusing to give certain requested jury instructions, and by imposing an excessive sentence.

The defendant first contends the trial court erred in refusing to grant his motion to waive jurisdiction to the juvenile court. It is his position the evidence presented at the transfer hearing does not support the court's findings and order denying the transfer. The State contends the district court properly denied the defendant's motion because the statutorily required balancing test by which public protection is weighed against the practical and probable rehabilitation of the defendant mandated retention by the district court.

The defendant was born August 31, 1969. On the date of the offense he was 15 years and 8 months old. His parents removed him from school after he had completed the eighth grade at Holton, Kansas.

At the hearing on the motion to waive jurisdiction to the juvenile court, the State introduced evidence concerning the torture of James Thimm and the defendant's participation in it.

The men who lived at the farm near Rulo, in addition to Ryan, James Thimm, and the defendant, included John David Andreas, James Haverkamp, Timothy Haverkamp, and Richard Stice. There were also a number of women and children. The women included Ruth Ryan, the wife of Michael Ryan and the mother of the defendant, Cheryl Gibson, Lisa Haverkamp, and Maxine Haverkamp. The children included Luke Stice, the 5-year-old son of Rick Stice, who also was tortured and killed at the direction of Ryan.

Andreas testified he had resided in Beatrice, Nebraska, for 19 years, and had moved to the Rulo farm in August 1984 because Ryan had told him that God wanted Andreas to move there. Andreas had known James Thimm for 7 or 8 years prior to his move to the Rulo farm. Thimm, who was approximately 25 or 26 at that time, was already living on the farm when Andreas moved there. Andreas testified he met Ryan in the latter part of 1982, a few days after a meeting near Hiawatha, Kansas, where a group of people were discussing different ways to defend themselves in the event of a breakdown of law and order and a Soviet attack. A few weeks later they met again at Ryan's home in Whiting, Kansas, and discussed the problems of the country and the activities occurring which were contrary to the words of the Bible.

Andreas continued to work at his job through 1983 and part of 1984, and the three men continued to get together. At some point, either in December of 1982 or January of 1983, Ryan said he could speak to God, and God would answer yes or no. Ryan and his brother-in-law had said they could talk to God and "they'd use one of their arm — right arm and they'd ask a question, and if the arm was strong, it was a yes, and if it was — the arm was weak, then it was a no." Andreas testified that "If the person that is holding the arm up would resist and the other person would press on the arm and try to force it down, and if it would stay up, or you could tell the difference in the strength, then it would be a yes." Andreas believed Ryan could talk to God during the period of early 1983 through August 1984, and had possibly seen Ryan use the defendant's arm to talk to God during that time. During the summer of 1983 Ryan told Andreas he could ask God whether or not people were "in deep trouble with God, and he even went as far as to say that you were in a condition where you would burn in hell if you didn't change . . . ." Ryan referred to God as "Yahweh." During that period Andreas participated in various thefts because Ryan said God wanted them to do so. Andreas stated he had equated their situation with being at war and taking from your enemies. The defendant did not participate in these thefts, but helped unload stolen property and was present when the thefts were discussed.

When Ryan told Andreas he should move to the farm and live with the group, Andreas stopped working in Beatrice. When Andreas moved to the farm, Cheryl Gibson and her children, Ryan and his family, James Thimm, Rick Stice and his three children, and James Haverkamp and his sister Lisa were already there. Andreas testified that once on the farm he and the other men, including the defendant, each had rifles.

A sort of military rank was imposed wherein the defendant began as a corporal and eventually was promoted to the rank of general. Andreas testified that at some point Ryan began to talk to God through his mind and that God told Ryan what everyone's rank should be.

Andreas testified he stayed on the farm from August 1984 until June 25, 1985, when he was arrested. He stated the defendant was promoted because, according to Ryan, the

defendant "had more faith in God than any of the rest of us did and that he did everything he was told without question or didn't have any bad thoughts in his mind." The defendant seemed proud of his promotions and was very enthusiastic. Andreas initially was given the rank of private but eventually was promoted to general. Ryan called himself the king. The defendant was called a prince and Tim Haverkamp a high priest. Andreas testified that a watch was kept on the road to see if anyone was coming from approximately 6 a.m. to about 10 p.m. every day. The watch was to look for law enforcement people, and, although the guard was armed, they were instructed to radio Ryan rather than use the weapons. Andreas testified the defendant did some guard duty and was treated like the other men. Although all of the men, other than Ryan, were eventually promoted to general, the defendant had authority over the other men, including James Haverkamp, Andreas, James Thimm, Tim Haverkamp, and Rick Stice. The defendant had authority to tell the others to do certain activities and relayed messages to them from Ryan.

Andreas testified in detail about Thimm's death. Thimm had been given the status of slave after the first of the year in 1984 and was living in a separate trailer because Ryan said he was in big trouble with God and was going to burn in hell. Ryan had told them Thimm had been demoted to slave because he had denied God and had bad thoughts. Additionally, there had been a message from God that Thimm had poisoned a wild turkey which had been shot and was to be used for the feast to celebrate the birth of Lisa Haverkamp's child. That incident was the final occurrence which resulted in Thimm's demotion. About 1 month prior to his death he was chained up at night and forced to sleep on the porch of the south trailer house. Thimm was chained at night by the defendant, or one of the others, or himself. Thimm did not resist this treatment in any manner. The chain was padlocked to his ankle, or around his waist or stomach, and attached to a post. Andreas testified Thimm was chained at night because "Mike said that God had told him that he might run off, or just that God had said that that's what was supposed to be done to James Thimm because he was having bad thoughts." During the day Thimm did activities around the

farm.

Andreas testified that in about the middle of March Thimm was shot through his left cheek by the defendant. Thimm was then fed cayenne pepper to control the bleeding and was bandaged by Ryan.

Andreas testified that Rick Stice was also demoted to slave after the first of the year in 1984. Andreas stated that the defendant and Tim Haverkamp lived in the south trailer, to which the porch in which Thimm lived was attached.

Two days before his death Thimm was moved to the hog confinement building and was instructed by Ryan to take a goat with him and have sex with it. Thimm was given a jar for water, a hotplate, and a sleeping bag. The next day someone took a turtle to him for food. The day before Thimm died Ryan inserted a greased shovel handle into Thimm's rectum several times, then the defendant, Tim Haverkamp, James Haverkamp, and Andreas also did so. Thimm offered no resistance. Later that same day the same men whipped Thimm. At this time Thimm was spread-eagled against an auger. Each man was directed to inflict 15 lashes. Two whips were used, a bullwhip and a livestock whip. As a result of the whipping, Thimm's skin was reddened. The men then left Thimm in the confinement building, restrained.

The next day Thimm was whipped again, because the redness from the first day was gone. The same men were involved and again inflicted 15 lashes apiece. Ryan then directed each man to take one shot at one finger on one of Thimm's hands. Andreas and Haverkamp then prepared to disk the field, and Ryan told Andreas to come into the building and say goodbye to "your good friend." At that time Thimm was alive and coherent, but unclothed. The defendant, Ryan, and Tim Haverkamp were in the confinement building. A short time later Andreas looked into the building and saw that Thimm's thighs were broken, and, he testified, it was the last time that he saw Thimm alive. Ryan later told Andreas that Thimm was dead and they would bury him that evening.

Later that evening Andreas saw Thimm's body on the sleeping bag, saw that his legs were broken, and saw that he had been skinned on one leg. The body was also more bruised than it

had been the last time Andreas had seen it. Andreas testified the defendant "thought it was kind of — it was kind of neat that he had helped kill somebody." Tim Haverkamp, the defendant, and Andreas dug the grave in the field that had been disked. Thimm was placed in the grave, and Ryan directed Haverkamp to shoot Thimm's head. Prior to that time Andreas had seen no signs of life in Thimm.

Andreas testified the defendant had later bragged about the killing and did not show remorse or sorrow.

On cross-examination Andreas testified that during the time he resided at the Rulo farm he believed that Ryan could talk to Yahweh. Andreas also testified Ryan did not threaten him with bodily harm when he directed Andreas and the others to torture Thimm, but told them God would be pleased if they did so. He testified he believed that that was what God wanted and he did not want to displease God. He testified that when he participated in the murder of James Thimm he thought that he was doing the right thing.

The defendant's counsel and Andreas illustrated how Ryan used the arm test to determine Yahweh's will. The attorney raised his arm at about a 45-degree angle toward the witness; Andreas stated a question would then be asked and he would try to pull down on the arm. If the arm fell down the answer would be no. If the arm was strong the answer would be yes. Andreas stated he thought he could talk to God in that manner until about 30 days after his arrest. He also testified he had thought Ryan could read minds, so he worried about having "wrong thoughts." He testified that during his residence at the Rulo farm he was not in touch with reality, stating, "There was very little reality that was out there. It was a fantasy world." He testified Ryan had told them that anything he said was the same as if it was written in the Bible. He stated he was fearful at that time that if he displeased Yahweh he would be condemned to burn in hell. Andreas testified Ryan had told them he could "deteriorate someone else's brain," and that he saw the results of what Ryan had done with Luke Stice and James Thimm. He stated he believed Thimm's brain had been deeply affected. Andreas stated Thimm complained very little of his torture, and throughout the ordeal begged Yahweh for forgiveness.

Andreas testified he was told the defendant had accidentally shot Thimm in the cheek; Yahweh had somehow pulled the trigger and caused the gun to fire.

Andreas testified that he was more concerned with Thimm's afterlife, that he would burn in hell, than with his suffering in his physical life. He testified that while he lived on the Rulo farm, the defendant was obnoxious, acted like a mouthy boss' son, and was a messenger and alter ego for his father. He stated he never saw the defendant disobey an order from his father and that he "blindly" followed what Ryan said. Andreas testified the farm had belonged to Rick Stice, who was initially a high priest until he was demoted to slave.

Andreas testified that when Stice was demoted to slave Stice was directed to have sex with a goat. Andreas held the goat while Stice did so.

Ryan was absent from the farm one weekend during the time Thimm was treated as a slave, but Andreas did not free Thimm and take him to Beatrice because Andreas was afraid Ryan would hunt Andreas down and kill him because he had displeased God. Andreas had disked the field to prepare for the burial of Thimm's body. Andreas felt that he had been brainwashed by Ryan, and that is why he had not left the farm for help even though he had access to weapons and transportation. He did not realize that he had been brainwashed until 40 days after he had been separated from the Rulo farm.

It was stipulated that Andreas had entered into a plea bargain with Richardson County and the U.S. attorney, and several counties in Kansas and Missouri, wherein he agreed to plead to three felony counts, with a total maximum penalty of 30 years, in exchange for telling the truth about the occurrences on the Rulo farm.

Andreas testified the younger children on the farm received some schooling at the farm, but the defendant did not participate in it.

Terry Becker, an investigator with the State Patrol, also testified. Becker participated in several searches of the farm near Rulo, Nebraska. The first search was conducted on June 25, 1985, to find stolen property allegedly located on the

premises. The officers cut the lock on the gate and approached the residence. Inside the home Becker observed numerous people, including the defendant's mother. He observed a number of guns and a birthing chair, which Ryan said had been used to deliver Lisa Haverkamp's baby. Becker testified, "There was continuously a gun within reach anywhere in that trailer. There were guns — like fully automatic weapons above each bed in the living quarters. There was a weapon above each doorway. There were handguns on the tables. It was a heavily armed residence." All of the guns were loaded. During this time the defendant was yelling obscenities at the officer from the south trailer, where he was in the custody of other officers.

As a result of the search the officers seized 13 fully automatic AR-15 rifles and approximately $120,000 of merchandise. The property was later determined to have been stolen from counties in Missouri, Nebraska, and Kansas. At the beginning of the search the defendant did not have a weapon on his person but was near a bed which had fully loaded automatic weapons on it.

A second search was conducted on the morning of August 17, 1985, because Rick Stice, a former resident of the farm, reported his son had been killed, and there was concern over the whereabouts of James Thimm. Stice had informed the officer that Thimm had previously been shot through the cheek by the defendant. That same day Ryan and Tim Haverkamp were arrested by the sheriff. On that day only one woman remained on the farm; the others had moved to Norton, Kansas, to the Lynn Thiele residence. More weapons and explosives were seized, as well as survivalist literature. In addition, the bodies of Luke Stice and James Thimm were discovered. The bodies were found after James Haverkamp told other officers that James Thimm had been killed and was buried in an unmarked grave with Luke Stice. The value of the property seized after this search was approximately $5,000, and included handguns, rifles, hand grenades, charcoal, and other chemicals for use in the manufacture of black powder. During this time the defendant was at the Lynn Thiele residence.

Becker testified that when he went there, with a search warrant, and attempted to obtain the weapon which had been

used to shoot into Thimm's body at the gravesite, the defendant was in custody in Kansas by virtue of an arrest warrant issued by Richardson County, Nebraska. The officer interviewed the defendant regarding the bodies found at the Rulo farm. The defendant indicated he knew nothing about any bodies at Rulo. The defendant stated his father had given him the gun which was then retrieved from the Lynn Thiele residence.

Becker testified the defendant had no juvenile record in any jurisdiction.

The State then rested.

The defendant presented testimony by two other men charged in the murder of James Thimm, a psychologist, a woman who works with cult members, and several attorneys.

James Haverkamp, one of the other men charged, testified that he moved to the Rulo farm in June or July 1984 because he then believed Ryan could speak with God and had instructed Haverkamp to move there. He had believed Ryan could talk to God for approximately a year prior to his move. Ryan sometimes spoke to God through Haverkamp's right arm. Haverkamp believed he was an Israelite, a descendant of Abraham, and that his belief was founded in different Bibles and Bible dictionaries. He began to believe he was an Israelite in the spring of 1983 and believed everyone who lived on the Rulo farm was an Israelite, including Luke Stice, until he was told in the spring of 1985 that the Stice boy was not. At that time Haverkamp was told that young Stice was a mongrel, and the boy was punished. The numbers 666 were written on the boy in red ink, and he was not allowed to wear clothes other than underpants for the last 2 months of his life.

Haverkamp testified he did not object to the boy's treatment because he was afraid of being punished and of burning in hell for questioning what God wanted.

Haverkamp testified that Ryan had directed him to probe James Thimm with the shovel handle because that was what Yahweh wanted. He had been told Yahweh wanted Thimm to feel pain because he had denied Yahweh. He believed he was doing God's will when he did so, and did not know how to justify how badly Thimm was hurt. Haverkamp participated in whipping Thimm and shot one of his fingers. Haverkamp

further testified he had participated in kicking Thimm. Haverkamp testified the defendant participated in the torture with the other men. The defendant was above him in rank, and Haverkamp had no say with regard to the defendant's activities. In the fall of 1984 he was told by Ryan that the defendant was considered a man in the eyes of God.

Haverkamp no longer believed he could talk to God through his arm and had stopped believing that about 40 days after he was separated from the Rulo farm by his arrest. His freedom to leave the farm was restricted, but he had not objected to such restrictions because he believed it was what God wanted. Haverkamp testified the defendant helped with the school on the farm on one or two occasions, and spent more time with the children than the other men.

Haverkamp believed he had been brainwashed, meaning he did things there he would not normally have done. For example, even though Haverkamp had previously been a hog farmer, as a member of the Rulo group he was forbidden to eat pork because it was "unclean."

Haverkamp was initially attracted to the Rulo group because of Yahweh and the fear of Armageddon. The men stole batteries, tractors with backhoes, guns, ammunition, and food to prepare for the battle they believed to be imminent. Toward the end of his stay at Rulo things were quite different than when they began.

Haverkamp testified he believed Ryan controlled his free will. When Thimm died he did not worry that he had committed a crime and did not get rid of the evidence. The shovel, for example, was still in the confinement building 4 months later.

Haverkamp testified that Ryan, Rick Stice, and the defendant had reported experiencing visions while at the farm. Haverkamp had not had visions nor heard voices, but Ryan, Stice, and the defendant had reported such experiences. Haverkamp testified he was told Ryan was married to his sisters, Cheryl Gibson and Lisa Haverkamp, and his mother, Maxine Haverkamp, in the eyes of Yahweh. Ryan was also legally married to Ruth Ryan, as far as Haverkamp knew. Haverkamp believed these marriages were what Yahweh wanted. He did not leave the farm for fear of burning in hell

because Ryan had told him that was what Yahweh would do to him. Ryan had announced on December 31, 1984, at a gathering at the farm that if anyone wanted to leave they should do so then because after the first of the year they would not be able to. They had to decide whether to follow Yahweh or go against him. There was an implication that if someone left they would have trouble in the hereafter.

Haverkamp testified he had never seen the defendant go against his father's wishes or question the existence of Yahweh. The defendant actively participated in the Bible discussions held on Saturdays.

Dr. James Cole, a professor of psychology at the University of Nebraska, testified regarding his psychological evaluation of the defendant. Cole had supervised a battery of psychological tests, including intelligence tests, given the defendant, as well as a psychological interview. Dr. Cole reviewed the results of those tests and a report from the State Patrol consisting of statements of Andreas and Haverkamp, and then interviewed the defendant a second time just prior to the hearing.

It was Dr. Cole's opinion that the defendant was functioning at an average or above average intellectual level, but that he appeared to be fairly immature, "particularly emotionally and in terms of general awareness of the world around him." The defendant's responses to the Rorschach test, in particular, tended to illustrate that his level of maturity was more in line with young people's than adults'. Dr. Cole also testified a portion of the defendant's responses showed "pretty good reality contact."

Dr. Cole testified the defendant was "very open and cooperative" during the October interview and had talked a lot about movies, particularly "Red Dawn" and "The Terminator."

Dr. Cole stated his definition of immaturity could be illustrated by the following "synonyms": "[A] kind of naivete, lack of sophistication, a lack of independence of judgment, acceptance of other people's in very absolute and total — other people's views as absolute and total. A lack of questioning of things." Dr. Cole believed the defendant was less independent than a typical 16-year-old. He further testified the defendant

unquestionably accepted the "values, the beliefs, the religion, of his father. . . . He believes in what his father believes in; he believes in the religion very strongly and uncritically." Dr. Cole viewed such uncritical acceptance as a sign of immaturity. Dr. Cole determined, based on the aforementioned testing, that the defendant's age in terms of maturity was that of a 12- to 13-year-old.

Dr. Cole illustrated his view of the defendant's immaturity by relating a question asked by the defendant with regard to "the gangs that wander around campus? . . . Where are they? Can you see them?" Dr. Cole also testified the defendant scored high on the "L" scale. He testified this was consistent with groups of people who tend to have strong and extreme religious views, not because they lie but because they "tend to have very strong absolute beliefs." Dr. Cole assumed the defendant's religious views were not significantly different from those at the time of the murder. That indicated to Dr. Cole the defendant was dominated by a "very strong, very absolute religious system that he believed in very strongly, still believes in very strongly" and that he is guided by "the words of Yahweh in his behavior, and he accepts that unquestionably." Dr. Cole stated the defendant believed it was Yahweh, rather than himself, who pulled the trigger and shot James Thimm in the cheek. The justification for this behavior was because Thimm had apparently denied Yahweh and this act would please Yahweh. Dr. Cole believed the defendant actually believed in the religious beliefs he professed.

Dr. Cole concluded the defendant "admires his father completely; he feels his father is a leader for Yahweh; he believes his father" had spoken at the farm because Yahweh had instructed him to do so. Dr. Cole further testified the defendant viewed his father as a martyr because he was subsequently betrayed by his followers. Dr. Cole viewed the defendant as totally committed to his father and stated that he showed no doubts as to his father's actions.

Dr. Cole testified the defendant seemed even more adamant about his religious beliefs at the more recent interview. At the second interview the defendant seemed to have more anxiety about the events. Dr. Cole testified the defendant had shared a

cell with his father in November and had been very distressed by it. He saw himself and his father as the only remaining believers and saw his whole world crumbling around him.

It was Dr. Cole's opinion that the defendant was "totally under the domination of his father" when he participated in Thimm's murder, and "was not acting on his own free will." Ryan was the single most important influence, but the whole group reinforced his orientation and the violence associated with it. Dr. Cole testified the participation of the adults had some influence on the defendant. It was his opinion the defendant would not benefit by being treated as an adult, but could be rehabilitated through participation in the juvenile system. Dr. Cole testified the success of such rehabilitation was contingent on the role in such a program played by his father. He testified it would be relatively easy for Ryan to undermine the defendant's rehabilitation.

Dr. Cole believed there was a chance the defendant could be rehabilitated if in an adult prison with his father, although he would be very vulnerable.

On cross-examination Dr. Cole testified that at the second interview, the Sunday prior to the hearing, the defendant still believed Yahweh speaks through his father. Dr. Cole had never before encountered a similar situation in his practice, and could only speculate about the length and type of treatment which would rehabilitate the defendant. He recommended placement, after counseling, in a carefully selected, healthy, religious home.

Dr. Cole stated that even if the defendant were separated physically from his father, it was doubtful whether he could be separated from his father's influence. For that reason Dr. Cole believed it was critical to obtain a commitment from his father to support rather than undermine a rehabilitation program. For the defendant to be rehabilitated required his father's support and the defendant to change his beliefs, but neither requirement had occurred. Dr. Cole stated that at his recent meeting with the defendant the latter was not even considering changing his religious beliefs.

Dr. Cole stated the defendant was reluctant to discuss his participation in Thimm's murder, tried to avoid talking too

much about his father, and did not show any remorse for what had happened. The defendant still believed that it was the will of Yahweh, and this belief was even stronger at the second interview. Dr. Cole testified that, for rehabilitation to succeed, the defendant would have to recognize the relationship between his religion and the inhuman behavior which resulted from it, and feel some remorse for his actions, but the defendant did not yet have those feelings. Dr. Cole testified that group membership often pulls people into activities they would normally never do, often macho behavior. In Rulo those pressures were present, plus the additional pressures of God and his father. Dr. Cole testified he was in favor of transferring the case to juvenile court to allow placement in a foster home, even though the placement period required might exceed the scope of the court's jurisdiction.

The defendant's next witness was Priscilla Coates, an executive director of the Citizens Freedom Foundation, a support group for former cult members. Coates testified she preferred the term "destructive group" to cult, and stated such groups have four common elements. Such groups

> recruit defectively; they gain their loyal followers by the use of mind-control or thought-reform techniques; there normally is a living leader who demands, requires, obedience, almost total obedience; and there is something in the doctrine of the group which says that it is all right to break the law.

Coates testified her role in the organization was to serve as a referral resource. She had contacts with cult members as well as other people throughout the country. Coates had obtained information about the group on the Rulo farm from newspaper accounts, talking with individual members, and reading some depositions and literature from members. She had also met and spoken briefly with the defendant. The literature she read included two exhibits received into evidence. She testified the literature espoused a philosophy that was historically incorrect, one based upon the "protocols of the elders of Zion." Cole testified that her research revealed such "protocols" had never existed, but a document bearing that title was written in 1864 as a satire of Napoleon III. It was later rewritten and attributed to

Maurice Jolly, and was supposed to be a conversation between Machiavelli and Montesquieu, having nothing to do with Judaism, Jewry, or anything related. Later, it was plagiarized and used in "a trashy German novel." It was then plagiarized again and printed in Russia in the early 1900s. At some time between 1905 and 1917, she testified, "it was said to be the secret minutes of a secret meeting of the elders of Judaism or Zionism." The essence of the minutes was some sort of plan to rule the world, which became the basic philosophy of the Posse Comitatus, even though it began as a joke in 1864.

Coates testified the element of mind control was present at the Rulo farm, in that the members were isolated and there was a kind of group paranoia. She viewed their quest to please Yahweh as part of the mind control on the farm. Coates testified Ryan was the "living leader" of the group, and the fourth factor, illegal acts, was also present. She stated people who have been involved in such groups can be "deprogrammed" through an educational process.

Coates testified she had been given, and had perused, a copy of Mike Ryan's Bible which he had edited and customized for use on the farm. The "Bible" had been extensively revised, and there were places where the meaning of a Bible verse had been reversed by changing the word "good" to "bad." Coates testified a revised Bible is often used in religiously oriented destructive groups and is one method of mind control. Coates testified she viewed nonleaders of such groups as victims of circumstance and deception. She testified there are special problems in rehabilitating children involved in such groups because they have "no life experiences to which they can return. All that they know is the group." She stated rehabilitation of such children is possible, but difficult. It was her opinion the type of isolation experienced by the defendant was devastating. In her opinion an average length of time people such as the defendant require counseling is from 6 months to 2 years.

Coates had spoken with the defendant for about 30 minutes the morning of the hearing. It was her impression the defendant was very concerned about and afraid of Yahweh.

The next witness to testify was Rick Stice. Stice testified the Ryan family moved to his farm near Rulo in the summer of

1984. He testified that at that time he believed he and Ryan could talk to Yahweh. Stice testified that at one time he believed Yahweh had made him a high priest and the spirit of the Archangel Raphael lived within him. He also testified he believed at that time that he could talk to Yahweh in his mind. He was demoted to the status of slave, without explanation, in February or March 1985. He further testified that in March 1985 his son, Luke Stice, began to be abused by some of the others on the farm. He testified Ryan had told him the abuse was directed by Yahweh. Luke was physically punished during the entire month of March. Ryan left the farm for a weekend around the 10th of that month. Stice then left the farm but did not take his son, even though he had already been abused. Stice returned to the farm voluntarily 7 days later, and his son was killed about 2 or 3 weeks later, after further abuse. Stice admitted abusing his son during that time. He stated he participated because his life and those of his other children were threatened, as well as facing threats of eternal damnation. After his son's death, Stice again left the farm but left his two other children there because they were not in any danger. He did not report the murder because he was afraid of Yahweh. Stice testified he still believed in Yahweh and had had visions since leaving the farm, but had not tried to talk to Yahweh. Stice testified that while he lived on the farm he believed in the imminent approach of Armageddon, and that he was one of those chosen to lead the fight against evil. He testified he still believed Armageddon would occur, but now kept it to himself. He no longer believed Ryan had the Archangel Michael or could speak with Yahweh, although he had believed it while he lived on the farm. After he had been separated from the farm for almost 3 months, Stice realized Ryan could not talk to Yahweh. Stice thought he had been brainwashed while on the farm.

Stice stated he had entered into a plea agreement whereby he agreed to cooperate with authorities in exchange for being charged with one federal felony.

Stice testified that when he left the farm on March 10, 1985, his son was clad only in his underwear, had been separated from his siblings, and was living with adults only. When Stice escaped

he had been living with his son in the south trailer.

The next witness was Victor Faesser, one of the defendant's attorneys. He identified and sponsored several school records and records of phone conferences with former schoolteachers of the defendant. He testified he had spoken with the director of the Youth Development Center at Kearney and was told of the counseling and rehabilitation measures used there. He was told they use a group-therapy program, based on peer groups, which is very successful. He further testified the institution has an educational psychologist on its staff.

On cross-examination Faesser testified he had had prior contact with the workings of the juvenile system and understood such jurisdiction terminates when a juvenile reaches the age of 19. He further testified the release decision is an administrative decision, over which the courts have no jurisdiction.

The defense then rested, and the State called a rebuttal witness, Jeff Clausen. Clausen is a juvenile parole officer for the Nebraska Department of Correctional Services. His job involves supervising juveniles once they are paroled out of the Youth Development Center at Kearney. In his experience, a youth offender is generally confined at Kearney for an average stay of 7 to 8 months. The juveniles then may be supervised by a parole officer until they are 19, but are usually supervised for only 6 months if they "perform well." Clausen testified he was familiar with the counseling services available both at Kearney and at the correctional center in Lincoln. He testified both institutions provide the same type of counseling. It was his experience that youthful offenders were generally kept at the correctional center, and are segregated from the older offenders. He testified the term "youthful" applied to offenders aged 17 and older. He estimated the majority of the prison population at that facility were in their 20s.

Clausen testified that he felt his program could benefit juveniles up to the ages of 17½ to 18 years of age. He testified that once a juvenile reaches the age of 19 he is automatically discharged without any continuing supervision.

Based on the evidence which has been summarized, the trial court found that a sound basis existed for the court to retain

jurisdiction of the defendant's case. The findings may be summarized as follows:

The trial court found that the types of treatment the defendant would most likely be amenable to were available in the juvenile court as well as adult court but that certain types of treatment available in adult court would not be available in juvenile court. The court found this consideration weighed in favor of retaining jurisdiction.

The trial court next found the alleged offense included violence and was committed in an aggressive and premeditated manner, another factor which the trial court found weighed in favor of retaining jurisdiction. The trial court found the apparent motivation for the commission of the offense was religious or cult fanaticism, which, according to the evidence presented at trial, was still present in the defendant and weighed in favor of retaining jurisdiction.

The trial court also found that the defendant's age of 16 years and the fact the others involved were adults weighed in favor of retaining jurisdiction.

The trial court further found the defendant did not have a previous juvenile or criminal record but that the defendant did have a previous history of antisocial behavior connected with his religious or cult fanaticism. The trial court further found there was evidence that rehabilitation might be difficult because of the defendant's inability to relate to the real world, another consideration which favored retention.

The trial court also found that there was evidence the defendant had the maturity of a 12- or 13-year-old, which might mean it would be very difficult to rehabilitate him while under the jurisdiction of the juvenile court and before he attains the age of 19, another consideration which weighed in favor of retention.

Finally, the trial court found that the best interests of the juvenile and the security of the public required custody or supervision extending beyond the defendant's minority, which weighed in favor of the retention of jurisdiction.

The defendant contends the evidence does not support the trial court's findings. The defendant argues the trial court implied, in finding No. 1, that the defendant was amenable to

treatment in the juvenile system, and therefore that criterion must be held in favor of the defendant. The defendant further argues that finding the offense was violent does not automatically mandate retention in the district court; that the defendant's membership in the cult was the result of his parent's actions rather than his informed choice, and therefore the third finding should weigh in his favor; that due to the influence of the adults in the perpetration of the offense, the fourth criterion should weigh in his favor; that since rehabilitation possibilities were presented and the defendant had no prior record, the fifth consideration weighed in his favor; the defendant's maturity level and treatment required the trial court to find in his favor on the sixth criterion; that since the court found there were juvenile programs available, the seventh consideration weighed in his favor; that there was no showing of a threat to the public by allowing the defendant to be treated as a juvenile; and, finally, that the court failed to make any findings with regard to criterion No. 9. The defendant argues the disparity in treatment between the defendant and others involved in the crime is a factor which weighs in favor of transferring the case. Finally, the defendant argues the State failed to establish a sound basis for retaining jurisdiction in the adult court.

The State contends the trial court fully complied with all of the statutory requirements for the juvenile transfer hearing, and its decision was supported by the evidence presented at the transfer hearing. The State contends the record shows the trial court's findings were proper and supported retention.

The record shows the trial court informed the defendant of his right to request waiver to the juvenile court and held an evidentiary hearing at which the county attorney and the defendant presented evidence on the issues pursuant to Neb. Rev. Stat. § 29-1816 (Reissue 1985). The trial court then considered the relevant statutory criteria, determined a sound basis existed for retaining jurisdiction, and set forth its findings. § 29-1816. In making the findings the court considered the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 1984).

Section 43-276 requires a consideration of the following criteria:

(1) The type of treatment such juvenile would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court . . . and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult . . .; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; and (9) such other matters as the county attorney deems relevant to his or her decision.

In *State v. Alexander*, 215 Neb. 478, 486, 339 N.W.2d 297, 301 (1983), we considered these statutory requirements. We there stated:

> In deciding whether to grant the requested waiver and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in the light of the criteria or factors set forth in § 43-202.01. There is no arithmetical computation or formula required in a court's consideration of the statutory criteria or factors. . . . [T]he court need not resolve every factor against the juvenile. Also, there are no weighted factors, that is, no prescribed method by which more or less weight is assigned to each factor specified in the statute. [Citations omitted.]
>
> The statutory criteria or factors of § 43-202.01 disclose a balancing test by which public protection and societal

> security are weighed against practical and not problematical rehabilitation of the juvenile. [Citations omitted.] "Rehabilitation has traditionally played a key role in the treatment of young offenders. . . . Nevertheless, the concept of deterrence and the need to balance individual justice with the needs of society—a balancing process that is basic and fundamental to the general scheme of the criminal law—also have a place in the juvenile justice system."

(Quoting *State in the Interest of C. A. H. & B. A. R.*, 89 N.J. 326, 446 A.2d 93 (1982).) As a result, some youths will be held accountable as adults so that future antisocial misconduct can be effectively deterred.

We then applied the balancing test to the facts of that case and upheld the retention of jurisdiction. The case involved a 14-year-old boy who had been charged with first degree murder, robbery by violence, and terroristic threats. The murder victim was an 80-year-old man who had been beaten to death by the defendant. The defendant had a lengthy juvenile record, had been diagnosed as significantly immature, functioned at an average intellectual level, and had a sustained rule-breaking pattern of behavior. At the evidentiary hearing evidence was presented that there was some chance of rehabilitation, which would possibly require many years of treatment.

Similarly, in *State v. Broomhall*, 221 Neb. 27, 374 N.W.2d 845 (1985), the retention of jurisdiction of a 14-year-old boy was upheld by this court. Broomhall had attacked, brutally beaten, and sexually assaulted a woman. In *State v. Selman*, 204 Neb. 833, 285 N.W.2d 832 (1979), a 14-year-old boy was tried as an adult for shooting with intent to kill, wound, or maim. Selman had a lengthy record, and we found sufficient evidence in the record to support retention. In *State v. Moore*, 209 Neb. 88, 306 N.W.2d 183 (1981), a 14-year-old boy was tried as an adult and sentenced to life imprisonment for his role in the death of an Omaha cabdriver. The boy and his brother had instructed the driver to take them to an isolated area, where they robbed him and the older brother shot him. The defendant's argument that he was under the influence of his older brother was found to be unpersuasive, and the retention was upheld.

The standard of review applicable to an appeal from a denial of waiver to juvenile court is abuse of discretion. *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977).

We find the district court did not abuse its discretion in retaining jurisdiction. All of the statutory provisions concerning transfer hearings were fully complied with. The record supports the trial court's findings that the crime was violent and the defendant may require treatment beyond the age of majority. Further, the nature of the offense and the defendant's beliefs at the time of the hearing were such that the defendant's rehabilitative needs were beyond the scope of the juvenile court. Further, more protection of the public was required than is available in that court. The defendant's first assignment of error is therefore overruled.

The defendant next contends the trial court erred in receiving certain photographs into evidence which, he contends, were so gruesome that the prejudicial effect of the photographs exceeded their probative value. The defendant argues the photographs did not illustrate or clarify the only controverted issue involving the autopsy: ante mortem versus post mortem injuries. The defendant argues the photographs were cumulative evidence and that the pathologist's testimony alone would have sufficiently described the victim's injuries. The defendant further argues the pathologist could have testified adequately without the photographs.

In support of this contention the defendant relies on *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977). In that case we stated that all of the circumstances of each case must be considered in determining the admissibility of photographs, including whether a witness, particularly a pathologist testifying about an autopsy, can adequately testify without them. The defendant also complains about the introduction of a photograph showing the victim alive and healthy, arguing the photograph was unnecessary and its stark contrast with the other photographs of the victim was unfairly prejudicial.

The State contends the photographs were introduced to prove the State's case. The State relies on *State v. Lynch*, 215 Neb. 528, 535, 340 N.W.2d 128, 133 (1983), where we stated, "Gruesome crimes produce gruesome photographs.

Gruesomeness by itself is not a sufficient reason to keep photographs from the jury, if the probative value of the photographs outweighs the possible prejudice to one accused of a crime." The State further argues the admission of evidence is within the sound discretion of the trial court and that photographs are admissible to show the condition of the body, the nature and extent of wounds and injuries, and to establish malice or intent. See, *State v. Freeman*, 201 Neb. 382, 267 N.W.2d 544 (1978); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). The State argues the defendant's malice or intent with regard to the crime was at issue in the case, and proof of such elements was crucial.

The State then explains the relevancy of each photograph as follows. Exhibit 19 is a full-length view of the victim's body wrapped in the sleeping bag prior to the autopsy. The State contends the photograph was introduced to show the condition of the body when found. The State contends the photograph was not gruesome or inflammatory because the body is not visible.

Exhibit 24 is a full-length view of the victim's body prior to the autopsy. The State contends the photograph was introduced to show the condition of the body and aid in its identification. Exhibit 27 shows the victim's back and was introduced to show the linear bruises described by the pathologist.

Exhibit 28 depicts the victim's buttocks, illustrating the condition of the body and the extent of an injury allegedly inflicted by the defendant. Exhibit 29 is a closeup of the victim's hand, introduced to show the injuries sustained on that limb. Exhibit 30 depicts the victim's broken thigh bones, again introduced to show the extent of an injury allegedly inflicted by the defendant.

The State cites several cases in which the admission of certain photographs was upheld despite their contents. See, e.g., *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982) (photographs of skull and torso of victim); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982) (photographs of dismembered body).

At the trial the State presented testimony by a pathology assistant, a pathologist, and the victim's sister to sponsor the photographs at issue.

David Hamilton, a pathology assistant with Pathology Medical Services in Lincoln, testified concerning the custody of the victim's body prior to the autopsy. Hamilton testified that exhibit 19 depicts the appearance of the body still wrapped in the sleeping bag prior to the autopsy. Hamilton testified as to the various details of the appearance. Hamilton then testified that exhibit 24 depicts an adult body, partially decomposed.

Dr. George Gamel, the pathologist who conducted the initial autopsy, then testified. Dr. Gamel also testified that exhibit 19 depicted the victim's body lying in a sleeping bag prior to the autopsy. He further testified that exhibit 24 depicted the body after it had been removed from the sleeping bag. Dr. Gamel testified he first noted the body had undergone extensive decomposition. His external examination revealed the head had been extensively injured; the chest had been crushed; the anus had been injured; the back had linear bruises, as from a beating; the genitals were missing; both legs were broken at thigh level; most of the skin on the right lower leg was missing; the fingertips of the left hand were damaged; and the left wrist or forearm was broken. Baling wire was wrapped around the wrists and ankles.

Dr. Gamel testified that the photographs of the body introduced into evidence depicted the various injuries.

At that point the jury was dismissed and the trial court heard the defendant's objections to the introduction of the photographs depicting the victim's body. The defendant objected to their introduction on the grounds the photographs were so prejudicial that any probative value was outweighed by that prejudice.

Dr. Gamel testified that due to the process of decomposition, even gross exterior observations were difficult for a professional. Dr. Gamel testified the photographs illustrated the broken bones very well, but the soft tissue injuries were difficult to see. Dr. Gamel testified a second autopsy had been performed, and the only area of disagreement between the pathologists was as to which injuries were inflicted before the victim's death.

The trial court had previously ruled the photographs were not admissible unless they were introduced to illustrate the

pathologist's testimony. Dr. Gamel, asked a foundational question, testified there were no injuries which he could not orally describe to the jury.

Dr. Gamel then testified that exhibit 30 shows the broken thigh bones and exhibit 29 the injury to the left hand; neither photograph dealt with a soft tissue injury. He testified that exhibit 28 illustrated the victim's dilated anus. He then testified the photographs depicted the injuries described in his testimony and would assist the jury in determining what those injuries were. Dr. Gamel testified that exhibit 27 depicted the linear bruises on the victim's back, which exhibit, in his opinion, would help the jury get a better idea of the injury. He further testified exhibit 24 would assist the jury in ascertaining the condition of the body. Dr. Gamel further testified that exhibits 27, 28, 29, and 30 would assist him in depicting the injuries to which he was testifying. He further testified the exhibits were accurate depictions of the injuries.

The court asked Dr. Gamel if the pictures were repetitive or depicted separate injuries. The witness replied that each picture showed a separate injury. The court then received the photographs into evidence and overruled the defendant's motion for a mistrial.

Dr. Gamel testified he believed the linear bruises depicted on exhibit 27 had been caused by a blunt stick or whip. Dr. Gamel testified that exhibit 28 shows the dilated anus of the victim. Dr. Gamel testified that the leg fractures depicted in exhibit 30 were caused by a blunt-force injury of some type. Dr. Gamel testified the left arm was also broken by a twisting or blunt force. Dr. Gamel testified that a metallic foreign body was found lodged in the skull when the skull was x-rayed.

Dr. Gamel testified that an internal examination of the body revealed the head was extensively damaged, and there was a gunshot wound in which the shot had entered the right cheek. The entire left side of the skull was shattered into multiple small fragments. Dr. Gamel testified this damage could have been caused by a second gunshot on the left side of the skull. It was his opinion the injury on the left side of the skull was caused by either a gunshot or blunt-force injury.

Dr. Gamel testified that many of the victim's ribs were

broken, and one rib was protruding into the chest cavity. Blood was found in the right chest cavity, which the witness believed was probably caused when the injuries occurred.

Dr. Gamel testified a blunt object had been inserted into the anus and pushed far up into the body cavity. He suspected the object had damaged the left lobe of the liver.

Dr. Gamel testified the victim's genitals were missing, and it was difficult to determine the cause. It was his opinion it was "most likely" they had been cut away. There were some sharp edges in that area which suggested removal had occurred before the body was buried. Dr. Gamel then testified that some of the skin on the right lower leg had been stripped off.

Dr. Gamel testified that the second pathologist who examined the body, Dr. Eckert, believed there had been two shots to the head, had found about one-half cup of grain in the victim's stomach, and had pointed out the left lobe of the liver was abnormal. It was Dr. Gamel's opinion the victim died of multiple traumatic injuries. He testified the gunshot wound or wounds in the head would have been fatal, and he could not determine whether the victim was then alive. Secondly, the crushed chest injury would have been fatal, and death would have occurred within minutes after such an injury. Dr. Gamel believed it was probable the victim was alive during the chest injuries. Dr. Gamel testified the broken thigh injuries would have been fatal due to shock, after a period of time. Dr. Gamel was unable to determine with certainty whether the victim was alive when his legs and arm were broken, but he suspected the victim was alive when his legs were broken. He testified it was most likely the victim was alive when the anal injury occurred.

Dr. Gamel testified the broken arm could have caused death in conjunction with the victim's other injuries, and the injury to the anus would have caused death eventually. Although the injuries to the victim's hand would not have been fatal, the whipping caused injuries on the back which could have been fatal.

Miriam Kelly, the victim's sister, was then called as a witness for the State. She testified that exhibit 9 was a photograph of the victim which accurately depicted his appearance in 1984. The defendant objected to the introduction of the exhibit on the

grounds of relevance and prejudice. The exhibit was received into evidence.

As we stated in *State v. Jones*, 213 Neb. 1, 8, 328 N.W.2d 166, 171 (1982), "The admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect." (Citing *State v. Freeman*, 201 Neb. 382, 267 N.W.2d 544 (1978).) We further cautioned that the probative value of gruesome photographs must be carefully weighed by the trial courts, which must determine the relevancy of the photographs and weigh their probative value against their potentially prejudicial effect. In that case we upheld the admission of photographs which depicted the brutal murder of a mother and daughter. The photographs showed the condition of the bodies prior to the autopsy and showed the causes of death, and the pathologist testified the photographs aided his testimony.

In *State v. West*, 223 Neb. 241, 248, 388 N.W.2d 823, 830 (1986), we upheld the admission into evidence of photographs of one of the victims. We there stated the photographs

> helped the jury to visualize the crime and view described events in proper context. The fact that a photograph might present a gruesome spectacle does not prohibit its admission in evidence. *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983).
>
> In a homicide case photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent.

We then found that the photographs at issue, in conjunction with the testimony of the examining pathologist, served those purposes.

Similarly, several gruesome photographs of a homicide victim were held admissible in *State v. Lynch*, 215 Neb. 528, 340 N.W.2d 128 (1983). The pathologist referred to the photographs in the course of his testimony about the nature and location of the wounds and the cause of death. We held the photographs were relevant because they tended to correlate the

victim's wounds with the defendant's knife. We there stated at 535, 340 N.W.2d at 133, "These photographs show a series of systematic, sadistic, and savage slashes in the victim's throat—visual proof from which a jury could reasonably infer that the homicide was committed with 'deliberate and premeditated malice.' " Illustration of the wounds in conjunction with the pathologist's testimony, that is, the location, number, and nature of such wounds, supplied evidence to prove the cause of death assigned by the pathologist. Generally, relevant evidence regarding causation of death in homicide cases is admissible, and the photographs in question were admissible under the circumstances. Gruesome crimes produce gruesome photographs. Gruesomeness by itself is not a sufficient reason to keep photographs from the jury, if the probative value of the photographs outweighs the possible prejudice. We then found the photographs had probative value regarding the elements the State had to prove, and upheld their admission.

In *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977), we upheld the admission of photographs depicting the victim of a brutal beating. We there stated that in determining admissibility the trial court must consider all the circumstances of the case, including whether a witness can effectively testify to the pertinent facts without the need of numerous photographs, or any photographs at all. In *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1970), we stated a gruesome photograph may be admitted if it makes clear some controverted issue in the case.

Our review of the record shows that the trial court did not abuse its discretion in admitting these photographs. While five of the photographs were gruesome, they were utilized by the pathologist to illustrate his testimony concerning the condition of the body and the nature and extent of injuries sustained by the victim. They were also pertinent to a controverted issue in the case: the disagreement regarding whether certain of the injuries occurred before or after death. Further, the photographs helped the jury to visualize the enormity of the torture, from which an inference regarding the defendant's participation could be drawn. The introduction of a picture of the victim shortly after his move to the Rulo farm was also proper, as it was used to identify him. This assignment of error

is overruled.

The defendant next contends the trial court's failure to admit relevant evidence denied the defendant his right to a fair trial. In particular, the defendant contends the depositions of Norbert and Maxine Haverkamp and evidence of the defendant's parents' prior sexual relationship with Sherry Kidd should have been admitted so that the jury could fully evaluate the defendant's mental state.

The State contends the trial court properly excluded that evidence after carefully weighing the interests of the defendant and his codefendant, Ryan. Ryan had objected to the introduction of the Haverkamp depositions on the grounds of relevancy, prejudice, insufficient foundation, and infringement of his constitutional rights. Michael Ryan objected to Sherry Kidd's testimony on the grounds of prejudice and relevance. The State further argued the defendant did not establish a connection between his mental state and his parents' relationship with Sherry Kidd because, at trial, Mrs. Ryan testified the defendant was probably not aware of the Ryans' relationship with Sherry Kidd because an effort had been made to hide it.

The depositions of Maxine and Norbert Haverkamp are in the record, and we have examined them. Norbert Haverkamp testified he had not spoken with any of the people who had lived at the Rulo farms about the victim's death. He further testified his wife did not inform him of the occurrences on the farm, or of the deaths. He had not visited the Rulo farm since June or July of 1984, and did not visit the farm after that time because his wife and son had told him he would be killed if he tried. The members of the group refused to talk to him after the middle of August 1984, except that Jim Haverkamp would talk to him about the children. Norbert Haverkamp had never talked much with the defendant, and had no direct contact with Michael Ryan from August 1984 until approximately August 1985. He had no personal knowledge of any of the events that occurred on the farm between August 1984 and August 1985, and had not been brainwashed.

Maxine Haverkamp testified that she believed she had been brainwashed. She believed Michael Ryan could talk to God,

and also believed in the arm control test. She had not seen the accidental shooting of James Thimm, although she was on the farm that day. She further testified she had not spoken with the defendant on that date or subsequently, and had only spoken with Ryan about the incident. She testified that Ryan had told her that Yahweh made the gun go off. Mrs. Haverkamp was unsure whether she was on the farm during the time James Thimm was tortured, murdered, and buried. Later, she was told that it had occurred, or she overheard the two defendants laughing and talking about whipping Thimm. None of the participants in the murder told her what had happened until after her son was arrested. She testified Ryan had controlled their minds by suppressing all forms of self-expression, had constantly criticized and denigrated their beliefs and opinions, and had yelled at them and made fun of them.

The trial court reviewed the depositions and sustained Ryan's objection to their admission. The defendant's attorney had testified the Haverkamps had avoided service of process, in an attempt to show unavailability in support of the introduction of the depositions. The State conceded the two Haverkamps had been told by the State that they would not be called as witnesses and, when they were told they would be called for the defense, had disappeared. A certified copy of the sheriff's return, showing the witnesses were not found, was received into evidence. The defendant argued proper foundation for the two depositions had been laid. His codefendant objected to the admission on the grounds the testimony was not relevant to Dennis Ryan's defense, the defense had failed to show good-faith efforts to produce the witnesses, the introduction of the testimony would violate Ryan's right to confront his accusers, the prejudicial effect of the testimony would outweigh its probative value, and insufficient foundation had been laid to connect the testimony with the defendant's mental condition. The State further argued Norbert Haverkamp had not been on the farm from August 1984 to August 1985, and the testimony of both contained much uncharged misconduct against the codefendant.

The defendant's attorney argued there was no violation of Ryan's confrontational rights because his attorney had

vigorously cross-examined both witnesses during the depositions. The defendant contends the testimony was relevant to show Ryan's dominance of the situation, the mind control he exerted over the deponents, and the testimony concerning brainwashing.

The defendant also attempted to introduce testimony by Sherry Kidd as to an adulterous relationship she had previously engaged in with the defendant's parents. Ryan's attorney objected to this testimony on the grounds that it contained uncharged misconduct and was not relevant. The relationship had occurred 6 years prior to James Thimm's death. The trial court stated it would sustain the objection unless the defendant could lay some foundation for the testimony. The court then stated it would permit the witness to testify as to the defendant's character, but not as to the witness' relationship with Ryan. The trial court stated that her testimony was not relevant unless the defendant produced some testimony making the defendant's early years relevant to his insanity defense. The defendant then made an offer of proof, and the State joined Ryan's counsel in objecting to the testimony on the grounds it was not relevant. The trial court sustained the objection, but told the defendant the witness could be recalled if some connection was shown between the defendant's insanity defense and his family situation during the time of the relationship.

The admissibility of evidence, preliminary questions concerning the qualification of a person to be a witness, and the existence of a privilege are issues to be determined by the court. Neb. Rev. Stat. § 27-104(1) (Reissue 1985). The admission or exclusion of evidence is a matter within the sound discretion of the trial court and will be upheld absent an abuse of discretion. *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987). See, also, *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986).

Neb. Rev. Stat. § 27-403 (Reissue 1985) provides for the exclusion of relevant evidence if its probative value is substantially outweighed by unfair prejudice. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) provides for the exclusion of some character information when used to prove the character of a person and show that person acted in conformity with that character. Whether evidence of previous conduct is not relevant

because of remoteness or lack of similarity is a matter within the sound discretion of the trial court. *State v. Keithly*, 218 Neb. 707, 358 N.W.2d 761 (1984). Relevant evidence is evidence having any tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable than it would be without such evidence. Neb. Rev. Stat. § 27-401 (Reissue 1985).

We find the trial court did not abuse its discretion in excluding the Haverkamps' depositions and Sherry Kidd's testimony. Norbert Haverkamp testified he was not "brainwashed" by Michael Ryan and had not been on the Rulo farm for some time prior to Thimm's murder. He had no personal knowledge of the occurrences on the farm or the defendant's participation therein. The defendant made no showing as to the relevance of this testimony, and we find it was properly excluded.

The deposition of Maxine Haverkamp presents a somewhat closer question. She was present on the farm during the months prior to the murder, and possibly was on the farm when the murder occurred. She believed she had been brainwashed, had some personal knowledge of some of the occurrences at the farm, and had some idea of Ryan's role therein. However, her testimony was not crucial to the defense, because it was duplicative of testimony given by other members of the group and would have provided cumulative evidence only. We find the trial court did not abuse its discretion in excluding this testimony.

Finally, we find that Sherry Kidd's testimony was properly excluded. There was no showing by the defendant of any connection between Kidd's relationship with his parents and his mental state at the time of the murder. Hence, this testimony was not relevant to the defendant's insanity defense and was properly excluded.

The defendant next contends the trial court erred in refusing to give two jury instructions. The defendant has only presented argument concerning one jury instruction. Accordingly, the assignment of error concerning the other omitted instruction will not be addressed. See *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986).

The requested instruction which was briefed and argued was instruction No. 4. It stated:

> To be an aider and abetter one must knowingly and voluntarily and with common intent with the principal unite in commission of the crime.
>
> If the intent of the aider is different from that of the perpetrator, the aider's guilt is measured by the intent that actuated or moved him to act.

The defendant argues there was evidence presented to support this instruction in the form of testimony which tended to show he did not share his father's intent to kill, but instead intended only to please Yahweh. The defendant argues that had this instruction been given the defendant could have been found guilty of manslaughter, as that crime does not require proof of a specific intent to kill. It is the defendant's position that there was an absence of specific intent, due to insanity or his mental condition caused by brainwashing, which theory formed the basis of his defense, and that denial of this instruction prejudiced the defense. He further argues that since no comparable instruction was given, the denial of the instruction constitutes prejudicial error.

The State contends the instruction was properly rejected because it did not accurately state the law in Nebraska and, further, that instruction No. 12, which was given, does correctly state the law. The State also contends the defendant waived the review of this issue because he did not object to the jury instruction when given. The State further contends the instructions, when read as a whole, properly submitted the case to the jury and that the defendant has failed to show he was prejudiced by the instructions given.

Instruction No. 2 stated the defendant had been charged with purposely and deliberately, and with premeditated malice, killing James Thimm. It further stated the defendant had entered a plea of not guilty to the charge and that it was the jury's duty to determine the verdict. The jury was instructed to separately determine the guilt of each defendant. The jury was instructed, in instruction No. 7, as to the elements required to find the defendant guilty of first or second degree murder, manslaughter, not responsible by reason of insanity, or not

guilty. In each murder and manslaughter instruction the jury was instructed that the State had the burden to prove the defendant killed the victim alone or while aiding and abetting another. The jury was instructed as to the insanity defense. An instruction concerning the intent required for the degrees of murder charged was given. An instruction was given in which "purposely," "deliberate," "premeditated," and "malice" were defined.

Instruction No. 11 explained that intent was a material element of the crime charged against the defendant. It further stated the jury was required to determine the defendant's intent from all of the facts and circumstances in the record. It also stated that intent is not a material element in the offense of manslaughter.

The last paragraph of the instruction provided:

> Where a crime requires the existence of a particular intent, an alleged aider or abettor cannot be held as a principal unless it is established that the aider knew that the perpetrator of the act had the required intent, or that the aider himself . . . had the required intent. If the intent of the aider is different from that of the perpetrator, the aider's guilt is measured by the intent that actuated him . . . .

The jury was also instructed, in instruction No. 12, concerning the elements required to prove aiding and abetting.

The failure to object to an instruction after it has been submitted to counsel for review will preclude raising an objection on appeal. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Further, all of the instructions must be read as a whole, and if the instructions, when read together, correctly state the law, are not misleading, and adequately state the issues, there is no prejudicial error.

At trial the defendant objected to instruction No. 7 because the element of aiding and abetting had not been added and the requested insanity instruction had not been incorporated. The defendant did not object to instructions Nos. 11 or 12, nor the exclusion of proposed instruction No. 4. The court rejected all of the proposed instructions which were inconsistent with those adopted by the court. The defendant did not object to this

ruling. Therefore, the issue regarding this instruction is not properly before us.

Moreover, our review of the record reveals no prejudice resulted to the defendant because of the jury instructions given. The jury was adequately instructed as to all of the relevant issues, the material elements of the crimes with which the defendant was charged, and the necessary instructions to explain the defendant's theory of the case. Instruction No. 12 correctly advised the jury concerning the intent required to prove the defendant guilty of aiding and abetting in the murder. See *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972), *cert. denied* 430 U.S. 947, 97 S. Ct. 1584, 51 L. Ed. 2d 795 (1977). That instruction included the portion of the defendant's requested instruction concerning the effect of a difference in intent between a principal and an aider. These instructions, when read together, fairly and accurately submitted the case to the jury.

The final issue to be addressed is the defendant's contention that the trial court abused its discretion in sentencing the defendant to the maximum term possible for his conviction of second degree murder. The defendant contends this sentence is excessive and relies on *State v. Foutch*, 196 Neb. 644, 646, 244 N.W.2d 291, 292 (1976), where we stated a sentence should not exceed "the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant." The defendant argues certain criteria this court has considered in reviewing sentences weigh in favor of a lesser sentence, including

> family ties, age, mentality, education, experience, and social and cultural background . . .; his willingness to work at honest labor; his past criminal record or law abiding conduct; the motivation for the offense, the nature of the offense, and the amount of violence, if any, involved; the frankness and willingness of the defendant to cooperate; narcotic addiction, if any; circumstances aggravating or mitigating the offense; community attitudes toward the offense; and the individual's potentialities for reform or recidivism.

State v. Etchison, 188 Neb. 134, 137-38, 195 N.W.2d 498, 501

(1972).

The defendant argues his age, character, the nature of and motivation for the offense, his rehabilitative needs, and the protection of the public, when considered, show the sentence is excessive. The defendant places much weight on the alleged domination exerted upon him by his father, the isolation of the farm, and the fact that the defendants in several other cases received sentences of less than life imprisonment for committing second degree murder. The defendant further argues the trial court placed undue weight on the crime itself and the need to protect the public.

The State contends there was no abuse of discretion shown in sentencing the defendant to life imprisonment. The State argues the sentence is within the statutory limits and, absent a showing of abuse of discretion, should be affirmed. The State contends the trial court considered the relevant factors in imposing the sentence and properly placed great weight on the seriousness of the crime.

The defendant was convicted of second degree murder, which is a Class IB felony. Neb. Rev. Stat. § 28-304 (Reissue 1985). It carries a maximum penalty of life imprisonment and a minimum of 10 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1985). The sentence imposed is within these statutory limits.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Sianouthai*, 225 Neb. 62, 402 N.W.2d 316 (1987). Moreover, the relevant question before this court is whether the defendant received an appropriate sentence, not whether someone else in a different case received a lesser sentence.

Our review of the record reveals there was no abuse of discretion in imposing the maximum sentence in this case. While the defendant contends his age, the isolation of the farm, and the influence of his father tended to create a type of mental illness described as folie a deux or shared paranoia, there was competent evidence presented from which the trial court could have inferred the defendant understood the nature of his acts and consciously chose to participate in the torture of James Thimm. In fact, there was evidence that the defendant enjoyed

participating in the torture of Thimm and laughed and bragged about the fact that he had helped to kill him.

The State presented testimony by Dr. Emmet Kenney as a rebuttal witness. It was Dr. Kenney's opinion that the defendant was not suffering from a mental illness at the time of the murder. He found no evidence in the defendant of neurosis or psychosis. It was his opinion the defendant understood what he was doing, understood the quality and nature of his acts, and had the capacity to distinguish between right and wrong at that time. Dr. Kenney further testified it was his opinion the defendant knew his acts were wrong and punishable. He further testified the defendant had sufficient mental capability to intend the obvious and probable consequences of his acts and could have formed a willful and corrupt intent. Dr. Kenney testified that, based on his evaluation of the defendant, the defendant was not suffering from a dependent personality disorder at the time of the offense. He testified the defendant showed a normal amount of dependency for a 15-year-old and, based on information concerning his participation in the group and his competitiveness, concluded he was not overly dependent.

The witness disagreed with the defendant's expert witnesses, who had diagnosed the defendant as suffering from the condition known as folie a deux or shared paranoia, although he testified it was his opinion that Ryan did suffer from a paranoid personality disorder. The witness testified he had been involved with members of various cults in his professional capacity, including those claiming to have been brainwashed, and testified he saw no evidence of brainwashing in the four people he saw from Rulo. Dr. Kenney testified he would not describe the group at Rulo as a cult but as an adult criminal gang, because the group functioned as a group engaged in a significant amount of criminal activity.

Dr. Kenney testified that, in his opinion, the defendant's maturity level varied from hypermature, or beyond his years, in his attitude of himself as a leader and his idea of appropriate friends, to immature in the area of social development. *Dr. Kenney concluded the defendant became involved in the torture of James Thimm because he derived pleasure from sadistic*

behavior. Dr. Kenney testified that the defendant enjoyed the farm life, described it as a "blast," and was "critical of people who tried to make it look as if it were an unpleasant place." He saw no evidence of serious psychiatric illness such that would produce a delusion in the defendant. It was his opinion the members of the group used the arm test and their religious beliefs as a way of gaining status and giving status within the group. Dr. Kenney testified that in such a group

> the leader has no real qualifications usually for leadership, so he controls his group by either allowing them special privilege with him, and he keeps them in line in one of two ways — what we call crowing on them — you know, mocking them, putting them down, humiliating them — or cutting them out of the group . . . .

Dr. Kenney testified that, in his opinion, the defendant's belief in Yahweh was probably sincere and that he probably believed such a belief entitled him to membership in a special group, and, as long as he went through a ritual, he could do illegal and cruel things. Dr. Kenney stated such a belief would be attractive to a person the defendant's age. Dr. Kenney testified that while the defendant probably subscribed to the attitude of the group, he also knew what the law was at the time. It was his opinion the defendant made up stories about his "visions" to gain status with the group. He characterized the group's belief system as self-serving. He questioned the defendant's theory that he was completely dominated by his father, because, according to the defendant's own version of the facts, there were a number of times people, including the defendant, had disobeyed Ryan. Dr. Kenney also testified it was his understanding that when Ryan left the farm, the defendant and Tim Haverkamp did not follow Ryan's orders, but behaved more aggressively in their treatment and punishment of the other members.

Four mental health experts testified on the defendant's behalf, giving their opinions as to possible diagnoses of the defendant's mental health and his capacity to appreciate the nature of his actions at the time of the offense.

Dr. Herbert Modlin testified it appeared the defendant enjoyed being assigned a weapon while on the farm. The

defendant had indicated he was "reasonably content with this kind of life. He didn't see anything very much wrong with it." Dr. Modlin testified the defendant was well able to keep in contact with reality during that time. It was his opinion the defendant's maturity level was more like a 12-year-old's than a 16-year-old's, and diagnosed the defendant as suffering from a dependent personality disorder. He testified such a disease is treatable "[t]o some extent," and the prognosis is enhanced by the defendant's youth. It was his opinion the defendant should be "deprogrammed" to rejoin general society and that such treatment would be long term, requiring some number of years. It was his belief the personality disorder played an important role in the defendant's participation in the torture-murder, and resulted in his following the group. Dr. Modlin testified that the defendant had apparently believed he was doing the right thing by following Yahweh's orders. Dr. Modlin testified it was his belief the defendant did not pose a further danger to the community because his participation was directed by his father. He further testified the defendant did have a tendency to follow and could fall into some other kind of cult or belief in the future and again be led down the wrong path. Dr. Modlin testified there was no evidence the defendant suffered from paranoia or schizophrenia, and stated "this kid is well put together." Dr. Modlin could not testify to any particular reasons to support his opinion that the defendant was overly dependent on his father. He also testified it was his belief the defendant understood right from wrong at the time of the torture-murder. Dr. Modlin further testified the defendant was capable of forming an intent at that time.

Dr. Cole also testified as an expert psychological witness for the defendant. It was his opinion the defendant was more adamant about his beliefs in December 1985 than he had been in October 1985. It was his opinion the defendant was suffering from shared paranoia. He believed the belief system espoused by the Rulo group was a systematized religious delusion. He believed the defendant was susceptible to such a delusion because of his youth and immaturity. It was his opinion the defendant's delusion was persecutorial. Dr. Cole also described the defendant as having formed a fairly normal relationship

with another member of the group. Dr. Cole testified the primary source of the delusion was Ryan, and also other people in the group. He defined the religious belief system as delusional because it defied credibility; therefore, an individual who believed in it would have had to have been suffering from a delusion.

Dr. Cole further testified that, in his opinion, the defendant's disorder was treatable, in part because of his youth, but for such treatment to work the defendant's father would have to cooperate and the defendant would have to establish attachments to people having different belief systems. Dr. Cole testified that such treatment would require several years, at minimum. Dr. Cole testified the defendant believed he was doing the right thing by participating in the torture-murder. He further testified it was his opinion that the defendant did, at that time, have the capacity to understand the nature and quality of his acts.

Dr. William Logan also testified on the defendant's behalf. He testified the defendant showed little emotion regarding James Thimm's death. The defendant had reported no difficulty in sleeping or nightmares as a result of his participation. Dr. Logan testified that when he asked the defendant what he would have done if Yahweh had prophesied or told the group the defendant should be tortured as was James Thimm, the defendant's response was "I'd either fight or run and get out of there."

It was Dr. Logan's opinion the defendant was suffering from a shared psychosis with his father. He believed the shared psychosis had developed because the father was suffering from delusions, and those delusions were transmitted to the defendant because his father was a very important person in the defendant's life. This was exacerbated because the family lived in a close-knit, isolated environment for a fairly extended period of time. Dr. Logan viewed the belief system of the group as delusional because it was so aberrant and unusual as compared to what an ordinary person would think. Dr. Logan also testified the defendant apparently was gratified by his acceptance as a man and enjoyed his rank on the farm.

It was his opinion that, at the time of the murder, the

defendant understood a man was being killed. He further testified that it was his opinion the defendant's ability to determine right and wrong at that time had been distorted by a major mental illness. It was his opinion the defendant could not have formed a willful and corrupt intention at that time. He also testified the defendant would have known his participation in the murder was wrong in the eyes of the law and that he could be punished for it.

The defendant testified at trial. He admitted he had not always been truthful with the psychiatrists, psychologists, and investigators that he had spoken with. He testified that he did not understand why James Thimm was supposed to be tortured.

When asked about the murder he gave the following version. He stated a shovel handle was inserted into the victim's rectum, and Michael Ryan, the defendant, Timothy Haverkamp, James Haverkamp, and David Andreas, respectively, each probed him. He then testified that when Michael Ryan left to find something bigger to use, Tim Haverkamp started probing again, and during that time something had broken inside of James Thimm. He testified his dad then inserted a second object which went in "real easy." He testified he and Tim then asked Yahweh "if James Thimm's bowels were busted," and Yahweh indicated they were. The defendant testified he had previously been told that James Thimm had been informed by Ryan that if he did not straighten up Yahweh would take his life. The defendant testified that during the probing he had gone to find some duct tape and that Ryan put the tape over James Thimm's mouth because the victim had groaned and asked Yahweh to forgive him. He testified that he had not felt sad for James Thimm because the victim had made Yahweh angry.

The defendant then testified that later that afternoon the five men went back to the farrowing house. James Thimm could then talk but could not walk very well. James Thimm was then laid on his belly and whipped 15 lashes by each of the five men. The defendant testified that, at that time, he was told James Thimm would probably die because his bowels had been "busted." The defendant testified he ate supper and slept that night without difficulty.

The next morning the men returned to the farrowing house. James Thimm was dragged from one side of the building to the other by wires around his wrists and was wired to an auger and whipped again. James Thimm was then wired to a pipe on the floor and whipped again. During this time he was undressed except for socks. The defendant testified that the victim first begged Yahweh for forgiveness and then began to lapse into unconsciousness after his fingers were shot. The defendant testified his arm was used by the men during the arm tests that day concerning shooting the victim's fingers and breaking his legs. The defendant testified that at some point during the whippings he had begun to call out the names of the other members of the group while lashing the victim. The defendant testified that after the whipping the five men ate lunch and that Ryan then told them Yahweh had said the victim was to be dead by 6 that night.

When the five returned to the farrowing house, each shot one of the victim's fingers on his left hand. The hand was propped up on a block of wood, palm up. He testified the victim was alive and conscious at that time. The victim was then whipped again, 15 more lashes apiece, twice by each of the five. The defendant then stated that some of the men discussed the possibility of skinning the victim, and the defendant went to get some razor blades. The defendant testified he believed the victim was dead at that time, but that he could not skin the leg very well because his hands kept sweating on the pliers and slipping off. The defendant testified that he and Tim then asked Yahweh if they could break the victim's legs, received an affirmative answer, and then each broke one leg. The defendant stated the body was then placed in a sleeping bag, a grave was dug, and the body was buried. He testified that later that night he, Tim and James Haverkamp, and David Andreas sat around, smoked marijuana, and laughed and talked about the murder. He further testified he had not had nightmares or trouble sleeping since the murder.

The defendant described Tim Haverkamp as a close friend and stated that he got along pretty well with Jim Haverkamp and David Andreas, but described his relationship with James Thimm as less close and that he ultimately disliked Thimm by

February of 1985. The defendant stated he had occasionally verbally abused Thimm. The defendant testified that he once accidentally shot Thimm, when Yahweh had pulled the trigger of his gun, causing a bullet to shoot James Thimm in the cheek. The following day, the defendant testified, he had put a notch on his gun to show that Yahweh had shot someone with it. The defendant also testified that once when Ryan had been gone, in March of 1985, he "grabbed my .45 and shoved it in his [Rick Stice's] face."

The defendant also testified that after the murder he had discussed the option of burning the body to destroy the evidence and had been told to get rid of the shovels, but did not do so even though Yahweh had told them to. The defendant testified, on cross-examination, that he enjoyed life on the farm and was not forced or coerced into participating in Thimm's torture and murder. He also testified he had been aware that Thimm was in pain while being probed.

The defendant testified he began to smoke marijuana late in the summer of 1984. He also testified that once, when Ryan was not on the farm, he, James Haverkamp, and Daniel Haverkamp went to Falls City and drove around drinking beer. When asked if he had ever worn a bulletproof vest and let people shoot at him, the defendant replied, "I wouldn't let it happen to me."

Ryan testified that it was his understanding the defendant had knocked Rick Stice into the front window of the trailer and broken it during Ryan's absence from the farm. He further testified it was the defendant's idea to say the names of the women and children while whipping Thimm.

Tim Haverkamp testified for the State. He testified the defendant was in charge of guard duty on the farm and that after the first of January 1985, the defendant was second in command. He testified that in March 1985 Ryan was gone for 2 1/2 days and the defendant and Tim were left in charge. He testified that during that time the two men had ordered Rick Stice and James Thimm to do extra work around the farm for punishment, including nonstop calisthenics and exercises. He testified that in the evening of the second day of Michael Ryan's absence from the farm, Richard Stice left.

Tim Haverkamp also testified regarding the defendant's shooting of Thimm's cheek. It was his recollection that prior to the incident the defendant had been talking to Thimm, became angered, and said something like, "Well, maybe I ought to just shoot you," and he then turned toward Thimm, aimed, and the gun went off. He also testified the defendant had put a notch on his gun and said it was to show he had shot one person.

Tim Haverkamp's version of the torture was similar to the defendant's in many respects, but differed in others. He testified Thimm was probed with two different shovel handles. Tim Haverkamp further testified Thimm was alive when he, Ryan, and possibly the defendant attempted to skin his leg. Tim Haverkamp testified it was the defendant who asked Ryan to ask Yahweh if he could break one of Thimm's legs and that he and the defendant then each broke one leg. Tim Haverkamp testified that, at this point, Thimm was still alive. He testified that Ryan then kicked Thimm a few times in the head and chest. Tim Haverkamp testified that after being kicked, Thimm was dead. Tim testified that he, Andreas, and the defendant dug the grave. He testified that Ryan placed the body in the grave and that Tim Haverkamp then shot Thimm once in the head, and later Thimm's remaining clothing was burned so that no evidence of Thimm's presence was left on the farm.

On cross-examination Tim Haverkamp testified that Ryan was proud of the defendant and had said the defendant would be his successor. He testified that he had stopped believing in Yahweh several weeks after his arrest and incarceration had separated him from the farm.

James Haverkamp also testified on behalf of the State. He testified that in August 1984 Ryan had announced that Yahweh had confirmed that the defendant was to be considered a man. He stated the defendant had seemed proud of his new status. He testified that at some point in time Rick Stice and James Thimm were demoted to slaves and that during Ryan's absence from the farm, the two "slaves" were ordered to do extra work, were not allowed to sleep, and were made to do calisthenics by the defendant and Tim Haverkamp. He further testified that during this time the defendant verbally abused both of the men and physically abused James Thimm.

He also testified that he saw Thimm's body lying on the floor in the confinement building, legs broken, after one leg had been skinned and that Thimm was then still alive. James testified Thimm was then stomped to death. After they were sure he was dead, James, the defendant, and Tim placed Thimm's body into the sleeping bag. James Haverkamp testified that he was not involved with the burial and that at the time of the murder he believed he was doing the right thing because he believed Yahweh's laws were supreme to all other laws.

David Andreas also testified on behalf of the State. His testimony closely matched James Haverkamp's, and differed from the defendant's testimony in several areas. He testified that when he first moved to the farm he and the defendant shared most of the guard duty, but the defendant's rank was always higher than his own. Andreas testified the defendant was subsequently in charge of Thimm, James Haverkamp, and Andreas; was generally above rank to Tim Haverkamp; relayed messages from his father; performed some guard duty; and was ultimately designated as the high prince in the fall of 1984.

Andreas testified that Stice and Thimm were demoted to slaves in approximately January of 1985. Andreas testified that when Ryan left the farm in March 1985, the defendant was in charge, physically abused Thimm by shoving him into and breaking a window above the sink in the south trailer house, and physically abused Rick Stice. He also testified the defendant forced the two men to stay awake, do calisthenics, and move hay bales from one side of a barn to the other and then back again. Andreas testified the defendant also ordered Thimm to stand up all night on guard as punishment.

Andreas testified Thimm was alive when his fingers were shot. He further stated he had later spoken with the defendant concerning the murder. It was his recollection the defendant thought it was "pretty neat" that someone who was 15 had killed a man. Andreas portrayed the defendant as a loud, obnoxious, boss' son.

Richard Stice testified on the defendant's behalf. Stice corroborated Haverkamp's and Andreas' testimony concerning the defendant's treatment of "the slaves" during Mike Ryan's absence. Stice also testified that during that time

the defendant ordered them to beat their heads against the wall and Stice had refused to do so. James Thimm, however, did follow the orders. It was at that point the defendant pulled a gun, put it against Stice's head, and told him he would blow Stice's head off if Stice refused. He further testified the defendant physically abused both of them by shoving them to the floor. Stice also testified the defendant was involved in the theft of some hogs. Stice testified it was his understanding Thimm was demoted to slave status because he and the defendant could not get along.

Stice testified he was present when the defendant shot Thimm in the cheek. Stice testified the defendant had been verbally abusing Thimm while the defendant was shooting out of the trailer window, turned toward Thimm, said, "I ought to shoot you," pulled the trigger, and shot him. Stice testified he saw the defendant pull the trigger. Stice also testified it was the defendant who suggested that Stice would be made to have sex with a goat unless he followed orders. Stice testified the defendant made hateful remarks to him when Ryan was not around, and would verbally abuse Thimm. It was Stice's opinion the defendant was not dependent on his father to make decisions, and exercised authority on his own.

Ruth Ryan testified on behalf of the defendant. She testified that she had seen the defendant snicker about what had happened to Thimm. Mrs. Ryan also testified that she believed the defendant felt he could communicate with Yahweh through his mind and that she knew the defendant and Tim Haverkamp had been put in charge of the men while Ryan was away from the farm.

Cheryl Gibson testified on behalf of the State. She testified the defendant was rather shook up when he told her Thimm had been shot in the cheek. Ryan had told her the defendant was eager to participate and learn how to torture and abuse a person. The defendant had appeared happy about how things had gone the day of the murder, and both defendant and Ryan had laughed and joked about Thimm's death. Gibson testified that the defendant was in charge of the men when his father left the farm, and she had heard Ryan tell Tim and the defendant they were in charge and to treat Stice and Thimm decently while

he was gone. When Ryan returned and learned how the men had been treated, he told the defendant, "I told you not to do that, but Yahweh is not mad at you, so that's okay."

John Dietrich, a criminologist for the Nebraska State Patrol, testified two shovels had been found which had greasy debris on the ends. Betty Jane Khreiss, a forensic serologist for the Nebraska State Patrol, testified she compared the hairs taken from the shovels with a sample taken from James Thimm and concluded they matched.

Jerry D. Rader testified he had been incarcerated for a time with Ryan, who told him that in the event he could not "carry out his role as the leader, his son was fully capable of following in his footsteps and would do so." He further testified Ryan had told him the defendant was his "right-hand man."

At sentencing the trial court stated that in sentencing the defendant the gravity of the offense could not be overlooked. The court stated that "[h]aving regard for the nature and the circumstance of this crime, and the history, character, and condition of this defendant, the Court finds that imprisonment of the defendant is necessary for the protection of the public for the following reasons." These reasons included that there was a risk the defendant would engage in future misconduct, that a lesser sentence would depreciate the seriousness of the crime and promote disrespect for the law, that the defendant required correctional treatment which could most effectively be provided by commitment, and that the court had considered and weighed the various grounds set forth in Neb. Rev. Stat. § 29-2260 (Reissue 1985) and had found no justification for withholding sentence or granting probation.

The evidence presented illustrated the defendant's participation in the daily life on the farm, his independent abuse of the victim prior to the murder, and his willing and enthusiastic participation in the murder. The defendant understood the nature of his participation in the murder. Further, all of the expert witnesses agreed the defendant's rehabilitation would require some length of time and was somewhat dependent upon support from Ryan. The trial court considered all of the relevant facts of the case before imposing sentence on the defendant. We find there was no abuse of

discretion in imposing the maximum sentence permitted by statute.

The judgment is affirmed.

AFFIRMED.

IN RE CLAIM OF REHM AND FAESSER FOR ATTORNEY FEES AND EXPENSES.
RODNEY J. REHM AND VICTOR FAESSER, APPELLANTS, V. COUNTY OF RICHARDSON, NEBRASKA, APPELLEE.

410 N.W.2d 92

Filed July 24, 1987. No. 86-477A.

1. **Criminal Law: Appeal and Error.** As a general rule, the right to appeal in a criminal case may only be exercised by a person aggrieved or injured by the judgment.
2. **Criminal Law: Attorney Fees: Counties.** Neb. Rev. Stat. § 29-1804.12 (Reissue 1985) requires the district court to make findings as to the reasonable expenses and fees of appointed counsel, which the county is obligated to pay.
3. **Criminal Law: Attorney Fees: Counties: Appeal and Error.** The finding of the district court as to fees and expenses to be paid to appointed counsel is binding upon both appointed counsel and the county unless an appeal is taken from that order.
4. _____: _____: _____: _____. Either appointed counsel or the county involved may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under Neb. Rev. Stat. § 29-1804.12 (Reissue 1985). Such an appeal is a proceeding separate from the criminal case and should be docketed separately and disposed of without regard to the result of any appeal in the criminal case itself.
5. **Case Disapproved.** *County of Boone v. Armstrong*, 23 Neb. 764, 37 N.W. 626 (1888), is expressly disapproved.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Remanded with directions.

Earl J. Witthoff of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., and William D. Sutter, for appellants, and Rodney J. Rehm and Victor Faesser, pro se.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

Peter Cohen for amicus curiae National Legal Aid & Defender Association.

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

BOSLAUGH, J.

The defendant in *State v. Ryan, ante* p. 59, 409 N.W.2d 579 (1987), was represented in the lower court by appointed counsel, Rodney J. Rehm and Victor Faesser.

Both attorneys were appointed by the county court, and their appointments were continued by the district court at the arraignment hearing held on October 8, 1985. Faesser's appointment was subsequently continued for the appeal to this court.

Neb. Rev. Stat. § 29-1804.12 (Reissue 1985) provides:

> Appointed counsel for an indigent felony defendant other than the public defender shall apply to the district court which appointed him or her for all expenses reasonably necessary to permit him or her to effectively and competently represent his or her client and for fees for services performed pursuant to such appointment . . . . The court, upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to counsel in the full amount determined by the court.

Rehm filed applications requesting compensation for 663.25 hours. Faesser filed applications requesting compensation for 488.9 hours.

A hearing on the matter of attorney fees was held May 30, 1986. Several lawyers called as expert witnesses by Rehm and Faesser testified that, in their opinion, the number of hours spent by both attorneys in preparing for and trying the case was reasonable. Kirk Naylor testified he was currently serving as a court-appointed attorney and was being compensated at $50 per hour, which included both travel time and in-court time. Dennis Keefe, the public defender of Lancaster County, Nebraska, testified it was the policy in his office to assign two attorneys to capital cases. Richard Goos, the deputy public defender of Lancaster County and counsel for Michael Ryan,

testified he had worked closely with both defense attorneys during trial and believed no unnecessary services had been performed, and that the number of hours spent by Rehm was approximately equal to the number of hours spent by the witness. The court had "stipulated" that $50 an hour was a reasonable fee and conceded that Rehm is a well-qualified attorney.

During the trial Rehm resided in Lincoln, while Faesser resided in Pawnee City. The trial lasted 6 weeks.

After hearing the evidence, the trial court reviewed the progression hearings and the various orders which had been entered concerning the defendant's representation. The court stated that, in its view, the case was not unnecessarily complicated, although it was unusual; that at the start of the trial the attorneys had been told to be efficient in their representation due to the sparse population and tax base of the county; and that no double billing would be allowed unless good cause was shown. The court also stated it had asked the attorneys to divide work among those having a common interest and had informed them that both cocounsel should not be present at depositions and read all reports because that would be duplicative. The court also noted it had asked the attorneys to tape-record depositions rather than hire an expensive reporter and that, although the attorneys early on stated few depositions would be taken, costs exceeding $7,000 for depositions had been incurred.

The trial court then analyzed the hours of work presented by the attorneys. The court took exception to the hours claimed for travel time and for double billing. The court specifically disallowed the hours billed for the presence of both attorneys at the depositions of Rick Stice, David Andreas, and James Haverkamp; and for the depositions of Maxine, Lisa, and Norbert Haverkamp. The court stated that only one attorney should have been present at the depositions of Stice, Andreas, and James Haverkamp, and therefore allowed compensation for those depositions only on that basis. The court stated the depositions of the three other Haverkamps were either unnecessary or that a simple statement would have sufficed. The court then apparently disallowed all or a portion of the

total of 27 hours billed for the Haverkamp depositions.

The court also took exception to the hours incurred when Rehm traveled to Omaha, picked up Dr. Temerlin, drove to Falls City and met with Faesser, took Dr. Temerlin to interview the defendant, and later took the doctor back to Omaha and returned to Lincoln. Rehm billed 11 hours for that day, and Faesser 4 hours. The court stated a less expensive arrangement could have been made, and apparently reduced the attorney fees by some percentage of those hours. The court also took exception to 26 hours, 12.36 of them incurred for driving, billed when Rehm traveled to Kansas to visit the defendant's relatives. The court stated that, again, a less expensive arrangement could have been made. The court took exception as well to Rehm's traveling to Omaha prior to the trial to check on the jury selection process, a trip which required a total of 25 hours. The court further noted that 21 depositions were taken and that daily copy was ordered by the attorneys at a cost of $3,055. The court was concerned that the inefficient taking of depositions created a rippling effect in the number of hours billed by the expert witnesses.

The court then stated it had reviewed the awards of fees in several other criminal cases, including a first degree murder case in Otoe County. The fees in those cases, the number of hours spent, and the length of the trials were compared to the instant case.

Based upon the evidence, the record in the case, and the comparisons with other cases, the trial court concluded a reasonable fee for Rehm for the entire case was $20,874 and, for Faesser, $8,776. Of those amounts Rehm had previously received $3,042.75 and Faesser $3,389.23. The court concluded the combined award of $29,650 was in line with awards in the cases researched.

Both Rehm and Faesser have appealed.

There appears to be some confusion in our cases as to the right of a defense attorney to appeal from an award of fees as part of the defendant's appeal in a criminal case.

The State contends the attorneys have no right to appeal the award of attorney fees as a part of the defendant's appeal. In support of this contention the State cites *State v. Berry*, 192

Neb. 826, 224 N.W.2d 767 (1975).

In the *Berry* case, we held that a county board did not have standing to appeal an award of fees in a criminal case in which the county was not a party, and cited *State v. Schmidt*, 259 Iowa 972, 145 N.W.2d 631 (1966). In *Schmidt*, the Iowa Supreme Court held that neither the county ordered to pay the fees nor the defendant's attorney had the right to appeal an award of fees as part of the defendant's appeal. Our holding was limited, however, to the right of the county to appeal; the issue of the attorney's right to appeal was not addressed or decided. Moreover, in Iowa, the proper recourse available to attorneys dissatisfied with an award of fees is by petition for an original writ of certiorari to the Iowa Supreme Court. *State v. Iowa Dist. Court of Sioux County*, 286 N.W.2d 22 (Iowa 1979).

In *State v. Berry*, we stated that, as a general rule, the right to appeal in a criminal case may only be exercised by a person aggrieved or injured by the judgment. We further stated that only a person convicted of an offense has the right to appeal in a criminal matter, except that the county attorney has certain limited rights of appeal. Additionally, we stated at 828, 224 N.W.2d at 768:

> There is no statutory authority contained therein for an appeal by a county from an order of the court in connection with a criminal case awarding attorney's fees to an attorney for an indigent defendant, even though a statute of this state requires the county to pay such fees. The proper way to raise such an issue on appeal would be as was done by appellant in . . . Kovarik v. County of Banner . . . .

In *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975), an attorney was awarded fees by the district court and filed a claim in that amount with the county board. The claim was disallowed, and the attorney appealed to the district court, which entered a judgment in favor of the attorney. The county appealed to this court, and the judgment of the district court was affirmed.

In *State v. Berry, supra*, we also stated that, in our view, § 29-1804.12 requires the district court to make findings as to the reasonable expenses and fees of appointed counsel, which

the county is obligated to pay, but that the statute does not empower the district court to enter a formal judgment against the county. We stated such a conclusion was inescapable because the county was not a party to the criminal action; therefore, the court could not enter a legal judgment against the county.

The *Berry* case is consistent with several early opinions concerning the issue of compensation for attorneys who had defended indigent defendants. In *County of Boone v. Armstrong*, 23 Neb. 764, 37 N.W. 626 (1888), two attorneys appointed to represent an indigent in a capital case appealed from the county board's reduction of the fees awarded by the district court. The appeal was separate from the appeal by the defendant and was taken directly from the action of the county board. Moreover, in *County of Boone v. Armstrong, supra*, this court held that a finding by a district court regarding fees was not conclusive, but only prima facie, evidence of the correctness of the amount.

In *Edmonds v. State*, 43 Neb. 742, 62 N.W. 199 (1895), this court held that bills for attorneys' services must be presented, initially, to the trial court which heard the case. In *Moran v. Otoe County*, 95 Neb. 658, 146 N.W. 956 (1914), a separate appeal from a decision rendered by a district court regarding fees was appealed to and affirmed by this court.

In several other cases prior to *State v. Berry, supra*, this court had reviewed awards of attorney fees as part of the defendant's appeal. In *State v. Belding*, 192 Neb. 555, 222 N.W.2d 835 (1974), a court-appointed attorney for Belding, a minor, appealed from an award of attorney fees set by the district court. This court increased the award of attorney fees and affirmed the judgment in all other respects. Similarly, in *State v. McDonald*, 187 Neb. 752, 194 N.W.2d 183 (1972), this court reviewed an award of attorney fees as an issue in an appeal by the defendant. In that case the court found the award was insufficient and that the record was not sufficient to redetermine the appropriate amount, and remanded the cause.

The statute, § 29-1804.12, provides that the district court, "upon hearing the application, shall fix reasonable expenses and fees, and the county board shall allow payment to counsel

in the full amount determined by the court." We think the proper interpretation of this language is that the finding of the district court is binding upon both appointed counsel and the county unless an appeal is taken from that order. Although the county may not be a party to the proceeding in the usual sense, the county is represented by the county attorney, who can make whatever showing is necessary to ensure that the district court has the evidence necessary to make a proper finding. In *Kovarik v. County of Banner, supra* at 824, 224 N.W.2d at 766, we pointed out that although the prosecution is brought in the name of the State, "the actual prosecution of criminal charges has been delegated by the state to the counties." It is the county attorney who has the duty to prosecute criminal charges.

In quoting from *State v. Rush*, 46 N.J. 399, 217 A.2d 441 (1966), we noted in *Kovarik* at 821, 224 N.W.2d at 764, " 'The county is a subdivision of the State, constituted to perform certain functions of State government, Bergen County v. Port of New York Authority, 32 N.J. 303, 312 (1960), and among them is the prosecution of criminal causes. . . .' " Criminal prosecution has always been regarded as being primarily a function of the counties.

Since the finding of the trial court is the basis for a claim to be presented to the county, both appointed counsel and the county must be afforded a right of review in this court in the event either is dissatisfied with the order of the district court.

The procedure described in *County of Boone v. Armstrong, supra*, is unsatisfactory for several reasons. The appeal to the district court from the action of the county upon the claim based on the allowance made by the county court gives appointed counsel no relief beyond restoring the claim to the amount originally fixed by the district court. In addition to being circuitous, it lacks due process.

We hold, therefore, that either appointed counsel or the county involved may appeal to this court from an order determining the amount of fees and expenses allowed appointed counsel under § 29-1804.12. Such an appeal is a proceeding separate from the criminal case. It should be docketed separately and disposed of without regard to the result of any appeal in the criminal case itself. In the absence of an

appeal, the order of the district court is conclusive upon both appointed counsel and the county as to the amount allowed. *County of Boone v. Armstrong*, 23 Neb. 764, 37 N.W. 626 (1888), and all similar cases are expressly disapproved.

In regard to merits of the appeal, the record shows the trial court held progression hearings periodically before the trial began. After a progression hearing in October 1985, an order dated October 11, 1985, was issued, wherein the attorneys were ordered to "avoid double billing" and were requested to designate a "chief counsel" for their teams. In its progression order dated October 28, 1985, the court stated, "Court allows all co-counsel to be present for these three depositions, but only one attorney from each set of deposition counsel is to ask deposition questions," referring to the depositions of Stice, Andreas, and James Haverkamp. On November 12, 1985, the attorneys were allowed fees, at $50 per hour, plus expenses, for their hours to date. An order dated November 14 stated that Rehm was appointed chief counsel for the defendant. On December 18, 1985, the monthly payments were discontinued, and counsel were advised that fees would be determined at the close of the case.

At the pretrial conference, the issue of the jury selection process was raised, and Goos, one of Michael Ryan's attorneys, suggested he and Rehm should go to Omaha and oversee the process. The court stated, "All right, you guys go up there."

As we stated in *Jensen v. State*, 184 Neb. 802, 172 N.W.2d 607 (1969), an award of a reasonable attorney fee will not be reversed by this court in the absence of an abuse of discretion.

From our review of the record we conclude the trial court abused its discretion by refusing to compensate the attorneys for several services necessarily performed in the representation of the defendant. These include the time billed by both attorneys for the depositions of Stice, Andreas, and James Haverkamp, the time billed for the depositions of Lisa, Norbert, and Maxine Haverkamp, the time billed for taking an expert witness to interview the defendant, the time billed to travel to Kansas to interview the defendant's family, and the time billed by Rehm to travel to Omaha to check on the jury selection process.

The record shows the trial court specifically approved the presence of both attorneys at the depositions of Stice, Andreas, and James Haverkamp; therefore, the attorneys must be compensated for that service. A similar finding is supported by the record with regard to Rehm's trip to Omaha to check on the jury selection process.

As to the depositions taken of the Haverkamp family, the record supports a finding that the attorneys reasonably believed such depositions were necessary to prepare an adequate defense. The State had subpoenaed Norbert and Maxine Haverkamp to appear at the trial and did not release them from those subpoenas until after jury selection had begun. Further, several references to Lisa Haverkamp were made by each codefendant prior to trial, which may reasonably have led the defense attorneys to believe that her deposition was necessary to prepare an adequate defense. The depositions were clearly not unnecessary services, and compensation should have been awarded for the time spent in obtaining them.

The record supports similar findings with regard to the travel required to transport the expert witness to interview the defendant and for the trip made to interview the defendant's family. The attorneys were attempting to ensure that they had adequate information to competently represent their client, and their actions, although perhaps not optimally efficient when viewed in hindsight, were not unreasonable under the circumstances.

We decline, however, to increase the award by compensating the attorneys for the hours billed for traveling to and from court appearances in this case. The attorneys were compensated on a per diem basis for court appearances and for their mileage and hotel expenses incurred during their representation. We decline to apply the portal-to-portal doctrine in this case to the attorneys who were appointed to represent the defendant. Cf., *United States v. James*, 301 F. Supp. 107 (W. D. Tex. 1969); *State v. Kenney*, 24 Wis. 2d 172, 128 N.W.2d 450 (1964).

Unfortunately, the record is not sufficiently clear and does not disclose the necessary facts so that the amount by which the awards should be increased can be determined.

The cause is, therefore, remanded to the district court for further proceedings with directions to modify the award of fees in a manner consistent with this opinion.

REMANDED WITH DIRECTIONS.

IN RE INTEREST OF T.C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. Q.M., APPELLANT.

409 N.W.2d 607

Filed July 24, 1987. No. 86-1002.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights.** In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence.
3. _____. A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
4. **Parental Rights: Juvenile Courts.** As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.
5. **Expert Witnesses: Appeal and Error.** Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion.

Appeal from the Separate Juvenile Court of Douglas County: COLLEEN R. BUCKLEY, Judge. Affirmed.

John G. Liakos of Liakos & Kuhn, for appellant.

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

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

A petition was filed on October 23, 1984, in the separate juvenile court of Douglas County, and contained allegations that T.C., born on August 15, 1984, was a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982), because T.C. lacked proper parental care by reason of the fault or habits of his parents, namely:

> A. [T.C.'s parents] have failed to cooperate with medical personnel in accepting the needed training required for providing the necessary care required by said child, who was born prematurely and is a high risk baby, to wit:
>
> 1. Said child was on the apnea monitor from August 15, 1984 to October 2, 1984; [T.C.'s parents] were told of the need for CPR and monitor training before said child could be released; [T.C.'s parents] failed to appear and satisfactorily complete the training.
>
> B. Said child was in the hospital from August 15, 1984 to October 2, 1984, during which time [T.C.'s parents] visited said child five times in August and only once in September; [T.C.'s parents] had been advised of the importance of visiting and becoming familiar with said child.

In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. See, *In re Interest of K.L.N. and M.J.N.,* 225 Neb. 595, 407 N.W.2d 189 (1987); *In re Interest of J.W.,* 224 Neb. 897, 402 N.W.2d 671 (1987); *In re Interest of M.L.B.,* 221 Neb. 396, 377 N.W.2d 521 (1985). In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Cum. Supp. 1982 & Reissue 1984), termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence. See, *In*

re Interest of K.L.N. and M.J.N., supra; In re Interest of J.W., supra. A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code. See, *In re Interest of K.L.N. and M.J.N., supra; In re Interest of J.W., supra.*

On November 5, 1984, the court placed temporary custody of T.C. with the Nebraska Department of Social Services until further order of the court and then held an adjudication hearing on January 30, 1985. T.C.'s mother was represented by counsel, and a guardian ad litem had been appointed for T.C.

At the adjudication hearing, a neonatologist testified that T.C. was born 8 to 10 weeks prematurely on August 15, 1984, and suffered from apnea, which is cessation of breathing accompanied by a decrease of the heart's rate, and had a hypothyroid condition. The neonatologist testified about the necessity of keeping T.C. on an apnea monitor after the child's release from the hospital. The apnea monitor sounds an alarm if the child's breathing stops. Therefore, in addition to the monitor, it is necessary for the child's survival that there be someone to administer cardiopulmonary resuscitation or the child will die within minutes.

The child's parents are not married to each other. The mother was informed about the serious consequences of her child's condition if prompt resuscitative action were not taken in response to the monitor's alarm. The mother was also informed that her child would be placed in foster care if the mother did not have suitable CPR training. Arrangements were made for the mother's CPR lessons at the hospital, but the mother did not attend those CPR classes. The mother told one of the hospital's staff that she was too busy to attend the classes and was thinking about changing doctors, since she did not want T.C. to come home from the hospital with an apnea monitor. The child was placed in foster care, pending the mother's CPR training.

The adjudication hearing was continued until April 1, 1985. When the adjudication hearing resumed, the mother had not completed CPR training. As an explanation for her failure to obtain CPR training, the mother testified that T.C.'s father had beaten her with a hammer in February 1985, breaking her ribs

and causing hospitalization for approximately 1 month. In the later stages of the mother's pregnancy with T.C., the child's father pulled the mother from an automobile and struck blows to the pregnant mother's stomach. T.C. is macrocephalic, a condition described as an abnormal rate of growth for the child's head as the result of excessive cranial fluid, which requires a permanent tap to drain the excess fluid from T.C.'s brain. T.C. is mentally handicapped and needs special attention and education, such as that available at the Meyer Children's Rehabilitation Institute.

The court found that T.C. was a juvenile within the meaning of § 43-247(3)(a) and ordered a dispositional hearing for May 13, 1985, at which the evidence established that T.C.'s mother, 31 years of age, was unemployed and had convictions for shoplifting, disorderly conduct, and prostitution. At the dispositional hearing, without objection, the court ordered

> [t]hat [T.C.'s mother] shall:
>
> a. Participate in a CPR and apnea monitor training program;
>
> b. Participate in the Early Referral Program through the Meyers Childrens [sic] Rehabilitation Institute;
>
> c. Participate in a domestic violence program;
>
> d. Maintain a stable legal income;
>
> e. Obtain and maintain suitable stable housing;
>
> f. Remain free from all state, municipal and federal criminal arrests;
>
> g. Have reasonable rights of visitation as arranged by the Child Protective Service worker;
>
> h. Cooperate with the workers on this case including notifying the Court within 48 hours of a change in residence or income.

At a review hearing on November 7, 1985, the court was informed about the necessity of CPR in relation to T.C.'s continuing condition, but T.C.'s mother had not completed CPR training. The court admonished T.C.'s mother concerning the necessity of the mother's completion of CPR classes. The court's previous order of May 13, 1985, remained in effect, without any complaint or suggestions by the mother, substantially unchanged except that T.C.'s mother was required

to participate in the Omaha Public Schools' Infant Stimulation Program instead of the program provided through the Meyer Children's Rehabilitation Institute.

Based on § 43-292(6) (Reissue 1984), a motion to terminate parental rights was filed on April 9, 1986, alleging that T.C.'s mother had failed to comply with the plan of rehabilitation ordered by the court on May 13, 1985, and its subsequent modifications, that is, T.C.'s mother had failed to complete a CPR training program; had not participated in the Infant Stimulation Program available through the Omaha public school system; had not participated in a domestic violence program; did not remain free from arrest; failed to maintain stable housing; and, from May 13 to November 6, 1985, had visited T.C. on only six occasions and had not visited T.C. since November 6, 1985.

At the hearing for termination of parental rights, on October 16, 1986, T.C.'s mother had completed neither the CPR training nor the Infant Stimulation Program required as the result of T.C.'s mental and physical condition. T.C.'s mother had told a social worker that the mother was too busy to attend the domestic violence program. When the social worker inquired about the mother's noncompliance with the specific rehabilitative program ordered by the court, the mother responded, "I'll get to it. I'll make an appointment. I'll go next week. I'll set it up." T.C.'s mother changed her residence, which was discovered by a probation officer only after additional investigation concerning the mother's whereabouts.

On account of his special needs, T.C. had been placed with the Nebraska Children's Home Society. During that time, T.C.'s mother was allowed weekly visits with T.C., including the time while T.C. was in a "Homebound Preschool Handicapped Program," when the mother could have observed a teacher working with T.C. in view of his special needs. Between June 3, 1985, and April 9, 1986, the child's mother visited him only twice and, before April 9, made no request to visit T.C. in 1986. The mother was never told that she could not visit the child. However, the mother visited T.C. on only six occasions in the 2-year span of foster care at Nebraska Children's Home Society. The mother was incarcerated in October 1985 for disorderly

conduct. After taking the case under advisement, the court, on October 30, 1986, made the following findings and order:

> That [T.C.] is within the meaning of . . . Section 43-292(6) . . . by clear and convincing evidence because reasonable efforts under the direction of the Court have failed to correct the conditions leading to the Court's previous finding that the child is within the meaning of Section 43-247(3a) . . . [and]
>
> . . . .
>
> . . . [t]hat the parental rights of [T.C.'s mother] . . . are hereby terminated . . . .

The court then placed T.C. in custody of the Nebraska Department of Social Services pending a further dispositional hearing. The mother has appealed and contends that the court should not have considered the mother's failure to remain free from arrest and her failure to participate in the programs regarding domestic violence and infant stimulation. Also, the mother contends that the court should not have considered the child's extended foster care as a factor affecting termination of parental rights and should not have considered certain testimony from a registered nurse, an expert witness, concerning programs for children with special needs as the result of their physical or mental condition. Finally, the mother contends that the evidence is not clear and convincing that she did not make reasonable efforts to correct the conditions leading to the adjudication that T.C. was a juvenile within the meaning of § 43-247(3)(a).

As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. See *In re Interest of Brungardt*, 211 Neb. 519, 319 N.W.2d 109 (1982). Cf. § 43-292 (termination of parental rights; failure to correct conditions leading to adjudication).

As expressed in *In re Interest of W.*, 217 Neb. 325, 330, 348 N.W.2d 861, 865 (1984): "The mother has failed to rehabilitate herself, notwithstanding the [court's] order and programs directed to rehabilitation. When parents cannot rehabilitate themselves within a reasonable time, the best interests of a child

require a final disposition be made without delay."

The program for the mother's rehabilitation was designed to supply proper parental care which was previously lacking and to attend to T.C.'s special needs. In view of the child's condition and special needs, T.C.'s best interests warranted some program such as that ordered by the juvenile court in this case. A court-ordered program, necessarily injected into the lives of T.C. and his mother, is a commentary in itself. The special needs of a child such as T.C., ordinarily, would have evoked a parent's spontaneous and voluntarily responsive attention, not parental procrastination approaching apathy. T.C.'s daily and immediate needs could not be deferred until his mother's inclination might prompt appropriate action. We find clear and convincing evidence that T.C.'s mother failed to comply with the rehabilitative program ordered by the juvenile court and that the mother has not corrected the conditions underlying the adjudication that T.C. was a juvenile within the Nebraska Juvenile Code. Therefore, termination of parental rights is permitted under § 43-292(6).

Finally, the mother contends that the court erred in admitting testimony of a registered nurse concerning programs for the special needs of T.C. As we stated in *State v. Copple*, 224 Neb. 672, 697, 401 N.W.2d 141, 158 (1987):

> Whether a witness is qualified as an expert is a preliminary question for a trial court. Neb. Evid. R. 104(1). Determination of a witness' qualification as an expert is a matter within the sound discretion of a trial court, whose ruling will be upheld unless such ruling constitutes an abuse of discretion. See *Schmidt v. J.C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985).

We find no abuse of discretion by the trial court in admitting the nurse's testimony as evidence. Also, as previously noted, this court reviews the record de novo in resolving questions concerning termination of parental rights.

AFFIRMED.

RICHARD D. PARRIOTT ET AL., APPELLANTS, V. DRAINAGE DISTRICT NO. 6 OF PERU, NEBRASKA, AND BURLINGTON NORTHERN RAILROAD COMPANY, A CORPORATION, APPELLEES.

410 N.W.2d 97

Filed July 31, 1987. No. 85-859.

1. **Political Subdivisions Tort Claims Act: Words and Phrases.** A drainage district is a political subdivision within the meaning of the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983).
2. **Constitutional Law: Property: Damages.** When private property has been damaged for a public use, the owner of such property is entitled to seek compensation in an action under Neb. Const. art. I, § 21.

Appeal from the District Court for Nemaha County: ROBERT T. FINN, Judge. Reversed and remanded for further proceedings.

John J. Higgins of Higgins, Okun & Calkins, and Dwight Griffiths, for appellants.

Albert G. Fuller and William C. Nelson of Fuller & Chatelain, for appellees.

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

GRANT, J.

Plaintiffs, Richard D. Parriott, John J. Kozak, Sarah E. Kozak, and Mary Dunn, appeal from an order of the district court for Nemaha County sustaining the demurrer of defendant-appellee Drainage District No. 6 of Peru, Nebraska, to plaintiffs' petition. Plaintiffs allege the district court erred in sustaining the demurrer on the basis that plaintiffs failed to allege compliance with the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983). For the reasons hereafter stated, the order of the district court is reversed and the cause remanded for further proceedings.

The record shows that plaintiffs are the present owners and tenant in possession of approximately 240 acres of land located in Nemaha County, Nebraska. On June 13, 1985, they filed a petition in the district court for Nemaha County seeking damages as a result of the defendants' alleged negligence in

failing to maintain a drainage ditch in proper repair, thereby resulting in the flooding of plaintiffs' land. The petition sought damages to plaintiffs' crops in the amount of $19,987.28. Defendant drainage district filed a demurrer to the petition on August 14, 1985, stating that the petition failed to state a cause of action in that it did not allege compliance with the Political Subdivisions Tort Claims Act. On September 18, 1985, the district court sustained the demurrer and gave the plaintiffs 10 days to amend their petition. Plaintiffs filed their amended petition on September 26, 1985, alleging that the defendant drainage district is a quasi corporation formed for the sole and exclusive benefit of the territory lying within the district for which it was formed and is not a governmental agency or unit of local government as contemplated by the Nebraska Political Subdivisions Tort Claims Act. Defendant drainage district demurred to the amended petition, again stating the petition did not state a cause of action in that it did not allege compliance with §§ 23-2401 et seq. The district court found that there was no allegation in the petition that plaintiffs had complied with the Political Subdivisions Tort Claims Act, sustained the demurrer, and dismissed the amended petition as to the defendant drainage district. Plaintiffs timely appealed to this court.

Plaintiffs in their first assignment of error contend that the trial court erred in holding that defendant drainage district is a political subdivision, thereby mandating compliance with the provisions of the Political Subdivisions Tort Claims Act before a suit can be instituted. Plaintiffs contend that a drainage district is not a political subdivision and therefore is not subject to the Political Subdivisions Tort Claims Act. We determine this contention is without merit.

While a drainage district has not been specifically listed as a political subdivision, as contemplated by the Political Subdivisions Tort Claims Act, this court has held that a corporation created for the purpose of conducting the affairs of a drainage district is a public corporation and a body politic, politically organized and engaged in the exercise of political functions. *Wellensiek v. Drainage Dist. No. 1*, 172 Neb. 869, 112 N.W.2d 267 (1961). We have defined a political subdivision

as a body which contemplates geographical area and boundaries, public elections, taxing power, and a general purpose or benefit. *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979). A drainage district, as established by Neb. Rev. Stat. §§ 31-301 et seq. (Reissue 1984), contains each of these qualities of a political subdivision. Section 31-301 states that the drainage district may have articles of association in which the limits of the proposed district shall be stated. Sections 31-306 and 31-307 provide for the election of the first board of supervisors and for annual elections thereafter. The authority to levy taxes is found in §§ 31-330 and 31-333, which provide that "the board of supervisors . . . may at once levy tax on the lands and other property in the district" and shall "annually thereafter determine, order, and levy the amount of the installment of the tax hereinbefore named . . . ." Finally, § 31-321 gives to the drainage district the power of eminent domain, which, as stated in the Constitution, must be used for a public purpose and benefit. Therefore, for purposes of compliance with the Political Subdivisions Tort Claims Act in actions arising in tort law, we hold a drainage district to be a political subdivision within the meaning of the Political Subdivisions Tort Claims Act, and, therefore, compliance with §§ 23-2401 et seq. is a condition precedent to the institution of a tort action against a drainage district. The failure to allege that the condition had been met is a fatal defect to such a suit. *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986). Courts in other jurisdictions have also reached the conclusion that drainage districts are political subdivisions. See, *Kaw Drainage Dist. v. Attwood*, 229 Kan. 594, 629 P.2d 163 (1981); *Reed v. Muscatine—Louisa Drain. Dist. No. 13*, 263 N.W.2d 548 (Iowa 1978); *Stark v. Bailey Drainage Dist.*, 505 So. 2d 566 (Fla. App. 1987).

Plaintiffs' second assignment of error is that the trial court erred in sustaining defendant's demurrer and dismissing plaintiffs' amended petition as to the drainage district. While our holding that a drainage district is a political subdivision requires compliance with §§ 23-2401 et seq. prior to the institution of a tort action, the fact that the plaintiffs did not allege compliance in their amended petition is not fatal in the

case at bar. In Nebraska it is the rule that pleadings are to be liberally construed, and if with such construction a petition states a cause of action against a defendant and in favor of a plaintiff, a demurrer thereto should be overruled. *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984). Under a code system of pleading, such as Nebraska's, it is not necessary to state a cause of action in any particular form. It is only necessary to plead the facts, and not the theory of recovery. *Waite v. Samson Dev. Co., supra.*

In the case at bar, plaintiffs' petition alleges that due to the failure to maintain and repair defendant drainage district's ditch, plaintiffs' land was flooded, resulting in damages to crops in the amount of $19,987.28. A drainage district, such as defendant, has been shown to be a political subdivision which by virtue of § 31-321 holds the power of eminent domain to be used for public purpose and benefit. When private property has been damaged for public use, alleged as in the case at bar, the property owners are entitled to seek damages in a number of ways. The landowners could have sued in tort under the Political Subdivisions Tort Claims Act, or could have sought compensation for an action for inverse condemnation under Neb. Rev. Stat. §§ 76-701 to 76-725 (Reissue 1981 & 1986). *City of Omaha v. Matthews*, 197 Neb. 323, 248 N.W.2d 761 (1977). Additionally, when private property has been damaged for public use, the owner is entitled to seek compensation in a direct action under Neb. Const. art. I, § 21. *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985); *Baum v. County of Scotts Bluff*, 169 Neb. 816, 101 N.W.2d 455 (1960). Merely because the landowners could have sued in tort under the Political Subdivisions Tort Claims Act does not preclude them from bringing a direct action for damages under Neb. Const. art. I, § 21.

Further, it is not necessary that Neb. Const. art. I, § 21, the specific provision of the Constitution relating to damage for a public use, be set out in the pleadings, or even its existence alleged. The pleading will be sufficient as against a general demurrer if it alleges facts which constitute a cause of action. *Kula v. Prososki, supra.* Neb. Const. art. I, § 21, is a self-executing provision which does not require legislative

action to make the remedy available. *Kula v. Prososki, supra; Wood v. Farwell Irr. Dist.*, 217 Neb. 511, 349 N.W.2d 633 (1984). In a suit to recover damages for a public use, if the fact is established that the property has in fact been damaged for a public use, the landowner is entitled to compensation. *Armbruster v. Stanton-Pilger Drainage Dist.*, 169 Neb. 594, 100 N.W.2d 781 (1960). The amended petition in the case at bar sufficiently pled the facts establishing a cause of action for damage to the property for public use, which if proved entitled the plaintiffs to compensation under Neb. Const. art. I, § 21.

We hold that the trial court improperly sustained defendant's demurrer to plaintiffs' amended petition and erred in dismissing the petition as to the drainage district. Therefore, the order of the district court for Nemaha County is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WASHINGTON HEIGHTS CO., A NEBRASKA CORPORATION, APPELLEE, V. JAMES R. FRAZIER, APPELLANT.

409 N.W.2d 612

Filed July 31, 1987. No. 85-887.

1. **Breach of Contract.** A suit for the claimed breach of a contract presents an action at law.
2. **Appeal and Error.** The findings and conclusions of the trial court in an action at law tried without a jury will not be set aside unless they are clearly wrong.
3. _____. In an action at law tried without a jury, it is not the province of the Nebraska Supreme Court to resolve conflicts in or reweigh the evidence; rather, the court presumes that the trial court resolved any controverted facts in favor of the successful party, and considers the evidence and all permissible inferences therefrom most favorably to that party.
4. **Contracts.** The meaning of an unambiguous contract presents a question of law.
5. **Appeal and Error.** The Nebraska Supreme Court has an obligation to reach independent conclusions on questions of law.
6. **Contracts: Intent.** If a written contract is expressed in unambiguous language, it is not subject to interpretation and construction, and the intention of the parties must be determined from the contents of the contract document.

7. **Contracts: Parol Evidence.** Parol evidence is admissible to explain vague language contained in a written contract.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Thomas J. Culhane of Erickson & Sederstrom, P.C., for appellant.

Keith I. Frederick of Schmid, Ford, Mooney & Frederick, P.C., for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

On September 23, 1983, plaintiff-appellee, Washington Heights Co., a Nebraska corporation, entered into an agreement to purchase the shares of its capital stock then owned by defendant-appellant, James R. Frazier. At about the same time, Richard Schurkamp agreed to purchase Frazier's interest in Grover Square, Ltd., a partnership. Each agreement required the purchaser to pay Frazier a base price which was subject to being increased, but not decreased, by one-third of any "net cash flow" produced by a particular Washington Heights Co. operation and by Grover Square, Ltd., to January 30, 1984, the closing date of the transactions. As a part of the closing, Washington Heights Co. paid $25,000 and Grover Square, Ltd., $1,000 to Frazier as advance distributions of the anticipated net cash-flows. After the closing, Washington Heights Co. concluded that its relevant operation resulted in a cash-flow deficit. Grover Square, Ltd., also concluded its operations resulted in a cash-flow deficit. Each then demanded return of the advance distribution it had made. Upon Frazier's failure to return the distributions, Schurkamp assigned any cause of action he might have to Washington Heights Co., which instituted this suit, seeking $25,000 on its first cause of action for the advance distribution it had made and $1,000 on its second cause of action for the advance distribution Schurkamp had made on behalf of Grover Square, Ltd. Frazier denied Washington Heights Co.'s claims and filed a

counterclaim, alleging that he was entitled to more money than he had received as the result of the net cash-flow produced by the relevant Washington Heights Co. operation. After a bench trial, the court entered judgments dismissing Frazier's counterclaim and awarding Washington Heights Co. the sums it had sought. Frazier appeals to this court only the judgments entered in favor of Washington Heights Co., and claims, in summary, that the trial court erred in (1) treating certain expenditures for capital improvements as ordinary expenses, (2) determining the amounts of certain other expenditures, and (3) failing to properly apportion the latter expenses between Washington Heights Co. and Frazier. We affirm in part and in part reverse and remand with directions.

The causes alleged seek damages for the claimed breach of contracts and, as such, present actions at law. *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985). Accordingly, our scope of review is limited to determining whether the judgments entered below are clearly wrong, for the findings and conclusions of the trial court in actions at law tried without a jury have the effect of jury verdicts and will not be set aside unless they are such. *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987); *Lis v. Moser Well Drilling & Serv.*, 221 Neb. 349, 377 N.W.2d 98 (1985). Moreover, in such a circumstance, it is not within our province to resolve conflicts in or reweigh the evidence; rather, we presume that the trial court resolved any controverted facts in favor of the successful party, and we consider the evidence and all permissible inferences therefrom most favorably to that party. *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985); *Grubbs v. Kula*, 212 Neb. 735, 325 N.W.2d 835 (1982).

The uncontradicted evidence establishes that over the years, Schurkamp, Frazier, and another shared ownership interests in a number of business operations. At the relevant time, each of these men owned, among other things, an equal share in Washington Heights Co., Grover Square, Ltd., and Frazier-Schurkamp, Inc., a corporation. Washington Heights Co. owned interests in and operated apartments, its principal asset being a 70-percent ownership interest as a joint venturer with Ohio National Life Insurance Company in a complex

called the Washington Heights Apartments. Grover Square, Ltd., also owned and operated an apartment complex. Frazier-Schurkamp, Inc., owned and operated a mechanical contracting business. As the consequence of a long-deteriorated relationship between Schurkamp and Frazier, and of Frazier's desire to withdraw from the business, it was decided that the interests would be divided such that Schurkamp would become the sole owner of the businesses for which he had been the principal manager, Washington Heights Co. and Grover Square, Ltd.; the third man would become sole owner of the business for which he had been the principal manager, Frazier-Schurkamp, Inc.; and Frazier would receive payment for his interests. It is in the context of that background that the contracts at issue in this litigation came into existence.

We note that although the pleadings raise an issue as to the existence and amount of the net cash-flow generated by Grover Square, Ltd., Frazier's attack focuses on the existence and amount of the net cash-flow generated by Washington Heights Co.'s operation of its joint venture with Ohio National Life Insurance Company. As a consequence, the record presents no evidence which permits us to disturb the $1,000 awarded to Washington Heights Co. on its second cause of action. Accordingly, we affirm the trial court's judgment on Washington Heights Co.'s second cause of action and proceed to review the judgment which awarded Washington Heights Co. $25,000 on its first cause of action.

The relevant Washington Heights Co. contract defined "Net Cash Flow" as being

> seventy percent (70%) of the excess of cash receipts over cash expenditures from the operation of Washington Heights Apartments in Omaha, Nebraska for any fiscal year or partial fiscal year from March 1, 1983 to the date of Closing, as determined in accordance with generally accepted accounting principles, except that depreciation of buildings, improvements, and personalty, and loan fees or expenses of refinancing contemplated by this Agreement, shall not be considered as a deduction from cash receipts (or included as cash expenditures) and real estate taxes, insurance premiums, and other items

> normally accrued or adjusted through pro-rations to reflect less than a full year of operations shall be pro-rated for the period involved.

Except for the proration language, the foregoing definition of "Net Cash Flow" parallels that used in the joint venture agreement between Washington Heights Co. and Ohio National Life Insurance Company. The contract documents related to this aspect of the transactions provided that the net cash-flow was to be determined by Washington Heights Co.'s accountants and that after such audit was completed, adjustments would be made to reconcile any differences. Frazier reserved the right to conduct an independent audit.

A member of the certified public accountancy firm which had always performed the accounting services required by Washington Heights Co.'s joint venture agreement with Ohio National Life Insurance Company, and did similar work for the parties' other businesses as well, concluded, through the exercise of his own independent judgment, that the operation of the complex known as Washington Heights Apartments during the relevant period resulted in a cash-flow deficit of $51,836. As might be expected, Frazier does not agree, and on this point the evidence is in conflict.

While Frazier did not cause an independent audit to be made, he did dispraise the Washington Heights Co. audit through the testimony of an assistant professor of accountancy from a local university. In the professor's opinion, the operation in question resulted in a total cash-flow during the relevant period of $242,638, leaving $169,847, 70 percent of the total, for distribution as the net cash-flow in accordance with the terms of the agreement. According to him, the difference stems from Washington Heights Co.'s mistreatment of expenditures for capital improvements, as claimed in Frazier's first assignment of error; Washington Heights Co.'s inappropriate calculation of certain other expenditures, as claimed in Frazier's second assignment of error; and Washington Heights Co.'s failure to properly apportion the latter expenses, as claimed in Frazier's third assignment of error.

As to the first matter, the professor, in effect, testified that $172,736 of the expenses for certain replacements, repairs, and

refurbishments of the buildings constituting the Washington Heights Apartments should have been treated as additions to capital rather than as ordinary expenses. In partial support of that position, the professor points to the fact that while only $203,987 was budgeted for such work during the relevant fiscal year, $304,509 was expended. That additional sum of approximately $100,000 is 49 percent greater than the amount budgeted. Moreover, the expenditures exceeded the prior year's like expenditures by approximately $140,000. However, the professor admitted that there were several ways in which to determine whether an item should be treated as an addition to capital or as an item of ordinary expense and that there are bases for a difference of opinion in that regard. He further admitted that if he were doing an audit, he would have considered it important to determine that he was aware of all the facts by consulting with Washington Heights Co.'s accountant; however, as he was not doing an audit, he did not take that step. Moreover, he conceded that the consistency principle of accounting holds that financial statements should be prepared in a manner consistent with those prepared for prior like periods.

Washington Heights Co. adduced evidence that the questioned expenses had always been treated in the past as they were on the present occasion and that Frazier and the other owner were aware of the expenditures being made. In fact, there was general agreement among the owners that it was important to keep up the appearance of the complex during the period of negotiations so as to keep it marketable. Further, while it is true the questioned expenses exceed the amount budgeted, such also occurred during the 1982-83 fiscal year, when the budget called for an expenditure of $117,000 but an additional $76,536, approximately 65 percent more, was actually expended, for a total of $193,536.

Given that state of the record, it cannot be said the trial court was clearly wrong in concluding the evidence supported the treatment Washington Heights Co. gave the questioned expenditures. There is therefore no merit to Frazier's first assignment of error.

In connection with the second assignment of error, Frazier

claims that in computing the net cash-flow Washington Heights Co. deducted certain expenses twice. The professor testifying on Frazier's behalf said he thought "the real estate taxes payable, the interest payable, the accrued items [were] double-counted." That witness did not, however, explain how he reached that conclusion.

On the other hand, Washington Heights Co.'s accountant explained that as the books had been kept on an accrual basis, a series of conversions had to be made to reflect the corporation's actual cash-flow, for in the accrual method of accounting one is not concerned with when an item of expense is actually paid. He testified that he made the conversions required to reflect the actual cash payments made during the year, and deducted nothing twice. Moreover, the professor conceded that the method used by Washington Heights Co. was "one approach that could be taken to calculat[e] cash flow."

Again, under that state of the record it cannot be said the trial court was clearly wrong in concluding that the evidence supported Washington Heights Co.'s accounting in that regard. There is therefore no merit to the second assignment of error.

In arguing his third assignment of error Frazier urges that Washington Heights Co. failed to prorate the real estate taxes, insurance premiums, interest, and other accrued expenses to reflect that he had an interest for only 11 months of the fiscal year which began on March 1, 1983, and ended February 29, 1984.

Resolution of this aspect of the case depends upon the meaning of the phrase "real estate taxes, insurance premiums, and other items normally accrued or adjusted through pro-rations to reflect less than a full year of operations shall be pro-rated for the period involved," as used in the contract definition of "Net Cash Flow." The meaning of an unambiguous contract presents a question of law. See *Martin v. Reavis*, 117 Neb. 219, 220 N.W. 238 (1928). This court has an obligation to reach independent conclusions on questions of law. *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987). It is also the rule that if a written contract is expressed in unambiguous language, it is not subject to interpretation and construction, and the intention of the parties

must be determined from the contents of the contract document. *Clemens Mobile Homes, Inc. v. Anderson*, 206 Neb. 58, 291 N.W.2d 238 (1980).

The unambiguous meaning of the phrase in question is that, as only 11 months of the fiscal year had passed at the time of closing, only eleven-twelfths of certain designated expenses were to be charged against that period's income. The agreement was obviously so structured in order that Frazier not be made to pay expenses attributable to a period of time during which he had no ownership interest. It is equally clear the phrase applies to real estate taxes and insurance premiums because it says so in exactly those words.

What is not clear is what the parties intended as being within the ambit of the words "and other items normally accrued or adjusted through pro-rations." The applicable rule in such a situation is that parol evidence is admissible to explain vague language contained in a written contract. See, *Lovelace v. Stern*, 207 Neb. 174, 297 N.W.2d 160 (1980); *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976).

The intent of the parties in that regard is evidenced by Schurkamp's testimony of his understanding that only eleven-twelfths of the interest and taxes were to be charged against the cash-flow. Thus, only eleven-twelfths of the real estate taxes, insurance premiums, and interest should have been deducted. Washington Heights Co.'s accountant testified, however, that he deducted the amount of interest, taxes, and expenses which had accrued and were owing as of January 30, 1984, notwithstanding the fact such may have been attributable to the entire year. Thus, Washington Heights Co. did not prorate the real estate taxes, insurance premiums, and interest as the contract required, and to that extent Washington Heights Co.'s accounting violates the terms of the agreement. So far as the record reflects, neither did the professor testifying for Frazier make any prorations in computing his version of the net cash-flow.

Thus, Frazier's third assignment of error is meritorious; the evidence fails to support the judgment which awarded Washington Heights Co. $25,000 on its first cause of action.

Accordingly, that judgment is reversed and set aside and the

cause remanded for further proceedings consistent with this opinion.

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

PLATTE VALLEY FEDERAL SAVINGS & LOAN ASSOCIATION, APPELLEE, V. MARJORIE L. GRAY ET AL., APPELLANTS.

409 N.W.2d 617

Filed July 31, 1987. No. 85-918.

1. **Foreclosure: Rescission: Appeal and Error.** In a foreclosure action with a counterclaim for rescission, both being equitable in nature, we review the record de novo and will reach an independent conclusion without reference to the findings of the trial court. However, where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Fraud: Proof.** The elements constituting fraudulent concealment, which must be proved whether seeking rescission or damages, are (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
3. **Fraud: Negligence.** The negligent failure to reveal a fact generally does not amount to fraudulent concealment.
4. **Rescission: Proof: Fraud: Damages.** Where the proof in an action to rescind a contract fails to establish fraud, a party will not be permitted to elect to pursue an alternative remedy for damages.

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

George A. Sommer, for appellant Gray.

Robert J. Bulger of Bulger & Jensen, for appellant Goltl.

Christine J. Law of Atkins Ferguson Zimmerman Carney Law, P.C., for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

Defendants appeal from an order granting plaintiff's requested decree of foreclosure on certain residential real property and denying defendants' counterclaim for rescission.

On May 7, 1982, Marvin E. Ziegler and Carol A. Ziegler executed a note to plaintiff for $66,000, secured by a mortgage on certain residential real property. On June 25, 1982, defendant Marjorie L. Gray contracted to buy that property from the Zieglers, subject to the mortgage to plaintiff. Then, on June 30, 1982, plaintiff issued a mortgage loan commitment to Gray and August P. Goltl. This commitment had a notation as follows: "( ) Flood Insurance Mandatory, see reverse." The notation on the reverse of the form read as follows:

> FLOOD INSURANCE
>
> If the "Flood Insurance Mandatory" box was checked, this property has been determined to be in an area which has a special flood hazard. Federal law requires that flood insurance, available through any agent, be written in either the maximum amount available or the loan balance, whichever is the lesser. This insurance will be mandatory until this loan is paid in full. By signing and accepting this commitment you acknowledge that the property securing this loan is in an area identified as having a special flood hazard and agree to these insurance requirements.

The blank opposite the "Flood Insurance Mandatory" condition was not checked. This loan commitment was signed by Gray and Goltl on July 2, 1982. Thereafter, on July 15, 1982, an assumption agreement was executed by the Zieglers, Gray and Goltl, and plaintiff by its agent, Russell A. Godberson. Defendants learned that the property was in a flood plain on July 11, 1983.

In March of 1984, defendants ceased paying the mortgage payments. Plaintiff then brought this foreclosure action against Gray and Adrian P. Goltl, the personal representative of the now-deceased August Goltl. Defendant Gray answered and counterclaimed for rescission of the assumption agreement,

based on plaintiff's alleged misrepresentation that the property in question was not located in a flood plain. Defendant Goltl's second amended answer also counterclaimed for rescission.

The case went to trial on September 10 and 11, 1985. The court granted plaintiff's requested foreclosure and denied defendants' claim for rescission. Defendants have appealed.

Two of defendants' assignments of error can be combined into one—that being that the trial court erred in finding that defendants were not entitled to rescission of the assignment of mortgage and note based on plaintiff's alleged misrepresentation. Defendants also contend that the trial court erred in denying rescission of the assumption agreement on the basis of delay by defendants in exercising their right of rescission. Finally, defendants contend that the court erred in not granting defendants leave to amend their pleadings to allege damages. We affirm.

This case is a foreclosure action with a counterclaim for rescission, both of which are equitable in nature. Therefore, we will review the record de novo, which means we will reach an independent conclusion without reference to the findings of the trial court. *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985); *First Fed. Sav. & Loan Assn. v. Cal-Neb Land Co.*, 219 Neb. 887, 367 N.W.2d 136 (1985). However, where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.

Although the briefs were written as if this were a false representation case, during oral argument counsel for both parties agreed that this case is really one of fraudulent concealment. Thus, we will analyze it using the factors set forth in *Nelson v. Cheney*, 224 Neb. 756, 401 N.W.2d 472 (1987).

In *Nelson* we set forth the elements which a party suing for damages based on fraudulent concealment must allege and prove by a preponderance of the evidence:

> (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or

> concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.

Id. at 762, 401 N.W.2d at 476-77. A party seeking rescission on the ground of fraudulent concealment must also allege and prove the same elements. In this case, however, defendants failed to prove that plaintiff concealed from defendants the fact that the property was in a flood plain.

As we stated in *Christopher v. Evans, supra*:

> *Conceal* means "To hide, secrete, or withhold from the knowledge of others. To withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight. To hide or withdraw from observation, cover or keep from sight, or prevent discovery of." Black's Law Dictionary 261 (5th ed. 1979).
>
> In *Mitchell v. Locurto*, 79 Cal. App. 2d 507, 514, 179 P.2d 848, 851-52 (1947), the court defined *conceal* as follows: "The word 'conceal' pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact. (Restatement of the Law, Contracts, § 471, p. 891 et seq.; Restatement of the Law, Restitution, § 8, p. 32 et seq.; 8 Words and Phrases, Perm. Ed., 328-342.) It has reference to some advantage to the concealing party or a disadvantage to some interested party from whom the fact is withheld."

219 Neb. at 55-56, 361 N.W.2d at 196.

Defendants in this case did not prove what affirmative action plaintiff took to hide, secrete, or withhold from the knowledge of defendants the fact that the property was in a flood plain. Defendants did show that plaintiff knew when it transacted a loan on different property which was located within the same subdivision as the property involved in this case that the subdivision was in a flood plain, and that plaintiff had informed the buyer of the other property of that fact. Defendants also showed that plaintiff had a flood map in its loan origination office. But showing knowledge on plaintiff's part is not enough. Defendants had to show that plaintiff hid the true facts from defendants. The most defendants could

prove was that plaintiff's failure to check the box on the loan commitment entitled "Flood Insurance Mandatory" was an "oversight." As plaintiff's counsel stated in oral argument, this "oversight" may have been negligence, but it does not amount to concealment. Indeed, as soon as defendant Gray informed plaintiff that the property was in a flood plain, plaintiff went out and purchased flood insurance to cover both its and defendants' interests in the property, and paid the premium itself.

Because plaintiff did not conceal anything from defendants, there was no fraud, and rescission was properly denied.

Goltl, in a motion for a new trial, requested in the alternative that the court permit his petition to be amended to one in damages and that that issue be tried and determined by the court. In support of his position he cites us to *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955). In that case defendants contracted to sell plaintiffs a motel, representing that, among other things, the premises were free of termites. As it turned out, the property was infested with termites. Plaintiffs sued for rescission, and defendants counterclaimed for specific performance.

In determining that fraud was present, this court stated: "We think, under the circumstances here disclosed, appellants [plaintiffs] had a right to rely upon the statements made by the executor Fred E. Williams, and in fact, that they did rely thereon to their subsequent injury." *Id.* at 578, 71 N.W.2d at 141. However, the denial of rescission by the trial court because of laches on the part of plaintiffs was affirmed on appeal.

By the same token, although the trial court granted defendants specific performance, this court reversed on the ground that because defendants had made misrepresentations, such a remedy would be unjust. In the final analysis, the cause was remanded to the trial court with directions to permit plaintiffs to elect to amend their cause of action for one in damages, stating the "cause of action in either event is fraud and the allegations of fact would be precisely the same in substance, the only substantial difference between the two being the form of relief prayed for." *Id.* at 587, 71 N.W.2d at 146.

What appellants here overlook is language in this court's opinion just preceding the above-quoted language:

> As held in Reinertson v. Struthers, *supra*: "* * * the failure to secure relief based upon a rescission, *unless for a failure to establish the fraud*, simply leaves the party who sought it in the attitude of having conclusively affirmed the contract. But affirmance of the contract does not waive the fraud, nor bar the right to recover damages, but bars a subsequent rescission merely."

(Emphasis supplied.) 160 Neb. at 587, 71 N.W.2d at 146. Such, of course, is not the case here. Because we find no fraudulent concealment on the part of the plaintiff, the defendants are not permitted to elect to pursue the alternative remedy for damages.

The judgment is affirmed.

AFFIRMED.

MICHELLE DELAWARE, A MINOR, BY AND THROUGH HER MOTHER AND NEXT FRIEND, MARY ANN DELAWARE, APPELLANT, V. PETER VALLS ET AL., APPELLEES.

409 N.W.2d 621

Filed July 31, 1987. No. 85-931.

1. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury.
2. _____: _____: _____. An efficient intervening cause is the intervening negligence of a third person who has full control of the situation and whose negligence is such as defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to plaintiff.
3. **Tort-feasors: Negligence: Liability.** The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.

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

Stephen L. Gerdes of Schrempp, Hoagland, Gray, Gerdes & Salerno, for appellant.

James L. Quinlan and Amy S. Bones of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellees.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Plaintiff-appellant, Michelle Delaware, alleges she was injured when a dirt bike motorcycle on which she was a passenger collided within the intersection of Madison and 35th Streets in Omaha with an automobile driven by defendant-appellee Albert Allen, Jr. She claims that defendants-appellees Peter and Barbara Valls negligently failed to warn about the presence of, and negligently grew, maintained, and failed to trim, certain vegetation on the realty they own at the northwest corner of the intersection, and negligently parked a truck on Madison Street within 30 feet of the intersection, all contrary to ordinances of the city of Omaha, which negligence was a "direct, proximate and contributing cause" of her injuries and damages. Concluding that the Vallses' negligence furnished only a condition by which Delaware's injuries were made possible through the subsequent independent negligence alleged on the part of Allen and the actions of Francis James Diggins, the driver of the motorcycle, the trial court sustained the Vallses' motion for summary judgment and dismissed Delaware's petition as to them. Delaware assigns the ruling as error, urging that whether Diggins' negligence was a superseding cause and whether the vegetation and parked truck were proximate causes presented fact issues for a jury to resolve. We affirm.

Diggins was driving the motorcycle southward on 35th Street. He testified that he stopped for the stop sign, "walked up a little bit with the bike" into the intersection, looked in both directions, did not see any approaching vehicles, and "started across the intersection." He testified that when he looked to the west on Madison Street, his vision was hampered "to some

extent" by a parked vehicle and "a little bit" by hedges on the northwest corner of the intersection. He also said, however, that as he looked west on Madison Street, he could see to the top of a hill.

Allen testified that he was traveling east on Madison Street at approximately 25 miles per hour when the motorcycle "came from . . . no place." Allen also testified that there were tall hedges and a parked truck in front of the Valls property. According to Allen, Diggins did not obey the stop sign.

Delaware, however, testified that Diggins did stop for the stop sign. She also testified that both the hedges and the parked truck blocked her vision and that she did not see the Allen automobile until its bumper was right at her leg.

Various Omaha city ordinances prohibit parking a vehicle within 30 feet of an intersection, planting trees within 35 feet of an intersection, and maintaining shrubbery more than 2½ feet tall within the triangle formed by the adjacent curblines of two intersecting streets and the line joining points "distant forty (40) feet on each side line from their point of intersection," and require landowners to trim, prune, and spray trees abutting a street as "will remove any hazard to life or property." Omaha Mun. Code, ch. 36, art. VI, § 36-126; ch. 37, art. I, § 37-9; ch. 37, art. IV, § 37-72; and ch. 37, art. V, § 37-94 (1980).

Since at least 1923, when *Steenbock v. Omaha Country Club*, 110 Neb. 794, 195 N.W. 117, was decided, the rule in this jurisdiction has been that passive negligence which does nothing more than furnish a condition by which injuries are made possible through the subsequent independent negligence of another is not actionable. In *Steenbock* an employee of the Omaha Country Club had negligently placed a flagpole across a driveway. Subsequently, the pole was negligently struck by the car of the defendant Crofoot and knocked into the plaintiff. In denying recovery the court concluded that the placement of the pole and the subsequent negligent striking of it were not concurrent acts, and, thus, the condition created by the placement of the pole was not a proximate cause of the plaintiff's injury.

The foregoing rationale has been applied in a variety of situations; for example, *C.S. v. Sophir*, 220 Neb. 51, 368

N.W.2d 444 (1985) (failure to clear weeds a condition and not a proximate cause of criminal assault on tenant); *Childers v. LCW Apartments*, 214 Neb. 291, 333 N.W.2d 677 (1983) (inadequate lighting a condition and not a proximate cause of criminal assault on tenant); *Bringewatt v. Mueller*, 201 Neb. 736, 272 N.W.2d 37 (1978) (escape of horse due to disrepair of fence a condition and not a proximate cause of vehicle collision); *Connolley v. Omaha Public Power Dist.*, 185 Neb. 501, 177 N.W.2d 492 (1970) (trespass action in which existence of overhead electric line a condition and not proximate cause of injury when flagpole lifted into line); *Bruno v. Gunnison Contractors, Inc.*, 176 Neb. 462, 126 N.W.2d 477 (1964) (construction barricades placed so as to route traffic onto unobstructed portion of road a condition and not a proximate cause of accident); *Jarosh v. Van Meter*, 171 Neb. 61, 105 N.W.2d 531 (1960) (double-parked truck obscuring vision a condition and not proximate cause of collision with pedestrian); *Anderson v. Byrd*, 132 Neb. 588, 272 N.W. 572 (1937), *after rehearing* 133 Neb. 483, 275 N.W. 825 (dense, damp, and impenetrable cloud of smoke caused by previously wrecked railroad engines merely a condition; thus, defendant automobile driver not entitled to an instruction that accident was proximately caused by smoke which was created by one not involved in the collision nor named as a party).

However, the preceding situations involving passive preexisting negligence have been distinguished from those situations in which active preexisting negligence combines with subsequent independent acts of negligence to cause injury. In the latter situations the preexisting and subsequent negligence have been held to combine and become concurrent acts of negligence such that each may be a proximate cause of the resulting injury. For example, *K.S.R. v. Novak & Sons, Inc.*, 225 Neb. 498, 406 N.W.2d 636 (1987) (without discussing condition-cause distinction held that continuing failure to provide security after knowledge of known perpetrator's repeated criminal acts on premises raised jury question as to whether landlord should have foreseen criminal assault on tenant); *London v. Stewart*, 221 Neb. 265, 376 N.W.2d 553 (1985) (driving on wrong side of road up to time of collision a

proximate cause of collision, not a mere condition); *Brown v. Nebraska P.P. Dist.*, 209 Neb. 61, 306 N.W.2d 167 (1981) (smoke produced by burning of weeds at time of collision a proximate cause, not a condition); *Johnson v. Metropolitan Utilities Dist.*, 176 Neb. 276, 125 N.W.2d 708 (1964) (failure to warn of obstruction created by parking tractor so as to protrude into street constituted continuing negligence and thus proximate cause, not a condition).

Delaware invites us to abandon this historical distinction between cause and condition. In doing so, she calls our attention to the fact that the distinction has been criticized as meaningless, Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103 (1911), providing no more guidance than calling something "blamable" or "not blamable," Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 Colum. L. Rev. 136 (1909), and as being "almost entirely discredited," Prosser and Keeton on the Law of Torts, *Proximate Cause: Scope of the Problem* § 42 at 278 (5th ed. 1984).

Delaware also urges that we abandon our traditional definition of "efficient intervening cause" and adopt the standard set forth in the Restatement (Second) of Torts § 447 (1965). We have defined an efficient intervening cause as a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. *London v. Stewart, supra.* It is the intervening negligence of a third person who has full control of the situation and whose negligence is such as defendant was not bound to anticipate and could not be said to have contemplated, which later negligence results directly in injury to plaintiff. *Corbet, Inc. v. County of Pawnee*, 219 Neb. 622, 365 N.W.2d 437 (1985). The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984). The Restatement, *supra* at 478, on the other hand, provides:

> The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the

actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

Although there may be merit in the criticisms of the cause-condition distinction, we need not examine the validity of that distinction in this case, for we are not persuaded that any good reason exists for abandoning the traditional efficient intervening cause concepts. That being so, it matters not how the Vallses' conduct is characterized, for they were not bound to anticipate and cannot be said to have contemplated that Diggins would negligently attempt to traverse the intersection when he could not see what he needed to see in order to do so safely or that Allen would, as it is alleged, fail to see Diggins in time to avoid the collision. Thus, Diggins' negligence and that alleged on the part of Allen are efficient intervening causes.

As to the Vallses, there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and they are entitled to judgment as a matter of law. Thus, the summary judgment dismissing Delaware's petition against them is correct. *Seagren v. Peterson,* 225 Neb. 747, 407 N.W.2d 790 (1987); *Smith v. Weaver,* 225 Neb. 569, 407 N.W.2d 174 (1987).

AFFIRMED.

IN RE APPLICATION A-15738 OF THE HITCHCOCK AND RED WILLOW IRRIGATION DISTRICT ET AL. HITCHCOCK AND RED WILLOW IRRIGATION DISTRICT ET AL., APPELLANTS, V. LOWER PLATTE NORTH NATURAL RESOURCES DISTRICT ET AL., APPELLEES.

410 N.W.2d 101

Filed July 31, 1987. No. 86-008.

1. **Administrative Law: Waters: Appeal and Error: Case Overruled.** The proper standard of review for the Supreme Court to follow in cases involving appeals from the Department of Water Resources under the provisions of Neb. Rev. Stat. § 46-210 (Reissue 1984) is to search only for errors appearing in the record; i.e., does the judgment conform to law, is it supported by competent and relevant evidence, and was the action neither arbitrary, capricious, nor unreasonable? To the extent that *In re Applications A-15995 and A-16006*, 223 Neb. 430, 390 N.W.2d 506 (1986), holds to the contrary, it is overruled.
2. **Constitutional Law: Waters.** 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.
3. _____: _____. The use of the water of every natural stream within the State of Nebraska is dedicated to the people of the state for beneficial purposes. Thus, the first characteristic of the appropriative right is that the holder possesses merely a usufructuary right.
4. **Waters.** The appropriator of the waters of a stream acquires a right to the use of such water for beneficial purposes, but does not acquire ownership of such water.
5. _____. The second characteristic of the appropriative right of water in a natural stream is that the application of water to a beneficial use operates as a condition subsequent which in fact fixes the extent of the right originally acquired.
6. **Waters: Words and Phrases.** Unappropriated water is that water which is available for appropriation because it is not subject to an existing appropriation right.
7. **Waters.** Although there may be some unappropriated water available at a proposed diversion point, the existence of a dependable water supply is essential to the success of any irrigation project and where, on the average, but an insignificant supply of water in relation to the maximum demand of the proposed appropriator is available, there is not a source of unappropriated water at the proposed diversion site.
8. _____. For a quantity of unappropriated water to be available at a proposed diversion point, it must be available in a supply which is fairly continuous and dependable.
9. **Statutes: Words and Phrases: Waters.** Because the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning, the Department of Water Resources may decline to approve an

appropriation of water which is significantly less than the application requests under Neb. Rev. Stat. § 46-235 (Reissue 1984).

10. **Waters.** In order to be able to assess the impact on the public interest of a proposed project for the diversion of water, the project's design must be definite enough to reflect its impacts and implications to generally apprise the public of the efficacy of the proposed use of the planned facility and of its potential impact.

11. _____. Where the evidence supports the proposition that the benefits to the state would be greatly enhanced by using the available unappropriated water in the river of its origin, rather than to divert it to another river basin, a denial of such transbasin diversion is demanded by the public interest.

Appeal from the Department of Water Resources. Affirmed.

Robert B. Crosby and Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester, for appellants.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee State of Nebraska.

George E. Svoboda of Sidner, Svoboda, Schilke, Wiseman, Thomsen, Holtorf & Boggy, for appellees Lower Platte North Natural Resources District et al.

Lyle B. Gill, Fremont City Attorney, for appellee City of Fremont.

Richard G. Kopf of Cook, Kopf & Doyle, P.C., for appellee Central Platte Natural Resources District.

Jess C. Nielsen of Nielsen & Birch, for appellee Twin Platte Natural Resources District.

Christopher H. Meyer, for appellee National Wildlife Federation.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and GRANT, JJ., and MCCOWN, J., Retired.

HASTINGS, J.

Three irrigation districts in southwest Nebraska appeal from an order entered by the director of the Nebraska Department of Water Resources (department) denying their application for authority to divert water from the South Platte River for storage in Enders Reservoir near Imperial, Nebraska. We

affirm.

The Hitchcock and Red Willow (H & RW), Frenchman Valley, and Frenchman-Cambridge Irrigation Districts filed an application with the department on December 19, 1980, for a permit authorizing the impoundment of approximately 45,000 acre-feet of water in Enders Reservoir. The source of water was listed as the South Platte River at a location near Big Springs, Nebraska. The appellants proposed a transbasin diversion of water from the South Platte River basin to the Republican River basin, as the water would be transported about 45 miles south by pipeline or canal to the Frenchman River, which flows into Enders Reservoir and eventually into the Republican River. Such a diversion was proposed to supplement the diminished flows in the Frenchman River and resulting lower water levels in Enders Reservoir brought about in part by increased groundwater development in the area. The appellants listed 1990 as the approximate date that water would first be impounded.

The magnitude of the record in this case points out the difficult and almost impossible task that our own rules have imposed upon this court. The application for diversion was filed with the Nebraska Department of Water Resources on December 19, 1980, which resulted in over 30 days of hearings culminating with an order entered by the director on November 4, 1985. The direct testimony constitutes approximately 5,600 pages of the bill of exceptions, consisting of some questions nearly a page in length and many answers covering several pages. In addition, there are exhibits in this case exceeding 3,000 pages of testimony from *In re Applications A-15145 through A-15148*, now also pending in this court as case No. 86-692. Finally, there are approximately 400 technical exhibits, ranging from single-page statistical printouts and maps to books and scientific treatises exceeding 400 pages in length.

The foregoing statement is only relevant to point up to us the possible need of altering our appellate practice to require the filing of a manageable statement of the case in lieu of a complete record of this magnitude.

The record does disclose that Enders Reservoir is owned by the Bureau of Reclamation, U.S. Department of the Interior.

Water is delivered from the reservoir to the H & RW and Frenchman Valley Irrigation Districts through canals originating at a diversion dam about 50 river miles downstream from Enders Reservoir. The canals serve about 11,500 acres in the H & RW Irrigation District in Hitchcock and Red Willow Counties and about 9,600 acres in the Frenchman Valley Irrigation District in Hitchcock County, and the two districts together planned to use 35,000 acre-feet of the proposed diversion. The Frenchman-Cambridge Irrigation District, the majority of which is located downstream from the other two districts on the Republican River, joined as an applicant for the remaining 10,000 acre-feet.

Objections to the application were filed by numerous parties, including conservation groups, natural resource districts, and municipalities. The director conducted a lengthy hearing on the application. At the request of the parties, the proceedings were governed by the rules of evidence applicable in district court.

Pursuant to the Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. §§ 37-430 et seq. (Reissue 1984), the applicants and the director initiated consultation with the Game and Parks Commission. The commission prepared a written biological opinion which concluded that the proposed diversion would jeopardize the continued existence of the whooping crane, bald eagle, and least tern. The director first admitted the biological opinion into evidence only to show consultation with the Game and Parks Commission, but he subsequently admitted it for the truth of the matter asserted therein. The director also denied requests by the applicants and one of the objectors for authorization to take depositions of the authors of the biological opinion and to subpoena them as witnesses.

The director issued an order dated November 4, 1985, denying the application and concluding the following: (1) that there was not a source of unappropriated water at applicants' proposed diversion point sufficient to meet their demand; (2) that when considering the provisions of Neb. Rev. Stat. § 46-289 (Reissue 1984), which sets forth factors to consider when evaluating an interbasin transfer of water, applicants

failed to meet the public interest test, most seriously falling short in addressing impacts to fish and wildlife; and (3) that applicants did not overcome the burden placed upon them by § 37-435(3) of the Nongame and Endangered Species Conservation Act to show that their proposal would not adversely impact endangered species.

The applicants raise no issues based on differences of testimony regarding facts, but raise the following assignments of error: (1) that the director incorrectly considered the likelihood of success of the proposed irrigation project when determining whether there was unappropriated water; (2) that the director applied an incorrect balancing test when considering the factors listed in § 46-289; (3) that § 46-289 is unconstitutional; (4) that the director erred in finding that the applicants have the burden of proving compliance with the Nongame and Endangered Species Conservation Act; (5) that the director erred in admitting the biological opinion into evidence; (6) that the director erred in not allowing the authors of the biological opinion to be deposed or called as witnesses; and (7) that § 37-435(3) is unconstitutional as applied to the facts in this case.

We need first to address the standard of review to be applied by this court. In that regard, we have not been completely consistent. In *Ainsworth Irr. Dist. v. Bejot*, 170 Neb. 257, 102 N.W.2d 416 (1960), a water appropriation case, we stated in a rather straightforward manner:

> This court has concluded in cases comparable with that at bar that on an appeal to this court from an order of the Department of Water Resources, the primary questions to be determined are generally whether such department acted within the scope of its authority and whether its findings and order complained of are supported by competent evidence or are unreasonable and arbitrary.

Id. at 268, 102 N.W.2d at 423. In other words, that would suggest a review for error rather than a de novo hearing.

Such a review would not be inconsistent with the review of an administrative agency's order on appeal to the district court; i.e., was the order in excess of the statutory authority of the agency and was the order unsupported by competent, material,

and substantial evidence. Neb. Rev. Stat. § 84-917 (Cum. Supp. 1984).

That such an appeal falls under the provisions of the Administrative Procedures Act is suggested by Neb. Rev. Stat. § 84-901 (Reissue 1981), which defines an agency as "each board, commission, department . . . or other administrative office or unit of the state government . . . ." Additional recognition was given to this proposition in the case of *In re Water Appropriation Nos. 442A, 461, 462, and 485*, 210 Neb. 161, 313 N.W.2d 271 (1981), wherein we held that because "the provisions of the Administrative Procedures Act are applicable to the Department of Water Resources . . . [u]pon motion by the appellants, the use of formal rules of evidence could have been required." *Id.* at 167, 313 N.W.2d at 275.

In *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985), we interpreted Neb. Rev. Stat. § 84-918 (Reissue 1981) of the Administrative Procedures Act, which provides that "[a]n aggrieved party may secure a review of any final *judgment of the district court* . . . by appeal to the Supreme Court," which appeal "shall be heard de novo on the record." (Emphasis supplied.) Although perhaps recognizing the absence of logic in requiring this court to review de novo a judgment of the district court which never did have an opportunity to make de novo findings, see concurrences of Shanahan, J., and Boslaugh, J., we nevertheless felt compelled to follow the unambiguous language prescribed by the Legislature. We therefore held that we would review the record of the administrative agency de novo and come to an independent conclusion without regard to what either the agency or the district court had done.

Finally, in the case of *In re Applications A-15995 and A-16006*, 223 Neb. 430, 390 N.W.2d 506 (1986), involving a pure interpretation of law as applied by the Nebraska Department of Water Resources, we perhaps gratuitously, and at least facially logically, following *In re Water Appropriation Nos. 442A, 461, 462, and 485, supra*, and *Haeffner, supra*, determined that "our review of an agency's decision under the Administrative Procedures Act is de novo on the record." 223 Neb. at 436, 390 N.W.2d at 510. We therefore stated that we would review that record under that standard.

However, what we have failed to do, perhaps because that precise issue has not previously been specifically presented to us, is to examine in detail the enabling legislation for an appeal from the Department of Water Resources and the exception as to appeals contained in the Administrative Procedures Act. Neb. Rev. Stat. § 46-210 (Reissue 1984) provides in part as follows:

> The procedure to obtain such reversal, modification, or vacation of any such decision or order upon which a hearing has been had before the Department of Water Resources shall be governed by the same provisions in force with reference to appeals and error proceedings from the district court to the Supreme Court of Nebraska.

Neb. Rev. Stat. § 25-1911 (Reissue 1985) provides that "[a] judgment rendered or final order made by the district court may be reversed, vacated, or modified by the Supreme Court for *errors appearing on the record*." (Emphasis supplied.)

Finally, § 84-917 of the Administrative Procedures Act, which prescribes the method for the original review of an administrative agency's order, provides further, as subsection (7), "The review provided by this section shall not be available in any case where other provisions of law prescribe the method of appeal."

Because the Administrative Procedures Act provides only for a review by the Supreme Court of the judgment of the district court and not of the agency, because the act is not applicable when another method of appeal has been prescribed, and because another method of review has been provided in the legislation specifically providing for an appeal of the order of the Department of Water Resources, we hold that the proper standard of review for this court to follow in cases such as this one is to search only for errors appearing in the record; i.e., does the judgment conform to law, is it supported by competent and relevant evidence, and was the action neither arbitrary, capricious, nor unreasonable? To the extent that *In re Applications A-15995 and A-16006, supra*, holds to the contrary, it is overruled.

Such position is also supported by logic. We have held in appeals from the Public Service Commission, where review is

also directly to this court, that we would not second-guess the commission or make independent findings or determinations of matters which are peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed on appeal absent a showing of illegality, arbitrariness, capriciousness, or unreasonableness. *In re Application of Northwestern Bell Tel. Co.*, 218 Neb. 563, 357 N.W.2d 443 (1984).

When consideration is given to the fact that our statutes require that members of the Public Service Commission need only be citizens and voters of the state, Neb. Rev. Stat. § 75-101 (Reissue 1986), whereas the director of the Department of Water Resources, who, together with the state hydrologist, conducted this hearing, is required to be a professional engineer with at least 5 years' experience in a position of responsibility in irrigation work, Neb. Rev. Stat. § 46-701 (Reissue 1984), there would seem to be little doubt but that similar deference should be afforded his expertise involving "judgment and policy determination."

Appellants contend in their first assignment of error that the director applied an incorrect definition of the term "unappropriated water," when he determined there was not a source of unappropriated water at the proposed "diversion point sufficient to meet their demand." They assert that the director incorrectly considered whether in his opinion the proposed irrigation project would be successful, and incorrectly based his decision on his determination that it probably would not be.

Neb. Const. art. XV, § 6, provides in part: "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." Neb. Rev. Stat. § 46-235 (Reissue 1984) provides in part that "[i]f there is unappropriated water in the source of supply named in the application, if such application . . . is not otherwise detrimental to the public welfare, and if denial of the application is not demanded by the public interest, the Department of Water Resources shall approve the same . . . ." The term "unappropriated water" is not expressly defined in the

irrigation code. Therefore, we must consider the inherent characteristics of the appropriative right to use the state's water, for the term "unappropriated water" finds its correct legal meaning therein.

The use of the water of every natural stream within the State of Nebraska is dedicated to the people of the state for beneficial purposes. Neb. Const. art. XV, § 5. Thus, the first characteristic of the appropriative right is that the holder possesses merely a usufructuary right. *Frenchman Valley Irr. Dist. v. Smith*, 167 Neb. 78, 91 N.W.2d 415 (1958). The appropriator of the waters of a stream acquires a right to the use of such water for beneficial purposes, but does not acquire ownership of such water. *Id.*

The second characteristic of the appropriative right is that the application of water to a beneficial use operates as a condition subsequent which in fact fixes the extent of the right originally acquired. *State v. Birdwood Irrigation Dist.*, 154 Neb. 52, 46 N.W.2d 884 (1951). For example, as part of the requirement of beneficial use, the Department of Water Resources is expressly authorized by statute, after notice and hearing, to forfeit a water right in whole or in part where it appears that the water appropriation has not been used for some beneficial or useful purpose or, having been so used at one time, has ceased to be used for such a purpose for more than 3 years, unless there has been sufficient cause for such nonuse. Neb. Rev. Stat. §§ 46-229.02 to 46-229.04 (Reissue 1984); *In re Water Appropriation Nos. 442A, 461, 462, and 485*, 210 Neb. 161, 313 N.W.2d 271 (1981). In addition, an appropriation right can be lost through abandonment or for nonuser for the amount of time found in Neb. Rev. Stat. § 25-202 (Reissue 1985) regarding actions for the recovery of title or possession of real estate. *State v. Nielsen*, 163 Neb. 372, 79 N.W.2d 721 (1956). Thus, first of all, "unappropriated water" is that water which is available for appropriation because it is not subject to an existing appropriation right.

Neb. Rev. Stat. § 46-203 (Reissue 1984) establishes a "first in time is first in right" seniority system for water appropriations. The priority of an appropriation dates from the filing of an application in the office of the Department of Water Resources

for a permit to make an appropriation. Neb. Rev. Stat. § 46-205 (Reissue 1984). The department is required to have public hearings on such applications, to receive evidence relevant to the matter under investigation, and to render a decision in writing. Neb. Rev. Stat. § 46-209 (Reissue 1984).

The record of the department's proceedings in the present case reveals that the director's conclusion relative to the availability of unappropriated water rests upon a large amount of technical and other evidence showing the historical usage of water taken from the South Platte River and the anticipated usage of such water in the future, taking into account numerous variables. Various expert witnesses testified as to the amount of water available at the proposed diversion point. The estimates of flows available for diversion ranged from an annual average of 6,200 acre-feet based on daily flow records and a facility which could pump 125 cubic feet per second, to an annual average of 26,500 acre-feet based on monthly flow records and a facility which could pump 175 cubic feet per second.

The director determined that an approach using mathematical relationships correlating river reach gains/losses and inflows and outflows, in conjunction with daily measuring station river flow data, was most appropriate for evaluating the existence of unappropriated water in the proposed source of supply. Using elements of this approach, Morton Bittinger, an engineer from Colorado who testified for one of the objectors, estimated that an average of 6,200 acre-feet of water would have been available annually based on daily flow records and a facility which could pump 125 cubic feet per second. Bittinger estimated that 8,400 acre-feet would have been available annually based on daily flow records and a facility which could pump 175 cubic feet per second. Marvin Dan Schmidt, an engineer from California who testified for the appellants, estimated that an average of 15,400 acre-feet would have been available annually based on daily flow records and a facility which could pump 125 cubic feet per second and that an annual average of 18,800 acre-feet would have been available based on daily flow records and a facility which could pump 175 cubic feet per second.

The director considered the fact that periodic water

shortages occur in the South Platte valley, caused in part by climatic factors and extensive upstream diversion. He also considered the impact of the South Platte River Compact, an agreement between Nebraska and Colorado that allocates to Colorado, during parts of the year, much of the water of the South Platte River flowing through that state. In his order denying the appellants' application, the director stated the following: "[I]t is apparent that Applicants' proposal rests upon developing its water supply from a source already extensively exploited . . . . In terms of available water supply, considerable risk is inherent in Applicants' proposal. They seek to remove some, perhaps at times all, of the last drops."

The director acknowledged that there is some unappropriated water available at the proposed diversion point. However, he declined to find the existence of unappropriated water because he considered the amount available to be inadequate. The director stated that "[t]he existence of a dependable water supply is essential to the success of any irrigation project" and that "[a]s an average, less than one-fourth Appellants' maximum demand would have been available at their proposed diversion point." Therefore, he concluded that the application should be denied because "[t]here is not a source of unappropriated water at Applicants' proposed South Platte River diversion point sufficient to meet their demand."

While it is true that some unappropriated water is present during times of high flow at the proposed diversion point, to be available in a practical sense the supply of water must be fairly continuous and dependable. *Wyoming v. Colorado*, 259 U.S. 419, 42 S. Ct. 552, 66 L. Ed. 999 (1922). The director concluded that based on historical flow records, the appellants would not be able to withdraw any water in a number of years, sometimes consecutive. Only in times of prolonged high flows would there be enough water available to enable the appellants to divert the 45,000 acre-feet for which they applied. Clearly, water would not be present in such a quantity as to supply the appellants' desired amount on a fairly continuous and dependable basis. Although appellants do not quarrel with that factual finding, it is their argument that the director is not entitled, as a matter of

law, to base his refusal to allow the application on the unlikelihood of success of the irrigation project.

As early as 1910, in *Young & Norton et al. v. Hinderlider*, 15 N.M. 666, 110 P. 1045 (1910), the New Mexico court held that it was proper to refuse an appropriation of water for a project which appeared doomed to failure. That court stated:

> If there is available, unappropriated water of the La Plata river for only five or six thousand acres of land, it would be contrary to the public interest that a project for irrigating fourteen thousand acres with that water should receive an official approval which would, perhaps, enable the promoters of it to market their scheme, to sell stock reasonably sure to become worthless, and land which could not be irrigated, at the price of irrigated land. . . . The failure of any irrigation project carries with it not only disastrous consequences to its owners and to the farmers who are depending on it, but besides tends to destroy faith in irrigation enterprises generally.

Id. at 677-78, 110 P. at 1050.

The Texas Supreme Court also has suggested that the term "unappropriated water" may include the element of sufficiency. In *Lower Colorado River Auth. v. Texas Dept.*, 689 S.W.2d 873 (Tex. 1984), the court set aside a permit granted by the Texas Water Commission authorizing a water district to use 113,000 acre-feet per year from the Colorado River to form a lake. The applicable Texas statute read in pertinent part as follows: "(b) The commission shall grant the application only if: . . . (2) unappropriated water is available in the source of supply . . . ." Tex. Water Code Ann. § 11.134 (Vernon Supp. 1987). The evidence showed that after taking into consideration existing water rights, very little water would be available for appropriation at the proposed reservoir site. The estimated firm yield of the reservoir for the quantities of appropriable water available was 3,120 acre-feet per year. The court set aside the permit because there was an insufficient supply of unappropriated water for the proposed project. See, also, *Tanner v. Bacon, State Engineer, et al.*, 103 Utah 494, 136 P.2d 957 (1943).

In Nebraska, the Department of Water Resources may, upon

examination of an application, endorse it approved for a less period of time for perfecting the proposed appropriation, or for a less amount of water, or for a less amount of land than applied for, and may also impose such other reasonable conditions as it deems appropriate to protect the public interest. § 46-235. In the present case, the director chose not to approve the application for a lesser amount of water. Generally, the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning. *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986). Section 46-235 gives discretionary power of approval to the department. *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 75 N.W.2d 619 (1956). The predecessor to the Department of Water Resources was viewed as having been made the guardian of the public welfare in the appropriation of the public waters of the state, necessarily devolving upon it a large discretion in such matters. *Kirk v. State Board of Irrigation*, 90 Neb. 627, 134 N.W. 167 (1912). In light of this discretionary power, it cannot be said that the use of the word "may" in its ordinary, permissive, and discretionary sense in § 46-235 would defeat the intent of the drafters.

The appellants argue that the director incorrectly refused to consider methods of diversion other than direct pumping from river flow with facilities capable of pumping either 125 cubic feet per second or 175 cubic feet per second and that greater amounts of water could be diverted using other methods. In his order, the director stated that consideration of other types of facilities, which might be less costly and more effective, was not warranted because the use of such devices was not narrated by any of the appellants' witnesses. While the appellants' witness Schmidt mentioned other methods of diversion, such as storage facilities along the South Platte River or the use of a retention recharge facility and a well field, his testimony focused on the use of a pumping facility with a maximum capacity of either 125 cubic feet per second or 175 cubic feet per second. Witnesses for the appellants and the objectors estimated the amount of water available for diversion based on the use of each of the two

facilities, and the possible impacts of the diversion were evaluated based on such facilities.

While "blueprint quality" plans need not be presented when applying for a permit to appropriate water, we agree with the following statement of the Idaho Supreme Court:

> In order to be able to assess a project's impact on the public interest, the project's design must be definite enough to reflect its impacts and implications. . . .
>
> . . . In all cases the plans should be sufficient to generally apprise the public of the efficacy of the proposed use in the planned facility, and of its potential impact.

Shokal v. Dunn, 109 Idaho 330, 339-40, 707 P.2d 441, 450-51 (1985). The record in the present case reflects that specific evidence was presented regarding only a pumping facility with a maximum capacity of 125 cubic feet per second or 175 cubic feet per second. Therefore, the director correctly evaluated the application in light of the facilities about which evidence was presented.

There was competent evidence, without regard to the rules relating to transbasin diversion found in § 46-289, to support the proposition that the benefits to the State of Nebraska would be greatly enhanced by using the available unappropriated water, if any, in the central Platte area rather than for the Enders Reservoir diversion. Neb. Rev. Stat. § 46-204 (Reissue 1984) permits denial of water diversion when such denial is in the public interest. Such appears to be the case here.

Because we find that the evidence supports the denial of the application based on a lack of unappropriated water to adequately support the appellants' proposed project, because the director's findings regarding the public interest support a denial of the application, and because the director's findings are not affected by errors of law, we find it unnecessary to consider the appellants' other assignments of error. The order of the Department of Water Resources is affirmed.

AFFIRMED.

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

410 N.W.2d 110

Filed July 31, 1987. No. 86-964.

1. **Judicial Notice: Records.** A court must take judicial notice of its own records in the case under consideration.
2. **Parental Rights: Trial.** Because the record must establish by clear and convincing evidence the basis for termination of parental rights, the observance of formal court procedures is encouraged.
3. _____: _____. When the State seeks to terminate parental rights, it is required to do so by fundamentally fair procedures which satisfy the requirements of due process. Parents in such proceedings have a right to cross-examine adverse witnesses.
4. **Juvenile Courts: Records.** Separate juvenile courts must make a verbatim record of evidentiary proceedings before them.
5. **Parental Rights: Appeal and Error.** An order of termination of parental rights is reviewed de novo, and evidence erroneously admitted is not considered.
6. **Parental Rights.** An order of termination of parental rights must be supported by clear and convincing evidence and should only be issued when there is no reasonable alternative.
7. _____. Where a parent fails to rehabilitate herself within a reasonable period of time, the best interests of the child may require that a final disposition be made without delay.
8. **Parental Rights: Abandonment.** A voluntary departure from the state may be viewed as an abandonment of one's children and cannot be used as an excuse for the impossibility of compliance with a court-ordered plan of rehabilitation.
9. **Parental Rights.** A parent is required not only to follow the plan of the court to rehabilitate herself but also to make reasonable efforts on her own to bring about rehabilitation.
10. _____. A child's future need not be subject to the risks of awaiting uncertain parental maturity.
11. _____. Indefinite foster care is not an acceptable alternative where the evidence suggests the need for a fixed and permanent home.

Appeal from the Separate Juvenile Court of Sarpy County: WILLIAM D. STALEY, Judge. Affirmed.

Julie A. Frank of Pollak & Frank, for appellant.

Patrick Kelly, Sarpy County Attorney, and Lawrence D. Gendler, for appellee.

Deborah R. Pred of Fiedler, Kushner & Pred, guardian ad litem.

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

PER CURIAM.

D.K., the mother, appeals from the September 22, 1986, order of the separate juvenile court of Sarpy County, Nebraska, terminating her parental rights to her daughter, R.A.

The child was born on April 24, 1976, to L.A. and D.K. The couple was divorced in February of 1981, with custody of the child awarded to the mother. She returned custody of the child to the father within 3 days following entry of the decree. Later in 1981, after regaining custody of the child, the mother enlisted in the Army and again relinquished custody to the father.

In August of 1983, the father turned custody of the child over to the separate juvenile court and requested its assistance. The mother was unavailable as an immediate custodial parent at that time because she was still in the service and was stationed in Virginia. Prior to the father's request for assistance from the court, the child was hospitalized at the Nebraska Psychiatric Institute from May 6 to July 16, 1983. She was diagnosed there as suffering an adjustment disorder with mixed disturbance of emotion. The hospitalization was precipitated by the child's threats to kill her stepmother and to burn down the family residence. These threats continued after her hospitalization. At that point, the child's father requested that his mother, the child's grandmother, take custody of the child. Subsequent to taking custody of her, the grandmother contacted the court requesting assistance for the child. Upon being detained, the child was placed in Midlands Hospital and, within a week of being there, alleged that she had been sexually abused by her paternal grandfather, A.A.

On August 15, 1983, a petition was filed in the separate juvenile court alleging that the child was homeless, destitute, or without proper support through no one's fault. See Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982). The child's mother's address was listed as unknown in the petition.

Following an October 4, 1983, hearing on the petition, the child was adjudicated to be a child within the meaning of § 43-247(3)(a) and was placed in the custody of the Nebraska

Department of Social Services. At the October 4 hearing, the father stipulated to the truth of the contents of the petition. The court relied on its own "social file" to establish a factual basis for the stipulation. The social file, otherwise known as the predisposition evaluation, was not offered into evidence. The mother was not present or represented by counsel at this hearing.

Subsequent further dispositional hearings were held on November 23, 1983; April 11, 1984; October 4, 1984; April 18, 1985; October 9, 1985; and April 10, 1986. The mother either appeared with or was represented by counsel at all of these hearings. However, no record of the dispositional hearings was made. The court entered orders pursuant to the hearings requiring the mother to abstain from the consumption or use of alcohol and controlled substances; participate in a Parents United program or its equivalent; participate in counseling; pay the costs of her child's medical care and therapy; submit to chemical and psychological evaluations; complete a parenting program; submit to a home-study evaluation; obtain and maintain housing suitable for herself and her child; and maintain gainful employment. She was also allowed only supervised visitations with her child.

The father relinquished his parental rights to his child on April 4, 1984. From that point on, he and his second wife were no longer subjects of the juvenile court orders.

On June 26, 1986, the Sarpy County deputy county attorney filed a supplemental petition seeking termination of the mother's parental rights to her child. The petition alleged that reasonable efforts under direction of the court had failed to correct the conditions leading to the determination that the child was a child within the meaning of § 43-247(3)(a). Termination was sought pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1984).

On September 15, 1986, a hearing was held on the supplemental petition. The mother was not present but was represented by counsel. The State made an oral request that the court take judicial notice of its own records, more specifically its "social file," which encompassed exhibits 1 through 28. The exhibits consisted of the court's predisposition report and an

addendum to it; reports and letters from the child's counselor; reports of the Child Protective Services workers; letters to the court from the mother; reports from the mother's counselors; further disposition reports of the court; and a psychological evaluation of the mother. The mother's attorney entered hearsay objections to exhibits 1, 2, 3, 4, 8, 9, 10, 11, 16, 17, 19, 21, 22, 23, 24, 25, 26, 27, and 28. The court stated that exhibits 1 through 28 had all been considered in previous proceedings in the case. Judicial notice of those exhibits was taken.

In addition to the aforementioned exhibits, the State introduced the testimony of the child's therapist, Janet Guilfoyle, and that of the Child Protective Services worker then assigned to the case, Ronda Newman. Newman was also called as the mother's sole witness.

On September 22, 1986, the juvenile court found there was clear and convincing evidence to show that reasonable efforts under the direction of the court had failed to correct the conditions originally leading to the determination that the child was a child within the meaning of § 43-247(3)(a). The court also found that it was in the best interests of the child to terminate the mother's parental rights and ordered the mother's parental rights to her child terminated.

On appeal from the order of termination, the mother essentially raises three issues: (1) whether the juvenile court abused its discretion and committed reversible error by admitting exhibits 1, 2, 3, 4, 8, 9, 10, 11, 16, 17, 19, 21, 22, 23, 24, 25, 26, 27, and 28, which consisted of hearsay where said exhibits were admitted solely because they came from the social file maintained by the juvenile court and were originally admitted into the social file without formal offers by any party, thereby denying appellant the opportunity to object to their admission into the file; (2) whether the evidence was sufficient to support the juvenile court's order terminating the mother's parental rights; and (3) whether the finding that reasonable efforts had failed to correct conditions leading to the determination that R.A. was a child within the meaning of § 43-247(3)(a) was contrary to the evidence presented, offered, and received at trial and was contrary to law.

The mother's first assignment of error is basically that she

was denied due process because receipt of the exhibits in question over her hearsay objections denied her the opportunity to cross-examine the witnesses and allowed her parental rights to be terminated on a lesser standard of proof than required.

The issue raised is a result of the juvenile court's failure to make a verbatim record of its dispositional proceedings. Due to that failure, there is no record before this court that the social file exhibits were ever received in evidence prior to their receipt at the termination hearing, that the mother ever had an opportunity to cross-examine the authors of the exhibits, or that she ever had an opportunity to inspect the exhibits prior to their introduction at the adjudication hearing on the supplemental petition. Further, there is no foundation evidence for any of these exhibits.

During the course of the October 4, 1983, adjudication on the original petition, the juvenile court determined there was a factual basis for the father's stipulation to the allegations in the petition, based on a predisposition evaluation which was not then received in evidence. The court did so to protect both the child's and her father's interests in confidentiality. Upon finding the child to be a child within the meaning of § 43-247(3)(a), the court made an immediate dispositional inquiry. Again, with the court, the State, and the guardian ad litem all citing concerns of confidentiality, disposition was had off the record. No verbatim record was made of subsequent further dispositional hearings, although they are evidenced by the court's findings and orders. No explanation is offered as to why a record of these proceedings was not made.

In *State v. Norwood*, 203 Neb. 201, 204-05, 277 N.W.2d 709, 711 (1979), this court indicated that "[a] court must take judicial notice of its own records in the case under consideration" and that it "has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined." Like the case at bar, *Norwood* involved a juvenile court's taking judicial notice of its prior proceedings in a termination of parental rights adjudication. Under the

aforementioned rules, this court found no error in the court's consideration of its earlier proceedings in the *Norwood* case. The rules relied on in *Norwood* imply that exhibits considered in prior proceedings may be noticed pursuant to an examination of its records of those proceedings. In effect, that was what the juvenile court attempted to do in this case.

Nevertheless, it is questionable whether the juvenile court could take judicial notice of the exhibits in question in this case under the authority of *Norwood, supra*. In this case, there is no verbatim record of the dispositional hearings at which the exhibits were allegedly considered.

In *In re Interest of D.*, 209 Neb. 529, 531, 308 N.W.2d 729, 731 (1981), we stated that in termination cases, because the record must establish by clear and convincing evidence the basis for termination of parental rights, observance of more formal court procedures is "encouraged." In that case, the evidence before the court consisted mostly of letters and unsworn testimony which was not objected to. As such, it was properly before the court. Nevertheless, this court expressed concern that there was no opportunity for cross-examination of the authors of the various reports to determine the bases of their conclusions.

Absent a verbatim record of the prior dispositional proceedings in this case, there is no foundation evidence for the questioned exhibits and no evidence that there was an opportunity to cross-examine the authors of the exhibits as to their contents, or of their availability to the mother or her counsel prior to the termination hearing. The fact that the juvenile court stated that it had previously considered the exhibits does not alleviate these problems. Because the strict rules of evidence do not apply to dispositional hearings, there are no assurances that the exhibits, even if considered at those hearings, were made available to the mother or her counsel. Neb. Rev. Stat. § 43-283 (Reissue 1984).

The Supreme Court of Iowa has previously set out safeguards for taking judicial notice of CHINA (child in need of assistance) proceedings in subsequent termination proceedings. *In Interest of Adkins*, 298 N.W.2d 273 (Iowa 1980). The safeguards include:

> Papers requested to be noticed must be marked, identified, and made a part of the record. Testimony must be transcribed, properly certified, marked and made a part of the record. Trial court's ruling in the termination proceeding should state and describe what it is the court is judicially noticing.

Id. at 278. The purpose of these safeguards is to ensure a meaningful review. *Id.*

When the State seeks to terminate parental rights, it is required to do so by fundamentally fair procedures which satisfy the requirements of due process. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). Parents in such proceedings have a right to cross-examine adverse witnesses. See, *In re Randy Scott B.*, 511 A.2d 450 (Me. 1986); *G.E.Y. v. Cabinet for Human Resources*, 701 S.W.2d 713 (Ky. App. 1985); *In re Gary U.*, 136 Cal. App. 3d 494, 186 Cal. Rptr. 316 (1982). Cross-examination is a means of exercising the right of confrontation, the purpose of which is "to advance practical concern for the accuracy of the truth determination process . . . ." *State v. Roy*, 214 Neb. 204, 207, 333 N.W.2d 398, 401 (1983).

Where hearsay statements, such as those contained in the exhibits in this case, are admitted over objection without foundation evidence, opportunity to cross-examine the authors, or even any opportunity to view the exhibits prior to their offer at the termination hearing, there is little from which this court can ascertain the reliability or trustworthiness of the exhibits. By taking judicial notice of the exhibits in question, the juvenile court failed to accord the mother her due process right of cross-examination.

Further, the exhibits were clearly hearsay statements. Termination proceedings are subject to the customary rules of evidence applied in nonjury cases. Neb. Rev. Stat. § 43-279(1) (Reissue 1984). The record of the termination hearing does not contain the evidence necessary to justify admission of the exhibits under any exception to the hearsay rule. The guardian ad litem suggests the caseworker's and other reports were admissible under Neb. Rev. Stat. § 27-803(7) (Reissue 1985). However, the record reflects no evidence to satisfy the notice requirements of that section. The exhibits in question were

clearly hearsay and, on the record of this case, were inadmissible as exceptions to the hearsay rule or by way of judicial notice.

The concern for the child's confidentiality exhibited by the juvenile court, the State, and the guardian ad litem is understandable. But it must be remembered that rehabilitative efforts may fail following a § 43-247(3)(a) adjudication. The failure of such efforts may provide the basis for termination of parental rights, where termination is in the child's best interests. § 43-292(6). If the State wishes to rely on evidence from dispositional proceedings to support a termination based on failed efforts at rehabilitation, it must see that a verbatim record is made so that the testimony and other foundation evidence is preserved. Otherwise, it is not possible for this court to make a meaningful review of the proceeding. Separate juvenile courts are courts of record and are not free to shield their actions behind a cloak of secrecy by failing to make a verbatim record of the evidentiary proceedings before them. See Neb. Rev. Stat. § 43-2,111 (Reissue 1984).

In this particular case, any error in receiving the exhibits was not fatal to the juvenile court's determination that the mother's parental rights should be terminated. The court had before it other evidence, in the form of testimony and exhibits from the social file stipulated to by the mother's counsel, which is sufficient to sustain the order of termination.

A termination order is reviewed de novo, and evidence erroneously admitted is not considered. *In re Interest of C.G.C.S.*, 225 Neb. 605, 407 N.W.2d 196 (1987). Such an order must be supported by clear and convincing evidence and should only be issued when there is no reasonable alternative. *In re Interest of J.W.*, 224 Neb. 897, 402 N.W.2d 671 (1987). Where a parent fails to rehabilitate herself within a reasonable period of time, the best interests of the child may require that a final disposition be made without delay. *In re Interest of J.W., supra.*

As previously noted, the various orders entered pursuant to the dispositional hearings required the mother to abstain from the use of alcohol or controlled substances; participate in a Parents United program or its equivalent; participate in

counseling; pay the costs of her child's medical care and therapy; submit to chemical and psychological evaluations; complete a parenting program; submit to a home-study evaluation; obtain and maintain housing suitable for herself and her child; and maintain gainful employment. She was also ordered to have only supervised visitations with her child.

The record shows a lack of compliance by the mother with these orders in several areas.

In regard to the evaluations, the mother was ordered to submit to a chemical evaluation on April 18, 1985, and to an updated psychological evaluation on April 10, 1986. Ronda Newman, the Child Protective Services worker on the case, testified at the September 15, 1986, adjudication hearing that she had advised the mother in August of 1986 of the petition to terminate and of the mother's need to schedule the chemical and psychological evaluations. The mother had indicated that she would schedule the evaluations and, according to Newman, understood that her failure to do so might result in a termination of her parental rights. The mother never responded to Newman's requests that she make appointments for the evaluations and to notify the court workers as to where and with whom they were scheduled. Newman also testified that the mother knew how to contact Newman if she desired assistance.

As to participation in the Parents United program, Janet Guilfoyle, the child's therapist, testified that based on what she had learned through "monthly staffings," the mother's attendance was inconsistent.

In regard to counseling, the evidence indicates that the mother participated in counseling off and on from April 1984 to either June or August of 1986. In exhibit 7, a September 28, 1984, letter addressed to the juvenile probation officer, the mother's counselor in Florida indicated that parenting skills had been discussed in several sessions and that continued counseling on a regular basis would be beneficial if the mother was awarded custody of her child. On March 29, 1985, in a letter marked exhibit 15, the mother's Omaha counselor stated that "[t]here is a lot of work that needs to be done, so I do see [the mother] as having to be in therapy a considerable length of time before a judgement could be made as to her ability to

parent [her child] successfully."

In her own letter of September 24, 1985, the mother revealed that she was suffering from bulimia. The condition had been aggravated by worries about her daughter, finances, and employment. She indicated that she had begun to counsel with a Dr. Smith in Florida, in an attempt to regain her health. Ronda Newman testified she was unable to ascertain the extent of the mother's involvement in counseling with Dr. Smith, as the mother did not sign a release of her records until the records were subpoenaed by the State on August 18, 1986. Those records were not received in evidence for purposes of this adjudication. However, it is clear that the mother had terminated her counseling with Dr. Smith either prior to or during the pendency of the supplemental petition for termination filed on June 26, 1986.

In terms of supervised visitations, it is clear that the mother did participate in some visitations with her daughter when she (the mother) was in Omaha. The child was originally fearful of the visitations. That fear diminished to some extent over time, but Janet Guilfoyle testified that there had not been much change in the quality of the mother's visits with the child. Also, there had been some problems in terms of the child's behavior during and following the visits. Repeated recommendations made to improve their interactions were not utilized by the mother.

The record shows that the mother resided in Florida from at least April to November of 1984. In November 1984, she returned to Omaha. The mother returned to Florida in June of 1985 for health and financial reasons. She did not attend the September 15, 1986, termination hearing.

Janet Guilfoyle testified that if the goal of juvenile proceedings and rehabilitative efforts is reunification, as was the case here, it is almost essential that the parent reside in the area so that the parent can have ongoing contact with the child. Once the mother returned to Florida in June of 1985, there was minimal correspondence between her and her daughter. Prior to the mother's brief stay in Omaha and her subsequent return to Florida, her Florida counselor indicated that it was difficult to emphasize any particular parenting skills with the mother due

to lack of contact with the child.

The mother complains that the termination of her parental rights is, in essence, punishment for her moving to Florida, which allowed her to improve her life. The evidence, however, is clear that the move did not serve to better her relationship with her child. There was little communication or contact subsequent to the move, which the testimony indicates was necessary for successful reunification. A voluntary departure from the state may be viewed as an abandonment of one's children and cannot be used as an excuse for the impossibility of compliance with a court-ordered plan of rehabilitation. *In re Interest of Moen*, 208 Neb. 337, 303 N.W.2d 303 (1981).

Further, the fact of participation in certain elements of the court-ordered plan does not necessarily prevent the court from entering an order of termination where the parent has made no progress toward rehabilitation. A parent is required not only to follow the plan of the court to rehabilitate herself but also to make reasonable efforts on her own to bring about rehabilitation. *In re Interest of C.G.C.S.*, 225 Neb. 605, 407 N.W.2d 196 (1987). In addition to the obstacles to reunification presented by the mother's move to Florida, there is evidence that she has not adequately dealt with her problems in regard to her abuse of her daughter. Her child was originally referred to Janet Guilfoyle because of past abuse by several people, including the mother. In 1984, the mother admitted to her Florida counselor that she had been guilty of abusing her daughter. She made similar admissions to her Nebraska counselor, but denied all but a few instances subsequent to her child's reaching age 1. She also has denied allegations by her child of sexual abuse. In an April 1985 report to the court, the Child Protective Services worker reported that the mother had been fluctuating between admitting and denying any physical abuse of her daughter. Janet Guilfoyle also testified that the mother failed to ever address the allegations of sexual abuse. Additionally, there is evidence that the mother failed to follow recommendations for improving her interactions with her daughter during supervised visitations. Clearly, the evidence shows not only a substantial lack of compliance with the plan but also a lack of progress.

The evidence also supports the determination that it is in the child's best interests to terminate the mother's parental rights. According to Janet Guilfoyle, the child has made great progress in therapy. Nevertheless, it was Guilfoyle's opinion that the child still exhibited some behaviors of an abused child and that, at 10 years of age, she was in crucial need of a permanent placement. Further, Guilfoyle testified that the placement should be in a situation where the child would receive a lot of consistent parenting, nurturing, and stability.

The mother's on-again, off-again relationship with her child has failed to provide the necessary consistency or stability. At one point prior to the mother's departure for Florida in June of 1985, her child indicated that she had four last names, including that of her foster parents and that of her mother. When the mother subsequently left Nebraska, her child was very angry and disappointed.

Combined with the above, evidence of the mother's progress and compliance shows that she will not provide the necessary parental skills and guidance to her child. The mother's lack of contact with her child, her need for long-term counseling, the fact that she had ended counseling at the time of the termination hearing, and her own needs for proper nurturing are all circumstances supporting the juvenile court's determination that it was in the child's best interests to terminate the mother's parental rights.

As we have frequently stated, a child's future need not be subject to the risks of awaiting uncertain parental maturity. *In re Interest of C.G.C.S., supra.* Indefinite foster care is not an acceptable alternative where the evidence suggests the need for a fixed and permanent home. *In re Interest of P.F.*, 222 Neb. 44, 381 N.W.2d 921 (1986).

The child has been a ward of the State since August of 1983. The mother had not had custody of her child for some 2 years prior to that time. After 3 years of rehabilitative efforts the evidence supports the need for permanent placement of the child and shows a lack of rehabilitation by the mother. The court properly entered its order of termination.

Finally, the mother claims that the order of termination was contrary to law because the conditions leading to the

determination that her child was a child within the meaning of § 43-247(3)(a) had nothing to do with her. Thus, she concludes that her parental rights could not be terminated on grounds that reasonable efforts had failed to correct the conditions leading to the determination that her child was a child within the meaning of § 43-247(3)(a). We do not agree.

The fact of the matter is that at the time of the original adjudication, the mother had twice relinquished custody of her child to the father following their divorce. The mother relinquished custody when she went into the Army and, upon leaving the service, returned to Florida to live with her parents instead of returning to her daughter, who was then in the custody of the State. Certainly, the mother's unavailability as a custodial parent at the time of the original adjudication was a condition leading to the determination that the child was "without proper support through no one's fault."

We conclude that the separate juvenile court's order terminating the mother's parental rights is supported by the evidence and was not contrary to law. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT D. SCHRECK, JR., APPELLANT.

409 N.W.2d 624

Filed July 31, 1987. No. 86-1013.

1. **Plea in Abatement: Appeal and Error.** Any error of a district court in a ruling on a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt.
2. **Criminal Law: Intent.** Intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
3. **Convictions: Appeal and Error.** It is not the province of this court on appeal of a conviction to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a guilty verdict returned by a jury must

be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

4. **Constitutional Law: Appeal and Error.** In order for an issue of constitutionality to be considered on appeal it must have been raised properly in the trial court, and if not so raised it will be considered to have been waived.
5. **Constitutional Law: Criminal Law: Statutes.** In order for a defendant to challenge a statute on the ground of vagueness, such defendant must not have engaged in conduct which is clearly prohibited by that statute.
6. _____: _____: _____. Penal statutes must only define a criminal offense with sufficient clarity to enable ordinary people to understand what conduct is prohibited by the statute.
7. _____: _____: _____. Where the language of a statute challenged conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice, the Constitution requires no more.
8. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal, in the absence of an abuse of discretion by the sentencing court.
9. **Sentences: Evidence.** In determining the appropriate sentence, evidence as to a defendant's life, character, and previous conduct is highly relevant.
10. _____: _____. The seriousness of the offense is an important factor in imposing a sentence.

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

Richard L. Kuhlman, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

Following a trial by jury the defendant was convicted of the May 26, 1986, assault in the first degree of Richard A. Porter III in Dodge County. This is a Class III felony under the provisions of Neb. Rev. Stat. § 28-308 (Reissue 1985), which provides for a penalty of from 1 to 20 years' imprisonment, or a $25,000 fine, or both such imprisonment and fine. Following a presentence investigation and sentencing hearing, defendant was sentenced to a term of imprisonment of not less than 5 nor more than 12 years.

Defendant has appealed, and the errors assigned and argued in his brief are (1) the court erred in not sustaining his amended

plea in abatement; (2) the court erred in failing to find the statute under which defendant was charged to be unconstitutionally vague, or, in the alternative, the State failed to prove beyond a reasonable doubt that defendant had violated the statute; and (3) the sentence was excessive.

It is defendant's contention that the preliminary hearing failed to produce facts that a crime had been committed. However, we have repeatedly held that any error of a district court in a ruling on a plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt. *State v. Baker*, 224 Neb. 130, 395 N.W.2d 766 (1986).

There was competent evidence from which the jury could properly have found beyond a reasonable doubt that defendant, without any cause, deliberately went over to the automobile in which the victim was sitting, forced open the door, and, as the victim started to get out of the vehicle, defendant slammed the door on him, pinning the victim between the door and the doorframe. Defendant then viciously struck the victim four times in the jaw, causing a fracture of the arch of the jaw.

The victim testified that he suffered extreme pain as a result of the assault and had to have an operation to wire the arch of the jaw and to place a metal disk on his face. He was hospitalized for 5 days. According to the examining physician, the victim sustained a depressed fracture of the zygoma, or cheekbone. An open reduction of the fracture was performed, which was necessary to prevent a serious permanent disfigurement.

Section 28-308 provides that a person commits assault in the first degree if he intentionally or knowingly causes serious bodily injury to another person. Neb. Rev. Stat. § 28-109(20) (Reissue 1985) defines serious bodily injury as "bodily injury which involves a substantial . . . risk of serious permanent disfigurement . . . ." Intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident. *State v. Tweedy*, 224 Neb. 715, 400 N.W.2d 865 (1987).

Although there was testimony to the contrary, there was sufficient evidence from which the jury properly could have found, as it did, that defendant intentionally or knowingly caused bodily injury to the victim which involved a substantial risk of serious permanent disfigurement. It is not the province of this court on appeal to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a guilty verdict returned by a jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Eggers*, 220 Neb. 862, 374 N.W.2d 36 (1985). See, also, *State v. Tweedy, supra*. Having determined that the evidence was sufficient to permit the jury to find guilt beyond a reasonable doubt, there is no merit to defendant's contention that his plea in abatement was wrongfully denied.

Defendant's challenge of § 28-308 as being vague must also fail. In the first place, defendant did not raise the constitutional issue in the district court. In order for an issue of constitutionality to be considered on appeal it must have been raised properly in the trial court, and if not so raised it will be considered to have been waived. *State v. Kaiser*, 218 Neb. 556, 356 N.W.2d 890 (1984). Secondly, in order for a defendant to challenge a statute on the ground of vagueness, such defendant must not have engaged in conduct which is clearly prohibited by that statute. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). Such factor is not present here.

Penal statutes must only define a criminal offense with sufficient clarity to enable ordinary people to understand what conduct is prohibited by the statute. *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). Furthermore, where the language of a statute challenged conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice, the Constitution requires no more. *Richardson v. City of Omaha*, 214 Neb. 97, 333 N.W.2d 656 (1983). See, also, *State v. Michalski*, 221 Neb. 380, 377 N.W.2d 510 (1985). The language of § 28-308 clearly is not vague.

Finally, defendant complains of the excessiveness of the

sentence. A sentence imposed within statutory limits will not be disturbed on appeal, in the absence of an abuse of discretion by the sentencing court. *State v. Tweedy, supra.* In determining the appropriate sentence, evidence as to a defendant's life, character, and previous conduct is highly relevant. *State v. Dobbins*, 221 Neb. 778, 380 N.W.2d 640 (1986). In this regard, defendant has demonstrated a serious disposition toward antisocial behavior for almost the past 10 years. He has been convicted of two previous felonies for which, in each instance, he was sentenced to a term of imprisonment; he has engaged in prior assaultive behavior which resulted in a term of incarceration; he has been fined or jailed for forgeries, thefts, and bad checks; and he has been found guilty of numerous traffic offenses, including six cases involving driving while his license was suspended, which resulted in jail terms. His actions have demonstrated a total disregard for the law and ordinary rules of social behavior. The crime was a serious one resulting in substantial injury. The seriousness of the offense is an important factor in imposing a sentence. *State v. Swillie*, 218 Neb. 551, 357 N.W.2d 212 (1984).

The sentence in this case was not excessive, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. ROBERT M. SPIRE, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. PUBLIC EMPLOYEES RETIREMENT BOARD ET AL., RESPONDENTS.

410 N.W.2d 463

Filed August 7, 1987. No. 86-819.

1. **Constitutional Law: Statutes.** Statutes are presumed to be constitutional, and all reasonable doubt must be in favor of the statutes' constitutionality.
2. _____: _____. The party challenging the constitutionality of a statute has the burden to show it is unconstitutional.
3. **Constitutional Law: Courts.** Courts must apply and must enforce the Constitution as it is written.

4. **Constitutional Law.** Before construing a constitutional provision, it must be demonstrated that its meaning is not clear and that construction is necessary.
5. _____. If a constitutional provision is construed, its words and terms are to be interpreted in their most natural and obvious sense, although they should receive a more liberal construction than statutes and are not subject to rules of strict construction.
6. **Constitutional Law: Initiative and Referendum: Intent.** The intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined by the words of the initiative amendment itself.
7. **Constitutional Law: Statutes: Legislature.** L.B. 1129, adopted by the Nebraska Legislature on April 16, 1986, is in contravention of the provisions of Neb. Const. art. III, § 7, and as such is invalid and unenforceable.

Original action. Judgment for relator.

Robert M. Spire, Attorney General, and L. Jay Bartel, for relator.

Steven E. Achelpohl of Schumacher & Gilroy, for respondents.

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

PER CURIAM.

This is a declaratory judgment action, brought by the Attorney General of the State of Nebraska, as relator for the State of Nebraska, challenging the constitutionality of 1986 Neb. Laws, L.B. 1129, passed by the Nebraska Legislature on April 16, 1986, over the veto of then Governor Robert Kerrey. Respondents are public officers delegated duties to implement the law, including then Treasurer, now Governor, Kay Orr. Because this is a civil action in which the State is a party and because this action involves a matter relating to the revenue of the State, is of great public importance, requires a prompt answer, and does not involve any disputed questions of fact, we granted authority to the Attorney General to file an original action in the Supreme Court pursuant to Neb. Const. art. V, § 2, and the provisions of Neb. Rev. Stat. § 24-204 (Reissue 1985).

We have now reviewed the law in question, considered the arguments of the parties, and examined the applicable authorities. We are of the opinion that L.B. 1129 is in

contravention of the provisions of Neb. Const. art. III, § 7, and as such must be declared invalid and unenforceable.

L.B. 1129, which consists of 20 specific sections, attempts to create a pension program to provide retirement benefits to members of the Nebraska Legislature. Section 3 of the law establishes a retirement system to be known as the Legislators' Retirement System. Section 5 provides that the system is to be administered by the Public Employees Retirement Board, and § 9 creates a fund known as the Legislators' Retirement Fund. Under provisions of § 12 of the act, a member of the Legislature is eligible for a retirement allowance, upon his or her written application, if he or she has attained the age of 65, has completed 5 or more years of "creditable service," and is no longer a member of the Legislature. "Creditable service" is defined under the provisions of § 4 of the act to mean "all years of service in the Legislature for any person who becomes a member of the system." The act further provides that upon retirement eligible members shall receive a monthly allowance equal to $38 times the number of years of his or her creditable service, subject to certain other limitations set out in the act. Finally, § 20 provides for an appropriation of $177,500 for the period of July 1, 1986, to June 30, 1987, for payment into the Legislators' Retirement Fund.

Each side cites us to a series of legal principles to be used when attempting to examine the constitutionality of a legislative act. We are reminded that statutes are presumed to be constitutional, and all reasonable doubt must be in favor of the statutes' constitutionality. *State v. Mayhew Products Corp.*, 211 Neb. 300, 318 N.W.2d 280 (1982). The party challenging the constitutionality of a statute has the burden to show it is unconstitutional. *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984). Courts must apply and must enforce the Constitution as it is written, *State ex rel. Meyer v. Steen*, 183 Neb. 297, 160 N.W.2d 164 (1968), and constitutional provisions are not open to construction as a matter of course, *Gaffney v. State Department of Education*, 192 Neb. 358, 220 N.W.2d 550 (1974). Before construing a constitutional provision, it must be demonstrated that its meaning is not clear and that construction is necessary. *State ex*

rel. School Dist. of Scottsbluff v. Ellis, 168 Neb. 166, 95 N.W.2d 538 (1959). If a constitutional provision is construed, its words and terms are to be interpreted in their most natural and obvious sense, although they should receive a more liberal construction than statutes and are not subject to rules of strict construction. *Nebraska P. P. Dist. v. Hershey School Dist.*, 207 Neb. 412, 299 N.W.2d 514 (1980). The language of the Constitution is to be interpreted with reference to established laws, usages, and customs of the country at the time of its adoption, *State ex rel. Caldwell v. Peterson,* 153 Neb. 402, 45 N.W.2d 122 (1950), and *State v. Sheldon,* 78 Neb. 552, 111 N.W. 372 (1907); yet the terms and provisions of the Constitution "are constantly expanded and enlarged by construction to meet the advancing affairs of men." *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 338, 37 N.W.2d 502, 506 (1949).

We turn first to the specific language of the Constitution which the Attorney General maintains invalidates the provisions of L.B. 1129. It is a section which we have had occasion in recent times to examine. See *State ex rel. Douglas v. Beermann*, 216 Neb. 849, 347 N.W.2d 297 (1984). Specifically, the language in question is found in Neb. Const. art. III, § 7, and reads in relevant part as follows:

> Each member of the Legislature shall receive a salary of *not to exceed* four hundred dollars per month during the term of his office. In addition to his salary, each member shall receive an amount equal to his actual expenses in traveling by the most usual route once to and returning from each regular and special session of the Legislature. Members of the Legislature shall receive no pay nor perquisites other than said salary and expenses . . . .

(Emphasis supplied.)

The question, simply stated, is: Does the granting of a retirement benefit to members of the Legislature constitute either "pay" or a "perquisite" otherwise prohibited by the provisions of Neb. Const. art. III, § 7?

While presented to us in a slightly different context, we did have an occasion to define the terms "pay" and "perquisite" in *State ex rel. Douglas v. Beermann, supra* at 854-55, 347 N.W.2d

at 301-02, where we said:

> Webster's Third New International Dictionary, Unabridged (1968), tells us that "pay," as a noun, in an archaic sense, means "something given in return by way of reward or retaliation"; that it is wages, salary, or remuneration. Black's Law Dictionary 1016 (5th ed. 1979) defines the noun "pay" as meaning compensation, wages, salary, commissions, or fees. . . .
>
> "Perquisite" is defined in Webster's Third New International Dictionary, Unabridged (1968), as casual income or profits; a privilege, gain, or profit incidental to an employment in addition to regular salary or wages; a gratuity or tip; something held or claimed as an exclusive right or possession. Black's Law Dictionary 1027 (5th ed. 1979) defines the word as meaning emoluments, fringe benefits, or other incidental profits or benefits attaching to an office or position. We have previously, in *State v. Sheldon*, 78 Neb. 552, 111 N.W. 372 (1907), defined perquisite as a gain or profit incidentally made from employment in addition to regular salary or wages. In that case we held that a residence provided by the state for occupancy by the Governor, at the place he was required by law to live, was not a "perquisite" within the meaning of a constitutional provision that the Governor might not receive any "perquisites of office or other compensation" in addition to his salary. We concluded that perquisite meant a compensation or reward for the performance of an official duty. [Citations omitted.]

We concluded in *State ex rel. Douglas v. Beermann, supra* at 855-56, 347 N.W.2d at 302, by saying:

> Therefore, the first 14 words of the third sentence of the constitutional provision in question, "Members of the Legislature shall receive no pay nor perquisites other than said salary," given their most natural and obvious meaning, say that Nebraska's legislators shall receive no wages, remuneration, compensation, fees, profit, or gain incidental to their office other than the salary mandated in the first sentence of the section.

We concluded that by reason of the provisions of Neb.

Const. art. III, § 7, a legislator could only receive $400 per month by way of salary and be reimbursed for expenses actually incurred in the performance of the legislator's official duties. In view of the fact that the moneys to be reimbursed to the legislator in the performance of official duties for expenses incurred were to be equal to and not in excess of actual moneys paid or incurred by the legislator for and on behalf of the State, the legislator would not be receiving more than $400 per month as salary, plus the return of moneys actually expended on behalf of the State of Nebraska in the performance of official duties.

We are unable to conceive how a retirement benefit awarded a former legislator for "creditable service" can be said not to be within one of the many meanings of either "pay" or "perquisites." Certainly the Legislature could not be making a gift of state money to its former members. The benefit can be nothing other than compensation for past services. Indeed, we have previously held that public employee retirement benefits or pensions constitute deferred compensation for services rendered. *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982); *Gossman v. State Employees Retirement System*, 177 Neb. 326, 129 N.W.2d 97 (1964); *Wilson v. Marsh*, 162 Neb. 237, 75 N.W.2d 723 (1956).

Respondents point to decisions from other jurisdictions which they claim hold to the contrary. As we earlier indicated in *State ex rel. Douglas v. Beermann, supra*, relying on other decisions by other courts which in turn relied upon provisions of other constitutions serves little purpose in determining the meaning of our own specific Constitution.

Nonetheless, a careful analysis of the decisions upon which the respondents rely establishes that they differ from the situation presented by this case. *Knight v. Bd. etc. Employees' Retirement*, 32 Cal. 2d 400, 196 P.2d 547 (1948), reasoned that state legislators were state employees, and a constitutional provision specifically empowering the legislature to provide for the " 'payment of retirement salaries to employees of the State' " modified the constitutional prohibition against legislators' receiving any " 'compensation for their services other than that fixed by the Constitution.' " *Id.* at 401-02, 196

P.2d at 548. Even if Nebraska's legislators are employees of the state, a question not before us and thus not decided, there is no Nebraska constitutional provision which modifies its prohibition against paying our legislators any "pay" or "perquisites" other than the specified salary and expenses.

Boryszewski v Brydges, 37 N.Y.2d 361, 372 N.Y.S.2d 623, 334 N.E.2d 579 (1975), conforms with our analysis by concluding that a pension benefit was compensation earned during a legislator's " 'continuance in office,' " and thus did not violate a constitutional provision prohibiting the receipt of any " 'fees or perquisites of office or other compensation' " except the compensation " 'fixed by law' " to be paid " 'during [a legislator's] continuance in office.' " *Id.* at 366, 372 N.Y.S.2d at 628, 334 N.E.2d at 582-83. *Chamber of Commerce E. Union Cty. v. Leone*, 141 N.J. Super. 114, 357 A.2d 311 (1976), *aff'd on appeal* 75 N.J. 319, 382 A.2d 381 (1978), essentially presented the same problem as faced the *Boryszewski* court. Using the same rationale as did *Boryszewski*, the *Leone* court permitted the payment of retirement benefits.

State ex rel. Todd v. Reeves, 196 Wash. 145, 82 P.2d 173 (1938), has no relevance to our inquiry. Therein, the Constitution provided that a legislator could not be elected to any office " 'the emoluments of which shall have been increased, during the term for which he was elected.' " *Id.* at 148, 82 P.2d at 174. The *Reeves* court held that the adoption of a retirement plan for judges was not an "emolument"; thus, one who had been a legislator when the plan was adopted could seek election as a judge. In so ruling, the court said the word "emolument" implied actual pecuniary gain, rather than some imponderable and contingent benefit. There is nothing imponderable and contingent about paying a specified monthly allowance such as is contemplated by the plan before us. It should also be noted that the *Reeves* court specifically avoided deciding whether the retirement plan was a pension, adjusted or deferred compensation, or insurance.

The West Virginia Constitution prohibited paying legislators any "allowance or emolument" other than the salary and expenses specified in the Constitution. Yet *Campbell v. Kelly*,

202 S.E.2d 369 (W. Va. 1974), held that the legislators' pension system constituted neither an "allowance" nor "emolument." In reaching that determination, the *Campbell* court noted it was dealing with language adopted in 1872, at which time 64 percent of the adult labor force was engaged in agriculture, there were no state pension plans in the country, and private pension plans were very rare. The *Campbell* court thus concluded that pension plans could not have been within the contemplation of the framers of the Constitution. The obvious distinction is that we are not dealing with 1872 language. Although it is true the Nebraska language prohibiting legislators from receiving any "pay" or "perquisites" other than the sums otherwise specified predated the 1934 initiative, and first appeared in Neb. Const. art. III, § 4 (1875), the fact remains that such language was retained in 1934. The relevant date therefore is 1934, and the record is silent as to the situation which then prevailed with respect to pension plans. More fundamentally, the rationale used by the *Campbell* court overlooks that, irrespective of whether the 1872 framers of the West Virginia Constitution contemplated pensions, they clearly stated that legislators were to receive nothing other than the sums specified in the Constitution. The *Campbell* court simply ignored that direction. Moreover, this jurisdiction is committed to the rule that the intent of the voters in adopting an initiative amendment to the Nebraska Constitution must be determined by the words of the initiative amendment itself, because there is no meaningful way to determine the motivations for submitting the initiative to the electorate or to determine the intent of those voting for its enactment. *Omaha Nat. Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269 (1986).

Nor does the fact that the Legislature has chosen to declare the act constitutional in its preamble alter the true nature of the act. It is true that if the purpose of the act is unclear and the Legislature declares a public purpose which is not invalid on its face, a court will give strong consideration to the intent of the Legislature. See *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979). Yet, if the act is clearly contrary to the Constitution, it is for the courts to make that decision, regardless of the proclaimed legislative

intent. See *State ex rel. Wright v. Pepperl*, 221 Neb. 664, 380 N.W.2d 259 (1986). Such is the instant case.

Respondents have very properly and accurately described the great inequity our decision will bring about. Respondents specifically call our attention to the fact that under the current salary limitations members of the Nebraska Legislature are generally unable to save for old age security and, further, unable to earn credit in an alternate plan where they work because of their legislative duties. We are advised by respondents that, should we declare L.B. 1129 invalid, Nebraska's will be but one of only seven state legislatures which do not have pension programs for their members. While all of this is true and a fact which the people of the State of Nebraska should consider, it is not a basis upon which a court may ignore, nor amend, the provisions of the state's Constitution. Our function is to adhere to the Constitution, regardless of the inequities that may result.

L.B. 1129, adopted by the Legislature on April 16, 1986, is hereby declared to be invalid and unenforceable, and the respondents, and each of them, are hereby enjoined from performing any of the duties or obligations required thereunder.

JUDGMENT FOR RELATOR.

STATE OF NEBRASKA, APPELLEE, V. SAM JACOBS, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. RYAN JACOBS, APPELLANT.
410 N.W.2d 468

Filed August 7, 1987. Nos. 86-854, 86-855.

1. **Plea in Abatement: Appeal and Error.** Any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence.
2. **Venue: Appeal and Error.** A motion to change venue under Neb. Rev. Stat. § 29-1301 (Reissue 1985) is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof.
3. _____: _____. A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity

make it impossible to secure a fair trial.

4. **Venue: Juries.** To secure a change of venue on the basis of pretrial publicity, the defendant must show that the publicity has made it impossible to secure a fair and impartial jury.
5. **Venue.** The factors to be evaluated in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn.
6. **Juror Qualifications.** A juror need not be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court.
7. _____. Under the provisions of Neb. Rev. Stat. § 25-1636 (Reissue 1985), it is not a "cause of challenge that a juror has read in the newspapers an account of the commission of a crime with which a prisoner is charged, if such juror shall state on oath that it is the belief of said person that he or she can render an impartial verdict according to the law and the evidence; and the court shall be satisfied as to the truth of such statement."
8. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1985) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove one's character or to show that one acted in conformity therewith, but makes such evidence admissible for other purposes, including "proof of motive."
9. **Rules of Evidence.** Under the provisions of Neb. Rev. Stat. § 27-403 (Reissue 1985), relevant evidence is to be excluded if its probative value is substantially outweighed by the danger of, among other things, unfair prejudice.
10. **Evidence: Other Acts.** Balancing the need for evidence of other crimes, wrongs, or acts against the possible resulting prejudice is within the discretion of the trial court.
11. **Motions for Mistrial: Appeal and Error.** The determination to declare a mistrial is a matter entrusted to the sound discretion of a trial court, whose ruling will be upheld absent an abuse of that discretion.
12. **Motions for Mistrial.** A mistrial is properly declared 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.
13. **Criminal Law: Evidence: Proof.** To establish an alibi, a defendant must show that at the relevant time he or she was so far removed from the scene of the crime as to render it impossible for him or her to be the guilty party.
14. **Convictions: Appeal and Error.** In determining whether evidence is sufficient in a jury trial to sustain a conviction, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury.
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 the verdict.

16. **Convictions: Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, viewed as a whole, the evidence establishes guilt beyond a reasonable doubt; the State is not required to disprove every hypothesis but that of guilt.
17. **Trial: Evidence: Motions to Dismiss: Appeal and Error.** Denial of a criminal defendant's motion to dismiss is without error where the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant.

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

Stephen A. Scherr of Whelan, Foote & Scherr, P.C., for appellants.

Robert M. Spire, Attorney General, and James H. Spears, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

A jury found defendant-appellant Sam Jacobs guilty of arson in the second degree in violation of Neb. Rev. Stat. § 28-503 (Reissue 1985), and of criminal mischief in violation of Neb. Rev. Stat. § 28-519 (Reissue 1985). The same jury found Sam Jacobs' son, defendant-appellant Ryan Jacobs, guilty of second degree arson. In accordance with the jury's verdicts, the district court adjudged each defendant guilty and sentenced Sam Jacobs to probation for a period of 3 years on the arson conviction and imposed a $250 fine on the criminal mischief conviction. Ryan Jacobs was sentenced to 3 years' probation. On appeal to this court each defendant assigns as errors the trial court's (1) failure to sustain the plea in abatement made by each defendant, (2) failure to grant a change of venue to each defendant, (3) admission of testimony concerning Sam Jacobs' prior conduct, (4) failure to grant a mistrial, and (5) failure to find the evidence insufficient to support the jury's findings of guilt. We affirm.

On Friday evening, August 2, 1985, Sam Jacobs got into a fight with Clinton Wreszinski and Kevin Lukasiewicz. Sam

Jacobs sustained some facial cuts, was treated at a hospital, and wanted charges brought against Wreszinski and Lukasiewicz. William Steele, a policeman for the city of St. Paul, located in Howard County, told Sam Jacobs that after the police finished gathering information on the fight, they would turn the matter over to the county attorney, who would decide if there was a basis upon which to press charges.

Lukasiewicz was a close friend of Scott and Ricky Klinginsmith and lived with their brother, Steve Klinginsmith. Ricky Klinginsmith owned a mobile home located in Howard County and lived there with Jeff Nowak. The mobile home was located 2.9 miles from Sam Jacobs' hog farm, a distance which could be traveled in 4 minutes and 15 seconds if the driver remained within the posted speed limits. Scott Klinginsmith lived with his parents, but Ricky Klinginsmith had given Scott permission to stay at the mobile home with Nowak while Ricky was in Minnesota.

On Saturday, August 3, 1985, Scott Klinginsmith and Nowak left the mobile home around 9 p.m. Because they did not have a key, they did not lock the front door. They drove Nowak's pickup truck and left Scott Klinginsmith's 1973 maroon Pontiac Grand Prix parked about 40 yards away.

Lukasiewicz owned a 1977 Pontiac Grand Prix which also was maroon and which Sam Jacobs knew Lukasiewicz had been driving on the night of the fight. The Lukasiewicz and Klinginsmith vehicles were of the same body style but perhaps differed in the configuration of the headlights, grill, and taillights. In addition, the Lukasiewicz automobile, unlike the Klinginsmith automobile, had a removable glass roof. The Lukasiewicz automobile displayed an "in transit" sticker.

According to his girlfriend, Ryan Jacobs left her house because of a telephone call he received around 9:15 p.m. that Saturday from his mother. Sam Jacobs wanted Ryan Jacobs home "because of the incidents that happened Friday night." When Ryan Jacobs arrived at home, Sam Jacobs asked him to change his clothes, purportedly to go burn musk thistles and shoot rats. Sam and Ryan Jacobs then left in the pickup truck with a rifle and a 4- to 5-gallon can filled with a mixture of diesel fuel and gasoline. A short while later, at 9:45 p.m., Ricky

Klinginsmith's mobile home was reported to be on fire. About 10 minutes after that, Ryan Jacobs was reported to be the victim of severe burns at the Jacobs' farm.

Additionally, Scott Klinginsmith's 1973 maroon Pontiac Grand Prix was found with a smashed windshield and driver's side window. Some blood was found on the driver's side rearview mirror.

Somewhere between 1:45 and 2 a.m., a few hours after the fire, Sheriff Bryer and others were at Sam Jacobs' farm, where Sam Jacobs took them out to a garbage or fire pit. This pit was an earthen hole about 4 feet by 10 feet and about 4 feet deep, which was used for burning garbage. Sam Jacobs told the sheriff that at about 9 p.m., Ryan Jacobs had dumped 4 or 5 gallons of gasoline-diesel fuel mixture into the pit, ignited it, and then fell into the pit at its east wall and came out on the same side. Sam Jacobs said he himself was burned while helping Ryan Jacobs out of the pit. According to Sam Jacobs, he rolled Ryan Jacobs in some grass or weeds near the pit in an effort to extinguish the flames, and he had ripped off Ryan Jacobs' clothes and then threw them into the pit.

Robert Burke, a deputy State Fire Marshal, was of the opinion that there had not been a recent fire in the pit because fresh paper, paper bags, Kleenex, and dried weeds were found on top of the ashes and debris left by a previous fire.

The St. Paul chief of police was also of the opinion that there had been no recent burning in the pit because of the dry grass, paper bags, and tissue paper found on top of old burnings.

The sheriff was also satisfied that there had not been any recent fire in the pit because he found no scuff marks on the wall where Ryan Jacobs was supposed to have come out from the pit, and found no smoke stains or anything that would indicate the intense heat that would radiate from 4 to 5 gallons of gasoline and diesel fuel.

An examination of the grass surrounding the pit showed it was still standing, and it appeared that no one had been rolled in it.

Sam Jacobs later changed his story about which side of the pit Ryan Jacobs was supposed to have fallen into. He also changed his story about the clothes Ryan Jacobs was wearing.

He had earlier said that he pulled off Ryan Jacobs' clothes and threw them into the pit, where they supposedly burned. However, after a search of the pit revealed no trace of any clothing, Sam Jacobs produced a cardboard box of laundered clothes which revealed no signs of having been burned.

The sheriff returned to the pit on August 5, where he took pictures and traced the path that Sam Jacobs said Ryan Jacobs had walked. It was a very difficult walk through the pit, and he left deep impressions, having sunk about halfway up to his knees. Although Sam Jacobs told the sheriff that the pit was in the same condition as the night of the fire, no similar impressions had been observed before.

Meanwhile, the deputy State Fire Marshal had concluded that the mobile home fire was set by a flammable liquid's having been poured onto the floor just inside the unlocked front door and then ignited.

The origin of the blood on the rearview mirror of the Klinginsmith automobile could not be precisely determined; however, laboratory tests did not rule out Sam Jacobs, who had a cut on an arm after the fire, as a possible source. He claimed both that he got the cut in the Friday night fight and that it had to come from something "like a hog panel wire" he brushed off of Ryan Jacobs' pants when rolling his son on the ground. However, a nurse who examined him at the hospital after the Friday night fight said the cut did not exist at that time.

Sam and Ryan Jacobs first assign as error the refusal of the district court to grant their respective pleas in abatement, in that there was no evidence at the preliminary hearing that a crime had in fact been committed, no competent testimony as to the cause of the fire, no evidence to place the defendants in the area of the fire, and no evidence of "any circumstantial nexus between the fire" and their conduct. The controlling principle is that any error in ruling on a plea in abatement is cured by a subsequent finding at trial of guilt beyond a reasonable doubt which is supported by sufficient evidence. *State v. Schreck, ante* p. 172, 409 N.W.2d 624 (1987); *State v. Baker,* 224 Neb. 130, 395 N.W.2d 766 (1986); *State v. West,* 223 Neb. 241, 388 N.W.2d 823 (1986). The issue is thus whether the evidence was sufficient to support the conviction. *State v. Baker, supra.*

Accordingly, resolution of this issue depends on the outcome of the fifth and last assignment of error, which challenges the sufficiency of the evidence. Thus, we need say nothing more about the matter at this point.

In connection with their second assignment of error, the defendants urge that the trial court erred in not granting their respective motions to change venue.

A motion to change venue under Neb. Rev. Stat. § 29-1301 (Reissue 1985), which permits such when it appears "that a fair and impartial trial cannot be had" in the county where the offense was committed, is addressed to the discretion of the trial judge, whose ruling will not be disturbed absent an abuse thereof. *State v. Bird Head,* 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Kern,* 224 Neb. 177, 397 N.W.2d 23 (1986). A trial court abuses its discretion in denying a motion to change venue where a defendant establishes that local conditions and pretrial publicity make it impossible to secure a fair trial. *State v. Kern, supra; State v. Irish,* 223 Neb. 578, 391 N.W.2d 137 (1986). To secure a change of venue on the basis of pretrial publicity, the defendant must show that publicity has made it impossible to secure a fair and impartial jury. *State v. Heathman,* 224 Neb. 19, 395 N.W.2d 538 (1986). The factors to be evaluated in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in the selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn. *State v. Bird Head, supra; State v. Kern, supra; State v. Heathman, supra; State v. Fallis,* 205 Neb. 465, 288 N.W.2d 281 (1980); *State v. Ell,* 196 Neb. 800, 246 N.W.2d 594 (1976). The law does not require that a juror be totally ignorant of the facts and issues involved; it is sufficient if the juror can lay aside his or her impressions or opinion and render a verdict based on the evidence presented in court. *Irvin v. Dowd,* 366 U.S. 717, 81 S.

Ct. 1639, 6 L. Ed. 2d 751 (1961); *State v. Bird Head, supra; State v. Kern, supra; State v. Heathman, supra; State v. Navarrete*, 221 Neb. 171, 376 N.W.2d 8 (1985); *State v. Torrence*, 192 Neb. 213, 219 N.W.2d 772 (1974), *cert. denied* 420 U.S. 928, 95 S. Ct. 1127, 43 L. Ed. 2d 399 (1975). Indeed, Neb. Rev. Stat. § 25-1636 (Reissue 1985) specifically provides that it shall not be a

> cause of challenge that a juror has read in the newspapers an account of the commission of a crime with which a prisoner is charged, if such juror shall state on oath that it is the belief of said person that he or she can render an impartial verdict according to the law and the evidence; and the court shall be satisfied as to the truth of such statement....

In an effort to establish that a fair trial could not be had in Howard County, Sam Jacobs' wife, in a single day and within 4 working days of the scheduled trial, obtained the signature of 52 Howard County residents to affidavits containing the conclusion that Sam Jacobs could not obtain a fair and impartial trial because "many residents of Howard County have formed an opinion concerning the contents of the case which is prejudicial" to him. The affiants did not report their own state of mind but in some unexplained way purported to divine the state of mind of other Howard County residents.

Be that as it may, the record reflects that a local area newspaper initially reported on August 7, 1985, the fact that there had been two fires in Howard County which were suspected to have been deliberately set, one early Friday morning and another Saturday evening. A separate, unrelated article in the same paper reported that an ambulance call had been made for Ryan Jacobs at the Sam Jacobs home. Later news articles factually reported that Sam Jacobs and Ryan Jacobs had each been charged with criminal mischief and arson and that the Howard County commissioners had adopted a resolution appointing a special prosecutor to assist the county attorney in the cases.

Many of the 75 venirepersons, which total included three talespersons, had heard rumors about the cases. As a consequence, approximately 40 percent of 75 venirepersons

were excused by the court because they said they could not be fair and impartial. Nonetheless, in a little more than a day a jury was empaneled and an alternate selected with the exercise of but a single challenge for cause on the basis that one venirewoman could not be impartial. The court sustained the challenge because the woman had signed one of the affidavits mentioned earlier and after some vacillation reasserted she thought the trial should have been moved, although she had not made up her own mind "either way."

Under the circumstances, there was no abuse of discretion in refusing a change of venue, and there is therefore no merit to this assignment.

In their third assignment of error, the Jacobses urge the trial court erred by admitting evidence of the Friday night fight. Their claim is that such evidence was not relevant and was unduly prejudicial to them.

The language of Neb. Rev. Stat. § 27-404(2) (Reissue 1985) prohibits the introduction of evidence of other crimes, wrongs, or acts to prove one's character or to show that one acted in conformity therewith, but makes such evidence admissible for other purposes, including "proof of motive." *State v. Nesbitt, ante* p. 32, 409 N.W.2d 314 (1987); *State v. Clancy,* 224 Neb. 492, 398 N.W.2d 710 (1987). Nonetheless, Neb. Rev. Stat. § 27-403 (Reissue 1985) provides for the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of, among other things, unfair prejudice.

Balancing the need for evidence of other crimes, wrongs, or acts against the possible resulting prejudice is within the discretion of the trial court. *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985); *State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984).

The attempt to explain how Ryan Jacobs came to be burned made relevant the question of whether the Jacobses had a motive to set fire to a mobile home near which there was parked an automobile which could have been mistaken for one seen in Lukasiewicz' possession and which had obviously been deliberately damaged. Under the circumstances, we cannot say the trial court abused its discretion in weighing the need for the questioned evidence as proof of motive against the danger of

prejudice to Sam and Ryan Jacobs and striking the balance in favor of admissibility. There is therefore no merit to this assignment.

The fourth assignment of error claims the trial court erred in not granting Sam and Ryan Jacobs' motions for mistrial "resulting from improper questioning by the prosecuting attorney and prejudicial and improper responses by a witness."

It is true that the sheriff demonstrated a remarkable inability, or unwillingness, to focus upon and limit his responses to the questions asked of him. However, the questions themselves were not improper, and there is no showing that the prosecutor was somehow responsible for the sheriff's wanderings. Moreover, upon the Jacobses' objection, the trial court instructed the jury to disregard the responses. Most importantly, the responses were cut off before any prejudicial statements were made.

The determination to declare a mistrial is a matter entrusted to the sound discretion of a trial court, whose ruling will be upheld absent an abuse of that discretion. *State v. Nesbitt, supra; State v. Clancy, supra.* A mistrial is properly declared 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. *State v. Clancy, supra; State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986).

The record fails completely to establish such event. Consequently, the assignment is utterly without merit.

In their ultimate assignment, Sam and Ryan Jacobs argue that the evidence is insufficient to support their convictions and that the trial court thus erred in failing to sustain their respective motions for dismissal.

The thrust of this argument, and of the defense relied upon at trial, is that neither Sam nor Ryan Jacobs could be guilty as charged because each proved an alibi; that is, according to them, each proved he was at Sam Jacobs' fire pit at the relevant time and thus could not have been at the scene of the crimes.

To establish an alibi, a defendant must show that at the relevant time he or she was so far removed from the scene of the crime as to render it impossible for him or her to be the guilty

party. See, *State v. El-Tabech*, 225 Neb. 395, 405 N.W.2d 585 (1987); *Commonwealth v. Warrington*, 230 Pa. Super. 332, 326 A.2d 427 (1974).

The mobile home and damaged automobile were located but a brief span of time away from Sam Jacobs' home. Although the Jacobses claimed Ryan Jacobs was burned in the fire pit and rolled on the grass surrounding it to extinguish the flames, there were photographs of dry, unburned paper and other debris in the pit, and testimony from which the jury could reasonably conclude there in fact had been no recent fire in the pit and that no one had been rolled in the grass around it. Thus, the jury could reasonably conclude the Jacobses were not where they said they were at the time the crimes were committed. That, coupled with the evidence of the Jacobses' motive for revenge against Lukasiewicz, the presence at the scene of the fire of an automobile which could be mistaken for one seen in Lukasiewicz' possession, and the fact that the mobile home fire showed the presence of an accelerant, is adequate to support the jury's verdicts and the judgments entered pursuant thereto.

As we have so often said, in determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on the credibility of witnesses, evaluate explanations, or reweigh evidence presented to the jury. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. *State v. Nesbitt, ante* p. 32, 409 N.W.2d 314 (1987); *State v. Bird Head,* 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Walker,* 225 Neb. 794, 408 N.W.2d 294 (1987); *State v. El-Tabech, supra.* Moreover, one accused of a crime may be convicted on the basis of circumstantial evidence if, viewed as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. *State v. Nesbitt, supra; State v. Bird Head, supra; State v. El-Tabech, supra.* In a prosecution in which the State introduces competent evidence which, if believed by the jury, is sufficient to establish all elements of the crimes charged against the defendant, denial of the defendant's motion to dismiss is without error. *State v. West*, 223 Neb. 241, 388 N.W.2d 823 (1986).

The record failing to sustain the errors assigned, the judgments of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. AGINALDO ALVARADO, SR., APPELLANT.
410 N.W.2d 118

Filed August 7, 1987. No. 86-998.

1. **Motions for Mistrial: Appeal and Error.** A motion for a mistrial is addressed to the sound discretion of the trial court, whose ruling will not be reversed on appeal in the absence of an abuse of that discretion.
2. **Juries: Discrimination: Proof: Prosecuting Attorneys.** A defendant may make a prima facie case of purposeful race discrimination in the selection of the jury solely on evidence of the prosecutor's exercise of peremptory challenges.
3. _____: _____: _____: _____. Once a prima facie case of purposeful race discrimination has been established by the defendant, the burden shifts to the State to show a neutral explanation for its challenge of the jurors in question. The prosecutor is required to articulate a neutral explanation related to the case to be tried.
4. **Trial: Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** The trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous.
5. **Trial: Juries: Discrimination: Proof: Prosecuting Attorneys.** The trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose.

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

Robert L. Gridley of Atkins Ferguson Zimmerman Carney, P.C., for appellant.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

The defendant, Aginaldo Alvarado, Sr., was charged by information with (1) assault on a peace officer, (2) resisting arrest, and (3) obstructing a peace officer. He pleaded not guilty to all three counts.

On October 27, 1986, the case came on for jury selection. Twenty-four prospective jurors were examined on voir dire by the court and counsel for both parties. Both the State and defense counsel passed the jury for cause. Each party then exercised peremptory challenges. The State's third and fifth strikes, respectively, were Thomas Patton, referred to in the record as an "Indian," and Ignacia Diaz, a "Mexican American."

At the conclusion of the peremptory challenges, defense counsel moved for a mistrial, claiming that the State had illegally used its peremptory challenges to systematically strike minorities from the jury. The State responded that it had legitimate reasons for striking both Patton and Diaz from the jury. The court found no systematic discrimination under the circumstances and overruled the motion for a mistrial.

After trial to the jury, the defendant was found guilty of all three counts.

On November 5, 1986, Alvarado filed a motion for new trial, claiming, inter alia, that the trial court had erroneously overruled his motion for a mistrial. Alvarado argued that under *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the State's striking of Diaz by way of peremptory challenge established a prima facie case of purposeful discrimination which the State had failed to rebut. The prosecutor responded that he would stand on his previously stated reasons for excluding both Patton and Diaz.

The trial court overruled the motion for new trial on all grounds after determining that under *Batson, supra,* 1 strike out of 24 jurors could not serve to establish a case of purposeful discrimination. Alvarado was subsequently sentenced to imprisonment for 15 months on count I and to 6 months each on counts II and III, all sentences to run concurrently, and with credit for 7 days in jail.

On appeal, Alvarado contends the trial court erred in: (1)

failing to sustain his motion for mistrial; (2) failing to sustain his motion for new trial; and (3) failing to uphold his constitutional rights as guaranteed by the equal protection clause of the 14th amendment to the U.S. Constitution, as interpreted and applied by the Court in *Batson v. Kentucky, supra.*

Recently, in *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987), this court applied the guidelines set out in *Batson v. Kentucky, supra*, to determine whether the State had purposefully discriminated on the basis of race by using its peremptory challenges to strike all black members from a jury panel. In *Batson, supra*, the Court held that a black defendant is denied equal protection of the law when the State puts him on trial before a jury from which members of his race have been purposefully excluded. It also held that a defendant may make a prima facie case of purposeful race discrimination in the selection of the jury solely on evidence of the prosecutor's exercise of peremptory challenges at the defendant's trial.

According to *Batson, supra* at 96, to establish such a prima facie case

> the defendant first must show that he is a member of a cognizable racial group [citation omitted] and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." [Citation omitted.] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.

Once a prima facie case has been established by the defendant, the burden shifts to the State to show a neutral explanation for its challenge of the jurors in question. *Batson, supra.* While this explanation need not rise to the level of that required to justify a

challenge for cause, the State may not rebut the defendant's prima facie case by stating that jurors of the defendant's race were struck based on an intuitive judgment that they would be partial to the defendant because of their shared race. *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The prosecutor also may not rebut the defendant's case by merely denying "that he had a discriminatory motive or 'affirm[ing] [his] good faith in individual selections.' " *Batson, supra* at 476 U.S. at 98 (quoting *Alexander v. Louisiana,* 405 U.S. 625, 92 S. Ct. 1221, 31 L. Ed. 2d 536 (1972)). Instead, the prosecutor is required to articulate a neutral explanation related to the case to be tried. *Batson, supra.*

On his motion for a mistrial, defense counsel asked that the record reflect that two members of minorities, a Mexican-American (Diaz) and an Indian (Patton), had been peremptorily challenged by the prosecutor. Defense counsel also argued that neither of the two jurors had been questioned regarding any problems or prejudices he or she might have with the case. On the basis of these facts, defense counsel urged the court to declare a mistrial because recent Supreme Court rulings precluded the prosecutor's use of peremptory challenges to strike members of minorities who might identify with the defendant.

The prosecutor responded that he had in fact questioned the panel which included Diaz. He also stated that he had peremptorily challenged Diaz because he had not received her jury questionnaire, which made her an unknown quantity to him regarding her qualifications to sit on the jury. In fact, the record indicates that the prosecutor addressed questions generally to the jury panel, of which Diaz was a member, on several occasions, and addressed her individually on one occasion.

The court overruled the defense motion, stating that it saw "nothing systematic in this situation."

A motion for a mistrial is addressed to the sound discretion of the trial court, whose ruling will not be reversed on appeal in the absence of an abuse of that discretion. *State v. Clancy,* 224 Neb. 492, 398 N.W.2d 710 (1987).

Applying the guidelines set out in *Batson, supra,* we

conclude that the trial court did not abuse its discretion in overruling the defendant's motion. Apart from evidence of the defendant's Hispanic surname, the defendant presented no evidence on the record prior to or at the time of the motion for a mistrial to show that he was in fact a member of a cognizable racial group. As such, the defendant failed to prove the first element of his prima facie case, as set out in *Batson, supra*.

In his motion for new trial, Alvarado alleged, inter alia, that the trial court erred in overruling his motion for a mistrial because the prosecutor had used peremptory challenges to strike all minority members, in violation of *Batson, supra*.

In his argument on that motion, defense counsel stated that both the defendant and Diaz were Mexican-Americans. These statements were not contested by the State. Defense counsel also argued that Diaz had been struck by the State's use of a peremptory challenge. This fact is supported by the record. Defense counsel further contended that the lack of questioning of Diaz by the State was a circumstance which, combined with the other facts, raised an inference of purposeful discrimination. He also maintained that the unavailability of a jury questionnaire for Diaz was not a neutral explanation justifying the strike because she could have been asked the same questions during voir dire.

The prosecutor responded that he would stand on the explanations which he had provided on the motion for a mistrial. He also argued that his statements during voir dire failed to indicate that he was attempting to exclude jurors on the basis of "national origin." Another consideration he cited for striking Diaz from the jury was the fact that she was young, and he feared she might identify with some of the young defense witnesses whom he thought would appear at trial. He reiterated, however, the fact that his primary consideration for challenging Diaz was the fact of his lack of background information regarding her qualifications.

Defense counsel responded that white persons who were the same age as some of the witnesses were left on the jury. He again complained that the lack of a jury questionnaire for Diaz could not justify the strike in light of the State's failure to question her.

The trial court overruled the motion for new trial on the

ground that one strike was insufficient to invalidate the entire jury under the rules announced in *Batson v. Kentucky,* 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

The sustaining or denial of a motion for new trial is, again, a matter left to the sound discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of that discretion. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987). Further, the trial court's determination regarding the existence of purposeful discrimination in the prosecutor's use of his peremptory challenges is a factual determination which this court will reverse only if clearly erroneous. *United States v. Mathews,* 803 F.2d 325 (7th Cir. 1986), *cert. granted in part* 480 U.S. 945, 107 S. Ct. 1601, 94 L. Ed. 2d 788 (1987); *Rodgers v. State,* 725 S. W.2d 477 (Tex. App. 1987).

We assume, without deciding, that defense counsel's uncontested statements regarding the defendant's and Diaz' race were sufficient to meet the defendant's burden of proof as to the first element of the *Batson* test. The question then becomes, Did those facts, combined with the other circumstances in the case, raise an inference of purposeful discrimination, and if so, did the prosecutor successfully rebut the inference by bringing forward a neutral explanation for the strike?

According to the Court in *Batson, supra*, the trial court is to consider all relevant circumstances in deciding whether the defendant has made the requisite showing of discriminatory purpose. A pattern of strikes against persons of the defendant's race or the prosecutor's questions and statements during voir dire were cited by that Court as examples of circumstances which might support or refute an inference of discriminatory purpose. *Batson, supra.*

In this case, there is no pattern of strikes from which such an inference can be raised, as there was only one strike which was relevant to a *Batson* determination. However, a pattern of strikes is not required to show a *Batson* violation. In *Batson, supra* at 476 U.S. at 97, the Court indicated that a pattern of strikes was merely an "illustrative" example of circumstances which might permit an inference of purposeful discrimination. In reaching its determination that a defendant could show

purposeful racial discrimination by evidence of the prosecutor's use of peremptory challenges in his own case, the *Batson* Court stated: " '[A] consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' " *Batson, supra* at 476 U.S. at 95 (quoting *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977)).

A similar interpretation of the *Batson* requirements was adopted by the court in *Rodgers v. State*, which stated at 479:

> Although *Batson* requires a showing that members of appellant's race were removed from the jury, it does not speak to how many members of appellant's race must be struck. [Citation omitted.] There is no quantitative formula with which to gauge peremptory challenges. Such determinations should be based on all relevant circumstances in a particular case.

As such, the trial court in this case erred in basing its determination that there was no showing of purposeful discrimination on the fact that there was only one strike at issue. Nevertheless, we are convinced that no substantial miscarriage of justice resulted, as the trial court's overruling of the motion for new trial was justified on other grounds. See Neb. Rev. Stat. § 29-2308 (Reissue 1985).

Initially, an inference of discrimination was not raised by the prosecution's alleged lack of questioning of Diaz. While it is true that she was addressed by the prosecutor only once individually, she, like the other 23 members of the venire, was subject to the many questions addressed to the panel in general. At one point during voir dire, the prosecutor explained:

> I'm trying to just pick on a few people rather than going through and asking each of you individually these questions. I would trust that if you note something that stands out in your own minds, a problem you might have, I'm trusting you to raise your hand and let me know, if you would. And that will prevent me from having to go through and ask everybody.

Thus, the lack of individual questioning did not necessarily imply an intent to discriminate. In fact, the record reflects that seven other persons on the panel were addressed individually by the State only one time or not at all. The record does not reflect the race of any of these other prospective jurors.

Even if the evidence had been sufficient to raise an inference of purposeful discrimination, the State provided a neutral explanation for the strike of Diaz.

At the beginning of the voir dire, the trial court explained that the purpose of the jury questionnaires was to inform the court and counsel about each juror's background. The court also added: "We'll try to avoid asking those questions which are answered on that questionnaire." Similarly, at the beginning of his questioning on voir dire, the prosecutor stated: "I'll try to avoid asking questions that you've already answered on your sheets, that's exactly the purpose of it, there's no other reason to fill out information questionnaires other than to save some time at this juncture so that we don't have to ask background questions we'd ordinarily ask."

In a footnote to *Batson v. Kentucky,* 476 U.S. 79, 89 n.12, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the Court provided further explanation for techniques used by attorneys to learn information about members of the venire from which the jury is likely to be drawn:

> Prior to *voir dire* examination, which serves as the basis for exercise of challenges, lawyers wish to know as much as possible about prospective jurors, including their age, education, employment, and economic status, so that they can ensure selection of jurors who at least have an open mind about the case.

In *Rodgers v. State*, 725 S.W.2d 477 (Tex. App. 1987), the court held that the prosecutor had provided a legitimate neutral explanation for the peremptory challenge of a black venire member where the prosecutor explained the venire member was struck because she had failed to fully complete the jury form. The court concluded that this strike and several others were justifiable because the neutral explanations were similar to those articulated in other cases. *Rodgers, supra.* It was significant in the other cases that the prosecutor's explanations

related to the outcome of the case and were found to have been exercised in the State's interest of a fair and impartial jury. *Rodgers, supra.*

Without the benefit of Diaz' jury questionnaire, the State, in the case at bar, was limited in its information from which to judge her ability to act as a fair and impartial juror. The prosecutor can hardly be blamed for not asking Diaz those questions during voir dire, as the stated purpose of the questionnaires was to save time at that stage.

The defendant argues that two white members of the panel, who failed to provide juror questionnaires, were allowed to sit on the jury despite the fact that one had been addressed individually only once during voir dire and the other not at all. While the record shows that these two persons did sit on the jury, there is no evidence of their failure to submit jury questionnaires nor of their respective races.

We conclude that the trial court did not abuse its discretion in overruling the defendant's motion for new trial. The judgment is affirmed.

AFFIRMED.

RICHARD CAIN, APPELLEE, V. PAMELA CAIN, APPELLANT.

410 N.W.2d 476

Filed August 14, 1987. No. 85-488.

Divorce: Minors: Names: Appeal and Error. Determination as to the name to be borne by a minor child of parties to a dissolution action is a matter initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind that this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Mark A. Klinker, for appellant.

Donald W. Kleine and Joel L. Klausen of Kleine Law Office, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This action for dissolution of marriage was instituted by Richard Cain, petitioner-appellee, against respondent-appellant, Pamela Cain, who stated in her answer and cross-petition that "she has been known by and has exclusively used the name of Pamela Elvig-Cain." The marriage was dissolved on May 24, 1985. Respondent timely appealed, assigning two errors: (1) The trial court erred in determining that in the best interests of the child of the parties his name should be changed from Timothy John Elvig to Timothy John Cain, and (2) the trial court abused its discretion in setting the level of child support. At the time of oral argument, appellant specifically abandoned her second assignment of error, and it will not be considered herein.

The record shows the following. The parties were first married on April 26, 1980. That marriage was dissolved on May 14, 1981. The parties were again married on May 25, 1984. Appellant left the marital home on July 7 and returned to live with her parents. Appellee instituted this dissolution proceeding on July 18, 1984.

Appellant bore a child on December 8, 1984. She named the child Timothy John Elvig and had that name put on the child's birth certificate. It was determined that appellee was the father of the child. The decree of dissolution restored appellant's maiden name of Elvig and set out in pertinent part "[t]hat the name of the parties' minor child is hereby changed to TIMOTHY JOHN CAIN, and the Respondent is Ordered to take all necessary steps to amend said child's birth certificate reflecting the Order of this Court."

Neb. Rev. Stat. § 71-640.01 (Reissue 1986) provides in part:

> The information pertaining to the name of an infant born in this state and reported on a birth certificate, filled out and filed pursuant to sections 71-601 to 71-648, shall comply with the following:

(1) If the mother was married at the time of either conception or birth of the child, or at any time between conception and birth, the name of such mother's husband shall be entered on the certificate as the father of the child and the surname of the child shall be entered on the certificate as being (a) the same as that of the husband, unless paternity has been determined otherwise by a court of competent jurisdiction, (b) the surname of the mother, (c) the maiden surname of the mother, or (d) the hyphenated surname of both parents.

In *Cohee v. Cohee*, 210 Neb. 855, 860, 317 N.W.2d 381, 384 (1982), we stated: "As we stated previously, the standard to be used in the accomplishment of this task [determining the surname of a child in a divorce action] is the best interests of the child, the same standard used in all cases involving custody and visitation of minor children. § 42-364."

With regard to that standard of review, see, *Clark v. Clark,* 220 Neb. 771, 371 N.W.2d 749 (1985), and *Grace v. Grace,* 221 Neb. 695, 380 N.W.2d 280 (1986). Determination as to the name to be borne by a minor child of parties to a dissolution action is a matter initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record in light of the factors set out in *Cohee v. Cohee, supra*, and affirmed in the absence of an abuse of the trial judge's discretion, keeping in mind that this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.

In reviewing what the court has done in this case, we are unable to find that the trial court abused its discretion. The parents are the two people most concerned with the best interests of the child, and they are unable or unwilling to make that determination. At the prehearing conference, both parties rejected the use of a hyphenated name for the child. The trial court, in its discretion, ordered the surname of the child to be "Cain," perhaps in the hope this on-again-off-again relationship between the parties might be seen as a valid effort at marriage rather than a casual encounter. The trial court did not abuse its discretion in its order.

AFFIRMED.

JANET BITTNER AND DUANE BITTNER, APPELLANTS, V. OTIS W. MILLER, M.D., APPELLEE.

410 N.W.2d 478

Filed August 14, 1987. No. 85-601.

1. **Pleadings: Appeal and Error.** A request to amend pleadings is addressed to the sound discretion of the trial court; absent an abuse of that discretion, the trial court's decision will be affirmed.
2. **Pleadings: Proof.** At certain stages of a proceeding a pleading may not be amended so as to change the issues and quantum of proof as to any issue.
3. **Pleadings: Statutes.** The statute concerning amendments should be liberally construed and amendments permitted where they are proposed at an opportune time and will be in the furtherance of justice.
4. **Trial: Appeal and Error.** An abuse of discretion exists when a ruling of the trial court is untenable such as to deprive a party of a substantial right and deny that party a just result.
5. **Venue: Appeal and Error.** The Nebraska Supreme Court will not disturb the ruling of the trial court on a motion to change venue in a civil action unless an abuse of discretion is shown.
6. **Juror Qualifications.** A party who fails to challenge prospective jurors for disqualification and passes them for cause waives any objection to their selection as jurors.
7. **Juror Qualifications: Physician and Patient: Medical Malpractice.** A past or present patient of a physician defending a malpractice action is not, by that reason alone, disqualified from jury service and may serve when the patient-physician relationship will not interfere with impartial assessment of the evidence and voir dire examination fails to demonstrate any factual basis for rejecting a protestation of neutrality.
8. **Actions: Negligence: Damages.** Negligence is actionable only when it results in damages.

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge. Reversed and remanded for a new trial.

Debra R. Nickels and Robert V. Roach of Welsh, Sibbernsen & Roach, for appellants.

Richard E. Gee, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

This is a medical malpractice case in which the plaintiffs-appellants, Janet and Duane Bittner, wife and husband, allege that the defendant-appellee, Dr. Otis W. Miller,

negligently performed a surgical procedure in that he failed to properly tie Mrs. Bittner's fallopian tubes, thus permitting them to bleed after the incision was closed, and in that during the course of the procedure, he left a surgical sponge in Mrs. Bittner's body. The Bittners also allege that as a proximate result of that negligence Mrs. Bittner suffered extreme shock and required blood transfusions and further surgery, as the result of all of which both she and Mr. Bittner sustained damages. The Bittners appeal from the judgment of dismissal entered pursuant to the jury's verdict and assign as error the trial court's failures to (1) permit them to amend their petition and (2) grant them a change of venue. We reverse and remand for a new trial.

The Bittners' motion to change venue was based on the claims that the smallness of the community, coupled with Dr. Miller's prominent standing in it, the paucity of physicians in the community, the fact that a great number of the jury panel were past or present patients of Dr. Miller, and the fact that a former mistrial of the case had been reported in the local press, established that a fair and impartial jury could not be selected for a trial at Ord in Valley County.

The Bittners "provisionally" passed for cause the 40 members of the jury panel remaining from the 90 originally summoned, "subject to [their] earlier discussions." The discussions referred to, however, are not preserved in the record. In any event, the jury as ultimately empaneled contained nine persons who were past or present patients of Dr. Miller, each of whom had said that such relationship would not interfere with his or her duty to impartially decide the case. The Bittners exercised their six peremptory challenges so as to remove from the jury's composition two past patients of Dr. Miller, one present patient, one who was slightly acquainted with Dr. Miller, one who considered Dr. Miller a friend, and one who had no relationship with Dr. Miller.

The evidence established that on August 13, 1981, Dr. Miller, a physician engaged in family practice at Ord, delivered the Bittners' fourth child at the Valley County Hospital. The next morning Dr. Miller performed sterilization surgery on Mrs. Bittner. Later that afternoon Mrs. Bittner's blood pressure dropped, and she went into a deep and severe shock. To treat

the shock she was given at least three units of blood, administered a drug which temporarily raises the blood pressure, and placed on shock blocks, which elevate the body's extremities so that less blood will travel to them and more blood will reach the heart and other vital organs. Mrs. Bittner's condition stabilized later that evening so that, in Dr. Miller's opinion, surgery to determine the cause of the complications was not necessary.

The next day, Mrs. Bittner felt ill, had fetid breath, and produced no bowel sounds. Dr. Miller diagnosed a paralytic ileus, that is, a paralysis of the intestinal tract. Dr. Miller's treatment of the ileus was unsuccessful, and 2 days later he ordered an x ray. The x ray revealed an abnormally small amount of bowel gas, the presence of fluid, almost certainly blood, and the presence of a surgical sponge which had to have been inserted during the surgery which Dr. Miller had performed, as Mrs. Bittner had not undergone any prior surgeries. Dr. Miller failed to note the presence of the sponge when he examined the x rays, but he nonetheless recommended additional surgery to treat the ileus. Mrs. Bittner's family requested that a specialist be called in for that purpose.

The specialist operated and found bleeding at the site of the earlier surgery, removed the blood which had accumulated, stopped the bleeding, and retrieved the surgical sponge which had been left behind. The specialist told the family Mrs. Bittner's problems were caused by "a bleeder [which had been] left open." Mrs. Bittner then improved and was ultimately discharged from the hospital.

The Bittners' expert witness testified that in his opinion Dr. Miller rendered "sub-standard care post-operatively" (that is, following the sterilization surgery) and that the surgical sponge should have been "removed by somebody." It was his opinion, however, that leaving the sponge in Mrs. Bittner was not "integral to [her] problems." Dr. Miller's expert witness was also of the opinion that leaving the sponge behind did not cause Mrs. Bittner any injury.

The Bittners' expert opined that Mrs. Bittner's complications were caused by bleeding at the site of the sterilization surgery performed by Dr. Miller. Again, Dr. Miller's expert shared this

opinion. However, no witness testified that the bleeding resulted from Dr. Miller's failure to exercise the generally accepted and recognized standard of care or skill in Ord and similar communities.

When the Bittners' expert was asked whether Dr. Miller's management of the shock Mrs. Bittner experienced following the sterilization surgery was appropriate under the circumstances, Dr. Miller objected. He did so on the grounds that "the pleadings say [Dr. Miller] improperly ligated the tube and there is [sic] not pleadings here calling for [alleging] his improper treatment of shock and the question is not relevant," and also because the issue was a "complete and severe surprise" to Dr. Miller. The trial court sustained Dr. Miller's objection, and the Bittners thereupon requested leave to amend their petition by adding the claimed improper management of the shock as an independent and additional specification of negligence. The trial court denied the request on the ground the proposed amendment constituted a substantial change of the Bittners' prior claims. However, the trial court also observed that the "claim is probably included in the present pleadings in the form that you have it. . . . [T]he jury could very well find either way with the pleadings you presently have."

In spite of the denial of leave to amend the petition, Dr. Miller's expert was permitted to testify on direct examination, over the Bittners' objection, that the quality of medical care Dr. Miller rendered to Mrs. Bittner had been "excellent," including his management of the shock.

At the close of all the evidence, the Bittners moved for a directed verdict on the issue of liability. The trial court overruled the motion and submitted to the jury the issues of whether Dr. Miller negligently tied Mrs. Bittner's fallopian tubes and left a sponge in her and the amount of damages resulting therefrom. The jury, by a vote of 10 to 2, returned a verdict in favor of Dr. Miller. One of the two dissenting jurors had been a patient of Dr. Miller over 20 years earlier; the other dissenting juror did not previously know Dr. Miller.

We begin our analysis of the Bittners' first assignment of error, that the trial court erred in overruling their motion to add mismanagement of Mrs. Bittner's shock as an additional

specific act of negligence, by noting that Neb. Rev. Stat. § 25-852 (Reissue 1985) provides in relevant part: "The court may . . . in furtherance of justice, and on such terms as may be proper, amend any pleading . . . by inserting other allegations material to the case . . . ." We have held that permission to amend pleadings is addressed to the sound discretion of the trial court; absent an abuse of that discretion, the trial court's decision will be affirmed. *Christian Servs., Inc. v. Northfield Villa, Inc.*, 222 Neb. 628, 385 N.W.2d 904 (1986); *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984); *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984). We have also said that although at certain stages of a proceeding a pleading may not be amended so as to change the issues and quantum of proof as to any issue, see *Collection Associates, Inc. v. Eckel*, 212 Neb. 607, 324 N.W.2d 808 (1982), the statute concerning amendments should be liberally construed and amendments permitted where they are proposed at an opportune time and will be in the furtherance of justice, *Building Systems, Inc. v. Medical Center, Ltd.*, 213 Neb. 49, 327 N.W.2d 95 (1982).

Thus, the question is whether under the circumstances of this case the trial court's rejection of the proposed amendment constituted an abuse of discretion.

While it is true that the operative petition did not specifically allege Dr. Miller was negligent in the management of Mrs. Bittner's shock, it did allege that as a proximate result of his negligence Mrs. Bittner suffered extreme shock and required treatment therefor, including blood transfusions and additional surgery. Under that circumstance, expanding the claims of negligence to include the management, or treatment, of the shock could not be considered a surprise to anyone.

The inconsistent reasons given by the trial court for denying leave to amend in and of themselves demonstrate that the proposed amendment did not result in surprise. On the one hand, the trial court said the proposed addition would substantially change the claims against Dr. Miller; on the other hand, the trial court said that the claim was probably included in the pleadings as drawn. Both conditions could not exist at one and the same time. The significance of not permitting the

amendment, of course, is that the court could not, and it did not, instruct the jury that mismanagement of Mrs. Bittner's shock was a claimed act of negligence on Dr. Miller's part.

Having prevented the Bittners from adducing evidence on whether Dr. Miller had been negligent in treating the shock, the trial court compounded its error by permitting Dr. Miller's expert witness to testify there had been no negligence in that regard.

For the foregoing reasons, we must conclude that the trial court's ruling denying the Bittners leave to amend their petition is untenable such as to have deprived the Bittners of a substantial right and may have denied them a just result, and therefore constituted an abuse of discretion. *State v. Heaton*, 225 Neb. 702, 407 N.W.2d 780 (1987); *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987).

Because the issue of venue may likely arise in the retrial made necessary by our resolution of the first assignment of error, we consider the Bittners' second assignment.

Except under certain circumstances not relevant to the present case, tort actions against Nebraska residents must be brought in the county where the cause of action arose, where the defendant resides, or where the plaintiff resides and the defendant may be summoned. Neb. Rev. Stat. § 25-409 (Reissue 1985). However, for the convenience of the parties and witnesses, or in the interest of justice, a district court may grant a party's motion to transfer any civil action to the district court for any other county. Neb. Rev. Stat. § 25-410 (Reissue 1985). As with motions to transfer venue in criminal cases, Neb. Rev. Stat. § 29-1301 (Reissue 1985); *State v. Jacobs, ante* p. 184, 410 N.W.2d 468 (1987); *State v. Bird Head,* 225 Neb. 822, 408 N.W.2d 309 (1987); *State v. Kern,* 224 Neb. 177, 397 N.W.2d 23 (1986), we will not disturb the ruling of the lower court on a motion to change venue in a civil action unless an abuse of discretion is shown. *Johnsen v. Parks*, 189 Neb. 712, 204 N.W.2d 804 (1973); *Markel v. Glassmeyer*, 132 Neb. 716, 273 N.W. 33 (1937); *Boyd v. Chicago, B. & Q. R. Co.*, 97 Neb. 238, 149 N.W. 818 (1914); *Hinton v. Atchison & N. R. Co.*, 83 Neb. 835, 120 N.W. 431 (1909).

We also note that a party who fails to challenge prospective

jurors for disqualification and passes them for cause waives any objection to their selection as jurors. See, *Schroll v. Fulton*, 213 Neb. 310, 328 N.W.2d 780 (1983); *Regier v. Nebraska P.P. Dist.*, 189 Neb. 56, 199 N.W.2d 742 (1972). While the fact the "earlier discussions" to which the Bittners refer are not in the record and we therefore cannot determine that their "provisional" passing of the prospective jurors for cause did not waive any objection they may have had to the composition of the jury, see *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987), we do not rest our resolution of the issue presented by this assignment on that ground.

Rather, we rest our conclusion that there was no abuse of discretion in denying a change of venue on the basis that a past or present patient of a physician defending a malpractice action is not, by that reason alone, disqualified from jury service. *Van Skike v. Potter*, 53 Neb. 28, 73 N.W. 295 (1897). See, also, *Scott v. McPheeters*, 52 Cal. App. 2d 61, 125 P.2d 868 (1942). We do not overlook the fact that *Van Skike* and *Scott* involved a single juror whereas three-fourths of the jury in this case was composed of Dr. Miller's past or present patients; the fact remains, however, that each of those past or present patients solemnly declared that the relationship would not interfere with his or her impartiality and that the Bittners' voir dire examination failed to demonstrate any factual basis for rejecting their protestations of neutrality.

In compliance with this court's order, the parties submitted supplemental briefs concerning whether we should note as plain error, under the provisions of Neb. Rev. Stat. § 25-1919 (Reissue 1985) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1986), the trial court's failure to grant the Bittners' motion for a directed verdict on the issue of liability because a surgical sponge was left in Mrs. Bittner's body during the course of the surgery Dr. Miller performed.

While *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969), suggests by way of dictum that leaving a sponge in a patient's body constitutes negligence as a matter of law, the issue is not present in this case. That is so because negligence is actionable only when it results in damages. *Sesostris Temple Golden Dunes v. Schuman, ante* p. 7,

409 N.W.2d 298 (1987); *Floridia v. Farlee,* 201 Neb. 39, 266 N.W.2d 204 (1978). The uncontradicted evidence is that leaving the sponge in Mrs. Bittner's body did not cause any of the complications which followed the sterilization surgery. That circumstance, coupled with the fact that Mrs. Bittner's body had to be reinvaded to stop the bleeding in any event, at which time the sponge was retrieved, means the evidence failed to establish that any of the damages the Bittners may have sustained were proximately caused by leaving the sponge behind.

REVERSED AND REMANDED FOR A NEW TRIAL.

INTERNATIONAL MOVING & STORAGE, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE AND CROSS-APPELLANT.

410 N.W.2d 483

Filed August 14, 1987. No. 85-668.

1. **Eminent Domain: Liability.** There is no vested right in a landowner to the continued flow of traffic by his property, so that where action is taken to reduce or eliminate that flow, such as closing a street or diverting traffic to another street, there is no liability.
2. **Eminent Domain: Damages: Evidence.** In determining the amount of damages which a property owner may recover by reason of a loss of ingress and egress to the property, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, not as independent items of damage, but for the purpose of determining market value of the property before and after the construction of such improvement.
3. **Jury Instructions.** In instructions to the jury, fragments, though open to criticism when considered by themselves, are not necessarily prejudicial to the complaining party if the charge as a whole correctly states the issues and the law applicable to the pleadings and the evidence.

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

A. James McArthur, for appellant.

William G. Blake of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for appellee.

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

KRIVOSHA, C.J.

This is a proceeding in eminent domain brought by the City of Lincoln (City) to acquire certain property owned by the appellant, International Moving & Storage, Inc. (International), for a bridge overpass and street widening project on North 27th Street in the City. The date of the taking was January 20, 1984. A board of appraisers was appointed as provided by law and awarded International damages in the amount of $70,660. International, dissatisfied with the award, appealed to the district court for Lancaster County, Nebraska. Following trial, the jury awarded International damages in the amount of $75,000. International, believing that error had been committed, appealed to this court. We believe that there is no reversible error, and affirm.

While there is a significant and material dispute between the parties as to the amount of damages caused by the taking, there is relatively little dispute with regard to the facts relating to the issues on appeal.

International's property is located on the east side of 27th Street in the City, several hundred feet north of the Burlington Northern railroad tracks and south of Cornhusker Highway, a main east-west highway running near the northern boundary of the City. The specific property owned by International fronts on 27th Street, a north-south arterial in the City. The property in question occupies 200 feet of frontage on 27th Street and, at the time of the taking, was occupied by two buildings constructed parallel to each other, one along the north line of the property and the other along the south side. The buildings were originally constructed by International for the storage of household furnishings, as part of International's moving and storage business, with the first building having been constructed in 1961.

International no longer operates a storage business in the property and has, for some time, rented portions of the

buildings to various tenants, including a motorcycle repair and customizing shop, a carpet cleaner, the University of Nebraska, a gunsmith, a wrecker service, and a body shop and auto repair business.

The taking consisted of a strip of land 32 feet wide along the west side of International's property, together with a temporary easement for use of an additional 10-foot strip for construction purposes. The taking was necessitated by a project to construct a bridge over the Burlington Northern tracks and to widen and improve 27th Street in the vicinity of Cornhusker Highway. As a result of the project, vehicular access off of 27th Street to and from International's property was eliminated.

The evidence discloses that after completion of the project, the elevation of 27th Street will be approximately 11 feet above International's property at the south end and approximately 2.6 feet above the property at the north end. The side of the overpass facing International's property will be solid concrete. A new access to International's property is provided by means of a new street constructed along the east side of the property, thus forcing the back of the property to become the front. The new street is known as the fairgrounds loop and serves as a service road to properties adjacent to the railroad overpass, including International's. It likewise provides an improved access road to the State Fairgrounds, located near the property in question.

International has assigned four specific errors involving two particular matters. Assignments Nos. 1, 2, and 4 relate to testimony sought to be introduced by International with regard to specific traffic counts on 27th Street at or before the time of the taking. Assignment of error No. 3 relates to the giving of instruction No. 7 by the court.

Prior to trial the City filed a motion in limine to prohibit International from introducing any evidence concerning specific traffic counts on 27th Street. Further, during the course of the trial, the district court sustained an objection made by the City with regard to the admission of exhibit 6, a specific traffic count introduced by International, and further sustained objections to offers of proof made by International after the specific objection with regard to exhibit 6 was sustained.

The record does reflect, however, that while the court did not permit evidence of specific traffic counts to be presented to the jury, the court did permit evidence to be presented that 27th Street was a major thoroughfare. Further, the jury was permitted to hear testimony, offered both directly by International and by cross-examining the City's witnesses, regarding the effect that the removal of direct access to 27th Street would have on the property. The jury was further informed that the zoning on the land involved a high-traffic area where visibility and vehicular access were important and that the loss of direct access to 27th Street would make the property less attractive for the higher value commercial uses. The jury was informed by all of the witnesses who testified regarding values that the change of access would decrease the value of the property, and some testified regarding the effect on value by reason of the loss of visibility due to the elevated grade of the new thoroughfare. The jury was further informed by all appraisers that the change in layout, forcing the back of the property to become the front, was a consideration to be taken into account in determining the value of the property after the taking. Additionally, the jury viewed the property and traveled the relevant length of North 27th Street.

International, in its brief, concedes that it has no right to any specific traffic flow, noting: "Plaintiff concedes that there is no vested right in a landowner to the continued flow of traffic by his property so that where action is taken to reduce or eliminate that flow, such as closing a street or diverting traffic to another street, there is no liability." Brief for Appellant at 18. International recognizes that we have so held in a number of decisions, including *Rossitto v. City of Omaha*, 199 Neb. 260, 258 N.W.2d 126 (1977), *Deyle v. State*, 194 Neb. 36, 229 N.W.2d 565 (1975), *Verzani v. State*, 188 Neb. 162, 195 N.W.2d 762 (1972), and *Painter v. State*, 177 Neb. 905, 131 N.W.2d 587 (1964).

International, however, seeks to make a distinction by arguing that the taking did not result in a mere reduction or elimination of traffic but, rather, a denial of access to the existing traffic, and, therefore, the traffic count was relevant evidence which the district court should have permitted

International to offer in arriving at International's damages. In attempting to make this distinction International argues:

> However, that is simply not the situation here. There was neither a reduction of traffic nor a diversion of traffic from North 27th Street. Indeed, the City's own engineer testified that not only would there be no diversion of traffic from this improvement, but that it was anticipated there would be an immediate substantial increase in the traffic along North 27th. The trial court simply misunderstood the issues involved here.

Brief for Appellant at 18.

If, indeed, International was not entitled to damages for the total elimination of traffic, which International concedes, we fail to understand how it could be entitled to damages by reason of the fact that, while the traffic still flows by its property, it is not able to get the specific cars to leave the road and come directly onto its property but, rather, must direct the cars to an alternative means of access.

This is exactly what occurred in *Painter v. State, supra*. The State of Nebraska constructed a median down the middle of a road abutting onto plaintiffs' tavern property. The evidence disclosed that the project would prevent 65 to 70 percent of the tavern's customers from leaving the road and gaining access to plaintiffs' tavern. In refusing to permit plaintiffs to recover damages for the construction of the median, we said at 911, 131 N.W.2d at 591:

> The rule is the same as if the islands had been constructed without the taking of any property by eminent domain. [Citation omitted.]
>
> The situation may be summed up as follows: Property owners abutting upon a public thoroughfare have a right to reasonable access thereto. This right of ingress and egress attaches to the land. It is a property right as complete as ownership of the land itself. But as to damages claimed by reason of a change in the flow of traffic by placing medians in the center of a street, they result from the exercise of the police power by the state and are noncompensable as being incidental to the doing of a lawful act. As such, they are wholly unrelated to the

> taking of the land for the purpose of widening the street and constitute no element of damage to the land remaining after the taking.

A case similar to the instant case is *Gillespie v. City of South Omaha*, 79 Neb. 441, 112 N.W. 582 (1907). Gillespie owned a tract of land abutting a heavily traveled thoroughfare which was closed in order to construct a viaduct. In affirming an award of damages to the property owner, we said:

> In determining the amount of such damages, the jury may consider diversion of travel, inconvenience of access, and diminution of business carried on upon said property, *not as independent items of damage*, but for the purpose of determining the market value of the property before and after the construction of such improvement.

(Emphasis supplied.) (Syllabus of the court.) The building of the bridge which prevented cars from driving onto International's property directly from 27th Street was no different than the construction of a median which prevents cars from getting directly to property located across the median.

International was permitted to introduce evidence regarding the taking of ingress and egress and the loss of access occasioned by the project and was permitted to recover damages by reason thereof. What it was not permitted to do was to offer, as evidence of damages, specific traffic counts. If such evidence had been permitted, International would have been permitted to offer evidence of an independent item for which it was not entitled to recover damages.

The reason that the specific traffic counts were not relevant is because International is not entitled to damages for the traffic flow, but only for the damages caused by reason of the taking of access to the property itself. We believe that the district court committed no error in this regard.

That leaves us then with the last issue: whether instruction No. 7 was in error. Specifically, International contends that the district court erred in instructing the jury that

> [i]n determining this question [the amount of damages] you must not take into consideration any conduct of the defendant that merely has the effect of changing the flow of traffic past the plaintiff's property, or that may require

persons to take a more circuitous or longer route to reach certain points on the plaintiff's property because of traffic regulations.

Again, we are unable to determine how this instruction can constitute error. Not only is the statement a correct statement of the law, see *Painter v. State*, 177 Neb. 905, 131 N.W.2d 587 (1964), but when the entire instruction is read, it is clear that there is no misstatement nor, as contended by International, is it confusing to the jury. Instruction No. 7 in its entirety reads as follows:

INSTRUCTION NO. 7

The right of an owner of property abutting on a street to ingress and egress to and from his premises by way of the street is a property right in the nature of an easement in the street which he cannot be deprived of without compensation for his loss. The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.

The plaintiff contends that it has been denied reasonable access from North 27th Street to its property by the taking of the defendant. The plaintiff is entitled to be compensated if it has been deprived of reasonable ingress to and egress from its property to North 27th Street under all the circumstances shown by the evidence.

In determining this question [the amount of damages] you must not take into consideration any conduct of the defendant that merely has the effect of changing the flow of traffic past the plaintiff's property, or that may require persons to take a more circuitous or longer route to reach certain points on the plaintiff's property because of traffic regulations.

If you find from a preponderance of the evidence that the plaintiff has been deprived of reasonable ingress to and egress from its property under all the circumstances, you should take this fact into consideration in determining the plaintiff's damages under Instruction No. 6. It is not, however, to be considered as a separate element of damage.

> If you do not so find, then you should not take it into consideration in determining the plaintiff's damages.

Instruction No. 7 correctly advises the jury as to what it must find before International is entitled to recover damages by reason of being denied ingress and egress to the street abutting its property. See *Balog v. State*, 177 Neb. 826, 131 N.W.2d 402 (1964). We have regularly and consistently held that " '[i]n instructions to the jury, fragments, though open to criticism when considered by themselves, are not necessarily prejudicial to the complaining party, if the charge as a whole correctly states the issues and the law applicable to the pleadings and the evidence.' " *Phillips Petroleum Co. v. City of Omaha*, 171 Neb. 457, 474, 106 N.W.2d 727, 738 (1960). See, also, *Lansman v. State*, 177 Neb. 119, 128 N.W.2d 569 (1964).

We believe that when all of instruction No. 7 and the other instructions are read together, as they must be, they correctly and accurately reflect the law. There was no error.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE and HASTINGS, JJ., concur in the result.

GARY C. FRERICHS AND DIANE L. FRERICHS, HUSBAND AND WIFE, APPELLANTS, V. NEBRASKA HARVESTORE SYSTEMS, INC., AND A.O. SMITH HARVESTORE PRODUCTS, INC., APPELLEES.

410 N.W.2d 487

Filed August 14, 1987. No. 85-727.

1. **Summary Judgment.** A motion for summary judgment should be granted if the pleadings, depositions, admissions, and affidavits, if any, show that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn from such facts and that the moving party is entitled to judgment as a matter of law.
2. **Courts: Judgments.** A trial court may vacate or modify its judgments within the term of court, but the power to do so rests in the sound legal discretion of the court.
3. **Summary Judgment.** A court may not enter summary judgment on an issue not presented by the pleadings.

4. **Pleadings.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.

Appeal from the District Court for Cedar County: RICHARD P. GARDEN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Law Offices of Robert M. Cook, and Michael T. Brogan of Brogan & Stafford, P.C., for appellants.

David A. Domina of Domina & Gerrard, P.C., and David H. Ptak of Ptak & Schukei, P.C., for appellees.

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

GRANT, J.

Plaintiffs-appellants, Gary C. and Diane L. Frerichs, husband and wife, brought this action in the district court for Cedar County, Nebraska, seeking damages from defendants-appellees, Nebraska Harvestore Systems, Inc., a Nebraska corporation, and A. O. Smith Harvestore Products, Inc., a Delaware corporation, in connection with the purchase of a model 2033 Harvestore grain silo systemized with an attached feeder, for the purposes of storing high-moisture corn and feeding it to dairy animals. Plaintiffs' petition was filed December 16, 1982. Their fourth amended petition, filed May 1, 1985, set out three "causes of action" seeking damages. As will be seen, these "causes of action" are differing theories of recovery, but they will be treated herein as pled.

The first cause of action pled breach of express and implied warranties. It was alleged that defendants had warranted to plaintiffs that the Harvestore storage feeder system would produce 50 pounds of milk per day per cow; that the system was suitable for use by the plaintiffs; and that the defendants would stand behind the system, install it correctly, and make plaintiffs' dairy operation more efficient and profitable. The second cause of action alleged negligence of the defendants in the design and installation of the system as well as the failure to properly test the system or to warn the plaintiffs of the dangerous characteristics of the system. The third cause alleged fraud of defendants in advising plaintiffs that the Harvestore

storage feeder system was safe, efficient, and profitable for plaintiffs' use; would give more production per animal; was oxygen limiting and was superior to concrete structures; and would prevent spoilage of feed. Plaintiffs sought damages of $363,000 on each cause of action.

After the overruling of defendants' demurrers, each filed a separate answer generally denying the allegations of the fourth amended petition and alleging that the statute of limitations had run as to all of plaintiffs' causes of action.

On May 10, 1985, the matter was set for jury trial to begin August 6. On August 5 the court partially sustained defendants' motion in limine and reversed an earlier order of the court which had denied defendants' motions for partial summary judgment. The court then granted partial summary judgment as to plaintiffs' claim as to implied warranty, set out in the first cause of action, and as to negligence, set out in the second cause of action. The court's order stated the evidence conclusively showed the statute of limitations had run on these causes of action.

The matter proceeded to trial on plaintiffs' claims of express warranty and fraud. On the day of the trial plaintiffs moved for a continuance, advising the court that as a result of the granting of defendants' motion, plaintiffs were "surprised and severely prejudiced." This motion was overruled and plaintiffs were directed to proceed with the trial. Plaintiffs elected to stand on their motion for continuance. A jury was selected over plaintiffs' continuing objection. After plaintiffs refused to make an opening statement, defendants made an opening statement. The court then directed plaintiffs "to call your first witness." Counsel for plaintiffs then stated before the jury that "the plaintiffs, at this time, are unable to offer any evidence and therefore regretfully and respectfully rest." Defendants then moved for a directed verdict. Defendants' motion was sustained, and the district court dismissed plaintiffs' fourth amended petition.

Plaintiffs timely appealed to this court, assigning as error that the trial court erred in granting partial summary judgment and determining the statute of limitations had run on plaintiffs' first and second causes of action, in granting such motion sua

sponte after initially overruling the motion, in sustaining defendants' motion in limine and motion for directed verdict, and in failing to sustain plaintiffs' posttrial motions. For the reasons hereafter stated, the judgment of the district court for Cedar County is affirmed in part and reversed in part.

The pertinent procedural background in the record before us shows the following. On May 10, 1985, the trial court continued the trial, which had been set for May 20, and set the case for trial on August 6. On May 8, 1985, defendant Nebraska Harvestore had filed its motion for partial summary judgment, seeking judgment on plaintiffs' first cause of action (breach of warranty) and third cause of action (fraud). A motion seeking the same relief was filed by defendant A. O. Smith on May 28, 1985.

A hearing was held on the defendants' motions for partial summary judgment on June 7, 1985. On July 30, 1985, the court found that genuine fact issues existed and overruled defendants' motions for partial summary judgment.

In the meantime, on July 17, 1985, defendants had filed a motion in limine seeking to exclude certain evidence listed generally in 14 paragraphs in the motion.

On August 2, 1985, a hearing was held on defendants' motion in limine. Defendants submitted six exhibits in support of their motion. Counsel for plaintiffs then inquired if plaintiffs' exhibits should be offered in evidence and informed the court that 527 exhibits had been submitted to the bailiff to be marked. Plaintiffs then offered "[e]xhibits 1 through 527 of the plaintiffs' case because it is only by reference to all of those items that this Court may reach a determination as to whether that evidence of the evidence as suggested by Mr. Domina would be properly excluded."

Defendants' exhibits 1 through 6 and plaintiffs' exhibits 7 through 13 (apparently with reference to the motion in limine) were received, and exhibits 1 through 527 were offered in opposition to the motion in limine and were "rejected." The motion was taken under advisement. Different exhibits 1 through 12 had previously been received at the June 7, 1985, hearing on defendants' motions for partial summary judgment.

It is at this point that we should note the wisdom (at least in this case) of Neb. Ct. R. of Prac. 5F(3) (rev. 1986), which provides in part: "Exhibits are to be marked in numerical order, irrespective of the party producing them." In this case, at this point, we are faced with 12 exhibits, numbered 1 to 12, on defendants' motions for partial summary judgment; 13 exhibits, numbered 1 to 13, submitted on defendants' motion in limine; and 527 exhibits, numbered 1 to 527, in response to defendants' motion in limine. To say the least, accurate references to exhibits numbered below 13 are difficult.

On August 5, 1985, the court informed the parties that "I find that I was in error in overruling the motion for summary judgment that insofar as it relates to the issue of statute of limitations on the implied warranty theory of the plaintiffs." After the court directed defendants' counsel to prepare a journal entry, the following colloquy occurred:

> MR. COOK [plaintiffs' counsel]: May I have one point of clarification.
>
> THE COURT: Yes.
>
> MR. COOK: With respect to the reversal on the summary judgment, would that also go, may I inquire of the Court, to negligence?
>
> THE COURT: It would.
>
> MR. COOK: May I ask that the Court include that. I have to explain to my clients exactly what we have left.
>
> THE COURT: Surely. I think what you have left is any express warranty that go to future performance of the —
>
> MR. COOK: The Court's order this morning excludes implied warranty as well as negligence?
>
> THE COURT: I will so state. I will reverse myself on the motion for summary judgment relating to the statute of limitations on the negligence claim. I find that there is no genuine issue as to any material fact and that as a matter of law the defendants are entitled to judgment on the negligence claim set forth in plaintiffs' fourth amended petition, for the reason that more than four years have elapsed since the system was placed in use on July 31, 1978 by the plaintiff and the filing of this action on December 16, 1982.

The trial court after reconsideration thus granted, in part, defendants' motions for partial summary judgment after determining that there was no dispute as to any material fact and that defendants were entitled to judgment as a matter of law on the fact that the statute of limitations had run on plaintiffs' implied warranty theory. The court also granted summary judgment for defendants on plaintiffs' negligence theory. Plaintiffs contend that the applicable statute of limitations had not run and in any event it was error for the court to reverse its earlier order denying defendants' motion for summary judgment because such action constituted a ruling, sua sponte, on defendants' motion for summary judgment. Plaintiffs contend such action is beyond the jurisdiction of the trial court.

Compounding the problem before us is the fact (not mentioned in the parties' briefs) that defendants made no motion seeking partial summary judgment as to plaintiffs' second cause of action alleging negligence. As set out above, defendants did specifically seek partial summary judgment as to plaintiffs' first cause of action (breach of warranty) and third cause of action (fraud).

We consider that the question as to the court's granting a partial summary judgment on the negligence issue is before us because, although plaintiffs have not specifically addressed the question of how their negligence theory was ruled on when there was no motion addressing that issue, plaintiffs have assigned the following error: "Whether a District Court commits an abuse of discretion by granting a partial summary judgment in favor of a party sua sponte."

Insofar as that assignment is directed to the question whether a district court may reverse its order without the filing of a new motion, the contention is without merit. A trial court may modify or vacate its judgments within the term of court, but the power to do so rests in the sound legal discretion of the court. *Sargent Feed & Grain Co. v. Anderson*, 216 Neb. 421, 344 N.W.2d 59 (1984). Such discretion must be exercised reasonably and not arbitrarily, depending upon the facts and circumstances as shown by the record. *Gutchewsky v. Ready Mixed Concrete Co.*, 219 Neb. 803, 366 N.W.2d 751 (1985). The record shows

the trial court vacated its earlier order overruling the motions for summary judgment because the trial court determined, after further reflection, that the evidence conclusively showed the applicable statute of limitations as to implied warranty had run. We find no abuse of the trial court's discretion in correcting an earlier order that the court determined was conclusively shown to be incorrect.

The problem of the exercise of the court's discretion in disposing of plaintiffs' cause of action alleged under a negligence theory by way of summary judgment is different. It is true that possible disposition of plaintiffs' negligence claim was injected into the case by plaintiffs in the colloquy set out above. It is also clear, however, that no motion had been made by either defendant as to summary judgment on plaintiffs' negligence claim. The court in disposing of the negligence theory was not acting on a motion submitted and did not have the benefit of an adversary hearing on that issue. Examination of the fourth amended petition shows there may be issues as to alleged negligent acts which might have occurred after July 31, 1978. The court was acting "sua sponte" in the truest sense and was not, as with the motion for summary judgment based on implied warranty, acting to correct a ruling on a motion that had been properly submitted.

We have stated "that the summary judgment procedure is purely statutory and that a motion for summary judgment requires compliance with all the statutory requirements." *Curley v. Curley*, 214 Neb. 780, 783, 336 N.W.2d 103, 105 (1983). There is a clear difference in changing a ruling on a motion properly filed and submitted and in ruling on a motion never made. A court may not enter a summary judgment on an issue not presented by the pleadings. Accordingly, the cause must be remanded for further proceedings on plaintiffs' claim of negligence only.

With regard to plaintiffs' assignment of error on the merits of the court's ruling on the issue of implied warranty, we find the plaintiffs' contention in that regard is without merit. We have held that the purpose of summary judgment is to pierce sham pleadings and dispose of cases where there is no genuine claim or defense. *Draemel v. Rufenacht, Bromagen & Hertz,*

Inc., 223 Neb. 645, 392 N.W.2d 759 (1986). A motion for summary judgment should be granted if the pleadings, depositions, admissions, and affidavits, if any, show that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn from such facts and that the moving party is entitled to judgment as a matter of law. The rules as to the granting of summary judgment have been applied to determinations as to the running of the applicable statutes of limitations. *Seagren v. Peterson,* 225 Neb. 747, 407 N.W.2d 790 (1987).

To determine whether the partial summary judgment was appropriate in the case at bar we must determine if there is any genuine dispute as to facts showing that the statute of limitations has run on plaintiffs' breach of implied warranty claim. When the statute of limitations begins to run must be determined from the facts of each case. Generally, a cause of action accrues and the statute begins to run when the aggrieved party has the right to institute and maintain a suit even though the plaintiff may be ignorant of the existence of such cause of action. *Mangan v. Landen*, 219 Neb. 643, 365 N.W.2d 453 (1985). Neb. U.C.C. § 2-725(1) (Reissue 1980) provides that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." Section 2-725(2) further provides that "[a] cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made . . . ." See *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

In the case at bar, the record clearly shows without dispute that the Harvestore storage feeder system about which plaintiffs complain was purchased in May of 1978 and placed in use on July 31, 1978. Plaintiffs' original petition in this matter was filed on December 16, 1982, more than 4 years after tender of delivery was made. In the deposition of plaintiff Gary Frerichs, plaintiff stated, with regard to a decline in milk production, that the decline was probably "five pounds in the first two months, five pounds per cow." There was no factual dispute about the time of the discovery of the alleged breach.

Plaintiffs complained about the system within 2 months of its installation. It was not error for the district court to grant summary judgment as to plaintiffs' cause of action based on breach of implied warranty.

Plaintiffs' next assignment of error is "[w]hether the District Court abused its discretion by granting a Motion in Limine, thereby excluding evidence on the basis of an asserted lack of foundation or basis in fact for such evidence." To set out such a statement is to demonstrate its fallacy. A motion in limine is not to be used to obtain a final ruling on the ultimate admissibility of evidence. As stated in *State v. Tomrdle*, 214 Neb. 580, 585, 335 N.W.2d 279, 283 (1983):

> A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. Cf. *State v. Bennett*, ____ R.I. ____, 405 A.2d 1181 (1979). As explained in *Lagenour v. State*, 268 Ind. 441, 450, 376 N.E.2d 475, 481 (1978): "[I]t is not the office of a motion *in limine* to obtain a final ruling upon the ultimate admissibility of evidence . . . but is rather to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to a jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself." As noted in *Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974): "It [the motion in limine] serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of trial. . . . It is not a ruling on evidence and should not, except on a clear showing, be used to reject evidence. It adds a procedural step to the offer of evidence."

In this case it appears that defendants were trying to limit evidence generally on the basis such evidence is irrelevant, or circumstantial, or without foundation. A shotgun approach in marking 527 exhibits is submitted as a defense to a shotgun motion in limine with 14 paragraphs. The trial court informed the parties that the disposition of defendants' motion was not to be controlled by "a mini trial of the issues." The court "rejected" plaintiffs' 527 exhibits in that connection.

The ruling on defendants' motion in limine is not reviewable in the procedural context of this case. There was literally nothing before the court to rule on with regard to evidence. There was no evidence offered by plaintiffs at the trial. There was no offer of proof of any fact the plaintiffs wished to submit to the jury. The only possible ruling the court could make after plaintiffs rested without adducing evidence was to grant defendants' motion for directed verdict.

A further question to be considered is that raised by plaintiffs when they allege that the trial court abused its discretion by failing to grant plaintiffs a continuance of the trial as the trial began on August 6, 1985.

With regard to the court's failure to grant plaintiffs' motion for continuance, it is the law in Nebraska that a motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *State ex rel. Douglas v. Schroeder*, 222 Neb. 473, 384 N.W.2d 626 (1986); *First Nat. Bank v. Schroeder*, 222 Neb. 330, 383 N.W.2d 755 (1986). In the case at bar, the court did not abuse its discretion in denying plaintiffs' motion for a continuance. When the trial began, plaintiffs had pending causes of action for fraud and for express warranty. This matter had been set for trial since May 1985, and the plaintiffs should have been able to proceed on the fraud and express warranty theories even though their other theories were dismissed by the summary judgment ruling. The plaintiffs elected to stand on their motion for continuance and refused to adduce any evidence. If plaintiffs were ready to try an action in which they alleged four theories of recovery, they certainly had to be ready to try their case presenting two theories of recovery. It was plaintiffs' own refusal to put on evidence which prevented them from proceeding, not the action of the court. The trial court did not err in refusing to grant plaintiffs a continuance.

Plaintiffs' final assignment of error alleges the district court abused its discretion in failing to sustain plaintiffs' posttrial motions for new trial, to reconsider the motion in limine, and to review the partial summary judgment. After a review of the record and in light of our finding there was no abuse of

discretion in the court's ruling on the motion in limine, on the motions for partial summary judgment, and on the implied warranty claim, we find no abuse in the court's failure to grant plaintiffs' posttrial motions. The trial court did not err in denying plaintiffs' posttrial motions.

The summary judgment entered in defendants' favor on the negligence issue is reversed and the cause remanded for further proceedings on that issue only. The judgments of the trial court in all other respects are affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MARVIN HUGHES AND DOROTHY HUGHES, HUSBAND AND WIFE, APPELLANTS, V. ENTERPRISE IRRIGATION DISTRICT, APPELLEE.

410 N.W.2d 494

Filed August 14, 1987. No. 85-746.

1. **Equity: Appeal and Error.** In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Political Subdivisions Tort Claims Act: Appeal and Error.** A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), will not be set aside unless such findings are clearly incorrect.
3. **Injunction.** A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle the claimant to relief.
4. **Proximate Cause: Words and Phrases.** *Cause* is defined as that which produced an effect, result, or consequence. The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it.
5. **Injunction: Proof: Proximate Cause.** By a preponderance of the evidence, one seeking injunctive relief must establish that the defendant's conduct to be enjoined is a proximate cause of the damage claimed.

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

R.L. Gilbert of Gilbert Law Offices, P.C., for appellants.

James R. Hancock of Hancock & Denton, and Robert G. Simmons, Jr., of Wright, Simmons & Selzer, for appellee.

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

SHANAHAN, J.

Marvin and Dorothy Hughes (Hughes) sued Enterprise Irrigation District in the district court for Scotts Bluff County and sought an injunction and damages regarding Enterprise's dam constructed in the North Platte River. In their petition, Hughes alleged ownership of their real estate adjacent to the North Platte River, Enterprise's existence as a political subdivision of the State of Nebraska, and Enterprise's construction of its dam, which prevented adequate "passage of all water, ice and debris" in the river, resulting in overflow, which caused damage to Hughes' crops and real estate. Hughes then alleged prospective and continued overflow, and requested removal of the dam obstruction and assessment of damages.

Hughes had filed, and Enterprise rejected, a tort claim against Enterprise for damages. See Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983) (Political Subdivisions Tort Claims Act). According to the order entered on the pretrial conference, the issue involved in this litigation related to injunctive relief and damages caused by Enterprise's structure in the river.

LOCATION OF THE FARM AND DAM

Hughes owns a farm which includes 79 acres of cropland abutting the North Platte River. The north bank of the river, which flows from west to east, is the southern boundary of the Hughes farm. A bridge for Highway 226, which runs in a north-south direction, bisects the Hughes farm and crosses the river. At the southeast corner of the Hughes tract and approximately 1,400 feet east of the highway bridge, Enterprise constructed its dam to divert water to the area within the irrigation district.

The cement base of Enterprise's diversion dam ran from bank to bank of the river, a distance of 260 feet. Steel piers, 8 feet apart, were placed in the concrete base and supported wooden planks placed lengthwise against the piers on the upstream side for diversion of the river. The dam, from riverbed to top, was approximately 30 inches high. Toward the dam's north end, at its juncture with the river's north bank, was a headgate which, when opened, permitted water to be diverted into a canal for transportation to the irrigated acres served by Enterprise.

The river had a history of seasonal high water. Excess snowmelt and rainfall, impounded and then released from several upstream reservoirs, contributed to spring and summer flooding of Hughes' farm. In one form or another, Enterprise's diversion dam has existed in the river since the turn of the century. However, regarding overflow in 1983 and 1984, there is no evidence of any antecedent causal relationship between such previous flooding and any structure in the river near the Hughes farm.

INUNDATION IN 1983 AND 1984

In April 1983, the river's flow began to increase and eventually reached 5,500 cubic feet per second (cfs) at a point west of the highway bridge, where the river overflowed its north bank and flooded part of Hughes' farm. At the point of overflow, the river's flow persistently exceeded 5,500 cfs from the spring of 1983 until the fall of that year.

According to Marvin Hughes, in the spring of 1983 the river's overflow inundated his land west of the highway, resulting in standing water, with a depth of 1 foot, covering part of the cropland and a "muddy" condition on the remaining cropland west of the highway. Such condition existed until September 1983. Hughes' land east of the highway became unusable on account of a condition which Hughes attributed to "seepage," that is, water had "come up from underneath" the land's surface and created a damp condition, which existed until disappearance of the overflow on the land west of the highway. The same patterns and conditions recurred in 1984 whenever the river's flow reached 5,500 cfs in the bridge-dam area.

Hughes claimed that Enterprise's diversion dam caused the

river to back up, resulting in the river's overflow onto Hughes' farm. Enterprise denied that its conduct or structure caused any damage to Hughes. Therefore, the crucial and dispositive question is: Did Enterprise's diversion dam cause the overflow?

THE EXPERTS

Hughes called John Baker, a civil engineer, as an expert witness to testify about the cause of the river's overflow. Baker had prepared two "water surface profiles" of the river. One profile was prepared for 1983 when the river's flow was 5,500 cfs; the other for 1984 when the flow was 1,200 cfs. Measurements were taken 500 feet downstream from Enterprise's diversion dam and 2,000 feet upstream from that structure. For the stretch of the river from west of the highway bridge to Enterprise's dam, the riverbed had a natural slope of 6.6 feet per mile. Taking into account the various elevations and other measurements, such as the river's depth and rate of flow at the flood site, Baker concluded that the river, in the absence of Enterprise's dam, could have accommodated an additional depth of 2½ to 3 feet before reaching 5,500 cfs and running over its north bank. However, with the dam as an obstruction raising the level of the river, the additional water backed up to the point of overflow west of the highway bridge. Therefore, according to Baker, Enterprise's dam caused inundation of Hughes' land west of the highway and the presence of water on the land east of the highway.

Enterprise called an expert witness, Meredith Schaff, a consulting engineer who was familiar with the river and its flood problems. Schaff's experience included work for the Corps of Engineers and cities along the river. Schaff disputed Baker's method and computations. Referring to Baker's 1983 river profile, Schaff testified that the profile "really shows . . . that there's so much water flowing down the stream and the water's going over the top of the [dam which] actually has no damming effect." To buttress his position, Schaff then referred to Baker's 1984 river profile, when the river's flow was 1,200 cfs. At the diversion dam, with the depth of the river increased by the obstruction, the water backed up "less than 150" feet before the water which had accumulated at the dam flowed over the top of the dam. Under such circumstances, the

diversion dam was merely a "spillway" over which the river flowed without affecting any upstream depth and, consequently, did not affect the river's flow or depth at the point of overflow onto Hughes' land. Thus, Schaff concluded that Enterprise's diversion dam was not a cause of any water problem, whether inundation or seepage, on Hughes' land.

The district court specifically found that any overflow was "not proximately caused by [Enterprise's] diversion structure," found generally in favor of Enterprise on "all causes of action," and dismissed Hughes' petition.

Hughes has raised several assignments of error, but each is an aspect of the basic contention that the district court erred in its finding that Enterprise, by its diversion dam, did not cause damage to Hughes.

STANDARDS OF REVIEW

Equity Actions

In an appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the Supreme Court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. See, Neb. Rev. Stat. § 25-1925 (Reissue 1985); *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986).

Tort Claims Against a Political Subdivision

"A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect." *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 125, 403 N.W.2d 335, 338 (1987).

INJUNCTIVE RELIEF

"A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle the claimant to relief." *Belsky v. County of Dodge*, 220 Neb. 76, 80-81, 369 N.W.2d 46, 51 (1985). "*Cause* is defined as 'that which produced an effect, result, or consequence.' " (Emphasis in original.) *Belsky v. County of Dodge, supra* at 85-86, 369 N.W.2d at 53. " ' "The defendant's conduct is a cause of the

event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." ' " *Greening v. School Dist. of Millard*, 223 Neb. 729, 735, 393 N.W.2d 51, 57 (1986). By a preponderance of the evidence, one seeking injunctive relief must establish that the defendant's conduct to be enjoined is a proximate cause of the damage claimed. See, *Belsky v. County of Dodge, supra; Steffen v. County of Cuming*, 195 Neb. 442, 238 N.W.2d 890 (1976).

Although both expert witnesses offered quite contrasting opinions regarding the role of Enterprise's diversion dam in relation to the river's overflow, we reach the same conclusion as that of the district court, namely, Hughes has failed to prove Enterprise's conduct or structure caused the water damage. Evidence presented a history of high water and seasonal inundation of land adjacent to the river, a longtime circumstance without previous causal correlation to Enterprise's diversion dam. Further, according to Enterprise's expert witness, the river profiles demonstrate that the diversion dam was incapable of containing the river's flow at the depth necessary to result in the river's backing up to the point of overflow west of the highway bridge. We find it is more likely that the river would spill over the diversion dam with its height of 30 inches before any obstructed water would back up to a point more than 1,400 feet west of the dam and at that point overflow the river's north bank. Having observed the experts during their testimony, the district court apparently reached that same conclusion about causation, namely, the explanation offered by Enterprise is more credible under the circumstances.

Regarding Hughes' tort claim against Enterprise, we cannot conclude that the district court's finding is clearly incorrect, especially in view of Hughes' failure of proof concerning causation.

In reference to any other cause of action, including a claim pursuant to Neb. Const. art. I, § 21, Hughes failed to prove the cause-and-effect relationship between Enterprise's conduct and damage to Hughes.

AFFIRMED.

BANNER COUNTY, NEBRASKA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

411 N.W.2d 35

Filed August 14, 1987. No. 86-699.

1. **Constitutional Law: Taxation: Valuation.** The Nebraska Constitution requires that taxes be levied by valuation uniformly and proportionately upon all tangible property except motor vehicles.
2. _____: _____: _____. The 1984 amendment to Neb. Const. art. VIII, § 1, which added the language, "The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural purpose shall constitute a separate and distinct class of property for purposes of taxation," did not repeal the uniformity clause.
3. **Constitutional Law.** The Constitution, as amended, must be read as a whole.
4. **Constitutional Law: Taxation.** The power to tax is a sovereign power, and constitutional provisions relating to that power limit that power.
5. **Constitutional Law: Legislature.** The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly.
6. **Constitutional Law.** In determining the meaning of a constitutional provision, we must look to the plain and clear language contained therein.
7. _____. A constitutional amendment becomes an integral part of the instrument and must be so construed. It must be harmonized, if possible, with all other provisions, and effect must be given to every section and clause as well as the whole instrument.
8. **Constitutional Law: Valuation.** The effect of the 1984 amendment to Neb. Const. art. VIII, § 1, is to permit the valuation of agricultural and horticultural land by a different method. However, the result must be correlated with the value of all other land.
9. **Statutes.** Neb. Rev. Stat. §§ 77-1502 and 77-1504 (Reissue 1986) were not repealed by 1985 Neb. Laws, L.B. 271.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

William E. Peters of Peters & Chunka, P.C., for appellant.

Robert M. Spire, Attorney General, and L. Jay Bartel, for appellee.

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

PER CURIAM.

This case arises out of a controversy concerning the valuation for tax purposes of irrigated cropland in Banner County, Nebraska, for 1986. The county assessor used the 1986

Nebraska Agricultural Land Valuation Manual to establish values of all agricultural land in the county for 1986.

Banner County officials had attended public hearings before the Tax Commissioner's staff regarding the implementation of the 1986 land manual prior to its completion. At those meetings, certain officials from the county testified there appeared to be some problem with some of the calculations. The land manual calculations were ultimately completed, and the manual was used by the assessor to determine values for the 1986 tax year.

Following the receipt of notices by taxpayers in the county, a number of questions were received by the county board of equalization concerning the values placed on irrigated cropland. Hearings were held on April 21 and 28, 1986, to permit all interested persons to provide information concerning the operation of such lands. After the hearings most of the owners of irrigated lands in the county filed formal protests, and a formal hearing was set for May 19, 1986.

Based on the evidence presented at the hearing, the board made several findings.

The board first found that all interested parties had received notices of increased valuations caused by use of the land manual for the 1986 tax year. The board then stated the increase for the value of irrigated lands was substantial and that the board had investigated the increase. The board found the valuations of irrigated lands had been increased by more than 54 percent. The board stated that it had evidence the valuations of dryland in the county compared favorably to counties adjoining Banner County but that values for irrigated land were considerably lower in the adjoining counties.

The board stated there was evidence the irrigated land in the county was very sandy ground and subject to severe erosion. The board further found the assessor had historically adjusted the values of these lands to compensate for the severe erosion and inadequate water supply in the area. The board found that such adjustments by the assessor were no longer possible under the 1986 land manual. The board further found that testimony presented at the hearing confirmed the previous appraisals made by the assessor, that the lands involved were sandy, that

there was severe erosion, and that the land was of lesser value than lands in Cheyenne and Kimball Counties which had received a lower value in the manual. The board stated it had viewed the lands whose valuations were being protested and land on which protests were not filed, had confirmed the testimony presented at the hearings, and concluded adjustments to the land manual valuations were required to determine the true value of the land. The board then asked the assessor to further review the information used by the department and to recalculate the values for such land.

The board stated such recalculations included the addition of information not used by the department, such as the type and condition of the land, and that the resulting values compared favorably with other counties and the information provided by the owners.

On May 29, 1986, the Banner County Board of Equalization adopted a resolution reducing the values of the subclasses of irrigated land in Banner County for the 1986 tax year from the values determined by the 1986 land manual. This adjustment was reported to the State Board of Equalization and Assessment by the State Tax Commissioner on July 10, 1986. The state board then directed the Tax Commissioner to review the action taken by Banner County, as well as by Custer County, Sherman County, and Cherry County, and to report her findings and recommendations on August 11, 1986. Notice to show cause was mailed to Banner County, and a hearing was scheduled for July 29, 1986. Banner County requested a continuance, which was granted, and the hearing was set for August 5, 1986.

At the hearing before the Tax Commissioner the county board contended it had acted properly in decreasing the values of irrigated land. The board contended the figures which the Nebraska Department of Revenue had used were flawed in two aspects: first, because the department improperly used harvested acres rather than total acres to calculate the agricultural land formula and, second, because the department improperly calculated the factor used to ascertain a 5-year average yield as established by the crop reporting service. The county also contended the values established in the 1986 land

manual did not achieve equalization among the counties. Barbara Stoddard, deputy county assessor for the county, testified the recalculation of values was done in the following manner. The formula from the land manual was used to determine the "contribution of value." She then went back to the crop reporting service report and took

> the acres under the crops that were sent out by the state for our use. I have recalculated those and came up with the average yield for Banner County for the last five years. The only change in that that I did make was in the sugarbeet crop, which we did use the yields for the years 1979 through 1984, [because] the 1984 report . . . could not be used because there was still some question as to the price to use . . . .

She also used the actual number of irrigated acres in Banner County as indicated on the 1985 abstract, which was 21,192 acres. She used the same percentage as the state used to determine crop mix. She then calculated the crop yield, which differed from that calculated by the state. That yield was then used in the computation as required by the formula, resulting in a different contribution to value, which lowered the value of irrigated lands from subclass 4A through subclass 2A.

Stoddard testified that she also looked at the values for dry cropland but found that very little change was necessary. Using the yield statistics from the Soil Conservation Service (SCS) reports in calculating the value of dry cropland resulted in a variance of only 1 or 2 percent from the values obtained using the manual, so the averages obtained by the land manual were used to value dry cropland.

Stoddard testified the state had used approximately 16,500 acres in the original manual calculation for the county. Stoddard testified she used the larger number because she believed it was necessary to include all irrigated acres because a crop is raised thereon every year and there is no set-aside on irrigated acres. Stoddard testified the calculations used by the state for dry cropland had accounted for most of those acres in the county and did not require adjustment.

The county assessor testified he had supervised the recalculations. He testified he had applied the land manual as

published in setting the original values and sending notices for 1986. The final adjustments occurred May 29, 1986. A public notice was published following that action to inform the taxpayers, which included the minutes of the board proceedings. It was his understanding the board was acting to correct an apparent problem in the valuations of irrigated land which had been raised by the protests. He further testified that the protests involved about 75 percent or more of the irrigated land in the county, so the county board adjusted the valuations of that land and then, for the purpose of equalizing within the county, adjusted the values of land not specifically within the protests. There was also testimony that Banner County was not on the soil survey at that time but that the classifications of land within the county were reasonable. When asked under what statutory authority the board had proceeded, one official stated he believed it was Neb. Rev. Stat. § 77-1502 (Reissue 1986).

Following the hearing the Tax Commissioner notified the county that the commissioner would recommend the state board restore the values in the county to the values established by the 1986 land manual.

On August 11, 1986, the state board met to consider the recommendations of the Tax Commissioner. At that meeting representatives of Banner County presented testimony regarding the recommendations. At that hearing Jerry Knoche, an appraisal manager in the property tax division of the Department of Revenue, testified the department had used the number of total agricultural acres in Banner County to calculate land values. He testified the factor used by the county as part of the formula to adjust the individual class yields for each crop with a 5-year average was incorrect because the county calculated its own averages rather than using the averages reported by the reporting services. It was his opinion the figures for the department were correct and the values established in the 1986 land manual reflected the actual value of irrigated land in the county. He also testified that 1985 Neb. Laws, L.B. 271, codified at Neb. Rev. Stat. § 77-201 (Supp. 1985) and Neb. Rev. Stat. §§ 77-112, 77-1330, 77-1343 to 77-1348, and 77-1358 to 77-1368 (Reissue 1986), required the use of the same formula to value different types of land and that

the county board had applied two different formulas to value land in the county. Knoche testified a perimeter study of Banner County had been done which illustrated the disparities in classification which occurred because Banner County is not on the soil survey. It was his opinion the same type of land in Banner County was valued differently than land in adjoining counties because the land in Banner County is not correctly classified. He also testified the adjustments made by Banner County created more disparity between that county and adjoining counties.

Knoche testified that prior to the implementation of L.B. 271, a "feathering process" had been used between counties, but that procedure was no longer in use. The state then argued that the formula had not been shown to be arbitrary, capricious, or contrary to law, and was required by law to be used to determine the actual value of agricultural land in the state.

Stoddard reiterated the method she had used to recalculate the figures and stated she had used the total number of acres of irrigated cropland rather than harvested acres. Knoche then testified that harvested acres were used by the department to determine the average by the statistical reporting service and to obtain the different percentages of crops in the crop mix. He also testified that the formula used by the state accounted for all of the acres stated in Banner County's abstract. He then testified that dryland was treated differently; the price had been cut in half to allow for the summer fallow situation. He later testified the statutes require the use of yield average as reported by the crop reporting service, and that office has stated "the only yield they have is on harvested acres."

Tom Gillaspie, an attorney for the Department of Revenue, stated that it was his belief the board made the adjustments pursuant to § 77-1502 and Neb. Rev. Stat. § 77-1504 (Reissue 1986). It was his belief that L.B. 271 "does create actual value in the county and in that instance that 1502 [sic] for the board to determine something other than actual value is beyond their scope." As for § 77-1504, Gillaspie stated that the question is how to determine what values can be compared to assessments to determine whether property is over- or under-assessed. He

stated that § 77-112 now says actual value for agricultural land is to be determined separately and that § 77-201 says actual value equals the results obtained by the use of the formula. He further stated L.B. 271 restricts the ability of county boards to adjust assessments.

The state board found the county board had acted outside the scope of its authority by adjusting only the actual value of irrigated land in the county to achieve equalization within the county and between the surrounding counties. The state board specifically found the use of the statutory formula achieves actual value of agricultural land; therefore, the county's use of different calculations for irrigated land and dryland resulted in inequality between the classes. The state board further found it is the only body empowered to equalize valuations between counties. The state board then ordered the restoration of values established pursuant to the 1986 land manual and declared the adjustments previously made by the county board null and void. This appeal followed.

Banner County's position is that it followed the statutes in adjusting the value of the irrigated cropland and used the methods prescribed and authorized by the statutes. Banner County does not contend that L.B. 271 is unconstitutional and does not seek such a declaration. Banner County seeks only to set aside the action of the State Board of Equalization and Assessment and reinstate the action of its county board of equalization.

The county has set forth six assignments of error. The county contends the state board erred in finding that the county board did not have authority to adjust irrigated land values in the county; in finding that the factors within the statutory formula converting the estimated individual class yields for each crop were properly calculated for the county; in finding that the formula established actual value in the county; in finding that the valuations established pursuant to the land manual equalized values between counties; in finding that the state board was bound by the formula in the land manual in determining equalization between the counties; and in ordering the increase of valuations for 1986.

The state board seeks affirmance of its order, contending

that the county board clearly acted outside the scope of its authority, that the evidence supports the order of the state board and the county has failed to show such action was arbitrary or capricious, and that the state board has a statutorily imposed duty to equalize valuations of all property in the state.

The dispute concerns the adjustment of values of irrigated cropland by Banner County from those set by the application of the 1986 land manual formula. The original land manual values and adjusted values are as follows:

Irrigated Classification Subclass	Land Manual Value Per Acre	Adjusted Value Per Acre
2A	$565	$425
3A1	490	365
3A	435	325
4A1	355	265
4A	275	205

The original values were determined by applying the formula provided by the Nebraska Agricultural Land Valuation Manual, issued in accordance with L.B. 271.

Prior to the passage of L.B. 271, agricultural land was valued by county assessors using manuals provided by the Nebraska Department of Revenue. This practice used earning capacity of the property as the sole criterion for determining land value and resulted in the undervaluation of agricultural land in comparison with other real property. Comment, *Nebraska's "Mysterious" New Tax Valuation System: L.B. 271, the Agricultural Land Valuation Law*, 19 Creighton L. Rev. 623 (1986).

In *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), we held that the Nebraska Constitution requires that all tangible property be taxed uniformly and proportionately. We there stated it would be permissible to

> reasonably classify property for tax purposes and to use different methods to determine assessed values for different classifications of property. . . . [H]owever, the

> results obtained by such permissible different methods must be in some way correlated so that the results reached shall be uniform and proportionate and shall not exceed actual value.

Kearney Convention Center, supra at 302, 344 N.W.2d at 625.

The Nebraska Department of Revenue then revised the land manual, which resulted in an increase of approximately 60 percent in the assessed value of agricultural land. 19 Creighton L. Rev. 623, *supra*. The increase was due to the infusion of market value as a part of the formula used to value the land. *Id.*

In 1984 the Legislature proposed an amendment to Neb. Const. art. VIII, § 1. This amendment, commonly referred to as amendment four, was adopted by the voters at the November 6, 1984, election. 19 Creighton L. Rev. 623, *supra*. The proposition on the ballot stated, "A constitutional amendment authorizing the Legislature to separately classify agricultural and horticultural land." L. Res. 7, 88th Leg., 1st Spec. Sess. (1984). The amendment added the following language to art. VIII, § 1: "The Legislature may provide that agricultural land and horticultural land used solely for agricultural or horticultural purposes shall constitute a separate and distinct class of property for purposes of taxation."

Before submitting the amendment four proposal to the voters, the Legislature rejected a proposal to amend the Constitution by repealing the uniformity clause. See L. Res. 1, 88th Leg., 1st Spec. Sess. (1984) (indefinitely postponed in committee). See, also, Note, *Separate Property Tax Classification for Agricultural Land: Cure or Disease?*, 64 Neb. L. Rev. 313 (1985).

Article VIII, § 1, also contains a clause which states that the value of land actively devoted to agricultural use shall be valued with regard to the value such land has for that use. That clause was added by amendment in 1972. 64 Neb. L. Rev. 313, *supra*. Subsequent to this amendment the Legislature added statutory language providing for a "greenbelt" special tax assessment on certain land to relieve urban fringe farmers of the tax burden caused by the speculative land value of the property for development. *Id.*

In 1985 L.B. 271 was enacted to implement amendment four,

and it resulted in several statutory modifications concerning the valuation of agricultural land.

Section 77-201 (Reissue 1981) had provided in part: "All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value."

Section 77-201 (Supp. 1985) provides:

> Except as provided in sections 77-1358 to 77-1368, all tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made.

Section 77-112 now provides:

> (1) Except as provided in subsection (2) of this section, actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (a) Earning capacity of the property; (b) relative location; (c) desirability and functional use; (d) reproduction cost less depreciation; (e) comparison with other properties of known or recognized value; (f) market value in the ordinary course of trade; and (g) existing zoning of the property.
>
> (2) The term actual value when applied to agricultural land . . . for purposes of taxation shall mean that value determined pursuant to sections 77-1358 to 77-1368.

Section 77-1358 states the legislative findings upon which L.B. 271 was premised. The Legislature found amendment four authorized the placement of agricultural and horticultural land into a separate class for the purpose of taxation. § 77-1358(1). The Legislature further found a different valuation system for such land was required for various stated reasons and that such a valuation method should be based on the earning capacity of such land. § 77-1358(2)(e). The earning capacity method "shall be rationally based on accurate crop yields, prices, and patterns, expenses, and rate of return data. The method shall use nominal interest rates and average income data in order to maintain the historical valuation relationship between

agricultural land . . . and all other real property." § 77-1358(3).

Section 77-1359 defines the terms agricultural and horticultural land, and § 77-1360 sets out the qualifications for small tracts which are to be assessed as agricultural lands. Section 77-1361 provides that agricultural and horticultural land, used solely for those purposes

> shall constitute a separate and distinct class of property for purposes of property taxation. For tax year 1986, and each year thereafter, agricultural land and horticultural land shall be valued using the agricultural land valuation manual issued by the Tax Commissioner pursuant to section 77-1330 which shall be developed using the methods prescribed in sections 77-1358 to 77-1368.

Section 77-1330 requires the Tax Commissioner to prepare and annually revise guides to be used by county assessors for all appraisals and reappraisals of property. The section further provides that when, upon review by the Department of Revenue, it becomes apparent that a county has

> failed or neglected to implement any guide prescribed or issued pursuant to subsection (1) of this section, the Tax Commissioner may, after a notice and hearing conducted in accordance with Chapter 84, article 9, order whatever corrective measures the Tax Commissioner deems necessary to secure compliance with subsection (1) of this section.

The wording of this section was not changed by L.B. 271 from its previous language.

Section 77-1362 prescribes the method to be used by the Tax Commissioner to determine the actual value of agricultural land for taxable years beginning in 1986. The method requires

> (a) [d]ividing agricultural land . . . into major use categories and such categories into subclasses based on soil classifications; (b) computing a typical income stream based on historical gross receipts and landowner share determined using the method described in section 77-1364; and (c) dividing the derived income stream by a capitalization rate determined using the method described in section 77-1365.

Subsection (2) of that section provides that the land manual

> shall contain allowances to adjust actual values for irrigation costs and land productivity cost variations. Adjustments shall be based on empirical data and apply to areas with uniform characteristics which are within or which cross county lines. Upon written application to and approval from the Tax Commissioner a county assessor may apply such adjustments to specific parcels of agricultural land and horticultural land. No other site specific adjustments shall be made. The provisions of this subsection shall be strictly construed to maintain the concept of statewide mass appraisal of agricultural land and horticultural land.

Section 77-1363 divides agricultural and horticultural land into five categories: irrigated cropland, dryland cropland, pasture, rangeland, and wasteland. Each category is to be divided into subclasses based on soil classification standards, and county assessors are required to utilize and implement soil surveys in the tax year after they become available.

Section 77-1364 states in part: "Income streams for irrigated and dryland cropland shall be computed by multiplying gross receipts by landowner share by county." Gross receipts are to be computed "by multiplying the most recent five-year average price of a crop by the most recent five-year average yield of a crop and weighting the result by the most recent five-year average cropping pattern." Crops included are enumerated in the statute. Such data are to be taken from the Nebraska Crop and Livestock Reporting Service (NCLRS) or other state or federal agencies. Landowner share is defined as the proportion of the gross receipts less landowner expenses paid to the landowner. Methods for determining values for the other categories of property are also set out in this section.

Section 77-1365 sets out the method to be utilized in establishing the capitalization rate. There are two components in the rate: the debt portion and the equity portion, which are based on the relative proportion of real estate debt to farmer equity for the farm sector in the state. The proportions are set at 20 percent debt and 80 percent equity for 1986. After January 1, 1987, those amounts may be adjusted.

The percentage of debt is then multiplied by a number equal

to the most recent 5-year average of the Federal Land Bank interest rates in the Omaha district, resulting in the weighted debt capitalization rate. The number representing owner equity is then to be multiplied by the most recent 5-year average of 6-month U.S. Treasury bill interest rates, resulting in the weighted equity capitalization rate.

The numbers yielded by those computations are then added together to obtain the appropriate capitalization rate.

Section 77-1366 creates the Agricultural Land Valuation Advisory Board. Section 77-1367 sets out the board's duties, which include reviewing the land manual, reviewing data sources, and generally overseeing revisions of the land manual. Section 77-1368 provides that a new manual must be prepared when the actual value of agricultural land in any crop reporting district exceeds 105 percent or is less than 95 percent of the actual value of such land as determined using the most recent land manual.

Banner County first contends the state board erred in finding the county board was without authority to adjust the values of irrigated land to achieve intracounty equalization. The county argues the state board erred in holding that (1) "the use of the uniformly applied formula is deemed to achieve actual value of agricultural land" and that (2) "equalization of these classes has not been achieved because different calculations were used to value irrigated land and dryland."

The county board contends it had the authority to adjust the values because the statutes setting forth the duties and procedures of county boards with regard to the equalization of property values, §§ 77-1502, 77-1504, and Neb. Rev. Stat. § 77-1506.02 (Reissue 1986), were not affected by the enactment of L.B. 271. The county board further contends this power was not affected by § 77-1361, arguing that provision applies only to county assessors. As further support for its position, the county board has pointed out that an opinion of the Attorney General issued on June 12, 1980, stated that the county board was not forbidden to depart from the manuals prepared by the Tax Commissioner or from exercising its normal equalization functions. It further stated: "[W]e would not hold that the County Board . . . was without power to

depart from the manuals unless compelled by unequivocal statutory language, because such a construction would, in our opinion, render the statute constitutionally suspect, as denying property owners due process of law." Op. No. 296, Rep. of the Att'y Gen. of Neb. 427, 428 (1979-1980).

The county further argues the statutes are not inconsistent and that the enactment of L.B. 271 did not repeal them by implication because the new statutes are not repugnant to the old, nor is there a mandated legislative intent to deny the county boards such authority. The county also argues the state board's finding that the use "of the uniformly applied formula is deemed to achieve actual value of agricultural land" means, in essence, the county board was without authority because the answer to questions regarding assessments must always be supplied by the "uniformly applied formula."

The state board contends the county board failed to comply with the notice requirements of § 77-1506.02, and the resolution does not state the adjustments made were considered to be a percentage adjustment. The state board argues that since a county board can exercise only such powers as are expressly granted by statute and that since such statutes are to be strictly construed, the county board acted outside the scope of its statutory authority in making the adjustments. The state further argues the county board's apparent reliance on § 77-1502 is also misplaced because that statute applies only to protests with respect to individual parcels of property, rather than countywide adjustments of entire classes of property. The state board argues the county board can only accomplish such an adjustment through § 77-1506.02.

The state board further argues that the county board's actions were outside the scope of its authority even if it had complied with the statutory requirements for taking action. The state board argues that although characterized as an attempt to achieve intracounty equalization, the county's action was in reality an attempt to equalize values between counties. The state board contends the sole basis presented by the county for its reduction in irrigated cropland values was the perceived disparity between such values in Banner County as compared to surrounding or neighboring counties. The state board contends

there is no evidence indicating the values for such cropland, as determined by the 1986 land manual, resulted in a lack of uniformity or equalization within the county.

The first issue is whether the county board had statutory authority to reduce the assessed values of irrigated cropland within Banner County. The authority and duties of the county board are set forth in Neb. Rev. Stat. §§ 77-1501 to 77-1515 (Reissue 1986). These statutes were not specifically amended or modified by L.B. 271.

At the hearing before the state board, there was evidence that the county had relied on §§ 77-1502 and 77-1504 in taking its action, and no question was raised as to the county's compliance with these sections. Further, there was evidence that the county had met the requirements of both sections. The county board heard the protests pursuant to § 77-1502 and then used the evidence obtained in the protest hearings to equalize values of irrigated land throughout the county.

Section 77-1504 empowers the county board to

> equalize the valuation of real property of the county by raising the valuation of such tracts and lots as are assessed too low and lowering the valuation of such tracts and lots as are assessed too high. In cases of evident error of assessment or of apparent gross injustice in overvaluation or undervaluation of real property, it may consider and correct the same by raising, after due notice has been given to the interested party or parties, or by lowering the actual valuation of such real property.

The record shows the county board followed the statutory requirements in decreasing the valuations at issue.

The next issue is whether the county board acted within its authority by considering the values of land in adjoining counties. The record shows that Banner County officials were concerned about some of the calculations to be used in the 1986 land manual prior to its completion. Following the use of the land manual to value property within the county, the board held hearings on the matter in April 1986, formal protests were subsequently filed, and a formal protest hearing held. The board considered evidence presented by landowners concerning the actual value of the land and also considered evidence that

the valuations for irrigated land were considerably lower in adjoining counties. The comparison with other counties was made after the board had recognized there was a problem with the valuations and had independently investigated. The county board adjusted the value of irrigated land within the county to achieve the actual value of such land. Such action is within the authority of the county board. §§ 77-1502 and 77-1504.

Banner County next contends the adjustments it made were appropriate to determine the valuation of irrigated land. The county has 21,192 acres of irrigated cropland. The Department of Revenue, in the 1986 land manual, utilized reported harvested acres, representing 16,584 acres, as the basis of its formula. The department later accounted for the remaining 4,608 acres by assuming the acres were planted to the same crops with the same average yields as the first 16,584 acres, and this assumed yield and crop pattern was then applied against the land manual area estimates of soil productivity grouped into land valuation groups and valued. The county used the SCS estimates of yield with minor adjustments applied to a similar array of cropping practices. The basic difference is that the county used SCS estimates to determine yields while the state used the NCLRS estimated yields.

The county contends its calculations are more accurate because the outcome of the formula will vary greatly depending on the assumptions made regarding cropping patterns. The county further contends its calculations take into consideration the productivity of the soil and are consistent with the values for similar land in adjoining counties.

The state board argues the county has not met its burden of proof to show the action by the state board in setting aside its adjustments was erroneous, arbitrary, or capricious. The state board further argues there is sufficient evidence in the record to sustain its findings and order.

In support of its position the state board argues that L.B. 271 provides the actual value of agricultural land is to be determined by the earning capacity valuation method. The state board contends the department presented evidence this method was rationally and correctly computed in the land manual and correctly determined the value of irrigated land in

Banner County for the 1986 tax year, and therefore, that value represents the actual value of the land. The state board further contends the county's calculations were incorrect.

This is a case of first impression before the court; the first case involving the application of the statutes codifying L.B. 271.

The state Constitution requires that taxes be levied "by valuation uniformly and proportionately upon all tangible property" except motor vehicles. The constitutional amendment upon which L.B. 271 is based, amendment four, permits agricultural property to be treated as a separate class for purposes of property tax. The amendment did not repeal the uniformity clause.

The Constitution, as amended, must be read as a whole. *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972). The power to tax is a sovereign power, and constitutional provisions relating to that power limit that power. The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. *Nebraska P. P. Dist. v. Hershey School Dist.*, 207 Neb. 412, 299 N.W.2d 514 (1980). In determining the meaning of a constitutional provision, we must look to the plain and clear language contained therein.

When amendment four was submitted to the voters it did not contain a proposal to repeal the uniformity clause. Such a proposal (L. Res. 1) had been introduced, considered, and rejected. Accordingly, the uniformity clause remains in effect unless the amendment necessarily conflicts with it. *Cunningham v. Exon*, 207 Neb. 513, 300 N.W.2d 6 (1980).

Generally, " 'A constitutional amendment becomes an integral part of the instrument and must be so construed. It must be harmonized, if possible, with all other provisions, and effect must be given to every section and clause as well as the whole instrument.' " *Swanson v. State*, 132 Neb. 82, 94, 271 N.W. 264, 271 (1937). In construing a constitutional provision which limits legislative power, when the language of the provision is explicit, the court is bound to find the intent of the Legislature in the words of the provision itself, and not hold that something different from what the words provide was

intended.

Applying those rules in this case, we find amendment four does not conflict with the uniformity clause. Although both relate to the taxation of property, the provisions were not adopted for the same purpose and can be enforced without substantial conflict. The uniformity clause requires that all tangible property be taxed uniformly and proportionately, while amendment four merely permits the Legislature to place agricultural land in a separate class for tax purposes, permitting the valuation of such land by a different method.

In *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 302, 344 N.W.2d 620, 625 (1984), we stated:

> [I]t is permissible to reasonably classify property for tax purposes and to use different methods to determine assessed values for different classifications of property. To comport with our Constitution's requirement that "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property," however, the results obtained by such permissible different methods must be in some way correlated so that the results reached shall be uniform and proportionate and shall not exceed actual value.

Since amendment four did not repeal the uniformity clause, expressly or by implication, the two clauses must be read in such a way as to give effect to both clauses. Thus, L.B. 271 must meet the requirements of both clauses to pass the test of constitutionality. Specifically, amendment four permitted the Legislature to classify property as a separate class, but the uniformity clause required the Legislature to treat that class in a uniform manner with other tangible property. This conclusion is supported by *Kearney Convention Center, supra*, wherein we stated that

> dry cropland, irrigated cropland, and all real estate, whether improved or not, are all tangible property of the same class for taxation purposes, as defined in our Constitution; and while such properties may be appropriately classified into logical subclassifications and different appropriate methods of determining values of such subclassifications may be utilized, the answers

> obtained as to the values of the various subclassifications of property must be correlated so that *all* tangible property shall be assessed uniformly and proportionately.

(Emphasis in original.) *Id.* at 303, 344 N.W.2d at 625-26.

Since the uniformity clause was not repealed, the Legislature can divide the class of tangible property into different classifications, but these classifications remain subdivisions of the overall class of "all tangible property," and there must be a correlation between them to show uniformity. Such a correlation is made by evidence that all tangible property has been uniformly assessed.

No evidence of such a correlation is present in the record before us or in the statutes implementing amendment four. In fact, our review of the statutes shows the correlation requirement was entirely disregarded. Section 77-201 now excepts agricultural land from being taxed at its actual value, but requires such taxation of other tangible property and real estate.

Section 77-112(1) defines actual value for tangible property and real estate as the value ascertained by using a formula containing seven different components to be considered as applicable to the property in question. Subsection (2) of that section provides that the actual value of agricultural land is the value obtained by the application of the earnings capacity formula set forth in §§ 77-1358 to 77-1368.

These sections provide for the separate classification and valuation of agricultural property and are consistent with amendment four. Conspicuously absent from these statutes, however, is a requirement that the resulting values obtained for agricultural land be correlated with the values obtained for other real property, as required by the uniformity clause.

These statutes have the effect of permitting the Legislature to do indirectly what it is prevented by the Constitution from doing directly—the taxation of agricultural land in a nonuniform manner from the taxation of other tangible property. This finding is also supported by § 77-1358(3), which states the 1986 land manual valuation method is designed to "maintain the historical valuation relationship between agricultural land . . . and all other real property." The historical

relationship between such properties in this state is the undervaluation of agricultural property as compared to other real property.

Since the uniformity clause which requires property taxes on all tangible property to be uniform has not been repealed, the Constitution cannot be circumvented by statutes which permit the nonuniform taxation of agricultural land. Since the issue is not presented, we do not undertake to determine whether a Nebraska constitutional amendment permitting land which produces income by raising crops to be taxed differently than land which produces income by other means would violate the U.S. Constitution. See *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923).

In reversing the order of the county board, the state board found the board had exceeded its authority in adjusting the value of irrigated land because the state board found that use of the land manual formula achieved actual value. This finding is erroneous because it permits agricultural land values to be determined without any requirement that the resulting values be correlated to ensure uniform taxation. The purpose of L.B. 271 appears to have been to preserve the historic undervaluation of agricultural land in comparison to other tangible property, a goal inconsistent with the uniformity clause.

Further, the county presented evidence that the use of the land manual did not result in a determination of the actual value of irrigated land in the county.

There is a presumption that a county board has faithfully performed its duties in making an assessment, which presumption remains until there is competent evidence to the contrary. Once such evidence is presented, the reasonableness of the valuation becomes one of fact based on the evidence, with the burden of showing such valuation unreasonable resting upon the appellant. *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987). Such a presumption applies as well to action by the state board. See *Carpenter v. State Board of Equalization & Assessment*, 178 Neb. 611, 134 N.W.2d 272 (1965).

The state board's order was contrary to the law because it

relied on statutes which failed to conform to the uniformity clause of the Constitution.

There is an additional issue raised by the parties as to the authority of a county board of equalization to adjust the values of land under the new land manual. The county board contends the boards retain their statutory authority as determined prior to L.B. 271 because such authority was not expressly repealed or repealed by implication. The state contends that L.B. 271 restricts the authority of the county boards and the state board in these matters to a determination of whether the land manual formula has been correctly applied, but has forbidden them from otherwise adjusting the valuation. The state board further contends the county board used a different method to value irrigated land than it had used for dryland, thereby violating the statutory requirement that all agricultural land be valued pursuant to the land manual.

Although there are certain statutes which apply to county assessors, for example, § 77-1362, L.B. 271 did not modify the statutes which empower the county boards and the state board to act. None of the new statutes contain provisions which specifically apply to those boards. Thus, L.B. 271 did not expressly modify the power of such boards to adjust assessments in the manner prescribed by statute.

It also appears that such statutes were not repealed by implication. The mandated intent of the Legislature in enacting L.B. 271 was to protect the agricultural sector from perceived difficulties in the taxation and valuation of such land. § 77-1358. To ensure such a result the Legislature stated such land would be valued on the basis of its earning capacity and "rationally based on accurate crop yields, prices, and patterns, expenses, and rate of return data." § 77-1358(3). This language indicates the necessity for accurate determination of the factors used in the land manual.

The review and adjustment by county boards and the state board of the factors utilized in the calculations made in preparing the land manual are not inconsistent with this intent if such action is taken to ensure actual value is obtained. The statutes providing for such review are not inconsistent with this goal, and accordingly, we find those statutes were not repealed

by implication. See *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985).

The state board's contention that the county board used a different method to value irrigated land than used for valuing dryland is also unpersuasive.

The disparity between the calculations arose out of the method used to determine average yield of each crop for the various subclasses of irrigated land within the county. Banner County took the total abstract irrigated acres for the county, determined the number of acres in each crop, and using the estimated average yields for each subclass as reported by the SCS, determined average yield per acre. The results obtained by this calculation were lower than those obtained by the department, which used the NCLRS average yield to factor the SCS estimated yields. Because the county used the SCS estimated yields without factoring them by the NCLRS average yields, lower yields resulted, which ultimately resulted in a lower valuation of the property.

Banner County argues its recalculation was necessary to obtain the actual value of irrigated land in the county. It contends the statute requires the use of average yields per crop, which are not available; therefore, assumptions must be made, and the assumptions made by the county were correct because the values obtained more nearly approximated actual value than did those obtained by the state board.

The state board contends the county's failure to use the NCLRS 5-year average yield and the properly factored SCS subclass yields is in direct violation of § 77-1364, which requires the use of the NCLRS 5-year average crop yield, and therefore the county's action was invalid as a matter of law.

Section 77-1364 provides as follows:

> Gross receipts shall be computed by multiplying the most recent five-year average price of a crop by the most recent five-year average yield of a crop and weighting the result by the most recent five-year average cropping pattern. . . . The *source* of cropping patterns and yields by county and prices by crop reporting district shall be as reported by the Nebraska Crop and Livestock Reporting Service *or as published by other state or federal agencies*.

(Emphasis supplied.)

Banner County used figures obtained from the crop reporting service which were sent to the counties by the state, but calculated yields by using the SCS estimated yields without factoring in the NCLRS 5-year average crop yields. Contrary to the state board's contention, § 77-1364 does not require that average crop yields or average cropping patterns be determined solely on the basis of the NCLRS, but states that source or any other source "published by other state or federal agencies" may be utilized. Therefore, the statute does not appear to require the exclusive use of the NCLRS figures, and the calculations made by the county are not invalid as a matter of law.

Our review of the record reveals the county had evidence that irrigated land in the county was overvalued because the valuations of such land increased by 54 percent after the implementation of the land manual. The board received protests as to the values, investigated, and found the land was assessed at a value higher than its actual value.

The county board then utilized the same statutorily required formula to value both irrigated and dryland cropland, but used the SCS estimates to determine the average yield for irrigated land because the board concluded the averages obtained by using the SCS estimates resulted in more accurate average yields per crop for irrigated land, and determined the amounts obtained for dryland were accurate. This was a relatively minor change which was permitted under § 77-1364, and it did not create disparity between the two classes of real estate in the county. Some evidence of the lack of disparity is the fact that the county received virtually no protests concerning the valuation of dryland.

Banner County argues its values are more accurate for the following reasons. First, maps included in the 1986 land manual illustrate the county has two significant areas of bluffs and escarpments and has areas of valley-sided slopes, while Kimball and Cheyenne Counties have only minor areas of bluffs and escarpments. Map 5 at page 10 of the land manual shows Banner County's and Kimball County's growing seasons are less than 2,400 degree days, with some portions having less than 2,200 degree days, while about half of Cheyenne County

enjoys more than 2,400 degree days overall, with some portions of the county having close to 2,600 degree days. Map 6 at page 11 of the manual shows Banner County receives less than 16 inches of precipitation annually, while Kimball is mostly above and Cheyenne overall above 16 inches. Map 7 at page 12 shows that Banner County has fewer freeze-free days than both counties.

Banner County then argues the figures in land manual area 1 illustrate the disparity in the county's valuations as compared to those of other counties as follows:

	Irrigated Land		
Subclass	Banner County	Cheyenne County	Kimball County
1A1	$710	$520	$420
1A	660	485	390
2A1	615	450	360
2A	565	405	325
3A1	490	350	285
3A	435	295	250
4A1	355	240	210
4A	275	185	165

In fact, the valuations in only three counties in land manual area 1 exceed Banner County's valuation as to subclass 2A1 land: Scotts Bluff County at $670; Dawes County at $635; and Sioux County at $650, while Banner County is $615. Only three counties exceed Banner County's valuation with regard to subclass 4A: Scotts Bluff County at $310, Dawes County at $310, and Sioux County at $385.

Banner County contends the state dismissed this argument at the hearing on the grounds the difference in classification was due to the dissimilarity of the classification between Banner County and its surrounding counties, because Banner County is not on the soil survey. However, Cheyenne County, one of the adjoining counties used for comparison purposes, also was not on the soil survey at that time.

Another problem raised by the department was that Banner County has only five classifications of irrigated cropland rather than the six recommended by the department. Banner County's

witnesses stated that the county had adopted only five classifications because there were fewer than 200 acres that would fall into either a 2A1 or 2D1 (dryland) classification, all of these acres being scattered throughout the county and not irrigated at the time of the conversion in 1979. Consequently, those acres were grouped into the lower dryland subclass. Banner County contends this grouping had no effect on the valuations of irrigated subclasses because it involves only 200 out of approximately 21,000 acres.

Banner County argues the perimeter study illustrates the validity of its position. That study shows that, comparing irrigated land to irrigated land, the values are as follows:

	Land Type	Land Manual Valuation	Adjusted Valuation
Banner County	3A	$435	$325
Kimball County	3A	250	——

The county argues that this is a comparison of values involving adjoining acres and that the perimeter study shows Banner County land is valued at a higher level of value than is Kimball County land along their mutual border.

The county further argues the average irrigated values presented by the department for Banner, Kimball, and Cheyenne Counties are very close to those developed by the county board.

The state board vigorously contends Banner County is incorrect. The state first contends it achieved the equalization of values because the same method of valuation was used in every county.

The state next contends the county improperly relied on the maps contained in the land manual because the maps are not detailed enough and reflect a 30-year trend, rather than the most recent 5 years as required by statute. The state also contends Banner County's comparison with other counties concerning subclass 2A1 land is irrelevant because it has no acres in that classification.

The state contends that due to the fact that Banner County's soil classification system is not the same as the other counties', the proper comparison to be made is to compare average

irrigated values and average irrigated crop yields from the counties being compared as follows:

		Average Irrigated Crop Yields Per Acre			
County	Average Irrigated Land Values	Alfalfa (tons)	Corn (bu.)	Dry Beans (lbs.)	Sugar Beets (tons)
Banner	380	4.36	113.80	1,822.20	22.17
Kimball	320	3.96	103.80	1,502.80	——
Cheyenne	350	4.24	117.80	1,651.20	20.29
Morrill	475	4.22	124.00	1,910.00	21.33
Scotts Bluff	610	4.44	126.20	1,950.00	22.59

The average value figures were taken from the map showing average irrigated values across the state, and the average yields are the NCLRS 5-year average crop yields taken from maps within the land manual.

The state argues this chart illustrates Banner County's land is reasonably valued. For example, all of Kimball County's crop yields are lower than Banner County's, and Cheyenne County's yields are lower in three of four crops, just as Banner County's are lower than Scotts Bluff County's. The state then argues that there are 200 acres known to be misclassified in Banner County, and possibly more. The evidence is, however, that only 200 acres were misclassified. The state also argues that since Banner County has only five subclasses of irrigated land, more value will be attributed to those subclasses. This argument can be illustrated as follows:

County	No. Subclasses	Land Manual Average Value Per Acre	Subclass Compared
Banner	5	$380	4A1
Cheyenne	6	350	3A1
Kimball	8	320	2A1

Based on this information, the state board argues in its brief that by using the land valuation by class chart and comparing Banner County's 4A1 (45 percent of all irrigated land in the county) value with Cheyenne County's value for 3A1 (45

percent of all irrigated land in the county) and Kimball County's value for 2A1 (28 percent of all irrigated land in the county) there was no equalization problem.

The state also contends the use of the perimeter study was improper because Banner County was not on a modern soil survey, while Kimball County was.

In reviewing the record, the following facts are apparent. First, the valuations at issue in this appeal pertain to subclasses 2A, 3A1, 3A, 4A1, and 4A. Banner County's valuations for those subclasses are higher than Kimball and Cheyenne Counties', as is illustrated in the chart detailing irrigated land subclass values above. The state argues a more accurate comparison of the three counties requires the comparison of the average values of irrigated acres, as illustrated in the chart above. The chart shows Banner County is valued at $380, Kimball County at $320, and Cheyenne County at $350. These figures illustrate Banner County's average irrigated land value is approximately 16 percent higher than Kimball County's and 8 percent higher than Cheyenne County's. The state further argues that a comparison of 2A1 land in Kimball County, 3A1 land in Cheyenne County, and 4A1 land in Banner County shows values of $360, $350, and $355, which are very similar values. This argument is not persuasive because those values account for only 28 percent of irrigated land in Kimball County, but 45 percent of such land in Cheyenne and Banner Counties.

Further, it is not a comparison of similar classifications of land because neither Banner nor Cheyenne County was on a modern soil survey at this time, while Kimball County was. The state had argued previously that the county was precluded from using such comparisons for that very reason.

Perhaps the best evidence of the actual value of the land was the perimeter study. It shows there is a disparity in the valuation of adjoining land between Banner and Kimball Counties for subclass 3A land in that Banner County was valued at $435 according to the land manual, while Kimball County was valued at $250. Banner County's value was still higher after the county board's adjustment, at $325. This evidence was properly introduced to show the valuation of adjoining lands in the two counties. The state's argument that the use of this study was improper because Banner County was not on the modern soil

survey is unpersuasive because there was evidence the adjoining land was of the same type; therefore, the valuations should have been similar, even though classified differently, because the law requires the uniform valuation of similar property.

We conclude the state board's action negating the action of the county board was contrary to law. The evidence presented by Banner County showed the value of irrigated land had been set by the land manual at an amount higher than its actual value and that the adjustments made by the county board correctly established the land's actual value.

The order of the State Board of Equalization and Assessment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF C.C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. T.C., APPELLANT.

411 N.W.2d 51

Filed August 14, 1987. No. 86-885.

1. **Parental Rights: Appeal and Error.** In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
2. **Parental Rights.** In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Reissue 1984), termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence.
3. _____. A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the Nebraska Juvenile Code.
4. **Parental Rights: Juvenile Courts.** As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct

the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code.

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

Christine P. Costantakos, for appellant.

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

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

PER CURIAM.

T.C., the biological father of C.C., appeals from an order of the separate juvenile court of Douglas County terminating his parental rights pursuant to Neb. Rev. Stat. § 43-292(6) (Reissue 1984) for failure to correct conditions leading to the adjudication that C.C. is a juvenile within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1986).

> In an appeal from a judgment terminating parental rights, the Supreme Court tries factual questions de novo on the record, which requires the Supreme Court to reach a conclusion independent of the findings of the trial court, but, where evidence is in conflict, the Supreme Court considers and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. See, *In re Interest of K.L.N. and M.J.N.*, 225 Neb. 595, 407 N.W.2d 189 (1987); *In re Interest of J.W.*, 224 Neb. 897, 402 N.W.2d 671 (1987); *In re Interest of M.L.B.*, 221 Neb. 396, 377 N.W.2d 521 (1985). In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Cum. Supp. 1982 & Reissue 1984), termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence. See, *In re Interest of K.L.N. and M.J.N., supra; In re Interest of J.W., supra.* A juvenile's best interests are one of the primary considerations in determining whether parental rights should be terminated as authorized by the

Nebraska Juvenile Code. See, *In re Interest of K.L.N. and M.J.N., supra; In re Interest of J. W., supra.*

In re Interest of T.C., ante p. 116, 117-18, 409 N.W.2d 607, 609 (1987).

On March 13, 1984, the State filed a petition and alleged that C.C., who was born on June 13, 1983, was a juvenile within the meaning of § 43-247(3)(a) (Cum. Supp. 1982) because C.C. lacked proper parental care by reason of the faults or habits of her parents. The petition contained the following allegations:

> A. On February 28, 1984, said child was admitted to the hospital suffering from a bilateral subdural hematoma, which required subdural taps; said injuries occurred while said child was in the custody of [C.C.'s parents]; said parents offered several inconsistent reasons for the injuries suffered by said child.
>
> B. [C.C.'s parents] have failed to make said child available for necessary cleft palate surgery and other medical needs of said child after having been advised by medical personnel of the urgency for said treatment and care.
>
> C. [T.C.] has admitted to violent shaking of said child, on several occasions; [C.C.'s mother] has failed to protect said child during these episodes and has continued to leave said child in the sole custody of [T.C.] being fully cognizant of his violent nature.
>
> D. [T.C.] has failed to seek or make himself available to the mental health care prescribed and/or recommended for him; [T.C.] has admitted to a violent temper and his need for therapy or counseling.
>
> E. [T.C.] has, on several occasions, physically assaulted [C.C.'s mother] in the presence of said child; [C.C.'s mother] has expressed a fear of [T.C.] because of his temper.

At the adjudication hearing, held on March 22, 1984, C.C.'s parents appeared before the court with their lawyer. Also, the guardian ad litem for C.C. appeared at the adjudication hearing. C.C.'s parents entered their pleas of "no contest" to the petition. The juvenile court found that C.C. was a juvenile within the meaning of § 43-247(3)(a) and continued the

proceedings until a dispositional hearing. On May 30, 1984, C.C.'s parents appeared before the court with their attorney for the dispositional hearing. The guardian ad litem for C.C. and a representative of the Nebraska Department of Social Services also appeared for the dispositional hearing. Evidence presented at the dispositional hearing disclosed that the father, T.C., had many problems, such as impulsivity, drug abuse, coping with stress, and urges of violence. T.C. was described as a person who is aggressive, violent, and manipulative and as an individual in desperate need of professional psychological help. A psychological evaluation indicates that T.C. has an antisocial personality, that is, he is prone to impulsive, explosive acts and has a history of drug dependence. The father has had several residences apart from the child and her mother. Psychological evaluation also revealed that C.C.'s mother is functioning at the borderline retarded area of intelligence. Evidence further disclosed that C.C. has a number of conditions which require special attention, including Waardenburg's syndrome, a musculoskeletal abnormality; an orthopedic and nervous disorder; a cleft palate, which required surgery; conducive hearing loss requiring a hearing aid; and a heart murmur and breathing condition, which required C.C. to be placed on an apnea monitor. At 9 months of age, C.C. suffered a bilateral subdural hematoma as a result of trauma to C.C.'s head. Prior to C.C.'s receiving that head injury, C.C. had quit breathing, to which T.C. responded by shaking her vigorously instead of administering CPR as he had been instructed. T.C. also disclosed another incident of head trauma, occurring prior to the preceding incident, when he placed C.C. on a table, left her unattended, and she fell on the floor, severely bruising her head.

At the conclusion of the dispositional hearing, the juvenile court, in addition to certain rehabilitative measures for the parents, ordered that C.C.'s parents take the Infant Stimulation Program at the Meyer Children's Rehabilitation Institute and receive parenting instruction. The court then ordered that temporary custody of C.C. would remain with the Nebraska Department of Social Services until C.C.'s parents complied with the plan to correct the conditions leading to the finding

that C.C. was a juvenile within the meaning of § 43-247(3)(a). Subject to supervision and monitoring by the Meyer Children's Rehabilitation Institute, C.C.'s parents were granted the reasonable right of visitation of C.C.

Following the dispositional hearing, review hearings were held in September of 1984 and March of 1985. During this period, T.C. had not been in compliance with the court's order regarding participation in the Infant Stimulation Program and had missed a number of his scheduled appointments. Although T.C. had complied with the order to be evaluated by Nebraska Psychiatric Institute, following his diagnosis disclosing marijuana and other drug abuse, T.C. refused to participate in any followup therapy, but continued to use marijuana. In March of 1985 T.C. had yet to maintain independent and separate housing and had no "workable income" at that time. The juvenile court then reaffirmed its order regarding T.C.'s compliance with the rehabilitation plan and set the matter for subsequent review hearings. Two hearings in 1985 and one in May of 1986 also disclosed that T.C. had yet to comply with the court-ordered rehabilitation plan.

Based on § 43-292(6), a motion to terminate parental rights was filed on June 4, 1986, alleging that T.C. had failed to comply with the plan for rehabilitation ordered by the court on May 30, 1984, that is, T.C. had visited C.C. on only 30 percent of the scheduled visits, had failed to maintain involvement in the Infant Stimulation Program through the Meyer Children's Rehabilitation Institute, had not pursued the recommendations of the Nebraska Psychiatric Institute, and had failed to maintain independent and separate housing and adequate income.

A hearing on the motion to terminate parental rights was held on August 6, 1986. Throughout the 2-year period of time during which this matter was pending before the juvenile court, T.C. was repeatedly admonished regarding compliance with the provisions of the rehabilitation plan ordered by the court. However, as shown by evidence at the August 6 hearing, T.C. had not completed participation in the Infant Stimulation Program. Jessie Rasmussen, a parent-infant educator for Meyer Children's Rehabilitation Institute, testified that,

beginning in September of 1984, T.C. was scheduled for bimonthly 1-hour sessions of training and instruction in view of C.C.'s disabilities. Rasmussen explained the importance of attendance at the sessions so that T.C. could obtain the necessary instruction to assist C.C. with physical and speech therapy, which was necessary because of C.C.'s condition. However, T.C. attended only 4 of the 13 scheduled sessions from September of 1984 through February of 1985 and discontinued participation in the program. Since October of 1984, when T.C. separated from C.C.'s mother, T.C. had the opportunity to be with C.C. during 80 scheduled visits. Of the 80 scheduled visits, T.C. visited C.C. on only 29 occasions, citing massive depression, drug withdrawal, and transportation problems as excuses. Further, throughout the entire proceedings, T.C. failed to maintain independent housing, and his employment history indicated that he was sporadically employed and rarely held a job for a period of time greater than 1 month.

Although T.C., as ordered by the court, had started individual and group therapy in view of T.C.'s psychiatric problems and drug dependency, he was terminated from two programs for lack of attendance and claimed he was unable to pay for therapy at the Nebraska Psychiatric Institute. Carol Citta, an employee of the Nebraska Department of Social Services, testified that she explained to T.C. how he could apply for free psychiatric treatment and care at the Nebraska Psychiatric Institute, but that T.C. failed to follow through with the application process, as he felt he really did not need psychiatric attention. Further, Citta testified that transportation was made available to T.C., and T.C. acknowledged that he had other means of getting to and from his scheduled appointments. The court found that the allegations that T.C. had failed to comply with the court's rehabilitation plan were true and that, in the best interests of C.C., the parental rights of T.C. should be terminated.

Following the termination order, T.C. filed a motion for new trial, alleging that newly discovered evidence, namely, that T.C. secured a job and separate housing subsequent to the hearing for termination of parental rights, required that the court grant

his motion. The motion was denied, and T.C. maintains on appeal that the juvenile court was in error in finding that T.C.'s lack of compliance with the court-ordered rehabilitation plan was established by clear and convincing evidence. T.C. further maintains the juvenile court erred in overruling his motion for new trial.

As we recently stated in *In re Interest of T.C., ante* p. 116, 121-22, 409 N.W.2d 607, 611 (1987):

> As part of its powers, the juvenile court, in its discretion, may prescribe a reasonable plan for parental rehabilitation to correct the conditions underlying the adjudication that a child is a juvenile within the Nebraska Juvenile Code. See *In re Interest of Brungardt*, 211 Neb. 519, 319 N.W.2d 109 (1982). Cf. § 43-292 (termination of parental rights; failure to correct conditions leading to adjudication).
>
> As expressed in *In re Interest of W.*, 217 Neb. 325, 330, 348 N.W.2d 861, 865 (1984): "The mother has failed to rehabilitate herself, notwithstanding the [court's] order and programs directed to rehabilitation. When parents cannot rehabilitate themselves within a reasonable time, the best interests of a child require a final disposition be made without delay."

The program for T.C.'s rehabilitation was designed for appropriate parental care for C.C. and her basic needs. In view of T.C.'s personality problems, a plan providing for therapy was reasonable under the circumstances. The needs of C.C. require both emotional and some financial stability and support, as well as parental desire to care for and assist C.C., a disabled child. T.C., by his actions, has shown no indication that he will provide such support. We find clear and convincing evidence that T.C. failed to comply with the rehabilitative program ordered by the juvenile court and that T.C. has not corrected the conditions leading to the adjudication that C.C. was a juvenile under § 43-247(3)(a). Therefore, termination of parental rights is proper under the circumstances.

Finally, regarding T.C.'s motion for a new trial, we note that "the granting or refusal of such a motion for a new trial is left to the sound discretion of the trial court, and in the absence of an

abuse of that discretion the determination will not be disturbed." *State v. Donnelson*, 225 Neb. 41, 53, 402 N.W.2d 302, 310 (1987). " 'Evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for new trial on the ground of newly discovered evidence.' " *Martinez v. Peterson*, 212 Neb. 168, 173, 322 N.W.2d 386, 389 (1982). See Neb. Rev. Stat. § 25-1142 (Reissue 1985). We find no abuse of discretion by the juvenile court in denying T.C.'s motion for a new trial. Accordingly, after our de novo review of the record, we affirm the juvenile court's order terminating the parental rights of T.C.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY C. COTTINGHAM, APPELLANT.

410 N.W.2d 498

Filed August 14, 1987. No. 87-012.

1. **Motions for New Trial: Appeal and Error.** The granting or refusal of a motion for new trial is left to the sound discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal.
2. **Motions for New Trial.** New evidence on which a motion for new trial is based must not be merely cumulative, but must be of such a potent nature that, by strengthening the evidence already offered, it would have probably produced a substantially different outcome.
3. **Criminal Law: Judgments: Evidence: Appeal and Error.** Writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
4. **Trial: Witnesses: Appeal and Error.** In order to establish reversible error due to a violation of a sequestration order, the defendant must make a showing of prejudice.
5. **Ordinances: Judicial Notice: Appeal and Error.** Where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged, but will not otherwise take judicial notice of the municipal ordinance.

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

James R. Place and Alan M. Thelen of Breeling, Welling & Place, for appellant.

Herbert M. Fitle, Omaha City Attorney, Gary P. Bucchino, Omaha City Prosecutor, and Richard M. Jones, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

The defendant, Jeffrey C. Cottingham, appeals from an order of the district court for Douglas County affirming the defendant's conviction and sentence in the county court for Douglas County of one count each of assault and battery, a violation of Omaha Mun. Code, ch. 20, art. IV, § 20-61 (1980); indecent exposure, a violation of Omaha Mun. Code, ch. 20, art. V, § 20-114 (1980); disorderly conduct, a violation of Omaha Mun. Code, ch. 20, art. III, § 20-42 (1980); and damage to property, a violation of Omaha Mun. Code, ch. 20, art. VI, § 20-158 (1980). On appeal, the defendant alleges the trial court erred in failing to sustain defendant's motion for new trial and for writ of error coram nobis, in failing to properly sequester the State's witnesses, in finding the evidence sufficient to support a conviction of indecent exposure, and in rendering excessive sentences. For the reasons hereinafter stated the order of the district court is affirmed.

The record shows that during the early morning hours of January 4, 1986, Timothy Darby and Jacqueline Avard, the complaining witnesses, were proceeding through the drive-through facilities of a Burger King restaurant in Omaha, Nebraska, in a car owned by Avard and being driven by Darby. As the witnesses were ordering their sandwiches, a car owned by the defendant and being driven by a companion pulled into the drive-through lane directly behind the witnesses' car. The defendant then got out of the car in which he was a passenger, unzipped his pants, and urinated on the drive-through lane. This behavior was observed by Darby, Avard, and Scott Gavin, an employee of the restaurant. Darby verbally objected to defendant's action and suggested there were other places where one could go to the bathroom. An exchange of comments

ensued as the two cars proceeded through the drive-through lane. Darby and Avard received their sandwiches from the drive-up window and proceeded to the side of the building, where they parked to eat.

The vehicle in which defendant was riding was driven around the corner and parked next to the Avard vehicle. The State's evidence showed that defendant and his companion left their car and approached the driver's side of Avard's car. The defendant then began to strike Darby through the open window while his companion was holding Darby. Avard jumped from the car and screamed at the defendant to stop. Darby crawled out of the passenger's side of the car and approached the defendant to try to calm him down. At this point, the defendant and Darby began to fight. The defendant suffered a cut lip which eventually required stitches. During the course of this fight, the defendant went to his car and removed a large radio. Darby thought the defendant was going to swing the radio at him and ran inside the restaurant. Avard jumped back into her car, drove up to the restaurant's door, and joined Darby inside the restaurant. Defendant and his companion then came to the door and began shouting at Darby to come out and finish the fight. Darby did not go back outside, and the defendant and his companion began kicking and jumping on Avard's car. This attack on the car lasted approximately 3 to 4 minutes, during which the car received numerous dents and a broken antenna, resulting in $675 damage. At this time the manager of the Burger King phoned the police, and the defendant and his companion fled the scene. The defendant was subsequently arrested and charged with assault and battery, damage to property, disorderly conduct, indecent exposure, and littering. After a trial to the bench, the defendant was found guilty on all of the charges except littering, which was dismissed by the trial court on the basis that urinating is not littering. The defendant was sentenced to 30 days in the county corrections center on each count, the sentences to run concurrently. On appeal to the district court for Douglas County, the judgment and sentences of the county court were affirmed. It is from this order the defendant appeals to this court.

The defendant first assigns as error the trial court's failure to

sustain defendant's motion for new trial and for writ of error coram nobis. The granting or refusal of a motion for new trial is left to the sound discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal. *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987). The new evidence on which a motion for new trial is based must not be merely cumulative, but must be of such a potent nature that, by strengthening the evidence already offered, it would have probably produced a substantially different outcome. *State v. Donnelson, supra; State v. Koch*, 224 Neb. 926, 402 N.W.2d 275 (1987).

With regard to defendant's motion for writ of error coram nobis, we have held that such a writ reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment. *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979); *Hawk v. State*, 151 Neb. 717, 39 N.W.2d 561 (1949).

The evidence on which the motion is based includes affidavits from Brad Carpenter, the defendant's companion on the morning in question; the defendant's mother; the defendant's attorney; and the defendant himself. The latter three affidavits are concerned with the diligent efforts to locate Carpenter and secure his testimony prior to trial. Carpenter's affidavit is the only one which relates to the circumstances and events occurring on January 4, 1986. This proposed testimony of Carpenter would have been subject to the scrutiny of the court to the same extent as was the testimony of the other witnesses. We cannot say that the affidavit is of such a potent nature that it probably would have produced a different result. In fact, the affidavit of Carpenter conflicts, in some respects, with the defendant's own testimony at trial. In other respects, both the testimony of the defendant and the affidavit of Carpenter support an acquittal, and to that extent, the proposed testimony of Carpenter would have been cumulative. Defendant's first assignment of error is without merit.

The defendant next assigns as error the trial court's failure to properly sequester the witnesses. The defendant specifically objects to the court's failure to exclude testimony of the

plaintiff's witnesses after one of the witnesses testified with respect to an apparent conversation with other witnesses concerning the location of the vehicles in the parking lot. We have held that in order to establish reversible error due to a violation of a sequestration order, the defendant must make a showing of prejudice. *State v. Hess*, 225 Neb. 91, 402 N.W.2d 866 (1987); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987). We find no showing of prejudice due to the sequestration order in the case at bar. The record of the voir dire examination of the witnesses shows there was a conversation with respect to the location of the vehicles. However, David Troia, one of the witnesses involved in the conversation, further testified that there was no discussion concerning a broken antenna, nor any discussion as to what else took place or who hit whom. Defendant's contention that the court erred in failing to properly sequester the witnesses is without merit.

The defendant further alleges that the evidence was insufficient to support a conviction of indecent exposure and that the trial court erred in imposing excessive sentences. The record shows that defendant was charged and sentenced under the Omaha Municipal Code. Our consideration of defendant's assignments of error on these matters requires an examination of the specific ordinances. Those ordinances have not been made a part of the record and are therefore not before this court. We have held that where an ordinance charging an offense is not properly made part of the record, the Supreme Court presumes the existence of a valid ordinance creating the offense charged. *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986). We will not otherwise take judicial notice of the municipal ordinance. *State v. Lynch, supra; State v. Richter,* 221 Neb. 487, 378 N.W.2d 175 (1985); *State v. Austin,* 219 Neb. 420, 363 N.W.2d 397 (1985).

In the absence of the applicable Omaha municipal ordinances from the record, we must presume the evidence sustained the findings and the sentences were within the limits as set in the ordinances. From consideration of the facts set out above, it is difficult to say that four 30-day sentences, to be served concurrently, amount to excessive sentences. Defendant admits that "[t]hese sentences were within the range of

permitted sentences for the offenses . . . ." Brief for Appellant at 13. We will not further address the assignments of error relating to the ordinances under which the defendant was convicted and sentenced. The facts on these issues speak for themselves.

The district court reviewed the entire record of the county court in making its determination that there was no error in the record and that the judgment and sentences of the county court should be affirmed. We agree. The order of the district court, affirming the judgment and sentences of the county court, is affirmed.

AFFIRMED.

RICHARD K. TURNER, APPELLANT, V. DENNIS E. WELLIVER AND NEBRASKA ALL RISK CROP COMPANY, A CORPORATION, APPELLEES.

411 N.W.2d 298

Filed August 21, 1987. No. 85-328.

1. **Trial: Evidence: Appeal and Error.** Generally, the reception or rejection of evidence is within the broad discretion of the trial court, and to obtain reversal on the grounds of exclusion of evidence, a clear abuse of discretion must be shown.
2. **Trial: Evidence.** Evidence which, although relevant, is cumulative may be rejected by the trial court in the exercise of sound discretion.
3. **Trial: Parties: Witnesses.** When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. However, the trial court has broad discretion in declaring a witness hostile, and in order for the court to do so the record should contain evidence supporting such hostility.
4. **Trial: Rules of Evidence: Testimony: Proof: Appeal and Error.** Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked.
5. **Trial: Rules of Evidence: Expert Witnesses.** If the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant.
6. _____: _____: _____. Proposed expert opinion testimony which has no reasonable basis in fact is properly rejected by the trial court.
7. **Trial: Directed Verdict: Evidence.** For purposes of a motion for a directed

verdict a court must assume the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed; nevertheless, where there is no credible evidence upon which a jury can properly proceed to find a verdict for that party, the trial court should direct a verdict.

8. **Libel and Slander.** In the law of libel and slander, a communication is privileged if made bona fide by one who has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer or speaker to give the information.
9. **Libel and Slander: Proof.** Where a qualified privilege exists, there can be no recovery without proof of malice.
10. **Libel and Slander: Words and Phrases.** Conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he or she has a duty, public, personal, or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty.
11. _____: _____. A communication may be conditionally privileged if it is made for the protection of the recipient or a third person and the recipient is one to whom the publisher owes a legal duty to publish the matter or to whom the publication is within generally accepted standards of decent conduct.
12. **Libel and Slander: Insurance.** Communications between an insurer and insured about an agent of an insurer may be qualifiedly privileged.
13. **Libel and Slander.** Generally, whether a publication was a privileged one is a question of law to be determined by the court.
14. **Libel and Slander: Liability.** Even though a communication is true or is protected by a qualified privilege, there may be liability on the publisher if such communication or statement was made with malice.
15. **Libel and Slander: Proof.** As a general rule, in a case of alleged libel or slander, truth is a complete defense absent proof of actual malice.
16. **Libel and Slander: Words and Phrases.** Actual malice may be defined as hate, spite, or ill will toward the person about whom a statement has been published.
17. **Libel and Slander: Words and Phrases: Actions.** A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.
18. **Libel and Slander.** A communication between those sharing a common interest is conditionally privileged.

Appeal from the District Court for Phelps County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

William H. Sherwood and Charles J. Cuypers of Sherwood & Cuypers, for appellant.

Jeffrey H. Jacobsen of Jacobsen, Orr & Nelson, P.C., for appellees.

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

HASTINGS, J.

The plaintiff has appealed from the judgment of the district court, which sustained the defendants' motion for a directed verdict made at the close of all of the evidence. This was a trial for damages because of alleged libel and slander. Errors assigned may be stated as follows: (1) The court erred by making findings of fact, which was properly for the jury to do; (2) errors were committed by the court in its interpretation of the rules relating to the law of slander and libel; and (3) rulings of the court as to the admission or rejection of evidence were not supported by either the facts or the law.

Richard K. Turner, the plaintiff, purchased the General Service Agency, Inc., in Holdrege, Nebraska, in 1978. Prior to 1980, "all risk" crop insurance was available to farmers only through an agency of the federal government known as the Federal Crop Insurance Corporation (FCIC). In 1980, the Congress enacted a law which established a new marketing plan for all risk crop insurance whereby that insurance would be made available through master marketers, but it would still be underwritten by the federal government. Turner engaged in the sale of all risk crop insurance as an employee of the FCIC's McCook, Nebraska, office until about February of 1982, when apparently that agency discontinued direct writing.

In 1981, Turner employed Claude Evans as an agent, and later, in the fall of 1981, he and Evans formed a partnership, called T & E, which was designed solely to solicit and sell all risk crop insurance coverage. It was through Evans that Turner eventually met Dennis E. Welliver, in August of 1981. Welliver was lining up agents for Welliver's master marketing company, the Nebraska All Risk Crop Company, also known as NARCC. Turner did contract with NARCC in October of 1981 and placed his all risk crop insurance through that company.

According to Turner, when the McCook office of FCIC was closed in the early part of 1982 because the agency went to the master marketing plan rather than direct writing, he was given a list of policyholders by a Ross Smith, the then director of the

FCIC in McCook. It seems to be on this basis that Turner claims the insurance customers, whom we will later discuss, were his customers. However, according to the testimony of Welliver, the customers were Welliver's.

There seemed to be no dispute but that, at the time in question, in order for a person to sell federal all risk crop insurance that person had to be certified, after having taken certain tests prescribed by the federal government. Also, it is agreed that Evans was a certified agent while Turner was not. However, Turner could sell crop insurance through a reinsurance program, as distinguished from direct FCIC insurance through a master marketer. It was this latter program that Turner was following until the spring of 1983.

Turner testified that he decided sometime in 1983 to transfer his crop insurance from NARCC to some other company. However, in later, more specific testimony, he said that it was not until the first or second week of April of 1983 when he made a decision to transfer his crop insurance to Rain & Hail Insurance Service, which was a reinsurance program backed by Aetna Insurance Company. At about this same time, according to the testimony of Claude Evans, on April 28, 1983, Evans terminated his partnership of T & E with Turner. Although Turner testified at trial that the T & E partnership still existed, he had earlier, apparently at a deposition, testified that it terminated on April 30, 1983. Exhibit 17 was a statement given by Evans to Turner, which stated that Evans gave Turner his half of the partnership, T & E, provided all commissions then due Evans would be paid to him. Turner conceded that if the partnership were terminated it would have been necessary for him to have hired a certified agent in order to continue handling federal crop insurance through FCIC.

The occasion which precipitated the series of events resulting in the filing of this lawsuit was the mailing of a letter, exhibit 5, to the all risk crop insurance customers which Turner had placed with NARCC during the past year. The text of this letter is set out in full as follows:

April 21, 1983

Dear Insured:

It has been a privilege to handle your "All-Risk" Crop

Insurance business this past year. We hope we have served you well.

In the past our agency contracted your all-risk coverage through the Federal Crop Insurance Corporation's (FCIC) master marketing system. While the coverage was there, we encountered problems in servicing some of our customers, mainly because of delays in losses being processed, indemnity checks being delayed, and other "red tape" hassles.

In an effort to eliminate these problems, we have decided to contract our All-Risk Crop Insurance with Rain & Hail Insurance Service in Omaha. This company has been in business since 1920, and is financially sound, being backed 100% by Aetna Insurance Company for over 60 years, who in turn is backed by FCIC. Our agency has had Crop Hail business with this company for over ten years, and can vouch for their excellent service.

The rates and coverages provided will be identical to those you received with FCIC. We know we will cut out much red tape, and have more control in the adjustment of claims and when they are paid.

To transfer your account to Rain and Hail, we will need to send a transfer request and application to insure that your past FCIC experience will continue on with your new contract. Unless we hear from you to the contrary by April 28, 1983, we will assume you approve this transfer of your account, and will process the necessary forms.

If you have questions, or would like to discuss this personally, please feel free to call or stop in at our office.

Cordially,

GENERAL SERVICE AGENCY, INC.

RKT/CE/fl R. K. Turner Claude Evans

The mailing of exhibit 5 apparently prompted Welliver to send out to these same customers exhibit 1, a letter dated April 28, 1983. Two additional sheets were attached to that letter; one was a list of agents and agencies in the Holdrege area who were certified NARCC agents and the other a copy of a form 758 which, if the customer signed, would effect a cancellation of

any crop insurance issued to Turner's agency and a placement of this same insurance with Nebraska All Risk Crop Company. The letter included in exhibit 1 is set out in pertinent part as follows:

April 28, 1983

Dear Insured:

You just have received a letter from the General Service Agency, agents R.K. Turner and Claude Evans, requesting you to transfer your Federal All Risk Crop Insurance to Aetna Insurance Company. Please disregard and ignore.

To transfer your Federal "All Risk" Contract to any other company requires a signed request by you, not your signature written in by Mr. Turner. Mr. Turner has been instructed by the Federal Crop Insurance Corporation (FCIC) that they are returning all previous transfer requests submitted by Mr. Turner and are requiring your personal signature on each request. These requests have to be signed by you by April 30, 1983, to be effective for the 1983 crop year. Any backdating will be monitored very closely by FCIC.

This illegal letter is just a continuation of Mr. Turner's unethical insurance practices. Mr. Turner was investigated by the USDA's Office of Investigation a year ago for similar unethical insurance practices and now this illegal letter will probably prompt another investigation. We have been instructed by Mr. Evans that because of Mr. Turner's continued unethical practices, he is in the process of terminating his partnership with Mr. Turner and will be leaving the General Service Agency. We have reconfirmed Mr. Evan's [sic] intentions today.

In addition, if you do wish your contract to remain directly with FCIC you will not be allowed to leave your file with the General Service Agency. FCIC required all agents who write directly with Federal Crop Insurance to pass a certification test to handle Federal All Risk Crop Insurance for the 1983 crop year. Mr. Turner did not take the time and effort to even attend any of the eight FCIC offered certification training and testing sites across the state, thus enabling him to learn the new changes and

better serve your "All Risk" policy. The deadline for an agent to be certified is April 30, 1983.

Due to all of the above facts we are recommending you transfer to a qualified and FCIC certified agent in your area. If you wish to remain directly with FCIC you will have to transfer.

. . . .

If there are any questions, please call our toll free number 1-800-652-1937.

Sincerely,

/s/ Dennis E. Welliver

Dennis E. Welliver, President

In addition to exhibit 1, Welliver had written exhibit 2, a previous draft of exhibit 1, which contained the phrase "all previous ~~forged~~ transfer requests" instead of the language "all previous transfer requests." Exhibit 2 was not received in evidence because it was not mailed out to anyone. However, Lana Dake, an employee of Sostad & Associates insurance agency, one of NARCC's certified agencies, testified that at a meeting with Welliver which she and several agents of the Sostad agency attended, she saw a copy of exhibit 2.

In answer to a question as to whether anyone had ever told her that Turner had committed forgery in connection with his insurance business, Dake answered that "[f]orgery is a hard word but I'd say 'Yes.' " The person who had told her that was Welliver. There is no indication in the record that she ever repeated this to anyone else.

During the course of the trial it was stipulated between the parties that Turner had sent a letter to Welliver requesting a retraction of exhibit 1 and that no retraction was made. Welliver admitted that no retraction was made because, in his own testimony, he said, "It's all true." Welliver also testified that his purpose in sending out exhibit 1 was to let his customers know what was going on and to properly service these customers, and it was not done in order to get Turner out of the picture or to harm Turner.

It was on the basis of the foregoing set of circumstances that Turner filed this action for libel and slander. The case was tried on a petition filed on November 7, 1984. It was on the basis of

that pleading that the trial court made its rather explicit findings, which we believe will make it easier to follow the progress of this litigation, and we will set them out in some detail later on.

Perhaps it will flow more smoothly for us to deal with the assigned errors in reverse order.

RULINGS ON EVIDENCE

Turner complains that the court was prejudiced against him because, of the 313 objections made by defendants, 227, or 72 percent, were sustained; whereas, of the 18 objections made by Turner, only 6, or 33 percent, were sustained. We have examined each and every one of those objections, and it would serve no useful purpose to deal with each separately. Suffice it to say that although many of defendants' objections were of a technical nature, we find either no error or no prejudice. The great bulk of the objections were based on leading questions, hearsay, relevancy, opinion evidence, and the document's speaking for itself. The objected-to questions were often repeated three or four times in a slightly changed mode, which accounted for the staggering numbers.

Some of the other evidentiary questions we will treat separately. The first of those is that the court erred in refusing to receive into evidence an enlargement (24 by 36 inches) of exhibit 1, the letter written by Welliver to the various insureds. The actual letter as written was received into evidence. Generally, the reception or rejection of evidence is within the broad discretion of the trial court, and to obtain reversal on the grounds of exclusion of evidence, a clear abuse of discretion must be shown. *Lincoln East Bancshares v. Rierden*, 225 Neb. 440, 406 N.W.2d 337 (1987). Evidence which, although relevant, is cumulative may be rejected by the trial court in the exercise of its sound discretion. *Nusz v. Wells*, 214 Neb. 1, 332 N.W.2d 204 (1983). There neither was an abuse of discretion present nor was the plaintiff in any way prejudiced by the court's ruling.

The other three specific evidentiary complaints raised by Turner relate to the refusal of the trial court to declare Lana Dake a hostile witness and thereby permit the interrogation of her by means of leading questions; the refusal to permit Leo

Holthaus, an employee of FCIC, to give his opinion as to the legality and ethical nature of Turner's insurance practices; and the refusal to permit the testimony of Bruce Lavalleur, Turner's accountant, to give his opinion as to the projected losses to be suffered by Turner.

We have previously indicated that such rulings generally rest within the sound discretion of the trial court. Neb. Rev. Stat. § 27-611 (Reissue 1985) provides in part as follows: "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." The problem in this case is that there is nothing in the record to sustain Turner's position taken in his brief that "[h]er [Dake's] answers were consistently evasive, her attitude was hostile and her interests were clearly aligned with those of the defendants." Brief for Appellant at 43.

The witness was identified as having been, at the time, an employee of Sostad & Associates insurance agency, as having happened into a meeting involving Sostad, Welliver, and some other employees of Sostad, and as having been shown a document which at least was similar to exhibit 2. Because of the broad discretion allowed to a trial judge in permitting or refusing a request to ask leading questions, we cannot say on the basis of the record before us that he abused that discretion. *State v. Brown*, 220 Neb. 849, 374 N.W.2d 28 (1985).

Leo Holthaus, field operation director for the FCIC, was asked whether he had an opinion as to the legality of exhibit 5, the letter from Turner, and whether, from his investigation of the subject transaction between Turner and Welliver, he found that anyone had been guilty of unethical conduct. Objections were sustained on the bases of relevancy and foundation. No offer of proof was made by Turner as to what the answers might be. Error may not be predicated upon a ruling of a trial court excluding testimony of a witness unless the substance of the evidence to be offered by the testimony was made known to the trial judge by offer or was apparent from the context within which the questions were asked. Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1985). Without regard to the basis for the trial court's ruling, appellant may not predicate error on those rulings.

Finally, regarding evidentiary matters, Turner contends that

the court erred in refusing to allow his accountant, Bruce Lavalleur, to testify as to a projection of loss of income beyond 1984, which he believed Turner would suffer because of the loss of his commissions from federal crop insurance. An offer of proof was made to the effect that exhibit 18 constituted a projection of income which Turner would have had but for the loss of customers for whom he had previously written federal crop insurance. This document was based upon actual income of Turner in 1982 and projected through 1987 by inclusion of a 15-percent increase in client base, and relying not, according to the offer, on the continuation of T & E partnership, but only upon the receipt of $12,719 in commissions received by Turner in 1982.

Although accepting the offer of proof, the trial court sustained the objection to the evidence based primarily, it would seem, on the fact that the witness could not or did not disclose the basis of his assumption of a 15-percent increase in client base. If the assumption for an opinion advanced by an expert witness is not true, such opinion lacks probative value and should be rejected as irrelevant. *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985).

Additionally, although the offer of proof recited that the opinion expressed was not based on a continuation of T & E partnership, the witness had testified earlier that he did, in making his projection, assume that T & E would continue, and immediately after the offer of proof on further examination, the witness said, "I have assumed that T & E Partnership would continue or that it would end amiably with some sort of agreement with Dick Turner and Claude Evans." No reasonable controversy appears in the record over the fact that Turner was not certified to sell federal all risk crop insurance as he had been doing, while Evans was, and that the partnership was terminated as of April 30, 1983.

It is also quite apparent from the testimony of Lavalleur that the $12,719 1982 income, upon which he proposed to base his projection, was income which Turner earned from federal crop insurance through T & E partnership. The proposed opinion, therefore, having no sound and reasonable basis in fact, was properly rejected. *Clearwater Corp. v. City of Lincoln*, 202

Neb. 796, 277 N.W.2d 236 (1979).

Turner's claimed errors regarding evidentiary matters are without merit. Accordingly, regardless of whether the proof made out a case in favor of the plaintiff for libel and slander, there was no competent evidence to support an award of special pecuniary damages. This leaves us to consider whether the case should have been submitted to the jury on the issue of general damages. To answer this question we need next to address Turner's complaint of error regarding the law applied by the trial court.

Neb. Rev. Stat. § 20-204 (Reissue 1983) provides as follows:

> Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy, if:
>
> (1) The false light in which the other was placed would be highly offensive to a reasonable person; and
>
> (2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Neb. Rev. Stat. § 25-839 (Reissue 1985) provides as follows:

> In an action for a libel or slander it shall be sufficient to state, generally, that the defamatory matter was published or spoken of the plaintiff, and if the allegation be denied, the plaintiff must prove on the trial the facts, showing that the defamatory matter was published or spoken of him.

Neb. Rev. Stat. § 25-840 (Reissue 1985) provides:

> In the actions mentioned in section 25-839, the defendant may allege the truth of the matter charged as defamatory, prove the same and any mitigating circumstances to reduce the amount of damages, or prove either. The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication.

Finally, Neb. Rev. Stat. § 25-840.01 (Reissue 1985) provides in pertinent part as follows:

> (1) In an action for damages for the publication of a libel or for invasion of privacy as provided by section

> 20-204 by any medium, the plaintiff shall recover no more than special damages, unless correction was requested, as herein provided, and was not published. . . .
>
> (2) This section shall not apply if it is alleged and proved that the publication was prompted by actual malice, and actual malice shall not be inferred or presumed from the publication.

Perhaps the most sensible manner in which to address the remaining assignments of error is to set forth each allegation in the plaintiff's petition, followed by the trial court's ruling and discussion by this court.

LIBEL

The plaintiff alleges at paragraph 4 that the defendants made the following false accusations:

(1) *The plaintiff practiced forgery in connection with FCIC transfer documents.*

The trial court found that the letter, exhibit 1, does not accuse or imply that plaintiff practiced forgery.

We agree. The letter refers to "all previous transfer requests," not "all previous ~~forged~~ transfer requests" as stated in uncirculated exhibit 2.

(2) *The plaintiff executed FCIC documents without client authority.*

The findings of the court recite that exhibit 1 does not accuse or imply that plaintiff executed documents without client authority.

What the letter did state was that a transfer of a "Federal 'All Risk' Contract" required a signed request by the client, not a signature written in by Turner. This view is undisputed in the record.

(3) *The plaintiff engaged in unethical insurance practices.*

Although the trial court found that exhibit 1 did in fact accuse the plaintiff of unethical conduct, which statements were actionable per se and would subject the defendants to liability without proof of special damages, it concluded as a matter of law that the statements were true and were privileged. It then held that there was no liability on the defendants because the defendants did not act in reckless disregard of the truth or falsity of the statement, and, furthermore, the plaintiff alleged

actual malice in his petition and was therefore held to that standard of proof rather than negligence in failing to ascertain the truth of the statement. The trial court referred to Restatement (Second) of Torts § 580B (1977).

The statements made by the defendants were that the plaintiff was the subject of a USDA investigation in the past and probably would be subject to an additional investigation in the future, that he was uncertified to sell FCIC insurance, and that he failed to attend training sessions. These statements are not contradicted by the record. In addition, the plaintiff's own testimony supports the truth of his unethical conduct. He agreed that backdating of his partnership agreement with Evans was illegal; he acknowledged that he should have known that the signing of the 758 forms with the farmers' names, with his initial, was not a permitted practice; and he conceded that his contact with a Kevin Pesek was "shady."

We find that the overwhelming weight of the evidence supports a conclusion that the statements made by Welliver in exhibit 1 were true. Although for purposes of a motion for a directed verdict a court must assume the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed, nevertheless, where there is no credible evidence upon which a jury can properly proceed to find a verdict for that party, the trial court should direct a verdict. *Settell's, Inc. v. Pitney Bowes, Inc.*, 209 Neb. 26, 305 N.W.2d 896 (1981); *Novotny v. McClintick*, 206 Neb. 99, 291 N.W.2d 252 (1980).

In addition, we find that the communication carried with it a qualified privilege. A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information. *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985); *Dangberg v. Sears, Roebuck & Co.*, 198 Neb. 234, 252 N.W.2d 168 (1977); *Hall v. Rice*, 117 Neb. 813, 223 N.W. 4 (1929) (citing *Wise v. Brotherhood of Locomotive F. and E.*, 252 F. 961 (8th Cir. 1918)). Where a qualified privilege exists, there can be no recovery without proof of malice. *Kloch v. Ratcliffe, supra; Bartels v. Retail Credit Co.*, 185 Neb. 304, 175

N.W.2d 292 (1970).

Conditional or qualified privilege comprehends communications made in good faith, without actual malice, with reasonable or probable grounds for believing them to be true, on a subject matter in which the author of the communication has an interest, or in respect to which he has a duty, public, personal, or private, either legal, judicial, political, moral, or social, made to a person having a corresponding interest or duty. 53 C.J.S. *Libel and Slander* § 89 (1948). The Restatement (Second) of Torts discusses several factors that determine the existence of a conditional privilege arising from an occasion, some of which could be involved in this case.

The conditional privilege involved in this case depends on the relationship among Turner, Welliver, and the recipients of exhibit 1. It appears that Turner was a subagent of Welliver, so the farmers who bought crop insurance from Turner were actually insureds of Welliver's agency. The communications between an insurer and insured may fall within the conditional privileges set out in the Restatement (Second) of Torts § 595 (1977). The Restatement, *supra*, states that a communication may be conditionally privileged if it is made for the protection of the recipient or a third person and the recipient is one to whom the publisher owes a legal duty to publish the matter or to whom the publication is within generally accepted standards of decent conduct. The Restatement, *supra*, § 596, states that a communication between those sharing a common interest is conditionally privileged. Cases involving a conditional privilege between an insurer and an insured are annotated at Annot., 85 A.L.R.3d 1161 (1978).

In several cases discussed in the annotation, courts have held that communications between an insurer and insured about an agent of the insured were qualifiedly privileged. This would be a similar situation as that in the present case, assuming Welliver as the insurer, Turner as his subagent, and the farmers as the insureds.

In *Hahn v. Kotten*, 43 Ohio St. 2d 237, 331 N.E.2d 713 (1975), the plaintiff, a district manager of Woodmen Accident and Life Company, was terminated. He sued the insurance

agency manager and two district managers for slander. The trial court directed a verdict for the defendants, and this was upheld by the Ohio Supreme Court. The defendant agents were instructed to tell insureds who had been served by the plaintiff agent that the agent had been terminated for cause, and if pressed for information, they were to show the insured a copy of the agent's contract describing circumstances under which an agent could be terminated for cause. Following these instructions, the defendant agents communicated with certain insureds of the plaintiff, and these communications were the basis of the slander suit.

The court held that the plaintiff's questionable conduct, including diverting company funds to his own use, placed a duty on the defendant agents to communicate with the insureds and that such communications were qualifiedly privileged. The court stated that a qualified privilege applies where the publisher and the recipient have a common interest, and the communication is of a kind reasonably calculated to protect or further it. Since the insureds were all doing business with the plaintiff at the time of his termination and subsequently transferred their insurance to the agent's new company, the insurer had a common interest with each insured, and the communication was reasonably calculated to protect or further that interest. In addition, the defendant agents had a legal and moral duty to speak. The court stated that the trial court properly found that the statements were qualifiedly privileged and that without some evidence in the record of the defendants' actual malice, the trial court was required to grant the defendants a directed verdict. See, also, *Trice v. Lancaster*, 270 S.W.2d 519 (Mo. App. 1954); *Holmes v. Royal Fraternal Union*, 222 Mo. 556, 121 S.W. 100 (1909); *Miller Ins. Agency v. Home Fire etc. Ins. Co.*, 100 Mont. 551, 51 P.2d 628 (1935); *Peterson v. Cleaver*, 105 Neb. 438, 181 N.W. 187 (1920).

Because the relationship among those involved in the present case is like the insurer-insured relationship in the cases from the annotation, a similar privilege would apply in this case.

Whether a publication was a privileged one is a question to be determined by the court as an issue of law, unless the facts are in dispute, in which case the jury will be instructed as to the proper

rules to apply. Prosser and Keeton on the Law of Torts, *Qualified Privilege* § 115 (5th ed. 1984). We find the record to reflect no reasonable controversy in this regard and that the communication carried with it a conditional privilege.

This does not dispose of this issue, however. Even though a communication is true or is protected by a qualified privilege, there may be liability on the publisher if such communication or statement was made with malice. *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985); § 25-840.

This has nothing to do with plaintiff's claimed error that the trial court incorrectly held plaintiff to a standard of malice, even though, because of the requested correction, § 25-840.01 seems to eliminate the "actual malice" requirement. The requirement of proof of malice to overcome a qualified privilege is quite another matter.

In *Whitcomb v. Nebraska State Education Assn.*, 184 Neb. 31, 165 N.W.2d 99 (1969), this court noted that with the 1957 addition of the last two sentences of § 25-840, truth was made a complete defense absent the proof of actual malice. This is consistent with the constitutional provision, Neb. Const. art. I, § 5, that "the truth when published with good motives, and for justifiable ends, shall be a sufficient defense."

The "malice" as used in § 25-840 must have meant common-law actual malice, rather than the constitutional definition contained in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), because that case postdated our statutory definition by some 7 years.

This court apparently has never defined common-law actual malice in a majority opinion. In *Iden v. Evans Model Laundry*, 121 Neb. 184, 236 N.W. 444 (1931), a dissenting opinion defines express malice (another word for actual malice) as hate, spite, or ill will. The common-law actual malice rule seems to focus on the defendant's attitude toward the plaintiff, while the *New York Times* actual malice rule focuses on the defendant's attitude toward the truth. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980). This is consistent with the definition of the term in the dissenting opinion in *Iden*, and we adopt that definition for the purposes of this case.

The only direct evidence on the issue of good faith or absence

of malice was provided by the testimony of Welliver, who said that his purpose in sending out the letter was to let his customers know what was going on and to properly service these customers, and it was not done in order to get Turner out of the picture or to harm Turner. The fact remains that Turner did send out information to customers of his, who were also insureds of Welliver, which was not accurate and which obviously was intended to lure those customers away from Welliver's Nebraska All Risk Crop Company. Welliver's response would not be unexpected. We find no credible evidence to support a finding of malice on the part of Welliver, and the trial court was correct in its ruling in this regard.

(4) *The plaintiff engaged in illegal insurance practices.*

The trial court found that exhibit 1 does not accuse the plaintiff of engaging in illegal insurance practices, but it did characterize the plaintiff's letter (exhibit 5) as being an illegal letter. However, according to the district court's findings, that statement constituted opinion which is not actionable, as provided by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), and Restatement (Second) of Torts § 566 (1977).

The Restatement, *supra* at 170, provides the following regarding expressions of opinion as defamation: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." The Restatement draws a distinction between two kinds of expression of opinion. The simple expression of opinion, or pure opinion, occurs when the maker of the comment states the facts on which he bases his opinion and then expresses a comment as to the plaintiff's conduct, qualifications, or character. The Restatement, *supra* at comment *b*. The pure type of expression of opinion also may occur without the expression of the alleged facts on which the maker bases his opinion, but both parties to the communication know the facts or assume their existence and the comment is clearly based on those facts. *Id.*

The second kind of expression of opinion, the mixed type, is an opinion in form or content but is apparently based on facts

about the plaintiff or his conduct that have not been stated by the defendant or assumed to exist by the parties to the communication. The expression of the opinion gives rise to the inference that the defendant knows undisclosed facts that justify the forming of his opinion.

The Restatement, *supra* at comment *c.*, states that the common-law rule that a pure type of an expression of opinion may be the basis of a defamation action appears to have been rendered unconstitutional by *Gertz v. Robert Welch, Inc.*, *supra*. The Court in *Gertz* stated at 339-40:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

As comment *c.* recognizes, the language in *Gertz* about there being no such thing as a false idea was only dicta. In addition, *Gertz* involved a media defendant, while the present case involved a nonmedia defendant. However, comment *c.* states that the logic of the constitutional principle would appear to apply to all expressions of opinion of the first, or pure, type. Courts have interpreted *Gertz* as prohibiting defamation actions based on expressions of pure opinion, even when nonmedia defendants are involved. See *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976) (involving a labor dispute, with the president and vice president of a labor union as the plaintiffs and the employer of union members as the defendant).

In *Henry v. Halliburton*, 690 S.W.2d 775 (Mo. 1985), an insurance agent and a business brought a defamation action against the author of an article in a trade association newsletter. The article was later sent to two prospective customers, and it was on this action that plaintiffs sued. The article used language such as "fraud" and said that certain agents "acted with 'greed' " in order to "fleec[e]" customers. *Id.* at 778. The plaintiffs alleged that the defendant knew the statements were false and defamatory and were made for the purpose of dissuading the customers from buying life insurance from the plaintiffs and to damage their business reputation. The petition

was dismissed for failing to state a cause of action, and the Missouri Supreme Court affirmed, finding that the statements were nonactionable opinion.

In the final analysis, Welliver's characterization of Turner's letter (exhibit 5) as an "illegal" letter only describes a violation of USDA regulations, which the record bears out as true, and was not actually an accusation of criminal conduct. Additionally, even if Welliver's statements did not qualify as nonactionable pure opinion, the truth of the statements still would be a defense to any defamation claim.

(5) *Plaintiff was the subject of USDA investigation for illegal and unethical insurance practices and would be the subject of an additional investigation.*

According to the trial court, exhibit 1 did accuse and imply that the plaintiff was the subject of a USDA investigation for unethical practices and could be the subject of additional investigation and, as such, was defamatory. As in (3), above, the trial court, however, found that such statements were actionable per se and would subject the defendants to liability without proof of special damages unless the statements were true. The trial court found as a matter of law that the evidence disclosed that the statements were true and were privileged.

We believe that our discussion in (3), above, regarding truth and malice, as well as our general discussion as to special damages, adequately disposes of this issue.

(6) *The plaintiff was uncertified to sell FCIC insurance.*

The trial court, as in (3) and (5), above, held that this was an actionable statement, but furnished no basis for recovery by the plaintiff because of the factors of truth and the absence of malice. This too has been disposed of by our discussion above.

(7) *The plaintiff failed to attend certification training sessions in connection with FCIC insurance.*

The truth of this statement is adequately supported in the record beyond any reasonable dispute, and there is no showing of malice.

SLANDER

The plaintiff alleges at paragraph 8 of his petition that the defendants made the following false accusations:

(1) *The plaintiff was no longer handling all risk crop*

insurance, and the only way clients would retain coverage was to sign a cancellation and request for transfer of their business to the defendants' companies.

The trial court found the defendant's allegation to be true. There is no evidence in the record to the contrary which affirmatively shows that Turner was switching to a program which was the same as federal all risk insurance.

(2) *The plaintiff was uncertified to sell crop insurance, including all risk crop insurance.*

Again, the trial court found that there was absolutely no evidence to support this allegation, except as to all risk coverage and that was true. Nowhere does the record suggest that Welliver stated that Turner was not certified to sell any kind of crop insurance.

(3) *The plaintiff is unethical and refused to obtain the necessary certification to sell crop insurance, including all risk crop insurance.*

As previously stated, the allegation regarding certification was true. Furthermore, the plaintiff himself admitted that his backdating of the partnership agreement was illegal, that he should have known that to sign the individual farmers' names to 758 forms was wrong and not allowed, and that his contact with Pesek was shady.

(4) *The plaintiff had previously been investigated by the USDA for unethical practices and would be investigated again.*

The trial court found that there was nothing in the record to support any such oral statements in that regard. Our opinion has previously discussed and disposed of similar allegations under the heading of libel.

(5) *The plaintiff practiced forgery in executing documents on behalf of insurance clients.*

Turner alleged that Welliver slandered him by stating that Turner practiced forgery in executing documents on behalf of insurance clients. Welliver might have used the word "forgery" when talking to Lana Dake, and did use the word when talking to his secretary. The court found that, even assuming the word "forgery" had been used, there was no evidence of harm to plaintiff's reputation, and there was no competent evidence to prove that the plaintiff suffered any special damages, in part

because there was no proof that the statements were repeated to anyone else.

In addition, applying the principles previously stated in regard to libel, we believe that a conditional privilege attached to these statements. A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the declarer to give the information. *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985). A communication between those sharing a common interest is conditionally privileged. Restatement (Second) of Torts § 596 (1977).

Because the record discloses no proof of actual malice to overcome the conditional privilege, there can be no liability on Welliver.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

EILEEN M. TIEDE, PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES F. TIEDE, DECEASED, APPELLANT, V. LOUP POWER DISTRICT, A CORPORATION, AND GERALDINE KENNEDY, PERSONAL REPRESENTATIVE OF THE ESTATE OF ARNOLD KENNEDY, DECEASED, APPELLEES.

411 N.W.2d 312

Filed August 21, 1987. No. 85-735.

1. **Motions to Dismiss.** In sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
2. _____. In considering the evidence for the purpose of ruling on a motion to dismiss, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every

inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law.

3. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.
4. **Negligence: Proof.** The burden of proving negligence is on the party alleging it, and merely establishing that an accident happened does not prove negligence.
5. _____: _____. The plaintiff must meet the burden of proving that the defendant engaged in some negligent conduct before a defendant is required to prove a defense of contributory negligence or assumption of the risk.
6. **Negligence: Words and Phrases.** A duty in negligence cases may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
7. **Invitor-Invitee: Negligence.** While the owner of premises owes an invitee the duty to exercise ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation, generally there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he or she may reasonably be expected to discover them and avoid injury.
8. **Negligence.** The duty to warn others of a particular peril is not absolute; the need to warn depends upon, among other things, the age, intelligence, and information of those to whom the warning might be due, and the obligation disappears entirely where it is shown that the injured person did in fact know of and fully appreciate the peril.
9. **Public Utilities: Electricity: Negligence.** A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.
10. _____: _____: _____. The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property.
11. _____: _____: _____. Power companies are not insurers and are not liable for damages in the absence of negligence.
12. _____: _____: _____. The principal basis for determining the liability of a power company for injuries resulting from contact between its wires and a movable machine is the foreseeability of a situation arising which might lead to such injuries.
13. **Negligence: Words and Phrases.** One who is capable of understanding and discretion but who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
14. _____: _____. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the

part of the defendant, is a proximate cause of injury.

15. _____: _____. To constitute want of due care on the plaintiff's part, it is not necessary that he or she have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that the plaintiff knew or should have known that substantial injury was likely to result from his or her acts.

16. **Public Utilities: Electricity: Negligence.** One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself or herself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the power company liable for the resulting injuries, and this is true even of an adult who is wholly unskilled in the handling of electricity.

Appeal from the District Court for Boone County: JOHN M. BROWER, Judge. Affirmed.

Thomas J. Young of Young, LaPuzza & Stoehr, for appellant.

Jewell, Gatz & Collins, for appellee Kennedy.

Noyes W. Rogers of Leininger, Grant, Rogers & Maul, for appellee Loup Power Dist.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Plaintiff-appellant, Eileen M. Tiede, personal representative of the estate of her late husband, Charles F. Tiede (hereinafter Tiede), alleges that the negligence of defendant-appellee Loup Power District and that of defendant-appellee Geraldine Kennedy, the personal representative of the estate of her late husband, Arnold Kennedy, caused the 37-year-old Tiede's death when he was electrocuted while helping harvest crops on the Kennedy farm. At the close of plaintiff's evidence, the trial court sustained the defendants' motions to dismiss, and plaintiff appeals. Her six assignments of error fuse into claims that the trial court erred in concluding that (1) neither Loup Power District nor the Kennedy estate was negligent, (2) Tiede was contributorily negligent in a degree sufficient to bar his recovery as a matter of law, and (3) he assumed the risk of injury and was thus precluded from recovery as a matter of law. We affirm.

On November 22, 1981, Tiede, a neighbor of the Kennedys,

was working on the Kennedy farm under an "exchange of work agreement" whereunder Tiede and the Kennedys pooled equipment and helped each other harvest their respective crops.

The owner of the farm, Arnold Kennedy, had died prior to the events in question, and management of the farm passed to his son, John Kennedy, Sr. However, the son had been injured earlier that fall and as a result could not supervise the harvest. Thus, the deceased Kennedy's 16-year-old grandson, John Kennedy, Jr. (hereinafter John Kennedy), was left to take care of the harvest. However, Tiede made many of the decisions because of his superior age and experience.

The point had been reached in the day's work when the westernmost of four grain bins on the site was to be filled with corn through the use of an auger which was 62 feet long and 32.5 feet high when fully raised, but only 15 feet high when completely lowered. The bin reached a height of 25 feet 8 inches and was 22.2 feet in diameter. A 14,400-volt three-wire electrical line ran diagonally from a pole located at a distance of 66.4 feet northwest of the westernmost edge of the bin to a pole 45.8 feet south of the southernmost edge of the bin. Tiede not only knew of the existence of the line, which had been in place since at least 1966, but had warned others about the dangers it posed.

Although Tiede knew that in previous years the subject bin had been loaded from the southeast, he wanted to load it from the west. John Kennedy had told Tiede that one reason the bin had been loaded from the southeast was because of the high-voltage electrical line. Nonetheless, Tiede said that there was room to miss the wires. John Kennedy said it was fine with him if Tiede wanted to try it. Tiede held the safety catch on the auger while it was being raised. James P. Nolan, another neighbor, and William Streeter, Tiede's hired man, lifted the lower end of the auger and began moving it, while raised to its maximum height, in position to load the bin from the west. Nolan and Streeter were pushing the auger, while Tiede was standing next to it, about 15 feet east of them. The auger either came into contact with one of the high-voltage wires or came close enough to the line to create an arc, causing electrical current to flow through the auger into the surrounding soil, thereby killing

Tiede, Nolan, and Streeter. Tiede's body was found directly under one of the support legs of the auger. John Kennedy's cousin, James Kennedy, was also in the area and was shocked unconscious, but survived because he was far enough away from the auger. The contact, or arcing, occurred at a point 24.5 feet southeast of the westernmost pole, where the line, as measured on May 31, 1985, when the temperature was 60 °F, was at an elevation of 20 feet 11 inches.

While the height of the line exceeded the standards set by the National Electric Safety Code, there was evidence from which a jury could conclude that it should have been built over and along a fence line.

It is good to begin our analysis of the applicable law by recalling that in sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Herman v. Bonanza Bldgs., Inc.*, 223 Neb. 474, 390 N.W.2d 536 (1986). Moreover, in considering the evidence for the purpose of ruling on such a motion, the party against whom the motion is made is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can be reasonably drawn from the evidence; if there is any evidence in favor of the party against whom the motion is made, the case may not be decided as a matter of law. *Herman v. Bonanza Bldgs., Inc., supra; Kahrhoff v. Kohl*, 219 Neb. 742, 366 N.W.2d 128 (1985).

In ruling on the Kennedy estate's motion, the trial court concluded there was "not sufficient evidence"; that is to say, that the plaintiff failed to establish the estate had been negligent.

For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty. *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987). It is axiomatic that the burden of proving negligence is on the party alleging it and that merely establishing that an accident happened does not prove negligence. *Himes v. Carter*, 219 Neb. 734, 365 N.W.2d 840 (1985); *Porter v. Black*, 205 Neb. 699, 289 N.W.2d 760 (1980).

The plaintiff must meet the burden of proving that the defendant engaged in some negligent conduct before a defendant is required to prove a defense of contributory negligence or assumption of the risk. See *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987). We thus consider first whether the plaintiff met her burden of proof as to the Kennedy estate.

A duty in negligence cases may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. *Holden v. Urban, supra.* The duty owed by the owner of premises to his invitees is well established in Nebraska. While the owner of premises owes an invitee the duty to exercise ordinary care to have the premises in a reasonably safe condition for use consonant with the purposes of the invitation, generally there is no duty on the part of an invitor owner to protect the invitee against hazards which are known to the invitee or are so apparent that he or she may reasonably be expected to discover them and avoid injury. *Bruyninga v. Nuss*, 216 Neb. 801, 346 N.W.2d 245 (1984). The duty to warn others of a particular peril is not absolute; the need to warn depends upon, among other things, the age, intelligence, and information of those to whom the warning might be due, and the obligation disappears entirely where it is shown that the injured person did in fact know of and fully appreciate the peril. *Hirschman v. Maddox*, 223 Neb. 302, 389 N.W.2d 297 (1986).

The evidence establishes that Tiede knew about the presence of the lines, was told it was because of the lines that the bin had in the past been loaded from the southeast side, and that, indeed, he had warned others about the lines. Thus, Tiede knew of and fully appreciated the peril. This being so, the landowner was under no duty to warn Tiede of the danger presented by the lines, or had extinguished that duty through adequate prior warnings. *Hirschman v. Maddox, supra.* There being no legal duty, there is no actionable negligence on the part of the landowner. *Holden v. Urban, supra.* The trial court therefore correctly dismissed the claim against the Kennedy estate.

We thus move on to consider the claim against Loup Power District. A power company engaged in the transmission of

electricity is required to exercise reasonable care in the construction and maintenance of its lines. *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984); *Roos v. Consumers Public Power Dist.*, 171 Neb. 563, 106 N.W.2d 871 (1961). The degree of care varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property. *Suarez v. Omaha P.P. Dist.*, 218 Neb. 4, 352 N.W.2d 157 (1984); *Rodgers v. Chimney Rock P.P. Dist., supra; Lorence v. Omaha P.P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974); *Roos v. Consumers Public Power Dist., supra.* However, power companies are not insurers and are not liable for damages in the absence of negligence. *Suarez v. Omaha P.P. Dist., supra; Rodgers v. Chimney Rock P.P. Dist., supra; Lorence v. Omaha P.P. Dist., supra; Gillotte v. Omaha Public Power Dist.*, 185 Neb. 296, 176 N.W.2d 24 (1970); *Roos v. Consumers Public Power Dist., supra; New Omaha Thomson-Houston Electric Light Co. v. Anderson*, 73 Neb. 84, 102 N.W. 89 (1905).

The principal basis for determining the liability of a power company for injuries resulting from contact between its wires and a movable machine is the foreseeability of a situation arising which might lead to such injuries. *Gillotte v. Omaha Public Power Dist., supra.* Where the circumstances are such that the probability of danger to persons having a right to be near an electrical line is reasonably foreseeable, power companies have often been held liable for injury or death resulting from contact between the powerline and a movable machine. *Gillotte v. Omaha Public Power Dist., supra*; Annot., 69 A.L.R.2d 93 (1960). Power companies must anticipate and guard against events which may reasonably be expected to occur, and the failure to do so is negligence. *Suarez v. Omaha P.P. Dist., supra; Rodgers v. Chimney Rock P.P. Dist., supra; Lorence v. Omaha P.P. Dist., supra; Gillotte v. Omaha Public Power Dist., supra; Roos v. Consumers Public Power Dist., supra.*

The evidence that the line should have been built over and

along a fence line requires us to assume, as we do, that the plaintiff proved Loup Power District was negligent. We must thus determine whether Tiede was contributorily negligent in a degree sufficient to bar his recovery as a matter of law.

One who is capable of understanding and discretion but who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987). Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury. *McMullin Transfer v. State*, 225 Neb. 109, 402 N.W.2d 878 (1987); *Lynn v. Metropolitan Utilities Dist., supra.*

To constitute want of due care on the plaintiff's part, it is not necessary that he or she have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that the plaintiff knew or should have known that substantial injury was likely to result from his or her acts. *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986); *Rodgers v. Chimney Rock P.P. Dist., supra; Lorence v. Omaha P.P. Dist., supra; Disney v. Butler County Rural P.P. Dist.*, 183 Neb. 420, 160 N.W.2d 757 (1968). One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself or herself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the power company liable for the resulting injuries, and this is true even of an adult who is wholly unskilled in the handling of electricity. *Rodgers v. Chimney Rock P.P. Dist., supra; Disney v. Butler County Rural P.P. Dist., supra.*

In several cases involving contact with high-voltage electrical lines, we have found that the plaintiff's knowledge of the existence of a high-voltage powerline was sufficient to constitute contributory negligence sufficient to bar recovery as a matter of law.

In *Suarez v. Omaha P.P. Dist., supra*, we held that a 12-year-old boy who climbed to the top of a tree where he could almost touch high-voltage electrical wires was contributorily negligent

as a matter of law and thus barred from recovery.

In *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984), the plaintiff's decedent was cleaning a well pit with a 28- to 30-foot metal pipe connected to an air compressor. A high-voltage line ran directly over the well. The plaintiff's decedent knew of the existence of the line and of the dangerous nature of electricity, and had been careful to avoid coming into contact with the line when moving equipment and haystacks. However, the metal pipe came into contact with the powerline, and the plaintiff's decedent was electrocuted. We held that the evidence was sufficient for the trial court to find that the plaintiff's decedent was guilty of contributory negligence which was more than slight and that he had assumed the risk of injury from contact between the metal pipe and the electrical wire.

In *Lorence v. Omaha P.P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974), we reversed the district court's decision in favor of the plaintiff and dismissed the case because the plaintiff was contributorily negligent as a matter of law. Lorence was repairing the lights on an outdoor advertising sign and brought a 20-foot aluminum ladder into contact with a powerline. Lorence had warned a newly hired electrician about the dangers of overhead powerlines. We held that the only inference that could reasonably be drawn from the evidence was that Lorence was contributorily negligent as a matter of law.

The case most factually analogous to the evidence before us is *Disney v. Butler County Rural P.P. Dist., supra*. The plaintiff in *Disney* was pulling 70-foot irrigation sprinkler arms under a two-wire electric power transmission line. Although he knew the equipment was elevated and thus had marginal clearance under the wires, he did not lower the boom to irrigating position before going under the wires. Pulling into the yard with the irrigation trailer system arms elevated and behind him, Disney stopped his tractor without first looking to see how close the arms were to the line. He apparently touched some part of the tractor while jumping off and was shocked unconscious. The evidence showed Disney knew about the lines, that they carried electricity, that it was dangerous to get anything in contact with or close to the lines, and that " 'he was going to get in

trouble' " if he got close to the lines. *Id.* at 422, 160 N.W.2d at 758. We held that the facts were conclusive of contributory negligence on the part of the plaintiff, who was clearly capable of understanding and discretion, at the time of the accident had knowledge of and was conscious of the danger involved, knew of the dangerous condition, and failed to exercise ordinary care to avoid an open and obvious danger.

The facts of this case compel a similar finding of contributory negligence sufficient to bar plaintiff's recovery as a matter of law. Tiede was a participant in the activities designed to move the auger while in a raised position higher than the electrical line about which he had been warned and about which he had warned others. The high-voltage line presented an open and obvious hazard which Tiede could have avoided by lowering the auger before participating in its move. Accordingly, the trial court was correct in determining that Tiede was contributorily negligent in a degree sufficient to bar his recovery as a matter of law.

The foregoing conclusion makes it unnecessary for us to consider whether Tiede assumed the risk of injury as well.

AFFIRMED.

MARTIN C. KOCH AND MARIE F. KOCH, HUSBAND AND WIFE, ET AL., APPELLEES, V. GERALD M. KOCH, INDIVIDUALLY AND AS TRUSTEE FOR STEPHEN GERALD KOCH AND KENNETH MARTIN KOCH, MINORS, APPELLANT.

MARTIN C. KOCH AND MARIE F. KOCH, HUSBAND AND WIFE, APPELLEES, V. GERALD M. KOCH AND CAROL KOCH, HUSBAND AND WIFE, APPELLANTS.

MARTIN C. KOCH AND MARIE F. KOCH, HUSBAND AND WIFE, ET AL., APPELLEES, V. GERALD M. KOCH AND CAROL KOCH, HUSBAND AND WIFE, ET AL., APPELLANTS, COUNTY OF DIXON, NEBRASKA, A POLITICAL SUBDIVISION, ET AL., APPELLEES.

411 N.W.2d 319

Filed August 21, 1987. Nos. 85-769, 85-770, 85-771.

1. **Attorney and Client.** It is the rule that, ordinarily, the power of the attorney to act for his client in an action is to be considered valid and sufficient until disproved, not void and insufficient until proved.
2. **Parties.** Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

Appeal from the District Court for Dixon County: ROBERT E. OTTE, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

Robert G. Scoville of Ryan & Scoville Law Office, for appellants.

William Horneber of Horneber Law Offices, for appellees Martin C. and Marie F. Koch and George M. and Dorothy M. Koch.

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

KRIVOSHA, C.J.

The appellees Martin C. and Marie F. Koch are the parents of the appellant Gerald M. Koch and the grandparents of Stephen Gerald Koch and Kenneth Martin Koch, the minor children of Gerald M. and Carol Koch.

Originally, Martin and Marie Koch were the owners of two

parcels of real estate. The first parcel (hereafter Section 29) is described as:

> The Southeast Quarter (SE1/4) and the North Half of the Northeast Quarter (N1/2 NE1/4) and the East Half of the Northwest Quarter except a tract of approximately 3 1/2 acres, beginning at the Northwest corner of said East Half of the Northwest Quarter (E1/2 NW1/4), thence South 40 rods, thence East 14 rods, thence North 40 rods, thence West 14 rods to point of beginning, all in Section Twenty-nine (29), Township Thirty-one (31), North, Range Four (4), East of the 6th P.M., in Dixon County, Nebraska.
>
> The South Half of the Northeast Quarter (S1/2 NE1/4) of Section Twenty-nine (29), Township Thirty-one (31), North, Range Four (4), East of the 6th P. M., containing 80 acres, more or less.

The second tract of land (hereafter Section 21) is described as:

> The East Half of the Northeast Quarter (E1/2 of the NE1/4) of Section Twenty-one (21), Township Thirty-one (31) North, Range Four (4) East of the 6th P.M., Dixon County, Nebraska.

In June of 1975, Martin and Marie Koch drafted a real estate contract in which they agreed to convey all of the property in Section 29 to Gerald and Carol Koch for $79,200. The contract recited that $12,000 was received by Martin and Marie Koch at that time. It also provided that Gerald and Carol Koch would assume a mortgage of $7,500 and that, for 20 years, they would make annual payments to Martin and Marie Koch for the balance of $59,700 plus interest.

In May of 1979, Martin and Marie Koch drafted an agreement for warranty deed in which they agreed to convey all of the above-described property in Section 21 to Gerald Koch, as trustee for his minor children, Stephen and Kenneth Koch. The agreement recited that the consideration for the conveyance was $40,000. The agreement further recited that $6,000 was "received" by Martin and Marie Koch "as a gift from sellers to purchaser" and that the purchaser would, for 20 years thereafter, make annual payments to Martin and Marie

Koch for the balance of $34,000 plus interest.

For reasons which are not particularly clear, in August of 1983, Martin and Marie Koch executed a warranty deed covering a portion of Section 29 to Gerald Koch "in consideration of Gift (Love and Affection)." Specifically, they transferred the "South half (S1/2) of the Southeast Quarter (SE1/4) of Section Twenty-nine (29), Township Thirty-one (31) North, Range Four (4), East of the 6th P.M., Dixon County, Nebraska." This was property that had previously been conveyed in June of 1975.

Thereafter, a dispute developed between Martin and Marie Koch and their son and daughter-in-law, Gerald and Carol Koch, and as a result of that, three lawsuits were filed in the district court for Dixon County, Nebraska. It appears from the record that the interests of appellees George M. and Dorothy M. Koch are as lessees of certain of the property involved in this litigation.

Subsequently, the parties entered into a stipulation whereby it was agreed that the district court for Dixon County should enter a decree providing that the property in Section 29 was to be conveyed by warranty deed to Gerald and Carol Koch as joint tenants. At the same time, the decree was to stipulate that the property in Section 21 was to be conveyed back to Martin and Marie Koch and that Gerald Koch, individually and as trustee for Stephen and Kenneth Koch, was to execute a quitclaim deed conveying all of their interests to the property in Section 21 back to Martin and Marie Koch. Also, the stipulation provided that certain personal property consisting principally of machinery and grain was to be divided between Martin and Marie Koch and Gerald and Carol Koch, with Gerald and Carol Koch paying $16,000 for the property granted to them to Martin and Marie Koch. Farm debts were divided between the parties. When all was said and done, Gerald and Carol Koch were once again the owners of the property in Section 29, as joint tenants, and Martin and Marie Koch were the owners of the property in Section 21, as joint tenants. The minor children were left without any interest in any property.

Gerald and Carol Koch, individually, and Gerald Koch, as

trustee for Stephen and Kenneth Koch, then filed a motion to vacate the decree which the district court had entered pursuant to the stipulation of the parties, alleging that they had not agreed to the stipulation or authorized their attorneys to enter into the stipulation. Gerald Koch, as trustee for Stephen and Kenneth Koch, also filed a motion to vacate the decree and to appoint a guardian ad litem for the minors. In the motion he alleged that the minor children were necessary parties to the lawsuit, had not been joined, and had not had a guardian ad litem appointed for them. The district court overruled these motions, and appeal was then taken to this court.

A number of assignments are raised. We may, however, dispose of these matters by simply addressing a single question with regard to each section of land. With regard to Section 29, the question is whether the district court erred in failing to sustain the appellants' motions to vacate the decree entered pursuant to the stipulation. With regard to Section 21, the question is whether the district court erred in failing to sustain the motions to vacate the decree because the minor children had not been made parties to the action and had not had a guardian ad litem appointed for them. We believe that the first question must be answered in the negative and the second in the affirmative, thereby requiring us to in part affirm and in part reverse and remand.

We turn first, then, to the issue involving Section 29. From the evidence it is clear that the minor children had no interest in this property. The only question, therefore, is whether the stipulation was entered into with the knowledge and consent of the appellants Gerald and Carol Koch. In answering that question we note that in *III Lounge, Inc. v. Gaines*, 217 Neb. 466, 471, 348 N.W.2d 903, 907 (1984), we said: "[I]t is the rule that, ordinarily, the power of the attorney to act for his client in an action is to be considered valid and sufficient until disproved, not void and insufficient until proved." For that reason, therefore, the burden was upon the appellants to establish that their attorneys were without authority when they acted. We do not believe that the appellants have met their burden.

To begin with, the record discloses that the appellants Gerald

and Carol Koch were present in the courtroom when their attorneys submitted the stipulation to the district court. Certainly, it is clear that they were aware the stipulation was being offered. Furthermore, the record discloses that at the hearing on the motions to vacate the appellant Gerald Koch was questioned regarding the stipulation and answered as follows:

> Q. Mr. Koch, during the negotiations preceding the entry of this stipulation on April 30, 1985, did you discuss with your attorneys, Mr. Fitch and Mr. Behm the real estate terms of that Stipulation?
>
> A. Yes, we did.
>
> . . . .
>
> Q. Would you tell the Court the substance of what you asked and when you asked it?
>
> A. Well, it was one of them long nights about 12 o'clock at night. He said we had to give away the kids' land. We kept asking the question, "Do we have the right?" That is no problem. Sign some papers and that will be all over with.

The appellants' former attorney, Donald Fitch, also testified at the hearing:

> Q. Prior to the entry of the Court's Order on April 30, 1985, approving the parties' stipulation in the three cases in question—which I believe the Court has been asked to take judicial notice of—as counsel, did you discuss the terms with your clients?
>
> A. Yes.
>
> Q. With all your clients?
>
> A. Yes.
>
> Q. With Gerald individually and as a trustee for the minor children?
>
> A. Gerald and Carol Koch were present at all the discussions together.
>
> . . . .
>
> Q. Did you discuss the conveyance of real estate—strike that. Was the conveyance of the real estate and terms of this stipulation entered on 4-30-85 discussed with your clients?
>
> A. The trust property?

Q. No, the conveyance. The real estate terms in general of that stipulation, were they discussed with your clients?

A. Yes.

. . . .

Q. Was the conveyance of the real estate agreed to by all your clients?

A. Yes.

. . . .

Q. Did these real estate terms of the stipulation . . . was this discussed with the Defendant-Trustee?

A. Yes, on several occasions.

. . . .

Q. Mr. Fitch, did you discuss with the Defendant-Trustee the probability of the Court's setting aside this agreement for warranty deed on this trust property?

A. Yes, we discussed several options in connection with the trust property.

Q. Did you explain the effect of such an order? That is an order setting aside the order for warranty deed?

A. Yes.

. . . .

Q. At the time of entry into the stipulation on 4-30-85 was the Defendant-Trustee in agreement with the disposition of the real estate; including the trust property on April 30, 1985?

A. In agreement, subject to some concern about how it could be done or whether it could be done.

. . . .

Q. . . . Once again getting back to the stipulation, was the ownership distribution and/or delivery of personal property, including farm machinery, set out in the stipulation?

A. Yes.

Q. And it was agreed by your clients?

A. I thought it was.

. . . .

Q. . . . Were items 1 through 15 on pages 2 and 3 specifically discussed with your clients?

A. If I'm not mistaken, all of these 15 items were

discussed . . . .

Q. It was understood and agreed to by your clients?

A. As far as I knew they were.

. . . .

Q. And [was the purchase price of $16,000] agreed to by your clients?

A. I was under the impression they were.

Q. Were you authorized to enter into the stipulation on their behalf?

A. Yes.

. . . .

Q. Were you authorized to enter into this stipulation with [the release of the bill of sale] in there?

A. I believed that I was, yes.

. . . .

Q. The division of the existing hay inventory, was this discussed with your clients?

A. Yes.

Q. Was that agreed to?

A. Yes.

Q. Were you authorized to so stipulate?

A. Yes, I thought I was.

. . . .

Q. And were you authorized to settle all three cases for all Defendants or Respondents in this matter?

A. Yes.

Q. Following the discussion with your clients of these specific terms of the stipulation, did your clients agree to accept those terms following your discussion?

. . . .

A. Yes.

Q. Were your clients advised of the specific terms of the stipulation prior to it being presented to the Court as Exhibit 1 and added into evidence?

A. Yes.

Thus, it seems clear beyond question that the weight of the evidence supports the contention that the appellants had authorized and consented that their attorneys enter into the stipulation. At least, absent any evidence to the contrary, it

cannot be said that the appellants have met their burden in this regard. For that reason, it appears to us that the stipulation and subsequent decree as they affect Section 29 must be affirmed.

The situation with regard to Section 21 is an entirely different matter. In *Johnson v. Mays*, 216 Neb. 890, 897, 346 N.W.2d 401, 405-06 (1984), we said:

> " 'Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. . . .' "

See, also, *Klitzing v. Didier*, 215 Neb. 122, 337 N.W.2d 418 (1983); *James J. Parks Co. v. Lakin*, 206 Neb. 184, 292 N.W.2d 21 (1980); *Shepoka v. Knopik*, 197 Neb. 651, 250 N.W.2d 619 (1977).

Further, in *Workman v. Workman*, 167 Neb. 857, 95 N.W.2d 186 (1959), this court found that the minor beneficiaries to a trust were indispensable parties to an action involving the trust. In so holding, we said at 869-70, 95 N.W.2d at 194:

> The beneficiaries of the arrangement made by Workman and Mrs. Workman as pleaded in the third amended and supplemental petition are their children, three of whom are minors. It follows they are necessary parties to the litigation as a condition of a full and final determination of the controversy alleged in this case. This is especially true if, as appellees contend, Mrs. Workman does not have capacity to be a proper plaintiff in the case, which it is not now necessary to determine. The Code of Civil Procedure declares if a determination of the controversy cannot be had without the presence of other parties, the court must order them to be brought into the litigation. § 25-323, R. R. S. 1943. Smith v. Shaffer, 29 Neb. 656, 45 N.W. 936, declares: "When it appears that all the parties necessary to a proper and complete determination of an equity cause were not before the district court, the supreme court may remand the cause for the purpose of having such parties brought in." See,

also, Cunningham v. Brewer, on rehearing, 144 Neb. 218, 16 N.W.2d 533; Burke Lumber & Coal Co. v. Anderson, 162 Neb. 551, 76 N.W.2d 630.

Furthermore, Neb. Rev. Stat. § 25-323 (Reissue 1985) provides:

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

One may argue that the minor children were present by reason of the fact that Gerald Koch sued both individually and as trustee for the minor children. In fact, the appellees argue that under the provisions of Neb. Rev. Stat. § 30-2222 (Reissue 1985) of the Nebraska Probate Code, the presence of Gerald Koch as trustee for the minor children was sufficient. Without attempting to analyze the full ramifications of that section, we believe that the language of the section, as relevant to this action, discloses on its face that the children were without representation. Section 30-2222(2)(ii) provides as follows: "To the extent there is *no conflict of interest* between them or among persons represented . . . orders binding a trustee bind beneficiaries of the trust . . . . If there is *no conflict of interest* and no conservator or guardian has been appointed, a parent may represent his minor child." (Emphasis supplied.)

The simple answer to this issue is that, at least on its face, there appears to be a clear conflict of interest. The property involved in Section 21 was owned by the minor children. When the settlement was finally effected, the trustee parent was an owner of Section 29, the grantor grandparents were the owners of Section 21, and the minor children were left without any interest in any property. It is difficult to imagine how that situation does not, at least on its face, establish a conflict of interest. For that reason, we believe that the minor children were necessary parties to the disposition of their interests in Section 21, though their father's interest has been disposed of. We therefore believe that the decree, insofar as it terminated the interests of the minor children in Section 21, was erroneous,

and that portion of the cause must be reversed and remanded with directions to make the minor children parties to the action, appoint a disinterested guardian ad litem for them, and litigate the issue of the interests of the minor children in Section 21. The decision of the district court is affirmed insofar as it affects Section 29 and the interest of Gerald Koch in Section 21, and reversed and remanded for new trial insofar as the interests of the two minor children in Section 21 are concerned.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

PAWNEE COUNTY BANK, A NEBRASKA BANKING CORPORATION, APPELLANT, V. KERMIT DROGE, APPELLEE.

411 N.W.2d 324

Filed August 28, 1987. No. 85-634.

1. **Pleadings: Proof.** A defendant must prove all elements of an affirmative defense.
2. **Undue Influence: Proof.** In order to establish a defense of undue influence, the party asserting the defense must show clearly and convincingly that the party who executed the instrument was subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence for an improper purpose, and that the result was clearly and convincingly the effect of such undue influence.
3. **Fraud: Proof.** To establish misrepresentation, the party alleging it must plead and prove that a representation was made; that the representation was false; that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; that it was made with the intention that the plaintiff should rely on it; that the plaintiff reasonably did so rely; and that the plaintiff suffered damage as a result.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Reversed and remanded with directions.

James B. Gessford of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., and Michael J. Donahue and Victor Faesser of Witte, Donahue & Faesser, P.C., for appellant.

L. Joe Stehlik, for appellee.

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

GRANT, J.

Plaintiff-appellant, Pawnee County Bank, a Nebraska banking corporation (hereafter Bank), brought this action in the district court for Pawnee County, Nebraska, against defendant-appellee, Kermit Droge, on a guaranty signed by Droge. The defendant affirmatively alleged that he signed the guaranty as a result of misrepresentation and undue influence by the Bank through the action of its officer and employee. A general jury verdict was returned in the defendant's favor. We reverse.

On October 12, 1984, the Bank filed a petition alleging that "Gary E. Droge, the son of the Defendant . . . for a valuable consideration executed in writing and delivered to Plaintiff a promissory note . . . for the total sum of $91,757.27, due, with interest, at maturity on March 8, 1984" and that "there is now due and owing upon said note the unpaid principal sum of $67,926.89 . . . ." The petition alleged, further: "ON May 12, 1983, the Defendant . . . for valuable consideration . . . executed in writing and delivered to Plaintiff a Guaranty guaranteeing to Plaintiff prompt payment of the foregoing promissory note," and "Defendant has failed to pay the same." The Bank's petition prayed for judgment against the defendant in the amount of $75,681.43, with interest and costs.

On February 11, 1985, defendant filed an amended answer and amended cross-petition. The trial court dismissed the amended cross-petition on the Bank's demurrer, and the case went to trial on the petition and defendant's amended answer, which generally denied the Bank's allegations and affirmatively alleged:

> [P]laintiff, through its officer and employee, did coerce the defendant into signing the purported Guaranty;
>
> . . . did exercise undue influence upon the defendant in order to force him to sign said purported Guaranty;
>
> . . . induced defendant to execute the purported Guaranty by misrepresenting:
>
> a. the financial condition of defendant's son, Gary E. Droge,

b. the purpose of the purported Guaranty,

c. the potential liability of defendant by signing said purported Guaranty.

Trial was held before a jury on May 20 and 21, 1985. At the conclusion of all the testimony the Bank moved for a directed verdict, alleging that the Bank proved the material elements of its cause of action and that defendant "failed to produce evidence sufficient to sustain his affirmative defenses of misrepresentation and undue influence." The court sustained the Bank's motion for directed verdict regarding "their burden of proof on the guaranty" and instructed the jury that defendant had executed the guaranty and was indebted to the Bank in the sum of $83,221.30, unless defendant proved his affirmative defenses of undue influence or misrepresentation. The issues of misrepresentation and undue influence were submitted to the jury.

On May 21, 1985, the jury returned a general verdict in favor of the defendant. The Bank filed a motion for judgment notwithstanding the verdict and a motion for new trial, both of which were denied on July 8, 1985.

The Bank timely appeals and assigns 11 errors, which may, for the purposes of this appeal, be consolidated into the following: (1) The court erred by submitting the issue of undue influence to the jury when there was a lack of sufficient evidence on this issue; (2) the court erred in submitting the issue of misrepresentation to the jury when there was a lack of sufficient evidence on this issue; and (3) the court erred in overruling appellant's motion for judgment notwithstanding the verdict.

In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor, giving to the successful party the benefit of inferences reasonably deducible from the evidence. *Bell v. Williams Care Center, ante* p. 1, 409 N.W.2d 294 (1987).

The facts pertinent to the issues of undue influence and misrepresentation, stated in the light most favorable to the defendant, are as follows.

Gary Droge (hereafter Gary), the son of the defendant, had a

farming operation, which he financed through the Bank from 1976 to 1983. During that time Gary dealt primarily with Michael Platt, a loan officer employed by the Bank. Gary testified that early in May 1983, Platt advised him that the Bank would no longer extend credit and that Gary "had to get some help." Platt testified that he discussed Gary's 1983 financial statement with Gary. That statement showed total assets of $120,520, total liabilities of $120,164, and a present net worth of $356. Platt further testified that all of Gary's collateral had been pledged to the Bank or other lenders, and that he told Gary "we were going to have to have some additional collateral to shore up our line" and that the alternatives were "either to have someone to co-sign his [Gary's] notes with him or guarantee his line." Gary testified that he told his father, the defendant, that he was "in a little trouble up there at the bank, and that they mentioned maybe he could come up and talk to him, they wanted to talk to dad."

The defendant testified that on the day Gary asked him if he would go to the Bank, Gary "didn't tell me nothing about anything. I didn't know what the trouble was . . . . I never asked him what it was." Gary apparently arranged for a meeting for the defendant at the Bank on May 12, 1983.

The defendant, age 64 at the time of trial, testified that he was a partially retired farmer, had farmed since he was 16, and has an eighth-grade education. He and his wife owned a 320-acre farm in Pawnee County. Defendant was not a customer of the Bank other than to purchase vehicle insurance, and had never borrowed money from the Bank.

The defendant testified that on May 12, 1983, he went from his home in DuBois, Nebraska, to Pawnee City, Nebraska, to visit the Bank. Defendant testified further that he was an alcoholic, that he drank every day, that he drank on the way from DuBois to Pawnee City on May 12, 1983, and that he stopped in Pawnee City to buy liquor and drank again before he went to the Bank.

The defendant's wife, Margery Droge, testified that the defendant had been an alcoholic for a number of years and that she had no personal knowledge of how much the defendant had been drinking on the morning of May 12, 1983, but that she

knew "he wasn't in his right state of mind."

Defendant arrived at the Bank around noon and met with Platt alone in his office. Defendant testified that he had never met Platt before. The meeting between Platt and the defendant took 20 to 30 minutes.

The defendant testified that "I walked in and sit down, and I guess mentioned something about, 'You've got something around here that Gary wanted for me to see.' . . ." Defendant further testified that Platt told him "he [Platt] believed he [Gary] could be — come out of this all right . . . . He said he figured out his deal, whatever he called it, and he could see that he could make it all right . . . . No reason why he couldn't." Platt then showed the defendant a computer printout of the cash-flow of Gary's farming operation. This printout was titled "Monthly Cash Budget—Agriculture," and had been prepared by the Bank between March and May of 1983 from information provided by Gary. The defendant testified that he did not ask any questions about the cash-flow statement and that it "was chicken tracks as far as I was concerned. I didn't know what that thing was. . . . I didn't know what he was talking about." It was Platt's uncontroverted testimony that he believed he indicated to the defendant what Gary's debt was at that time, "because it's the very first figure on the sheet." The cash-flow statement showed a "short term bank debt [expressed in $000]" of "93.6" for the month of January 1983, "101.4" for May 1983, and "45.7" for December 1983. Gary testified that at the time he talked to his father in early May of 1983 about visiting the Bank, he owed the Bank over $90,000.

Defendant testified that Platt also told him "Gary was supposed to get a job. . . . [H]e was getting a job. It was 'prise to me; I didn't know how you get a job and farm both, but that's what he said, he was getting one." The defendant stated that the conversation in the meeting up to this point had taken approximately 5 minutes.

After this discussion, Platt spent 10 to 15 minutes taking a financial statement from the defendant, based on information given at that time by the defendant. Defendant signed the financial statement. The defendant then testified that Platt "went and got . . . [t]hat guaranty thing, and printed something

on it, and put it in front of me to sign." The defendant further testified that he signed the guaranty

> after I told him I said I never seen one of these things, don't know what it means. He never said anything and I kind of glanced through the thing. I did see that 125,000, I didn't know what that meant, I never seen anything else. I didn't even try to look at it . . . I don't know why I signed it
> . . . .

Platt testified that the guaranty form was a standard guaranty form used at the Bank. The guaranty signed by defendant had the word "GUARANTY" in bold letters at the top of the form and stated in pertinent part as follows:

> I hereby request Pawnee County Bank hereinafter called the "Bank" to give and continue to give credit to Gary Droge and in consideration of all and any such credit given, I hereby unconditionally guarantee prompt payment to the Bank when due, of any and all notes at any time made by said debtor to said Bank and any renewal or renewals thereof, together with any other indebtedness (now existing or hereafter incurred) of said debtor to said Bank arising from borrowings, overdrafts, notes discounted or otherwise. The Bank shall not be required to first proceed against the debtor on any past due obligation, this Guaranty being absolute in respect to prompt payment. Any and all renewals, extensions, modifications, or alterations of any indebtedness or obligation of the Guaranteed to the Bank are expressly made upon the faith and credit of this Guaranty, and are the consideration for the extension of this Guaranty.
>
> My liability herein shall not exceed One Hundred Twenty Five Thousand and no/100 . . . .

Defendant testified that he did not ask any questions about the guaranty form, and did not ask any questions all day, because he "was in a kind of a stupor, you'd call it . . . ."

Defendant further testified that Platt did not tell defendant the effect of the guaranty form and did not show the defendant Gary's financial statement before defendant signed the guaranty. Platt testified that Gary's loan file was on his desk during the meeting with the defendant, and contained both

Gary's cash-flow statement and his financial statement for 1983 which showed Gary's present net worth of $356.

On cross-examination the defendant testified that he saw the figure "125,000" on the guaranty form, but that he "never read anything on the thing." The following cross-examination ensued:

> Q Besides you and Mike Platt, there was no one else?
>
> A No.
>
> Q Did you want to leave at any time before you were finished with everything?
>
> A I don't know —
>
> Q Did you indicate the desire to leave to anybody?
>
> A I guess not.
>
> Q Okay. Was there anything that prevented you from just saying, "Goodbye, I'll think about it."
>
> A No, I guess I was too dopey to know what was going on on that part. I just sat there.
>
> Q You were free to walk out —
>
> A I suppose I was free there.
>
> Q You were free to walk out of the bank anytime?
>
> A I suppose I was.
>
> Q Nobody was restraining you, holding you?
>
> A No, they wasn't holding me.
>
> Q Physically?
>
> A No.
>
> . . . .
>
> Q Okay. Did Mike Platt make any physical threats to you —
>
> A No.
>
> Q — on May 12?
>
> A No, he didn't make no physical threats.
>
> Q Did he make any threats of an economic nature to you?
>
> A No. He was very pleasant.

The defendant testified that he did not request to take the papers home or to have an attorney look at them before signing them.

Two weeks later, Gary went to the Bank to get a copy of the guaranty for defendant. Defendant testified that up to then he

did not know what he had signed and that "I seen what it meant then after I sat down and worked it over." The defendant stated that he did not go back to the Bank after he discovered what he had signed, and did not do anything about it. After the guaranty was signed, the Bank continued to renew Gary's bank notes. On November 23, 1983, the defendant was notified by letter that the Bank was liquidating Gary's assets, that they would apply the proceeds to the debt at the Bank, and that they would look to defendant to cover any shortages.

We first consider whether there was sufficient evidence of undue influence by the Bank to submit the question to the jury. Initially, it is clear that a defendant must prove all elements of an affirmative defense. *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982).

In order to establish a defense of undue influence, the party asserting the defense must show clearly and convincingly that the party who executed the instrument was subject to undue influence, that there was an opportunity to exercise undue influence, that there was a disposition to exercise undue influence for an improper purpose, and that the result was clearly and convincingly the effect of such undue influence. *In re Estate of Massie*, 218 Neb. 103, 353 N.W.2d 735 (1984); *McDonald v. McDonald*, 207 Neb. 217, 298 N.W.2d 136 (180).

Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence, but there must be a solid foundation of established facts on which to rest the inference of its existence. *McDonald v. McDonald, supra.* The jury's findings concerning undue influence are determinations of fact. This court's standard of review is whether such findings are supported by sufficient evidence, and the findings are not to be disturbed unless clearly wrong. *In re Estate of Massie, supra.*

Our review of the record shows that the defendant failed to establish in any way the elements required to show undue influence. We note that we are not presented, in this case, with ordinary concerns where undue influence is involved; that is, there are no such questions as the influence exerted by an adult child over an aging parent or that exerted by someone over an incompetent. In this case, defendant was not subject to any undue influence. Defendant voluntarily went to the Bank—not

at the Bank's request but at his son's specific request. Defendant was free to leave when he chose and admittedly was not subject to any physical or economic threats. He was a wealthy, retired farmer who chose voluntarily to go to the Bank to discuss his son's affairs. This state of facts is far different than those in the case of *Haumont v. Security State Bank*, 220 Neb. 809, 374 N.W.2d 2 (1985), where the guarantor testified that a bank official threatened to prosecute and jail the guarantor's son if the guarantor did not sign the guaranty.

Further, we cannot determine that there was opportunity to exercise undue influence. The meeting between defendant and the bank's employee was open, cordial, and pleasant, by defendant's own testimony.

Further, there was no evidence showing a disposition on the part of Platt, an officer and employee of the Bank, to exercise undue influence on the defendant, for an improper purpose, when defendant signed the guaranty form.

In connection with all of these matters, the defendant testified that he was not a customer of the Bank and had never met Platt before May 12, 1983. The defendant met with Platt at the request of his son, Gary. It was Platt's uncontroverted testimony that he did not call the defendant to come in and that he did not know of anyone at the Bank who called him in. The record shows that the defendant signed the guaranty in the absence of any physical or economic threats from Platt, and there were no constraints on defendant's liberty. The defendant did not testify to any statements made to him by Platt or to any other facts which would show that Platt had a disposition to exercise undue influence on the defendant for any improper purpose. Even considering the facts in a light most favorable to the defendant, defendant has failed to show any evidence of the essential elements of undue influence. The only influence on defendant appeared to be a natural desire to help his son. We conclude that as a matter of law there was insufficient evidence of undue influence, and the court was clearly wrong when it submitted that issue to the jury.

The record also shows that there was a lack of sufficient evidence of misrepresentation to submit that issue to the jury. In order to show misrepresentation, the party alleging it must

plead and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that the representation was known to be false when made, or was made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely on it; (5) that the plaintiff reasonably did so rely; and (6) that the plaintiff suffered damage as a result. See *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986).

Defendant failed to present any evidence to show that the statements made to defendant by Platt were known to be false when made (or indeed that the statements were false at all), or were made recklessly, without knowledge of their truth and as positive assertions. Defendant's brief on appeal provides little help to determine which statements made by Platt were alleged to be a misrepresentation of facts. It appears from defendant's brief that the questionable statements made by Platt were that defendant's son, Gary, " 'would make it' " and that Gary "was getting a job." Brief for Appellee at 6. The Bank asserts in its brief on appeal that the defendant's claim of misrepresentation rests upon the following: "(1) that Mike Platt said 'he believed he [Gary Droge] . . . could come out of this all right'; (2) that Mike Platt said Gary Droge 'was going to get a job'; and (3) the failure of Mike Platt to show defendant/appellee his son's financial statements even though he didn't ask to see them." Brief for Appellant at 30. The statement by Platt that Gary "could come out of this all right" was in regard to the future success of Gary's farming operation. Platt testified that he showed the cash-flow statement to defendant and said, " 'This is where Gary's debt's at now. Looks like if things are averaged through the year,' that's what we always tried to base them on was an average crop yield and average price, 'it looks like Gary will make some progress through the year.' "

Although Platt did not show the defendant Gary's financial statement, Platt was under no obligation to do so. Defendant did not request to see it. Platt testified that the amount of Gary's debt which defendant was asked to guarantee would have been discussed at the meeting with defendant.

The statement that Gary "was going to get a job" also

concerned a future event. Generally, fraud cannot be based on predictions or expressions of mere possibilities in reference to future events. *In re Estate of Hesemann*, 214 Neb. 842, 336 N.W.2d 568 (1983). The exception to the rule is that fraud may be predicated on the representation that an event which is in control of the maker will, or will not, take place in the future, if the representation as to the future is known to be false when made, or is made in reckless disregard as to its truthfulness or falsity and the other elements of fraud are present. See *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 371 N.W.2d 732 (1985).

Whether Gary's farming operation would be successful and he would "come out of this all right," that is, reduce or be able to pay his debt at the Bank, was not an event which was in the control of Platt, the maker of the statement. Neither was Platt's statement that Gary "was going to get a job" an event within Platt's control.

The record shows that defendant failed to establish misrepresentation. We find that as a matter of law there was insufficient evidence of misrepresentation, and that issue should not have been submitted to the jury.

The judgment is reversed and the cause remanded with directions to enter judgment for the Bank on its petition.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., not participating.

SHADOW ISLE, INC., A CORPORATION, DOING BUSINESS AS ANKONY SHADOW ISLE RANCH, APPELLEE AND CROSS-APPELLANT, V. GRANADA FEEDING COMPANY, A DIVISION OF AFC, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE.

411 N.W.2d 331

Filed August 28, 1987. No. 85-729.

1. **Breach of Contract.** Where a party's breach by nonperformance contributes materially to the nonoccurrence of a condition of one of his duties, the nonoccurrence is excused.
2. **Damages.** Damages that are uncertain, conjectural, or speculative cannot be the basis of a recovery.
3. **Damages: Proof.** A party seeking damages must offer proof which affords a basis for ascertaining their monetary value with reasonable certainty.
4. **Appeal and Error.** A party cannot complain of error when, by his own action, he has acquiesced therein.
5. **Contracts.** A contract provision is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.

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

Donn C. Raymond of Raymond, Olsen, Ediger & Ballew, P.C., for appellant.

Paul W. Snyder of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

This case arises out of a controversy concerning an agreement for the use of water from two wells on the defendant's land.

The plaintiff, Shadow Isle, Inc., and the defendant, Granada Feeding Company, own adjacent tracts of land in Scotts Bluff County, Nebraska. In 1973 the predecessors in title of the parties executed a "Deed and Easement of Water Right." American Beef Packers, Inc. (American), the predecessor in title of the defendant, was the owner of the land referred to in the deed as "Tract A." Colossal Cattle Company (Colossal), the

predecessor in title of the plaintiff, was the owner of the land referred to in the deed as "Tract B."

Under the terms of the deed, American conveyed to Colossal, and its successors and assigns, the right to use water from the wells described as wells 2 and 3 and located on Tract A. Colossal, on behalf of itself, and its successors and assigns, conveyed to American, and its successors and assigns, a perpetual easement appurtenant to and running with Tract A, for the purpose of allowing the continued use of the main waterline running from well 3 over Tract B.

Paragraph 2 of the deed provides:

> 2. Both American and Colossal covenant for and on behalf of themselves, their successors and assigns and which [sic] each other and their respective successors and assigns, that both parties will at all times keep and maintain or cause to be kept and maintained the wells and the lines thereto in good order and free from contamination and *all costs of maintenance and repair on said wells and lines leading therefrom will be borne by the parties hereto*, their successors and assigns, *in the ratio that the parties hereto*, their successors and assigns, *use the water from said wells as such use is determined between the parties hereto*, their successors and assigns.

(Emphasis supplied.)

The defendant is now the owner of Tract A and the plaintiff is the owner of Tract B as referred to in the deed and easement.

On May 8, 1984, the defendant wrote to the plaintiff threatening to "disconnect our water supply going to your property" on June 1, 1984, because the plaintiff had refused to pay any of the costs of maintenance or repair of the water supply.

The plaintiff commenced this action on May 31, 1984, to enjoin the defendant from disconnecting the water supply system, to obtain a declaration of the rights and status of the plaintiff under the deed, and for such other and further relief as the court deemed just and equitable.

The defendant filed an answer and a cross-petition. In its answer, the defendant admitted the existence of the deed and the ongoing dispute regarding operational costs of the well and

water systems and denied other allegations of the petition. The defendant also alleged the plaintiff had not reimbursed it for any costs of operation, maintenance, or repair of the water supply system since July of 1978 and that the rights of the parties under the deed should be clarified and declared by the court to avoid continuing disputes between the parties. The answer prayed for a declaration of the rights of the parties under the deed and for such other and further relief as the court deemed equitable.

In its cross-petition, the defendant alleged that the plaintiff owed 30 percent of all operational, maintenance, and repair costs incurred from July 1978 to June 21, 1984, in the amount of $35,510.26.

In its answer to the cross-petition, the plaintiff denied that the defendant was entitled to relief; that it had not agreed to pay for operational costs of the water system; and that such costs were to be distinguished from costs of maintenance and repair. The plaintiff further alleged that the defendant's claim for damages prior to June 22, 1980, was barred by the statute of limitations.

The trial court found that under the deed the cost of maintenance included electrical costs of maintaining the wells; that the parties had failed to determine the ratio of use between themselves as required by the deed; that the parties should determine their respective ratio of use and the court would not determine that ratio for them; and that the plaintiff had failed to equitably determine its ratio of maintenance and repair costs for which it should reimburse the defendant, and therefore was not entitled to equitable relief. The trial court dismissed both the petition and cross-petition.

Both parties filed motions for new trial.

The defendant has appealed and has alleged three assignments of error, that the court erred (1) in refusing to resolve the dispute between the parties concerning the costs of operating, maintaining, and repairing the wells and waterlines, and in dismissing its cross-petition; (2) in not awarding it a money judgment for at least 30 percent of the costs of operating, maintaining, and repairing the wells over a period of 4 years prior to the filing of the cross-petition; and (3) in

refusing to permit Meredith C. Schaff, its expert witness, to testify.

The plaintiff has cross-appealed and has alleged four assignments of error, that the trial court erred (1) in dismissing its petition for injunctive relief before it had an opportunity to present rebuttal evidence and before it had presented its defense to the cross-petition; (2) in finding that "maintenance" included the cost of electricity to operate the pumps; (3) in admitting evidence of utility bills, repair bills, and invoices; and (4) in not finding the statute of limitations barred the defendant's claim under the cross-petition.

The first question on appeal is whether the trial court erred in dismissing the defendant's cross-petition and refusing to resolve the dispute regarding the plaintiff's liability for costs of operation, maintenance, and repair.

The trial court based its decision on the fact that the parties had failed to determine the ratio of water use between themselves. Clearly, there was a dispute as to the plaintiff's liability for the cost of water supplied to it by the defendant. The defendant's May 8, 1984, demand letter was incorporated into both parties' pleadings and was received in evidence. The letter provided as follows:

> Since 1980 we have attempted to determine with you an equitable solution to the water supply situation at your Minatare property. We have accepted your excuses for being unable to deal with the problem and we have patiently provided your operation with a water supply from our wells for almost 5 years. We have billed you for only 1/3 of the power cost of operating the wells which we have been willing to accept as compensation for our cost. We have not billed you for any of our repair, capital or replacement costs in maintaining the water supply, which we believe you clearly owe us. At no time have you offered any compensation to us for the water you use each day. Our billings to you have been ignored to the extent that 1/3 of electrical cost for the pumps supplying water to your property amounts to $32,206.34 through April 1, 1984.
>
> We have delayed pressing the matter on several

> occasions because each time you needed more time to present a solution. We will not wait beyond June 1, 1984. Be advised that on June 1, 1984 we will begin to disconnect our water supply going to your property.
>
> We also will pursue collection of the amount we believe you owe us on the water services we have supplied in the past.

The defendant's manager testified that when the dispute first arose in 1980, the defendant considered putting flow meters on the wells, but did not do so because both parties talked of settling the matter.

The record shows that it was the plaintiff which was unwilling to work with the defendant to determine the parties' ratio of water use. On the other hand, the defendant persisted in its efforts to resolve the matter for some 4 or 5 years before concluding that the plaintiff's water usage approximated 30 percent.

The Restatement (Second) of Contracts § 245 at 258 (1981) provides: "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." Comment *a.* to that section indicates at 258:

> Where a duty of one party is subject to the occurrence of a condition, the additional duty of good faith and fair dealing imposed on him under § 205 may require some cooperation on his part, either by refraining from conduct that will prevent or hinder the occurrence of that condition or by taking affirmative steps to cause its occurrence. Under § 235(2), non-performance of that duty when performance is due is a breach. . . . Under this Section it has the further effect of excusing the non-occurrence of the condition itself, so that performance of the duty that was originally subject to its occurrence can become due in spite of its non-occurrence. . . .

In this case, the plaintiff did not try in good faith to determine its ratio of water use with the defendant. Despite the supposed efforts of the plaintiff to resolve the matter, the evidence does not show that it ever offered a solution or that it reimbursed the defendant for any of its expenses of operating,

maintaining, or repairing the wells. The evidence supports a finding that the provision requiring the parties to determine their respective ratio of water use between themselves should have been excused. The plaintiff did not use good faith in an effort to reach such a determination. The defendant could not be expected to reach a ratio determination with the plaintiff when the plaintiff refused to cooperate.

If there had been sufficient evidence, the trial court should have determined the ratio of water use between the parties and determined the amount due the defendant under the deed.

Next, the defendant contends that it should have been awarded a judgment for 30 percent of its costs of operating, maintaining, and repairing the wells which provided water to the plaintiff.

The plaintiff contends the defendant's proof of damages was too uncertain to permit any recovery of damages. There was no direct evidence of the amount of water used by either party. There was evidence that prior to mid-June 1984, the defendant supplied all of the water used by the plaintiff on Tract B. There was some evidence of the parties' respective uses of water on the two tracts and some evidence of the relative sizes of the cattle feeding and other agricultural operations on both tracts. The defendant presented evidence of repair bills and operational costs of the wells supplying water to the two tracts. However, there was no evidence from which a satisfactory calculation could be made as to the amount due the defendant from the plaintiff.

Damages that are uncertain, conjectural, or speculative cannot be the basis of a recovery. See, *Siefford v. Housing Authority*, 192 Neb. 643, 223 N.W.2d 816 (1974); *Sherman v. Travelers Ind. Co.*, 193 Neb. 104, 225 N.W.2d 547 (1975); *K & R, Inc. v. Crete Storage Corp.*, 194 Neb. 138, 231 N.W.2d 110 (1975).

A party seeking damages must offer proof which affords a basis for ascertaining their monetary value with reasonable certainty. *Siefford v. Housing Authority, supra.*

Since there was a failure of proof, the defendant was not entitled to recover any damages. It is unnecessary to consider the defendant's third assignment of error.

As to the cross-appeal, the plaintiff first contends that it was prejudiced because it was not permitted to offer rebuttal evidence or present a defense to the cross-petition. Specifically, the plaintiff claims it should have been allowed to offer proof that it had done equity and had "clean hands."

At the trial the plaintiff offered three exhibits and then rested. The defendant then presented its evidence. When the plaintiff was asked if it had any rebuttal, it responded that it had a motion. The plaintiff then moved for a directed verdict on the cross-petition. The defendant moved to withdraw its rest in order to offer an exhibit regarding repair costs, which had been discussed but not offered in evidence. The exhibit was then offered and received over the plaintiff's objection. The trial court then asked the defendant, "Do you renew your rest now and want to go ahead with the argument?" The defendant responded affirmatively. The record does not show any objection by the plaintiff. The record shows no ruling upon the motion for a directed verdict. Counsel then proceeded with argument. No further proceedings are shown.

"A party cannot complain of error when, by his own action, he has acquiesced therein." *Langenheim v. City of Seward*, 200 Neb. 740, 747, 265 N.W.2d 446, 451 (1978). The plaintiff may not complain now of the procedure below, since it made no objection.

The plaintiff next contends the trial court erred in holding electrical costs of maintaining the wells are included in maintenance costs under the deed and easement.

A written contract is not subject to interpretation or construction where the language of the contract is unambiguous. *Kansas-Nebraska Nat. Gas Co. v. Swanson Bros.*, 215 Neb. 398, 338 N.W.2d 774 (1983). In *Pawnee Plastics, Inc. v. American Savings Co.*, 210 Neb. 131, 133, 313 N.W.2d 262, 264 (1981), we held that a contract provision "is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one."

In addition to paragraph 2, the deed reflects that Tract A has water wells; the owner of Tract B has utilized water from those wells for many years and will continue to have a need for it; and

the parties' predecessors in title wished to set in writing the terms of the water right being conveyed so that the owners of Tracts A and B could rely on the same.

Nowhere in the deed are operational costs expressly discussed. Nevertheless, the clear implication of the contractual provisions is that the parties to the contract contemplated that the water system would be operational.

Insurance Co. v. Wayne, 75 Ohio St. 451, 80 N.E. 13 (1907), involved litigation pertaining to a contract which provided for the allocation of maintenance and repair costs of certain improvements benefiting adjacent buildings. The plaintiff sought money under the contract for costs of maintaining and repairing an elevator. The court determined that operational costs of the elevator were included within maintenance costs, in part because the contract as a whole contemplated that the elevator would be operational.

In *Romney v. Improvement Co.*, 122 W. Va. 608, 609, 11 S.E.2d 758, 758-59 (1940), the court stated in regard to a franchise agreement for a sewage system: "The definers, generally, concur that costs properly allocated to maintenance of property, include all expenses reasonably necessary to its sustention. Operation and maintenance cover the same expenditures." See, also, *Boston, Petitioner*, 221 Mass. 468, 109 N.E. 389 (1915).

Since the deed in the case at bar clearly contemplated operation of the water system, we believe that paragraph 2 presented an ambiguity subject to construction. Like the courts in *Insurance Co., supra* and *Romney, supra*, we interpret the language to mean that operational costs of the water system are included in the term "maintenance." If the water system is not maintained in an operational state, the deed and easement have no purpose or effect.

It is unnecessary to consider the plaintiff's other assignments of error.

The judgment dismissing the petition and cross-petition is affirmed.

AFFIRMED.

JAMES BERGMAN, A MINOR, BY HIS NEXT FRIEND AND MOTHER, PHYLLIS HARRE, APPELLEE, V. ROYCE ANDERSON, APPELLANT.

411 N.W.2d 336

Filed August 28, 1987. No. 85-825.

1. **Torts: Battery: Assault: Intent: Words and Phrases.** Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another.
2. **Torts: Battery: Words and Phrases.** A battery requires an actual infliction of unconsented injury upon or unconsented contact with another.
3. **Torts: Assault: Intent: Words and Phrases.** An assault is a wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt, without requiring that the one assaulted be subjected to any actual physical injury or contact.
4. **Torts: Battery: Assault: Intent: Words and Phrases.** The intent required for a battery or an assault contemplates only the intent to cause physical contact or injury or arouse an apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery.
5. **Jury Instructions: Appeal and Error.** Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
6. **Torts: Liability.** As a general rule, one who counsels, commands, directs, advises, assists, or aids and abets another individual in commission of a wrongful act or tort is responsible to the injured party for the entire loss or damage.
7. **Pleadings: Actions.** Under a code system of pleading, such as that in Nebraska, it is not necessary to state a cause of action in any particular form. It is only necessary to plead the facts, and not the theory of recovery.

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

Gregory R. Abboud, for appellant.

Raymond J. Hasiak, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

On the evening of October 16, 1983, James Bergman and his girlfriend stopped at a gas station near 84th Street and West Center Road in Omaha. As Bergman started to drive from the gas station, Royce Anderson drove into the station and parked his van in front of Bergman's car, blocking Bergman's exit. Anderson got out of his van and was accompanied by his three teenage sons and four of their friends. Anderson and his teenage companions, carrying baseball bats, approached Bergman's automobile and began beating on the hood with their bats. Anderson's group had been tracking Bergman because of a previous dispute between Bergman and one of Anderson's sons. After someone broke out the driver's side window, Anderson reached into the car, grabbed Bergman around the neck, and pulled him out of the car and onto the pavement. Anderson punched Bergman in the back of the neck and jaw and held Bergman down on the pavement while Anderson's companions kicked him. At trial, Anderson denied hitting Bergman, but claimed his actions in pulling Bergman out of the car were to protect him from the seven other individuals. As a result of the attack, Bergman was left bleeding from his nose and mouth and sustained injuries to his head and back. Bergman's car also sustained damage, including a broken windshield, broken headlights, and numerous dents.

In his petition, Bergman alleged:

> That on the 16th day of October, 1983 at the vicinity of 84th and Center Streets the Defendant and certain minor children under the Defendant's direction did unlawfully and without provication [sic] did assault the Plaintiff by striking him on the head and grabbing him behind the head and dragging him out of the car. After being dragged out of the car the Plaintiff was struck again by the Defendant on the head and side. As . . . a result of the assault by the Defendant and minors under the Defendant's direction the Plaintiff has suffered severe pain and mental anguish and the Plaintiffs [sic] body was badly bruised and injured.

Bergman also alleged in his petition that as a consequence of the attack, he incurred medical expenses in the amount of

$216.55 and repair costs to his automobile in the amount of $923. At trial, a witness, testifying on behalf of Bergman and over Anderson's objection, testified that the actual repair cost would be approximately $2,000. Bergman requested that the court enter judgment for the specifically enumerated amounts, as well as for damages for mental anguish and pain and suffering.

After Bergman adduced evidence, Anderson unsuccessfully moved for a directed verdict, alleging that Bergman's petition failed to state a cause of action under the theory that Anderson acted in concert with others and aided and abetted in the commission of an assault or battery. Following the adduction of evidence, the trial court, over objection, gave the following "assault" and "battery" instruction:

> "Assault" may be defined as a wrongful offer or attempt, with unlawful force or threats, made in a menacing manner, to inflict bodily injury upon another, with the present apparent ability to give effect to the attempt.
>
> "Battery" may be defined as any intentional, unlawful physical violence or contact inflicted on a human being without his consent. The word "battery" also includes within its meaning "assault" as above defined.
>
> Any unlawful or unjustified striking of another is an assault and battery, for the direct consequences of which the party guilty thereof is liable in damages.

Over Anderson's objection, the court also instructed the jury on the theory of aiding and abetting, using an instruction substantially similar to that contained in NJI 14.12, and providing in part:

> Aiding and abetting involves some participation in the unlawful act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that any physical part in the commission of the unlawful act is taken or that there was an express agreement therefor. *Mere encouragement or assistance is sufficient.*

(Emphasis supplied.) Following jury deliberation, the jury returned a general verdict, on which judgment was entered, in the amount of $8,000.

Anderson now appeals to this court and alleges that the district court erred in (1) instructing the jury on the definitions of "assault" and "battery"; (2) allowing the jury to be instructed on the theory that Anderson acted in concert with others and aided and abetted in the commission of an assault or battery, when Bergman's petition does not allege such theory; (3) instructing the jury regarding a definition of aiding and abetting; and (4) allowing Bergman's witness to testify as to the repair cost of Bergman's car in an amount in excess of the cost of repair pled in Bergman's petition.

Regarding Anderson's first assignment of error, Anderson contends that the trial court incorrectly instructed the jury regarding the law of "assault and battery" and that his tendered instruction, "[t]hat assult [sic] and battery is a physical touching with intent to inflict bodily injury," should have been given.

First, Anderson misinterprets the law regarding the intentional torts of battery and assault. Battery and assault are separate torts resulting from a defendant's intentional actions directed toward another. See Prosser and Keeton on the Law of Torts, *Intentional Interference with the Person* §§ 8 through 10 (5th ed. 1984). A battery requires "an actual infliction" of an unconsented injury upon or unconsented contact with another. See *Newman v. Christensen*, 149 Neb. 471, 31 N.W.2d 417 (1948). In contrast, we have characterized the intentional tort of assault as a " 'wrongful offer or attempt with force or threats, made in a menacing manner, with intent to inflict bodily injury upon another with present apparent ability to give effect to the attempt,' " without requiring that the one assaulted be subjected to any actual physical injury or contact. *Crouter v. Rogers*, 193 Neb. 497, 499, 227 N.W.2d 845, 847 (1975). See Prosser and Keeton, *supra* at § 10 (no actual contact is necessary to establish the intentional tort of assault). See, also, 6 Am. Jur. 2d *Assault and Battery* § 3 (1963); 6A C.J.S. *Assault & Battery* §§ 3 and 4 (1975). To the extent Anderson's tendered instruction treated battery and assault as one and the same, which they are not, such tendered instruction was an incorrect statement of the law, which was properly rejected by the trial court.

Second, Anderson contends that "intent to cause bodily injury," necessary for proper instruction regarding an assault, see *Crouter v. Rogers, supra*, was omitted from the instruction given by the trial court. Both the intentional tort of battery and the intentional tort of assault require an intent which may be shown by proof that the defendant intended to physically injure or contact another or intended to cause apprehension that such physical injury or contact is imminent. See Prosser and Keeton, *supra* at §§ 9 and 10. However, such intent contemplates only the intent to cause physical contact or injury or arouse an apprehension of imminent injury, as the assailant need not intend the precise or particular injury which followed as the result of the assault or battery. See *Morfeld v. Weidner*, 99 Neb. 49, 154 N.W. 860 (1915). Cf. *State v. Ristau*, 201 Neb. 784, 786, 272 N.W.2d 274, 276 (1978), "It is not essential to a conviction for assault with intent to do great bodily injury that the accused should have intended the precise injury which followed as the result of the assault. It is sufficient if serious bodily harm of any kind was contemplated." The trial court's instruction on "assault" included the language "wrongful offer or attempt" at an "unlawful or unjustified striking of another." In its ordinary use, an offer includes "an action or movement indicating a purpose or intention of doing something." Webster's Third New International Dictionary, Unabridged 1566 (1981).

> "Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. . . . ' " 'All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.' " ' "

State v. Copple, 224 Neb. 672, 699, 401 N.W.2d 141, 159 (1987). See, also, *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987). Reviewing the instructions as a whole, we find that the jury was correctly instructed concerning the element of intent required in the tort of assault.

Regarding Anderson's second and third assignments of error, because they both relate to questions regarding the same legal theory, we address them conjunctively.

> Plaintiffs-Appellants invoke the settled principles of law covering concerted wrongful action: that in addition to persons who actually participate in an assault and battery, persons who aid, abet, or procure the commission thereof, are subject to a civil action therefor; that on the theory that the act of one is the act of all, the rule of joint and several liability of tort feasors prevails where the tort feasors act in concert or unity of action, and, therefore, applies to tort feasors who intentionally unite in the wrongful act or who are present, assist, or participate therein; and that where two or more persons engage in a common enterprise, they are jointly liable for wrongful acts done in connection with that enterprise, at least where the enterprise is an unlawful one, in which case all are answerable for any injury done by any one of them, although the damage done was greater than was foreseen or the particular act done was not contemplated or intended by them.

Thompson v. Johnson, 180 F.2d 431, 433-34 (5th Cir. 1950). See Prosser and Keeton on the Law of Torts, *Joint Tortfeasors* § 46 (5th ed. 1984). As a general rule, one who counsels, commands, directs, advises, assists, or aids and abets another individual in commission of a wrongful act or tort is responsible to the injured party for the entire loss or damage. See, *Dickinson v. Lawson*, 125 Neb. 646, 251 N.W. 656 (1933); 74 Am. Jur. 2d *Torts* § 66 (1974). See, also, *Acree v. North*, 110 Neb. 92, 192 N.W. 947 (1923); *Cooney v. Burke*, 11 Neb. 258, 9 N.W. 57 (1881).

Anderson contends that Bergman's petition failed to state a cause of action based on the theory that Anderson acted in concert with others and aided and abetted in the commission of an assault or battery on Bergman.

> The failure of a petition to state a cause of action may be challenged at any time during the pendency of the litigation. Gerard v. Steinbock, 169 Neb. 828, 101 N.W.2d 194. An objection to the introduction of any evidence on

> the ground that the petition fails to state a cause of action is a recognized practice in this state; and if the petition is totally defective, the objection should be sustained. Gerard v. Steinbock, *supra*.
>
> Where the objection is not made until after the trial has commenced, the petition will be liberally construed and sustained if possible. Welch v. Adams, 87 Neb. 681, 127 N.W. 1064; Elvidge v. Brant, 131 Neb. 1, 267 N.W. 169. The petition will be liberally construed in the light of the entire record; and if the essential elements of the plaintiff's case may be implied from the petition by reasonable intendment, it will be held sufficient. Dickinson v. Lawson, 125 Neb. 646, 251 N.W. 656; Bradway v. Higgins, 152 Neb. 724, 42 N.W.2d 627; Goger v. Voecks, 156 Neb. 696, 57 N.W.2d 621. Any error or defect in the pleadings which does not affect the substantial rights of the adverse party must be disregarded. [Neb. Rev. Stat.] § 25-853 [(Reissue 1985)]; Dickinson v. Lawson, *supra*.

Gibbs v. Johns, 183 Neb. 618, 619-20, 163 N.W.2d 110, 111 (1968). See, also, *Contois Motor Co. v. Saltz*, 198 Neb. 455, 253 N.W.2d 290 (1977). "Under a code system of pleading, such as Nebraska's, it is not necessary to state a cause of action in any particular form. It is only necessary to plead the facts, and not the theory of recovery." *Parriott v. Drainage Dist. No. 6, ante* p. 123, 126, 410 N.W.2d 97, 100 (1987). See *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984). Bergman's petition specifically alleged that those attacking Bergman were under Anderson's "direction," and such allegation permits the inference that Anderson actively assisted, participated, and aided and abetted in the attack on Bergman. We conclude, upon our review of the pleadings, that Bergman stated sufficient facts to support a theory that Anderson acted in concert with others and aided and abetted in the commission of an assault or battery.

Anderson also complains that the court's instruction on aiding and abetting was incorrect. In particular, Anderson contends that " '[m]ere encouragement or assistance' " in the commission of the unlawful act is not sufficient, but that the definitional "standard" is one of "substantial" encouragement

or assistance. Brief for Appellant at 11. In this case, the trial court adapted NJI 14.12, an instruction in a prosecution for a criminal offense, for use as an instruction in a civil action. Presently, under our criminal law, the standard requiring "mere encouragement or assistance" in commission of a criminal act is sufficient to impose criminal liability for "aiding and abetting." See, *State v. Bennett*, 219 Neb. 601, 365 N.W.2d 423 (1985); *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982). We decline to adopt a more stringent standard in our tort law than that which presently prevails in our criminal law. Therefore, we find that the trial court properly instructed the jury regarding Anderson's acting in concert with and aiding and abetting others in the commission of an assault or battery on Bergman.

Finally, we address Anderson's fourth and last assignment of error. We note that the jury returned a general verdict in favor of Bergman. We are unable to determine what part or amount, if any, of the verdict represents property damage concerning Bergman's car. The cost of repair to Bergman's car, as an item of damage, may or may not be included in the amount of the general verdict and, under the circumstances, cannot be separated from the other damages awarded by the jury. Thus, we are unable to determine whether the jury actually awarded to Bergman property damage in excess of the amount stated in Bergman's petition.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN DWYER, APPELLANT.

411 N.W.2d 341

Filed August 28, 1987. No. 86-961.

1. **Directed Verdict: Convictions.** In a criminal trial, the trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon could not be sustained.

2. **Verdicts: Appeal and Error.** A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict.
3. **Criminal Law: Robbery.** Robbery of contraband may be subject to the penal sanction of Neb. Rev. Stat. § 28-324 (Reissue 1985).

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Richard L. Schmeling, for appellant.

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

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

GRANT, J.

Defendant, John Dwyer, appeals his jury convictions in the district court for Lancaster County on one count of robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1985), and one count of use of a weapon during the commission of a felony, in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1985). The defendant was sentenced to the state Department of Correctional Services for a term of 2 to 4 years on each count, with the sentences to be served consecutively. On appeal, the defendant assigns as error the trial court's failure to grant defendant's motions to dismiss at the close of the State's case and again at the close of all the evidence and alleges the verdicts of the jury are contrary to law and to the evidence. The defendant further alleges the court erred in preventing the defendant from introducing testimony concerning drug dealings between the victim and the two codefendants for purposes of impeachment and in failing to sustain defendant's objection as to testimony concerning the amount of money the victim paid for the marijuana which was taken from him. Finally, the defendant alleges the district court erred in giving instruction No. 9 over objection of the defendant and in failing to give two of defendant's proposed instructions. For the reasons hereafter stated, the judgment and sentences of the district court are affirmed.

There is little dispute concerning the events leading up to and

including the robbery. The record shows that Allen Bennett, the complaining witness, was residing at 421 Main Street, apartment No. 1, in Hickman, Lancaster County, Nebraska, at the time of the robbery. Bennett suffers from muscular dystrophy, has no use of his legs, has limited use of his arms, and is confined to a wheelchair, which he operates by using a hand control on the arm of the chair. Bennett testified that on the evening of March 11, 1986, he was at home in his apartment, watching television. The door to his apartment was unlocked. At approximately 7 p.m., three people wearing ski masks, later identified as defendant John Dwyer, James Rosenkrans, and Timothy Tuttle, burst into his apartment. At the time the three entered the apartment Bennett did not know who they were. One of the three moved behind the witness, pulled back the witness' head, and told him to be quiet, to keep still, and he would not get hurt. Bennett saw one of the intruders holding a "black stiletto type knife" with a blade length of approximately 6 to 8 inches. The individual standing behind Bennett placed electrical tape over Bennett's mouth and disabled his wheelchair by releasing the pulleys on the sides of the wheels. The defendant, who was later identified as the individual holding the knife, moved in front of the witness and held the knife to his throat. Rosenkrans and Tuttle searched through Bennett's desk. The ordeal lasted approximately 30 seconds, during which time the witness was repeatedly told to keep quiet and he would not get hurt. After Rosenkrans and Tuttle found what they were looking for, the three intruders left the apartment, leaving Bennett stranded in his wheelchair. Bennett was able to remove the tape from his mouth and call for help. Several residents of the apartment building responded to Bennett's call. Bennett related to them the events of the robbery.

Initially, Bennett was unable to determine whether or not anything was missing, and felt something had gone wrong and the intruders were scared off. However, Bennett later discovered that a bag containing approximately 2 1/2 ounces of marijuana had been taken from his desk.

Approximately 20 minutes after the robbery, a sheriff's deputy arrived at the scene. Bennett told the deputy generally what had happened, but instead of reporting that marijuana

had been stolen, he told the deputy that the intruders had stolen cash in the amount of $325. This amount was the sum Bennett paid for 4 ounces of marijuana approximately 2 weeks prior to the robbery. Some months later, Bennett called the police and admitted to the falsity of the initial report and told the investigators that marijuana, rather than money, had been stolen.

The three men involved in the robbery were subsequently arrested and charged with robbery and use of a weapon during the commission of a felony. On September 10, 1986, the codefendant Rosenkrans entered into a plea agreement under which Rosenkrans entered a plea of no contest to a charge of attempted robbery. On September 11, 1986, the codefendant Timothy Tuttle entered into a plea agreement under which Tuttle pled guilty to attempted robbery. Neither codefendant was required, under the terms of the agreements, to testify against the defendant.

At the defendant's trial, the State adduced the testimony of the managers of the apartment building, who were Douglas and Debra Rosenkrans, the brother and sister-in-law of James Rosenkrans. They testified that during the early evening of March 10, 1986, they observed three men, one of whom was wearing a ski mask, "hanging around" the apartment building. They saw the three men in a vehicle bearing the license number 2-G7771, which was registered to James Rosenkrans, talked to them, and identified them as Tuttle, James Rosenkrans, and the defendant, who was the person wearing the ski mask.

At about 7 p.m. the night of the robbery, a resident of the apartment building saw James Rosenkrans and two other persons, whom he did not know, in the apartment building. James Rosenkrans testified that he took part in the March 11 robbery of Bennett and that defendant also participated. The testimony of this witness generally corroborated that of Bennett and that of the managers of the apartment building. Defendant did not testify.

At the conclusion of the trial, the jury returned a verdict of guilty on each count. The defendant was sentenced to the state Department of Correctional Services. Defendant timely appealed to this court.

In his appeal, the defendant alleges that the verdicts are contrary to the law and the evidence and that the court erred in failing to sustain the defendant's motions to dismiss, motions which for the purpose of this case will be treated as motions for a directed verdict. In Nebraska, it has been held that a trial court will be justified in directing a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony is of so weak or doubtful a character that a conviction based thereon could not be sustained. *State v. Meints*, 225 Neb. 335, 405 N.W.2d 15 (1987); *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987). In determining whether the evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence. Those determinations are within the province of the jury. *State v. Meints, supra; State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). A jury verdict of guilty will not be overturned on appeal unless it is based on evidence so lacking in probative force that it can be said as a matter of law that the evidence is insufficient to support the verdict. *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985).

It has been shown that the facts concerning the alleged robbery are not in dispute. Defense counsel makes no attempt to show that the defendant was not involved in the events which took place on March 11, 1986. The only point the defendant argues on appeal is whether the property stolen in the present case, marijuana, has any value as contemplated by the robbery statute, § 28-324(1). That statute states, "A person commits robbery if, with intent to steal, he forcibly and by violence . . . takes from the person of another any money or personal property of any value whatever." Defendant contends that marijuana is a controlled substance, that possession of marijuana is illegal, and that therefore marijuana has no legal value and cannot be the subject of robbery, in the absence of specific statutory provisions to the contrary. The defendant specifically refers to the failure of the Legislature to include language defining contraband as property in the robbery statute, although such language appears in the theft statute, Neb. Rev. Stat. § 28-509(6) (Reissue 1985). While we agree with

the defendant that marijuana is a controlled substance and possession thereof subjects one to criminal penalties, we do not agree that it has no value for purposes of the robbery statute. Robbery is classified in our statutes as an offense against the person, and the focus in the statutes forbidding such claim is on the protection of the victim rather than the monetary value of the item taken. See *Hairston v. Com.*, 2 Va. App. 211, 343 S.E.2d 355 (1986). The lack of monetary or intrinsic value of property is not a defense to a prosecution for robbery. *People v. Greene*, 129 Misc. 2d 1008, 495 N.Y.S.2d 600 (1985). See, also, *State v. Gomez*, 234 Kan. 447, 673 P.2d 1160 (1983). The fact that the item stolen may have been contraband and cannot have legal value does not alter the situation. The taking of contraband by force is subject to penal sanction. *People v. Dillon*, 34 Cal. 3d 441, 668 P.2d 697, 194 Cal Rptr. 390 (1983); *State v. Pokini*, 45 Haw. 295, 367 P.2d 499 (1961).

Defendant cites *People v. Spencer*, 54 Cal. App. 54, 201 P. 130 (1921), to the effect that intoxicating liquor could not be the subject of robbery because it was an illegal substance. Defendant admits that the *Spencer* case was later "eroded" by *People v. Bailey*, 82 Cal. App. 700, 256 P. 281 (1927). We rely on the California Supreme Court statement in *People v. Dillon, supra* at 457 n.5, 668 P.2d at 704 n.5, 194 Cal. Rptr. at 397 n.5, where the court stated:

> Defendant apparently concedes that robbery of contraband is subject to penal sanction. California was for some time the only jurisdiction to adhere to a contrary rule (*People v. Spencer* (1921) 54 Cal.App. 54, 301 P. 130), but our court has long since agreed to the overruling of this aberrant precedent. (*People v. Odenwald* (1930) 104 Cal.App. 203, 211-212, 285 P. 406, 286 P. 161 [opn. on den. of hg.].) Today the rule is universal that by prohibiting possession of an item, the government does not license criminals to take it by force or stealth from other criminals.

We agree. Robbery of contraband may be subject to the penal sanction of § 28-324. In the present case the marijuana, although contraband, could be the subject of robbery if shown to have "any value whatever." The court, when considering the

defendant's first motion to dismiss, stated, "It would be the height of naivete . . . to believe that the property that was taken in this robbery did not have a value when it is common knowledge that drugs are illegally sold upon the street . . . and that money can be had for that item." The court later found that there was sufficient evidence from which the jury could conclude that the marijuana taken from Bennett had a value of approximately $202. Defendant's contention that the verdict is contrary to the law and evidence in that marijuana has no value and cannot be the subject of a robbery is without merit.

Defendant assigns as error the refusal of the trial court to permit defendant to impeach Bennett's credibility by testimony "concerning drug dealings between the victim and two of the co-defendants in order to impeach the credibility of the victim's testimony." Examination of the record shows that the court permitted much cross-examination of Bennett concerning prior sales of marijuana to James Rosenkrans in the presence of Tuttle, but did not permit defendant's attempt to show that Rosenkrans had purchased Valium from Bennett. The court determined such evidence was irrelevant. We agree.

Other errors are assigned in the giving or refusing of certain instructions, but these errors are not discussed. We have held that a party who claims error in a proceeding is required to point out the factual and legal basis that shows the error. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). In the event the assignments of error are not supported by accompanying arguments in the brief, but are only statements of general dissatisfaction with the conclusion reached by the trial court, this court will not speculate in regard to the reasoning behind the defendant's dissatisfaction. *State v. Copple, supra; Bohaty v. Briard*, 219 Neb. 42, 361 N.W.2d 502 (1985).

There is no error. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MELVIN L. MOORE, APPELLANT.

411 N.W.2d 345

Filed August 28, 1987. No. 86-1045.

1. **Constitutional Law: Appeal and Error.** Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.
2. **Arrests: Police Officers and Sheriffs: Probable Cause.** The lawfulness of an arrest without a warrant must be based on probable cause, which exists where facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. If the facts available to the officer at the time of the arrest would warrant a person of reasonable caution in the belief the action was appropriate, then probable cause exists.
3. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this 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. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. Further, in a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.

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

Dorothy A. Walker of Mowbray, Chapin & Walker, P.C., for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

Melvin L. Moore appeals his convictions for disturbing the peace and quiet of others, a violation of Lincoln Mun. Code § 9.52.030 (1984), and resisting arrest, a violation of Lincoln Mun. Code § 9.12.040 (1984). We affirm.

At approximately 1 a.m. on July 29, 1986, Lincoln Police

Officer Don L. Marti responded to a complaint of a disturbance at a house identified as 615 South 21st Street, in a Lincoln residential neighborhood. On arrival at the scene, Marti initially stopped his cruiser 75 to 100 feet away from the house and heard noise coming from the house's front yard, that is, people talking and laughing very loudly in what Officer Marti characterized as "party noise." Marti then stopped his cruiser on the street in front of the house, but could not see the individuals who were making the noise, since they were in a darkened part of the yard. When he had stopped his cruiser, Officer Marti shined the cruiser's spotlight on the front of the house, lighting the area where the individuals were standing, and then observed four males in the front yard, who were drinking from some unidentifiable type of beverage bottles.

As Officer Marti was getting out of his cruiser, Moore ran up to the cruiser and yelled, "What the fuck are you doing here? You've got no business here. Get the fuck out of here." Officer Marti testified that Moore

> continued to yell at me and I finished getting out of my cruiser and he was right up in my face. It was difficult to get out of my car, in fact. And I explained or tried to explain to the defendant that I was there on a disturbance call which seemed to even make him madder. . . . And I asked him for some identification and he refused to do that. And he kept yelling at me.

Moore continued "yelling and screaming" and "flailing his arms around" as Officer Lyle A. Lacy, another Lincoln policeman dispatched on the disturbance call, arrived at the scene. Officer Lacy tried to calm Moore and asked him to move away from Officer Marti so that Officer Lacy could speak with Moore. Officer Lacy attempted to move Moore away from Officer Marti on at least three occasions, but Moore kept running back to Officer Marti, yelling at him and poking his finger in Marti's face. Officer Marti described the incident:

> Finally, I think maybe the second or third time that he came running back at me and poking his finger in my face yelling, I told Mr. Moore that he was under arrest and he stated, "Don't touch me," and started to back away. I followed Mr. Moore for a few steps. I told him he was

> under arrest and I reached out and I grabbed ahold of his left arm. At which time Mr. Moore grabbed me by the front of the shirt with one arm and by the neck with his other hand. And at that point the fight was really on. We grappled with Mr. Moore and the other three parties who were in the front yard started grabbing onto us. And other people came from outside — from inside the house and began grabbing onto us. We called for additional units. And I would say maybe two to three minutes elapsed before other units could get there. At which time the majority of the other people retreated inside the house and locked the door. And Mr. Moore was finally subdued and placed in the cruiser by Officer Lacy.

Officer Lacy testified that Officer Marti "told Mr. Moore he was under arrest for disturbing the peace." Immediately after such statement to Moore, "Officer Marti put his hand out and touched Mr. Moore on the arm," as testified by Officer Lacy. Both officers were in police uniform during their contact with Moore.

After finding Moore guilty of disturbing the peace and resisting arrest, the trial court sentenced Moore to pay fines of $10 and $75, respectively, on the convictions. On appeal to the district court for Lancaster County, Moore's convictions and sentences were affirmed. Moore appeals his convictions to this court, assigning as error and arguing that the municipal ordinances under which he was convicted are constitutionally invalid; that his conviction for resisting arrest was contrary to the Nebraska statutory scheme governing justification for use of force; that his conviction for disturbing the peace was based solely upon speech which is protected by the 1st and 14th amendments to the U.S. Constitution; and that there was insufficient evidence as a matter of law to sustain his convictions beyond a reasonable doubt.

While Moore claims that the municipal ordinances under which he was convicted are unconstitutional, the question of constitutionality of those ordinances was not presented to the trial court and, therefore, will not be considered on appeal. "Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been

properly raised in the trial court. If not so raised, it will be considered to have been waived." *State v. Brand*, 219 Neb. 402, 404, 363 N.W.2d 516, 518 (1985). See, also, *State v. Fleming*, 223 Neb. 169, 388 N.W.2d 497 (1986); *State v. Hunter*, 219 Neb. 850, 367 N.W.2d 122 (1985); *State v. Kaiser*, 218 Neb. 556, 356 N.W.2d 890 (1984). Although Moore did not question the constitutionality of the ordinances during his trial, Moore contends that the constitutionality issue was raised during his appeal to the district court and, therefore, should be addressed by this court. A similar contention was rejected in *State v. Kaiser, supra*, where we stated at 558, 356 N.W.2d at 892:

> The fallacy with this argument, however, is that appeals in criminal matters from the municipal court to the district court are not reviewed de novo upon the record; rather, they are reviewed "for error appearing on the record made in the county or municipal court." Neb. Rev. Stat. § 24-541.06(1) [Reissue 1985] . . . . The district court in the instant case was functioning as an appellate court and not as a trial court; thus, it was restricted in its review to the record made in the lower court.

(Citations omitted.) See, also, *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987); *State v. Painter*, 224 Neb. 905, 402 N.W.2d 677 (1987); *State v. Daniels*, 224 Neb. 264, 397 N.W.2d 631 (1986); *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984).

Neb. Rev. Stat. § 28-1412 (Reissue 1985) states in part:

> (1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.
>
> (2) The use of force is not justifiable under this section unless:
>
> (a) The actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and
>
> (b) When the arrest is made under a warrant, the

warrant is valid or believed by the actor to be valid.

Neb. Rev. Stat. § 28-1409 (Reissue 1985) states in part:

> (1) Subject to the provisions of this section and of section 28-1414, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
>
> (2) The use of such force is not justifiable under this section to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful.

Moore argues that Officer Marti initiated the use of force by grabbing Moore's arm, that Officer Marti did not advise Moore as to the reason for his arrest, and that the use of force in law enforcement is justifiable only if the arrest is made under a warrant. Moore's arguments are unpersuasive. Officer Marti's contact with Moore consisted of official restraint in connection with the announced arrest for disturbing the peace and prevention of Moore's departure from Marti, the arresting officer. Any of Officer Marti's additional physical contact with Moore was, under the circumstances, force justifiable in defense of Moore's assault on the officer.

Although Officer Marti did not have an arrest warrant for Moore, the arrest of Moore was lawful.

> The lawfulness of an arrest without a warrant must be based on probable cause, which exists where "facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed." *State v. Harrison*, 218 Neb. 532, 535, 357 N.W.2d 201, 204 (1984). . . . "If the facts available to the officer at the time of the arrest would warrant a man of reasonable caution in the belief the action was appropriate, then probable cause exists." *State v. Hack and Callans*, 212 Neb. 406, 408, 322 N.W.2d 806, 808 (1982). Thus, the key to a lawful arrest without a warrant is reasonable or probable cause that a person has committed a crime.

State v. Roggenkamp, 224 Neb. 914, 919, 402 N.W.2d 682, 686

(1987). On the facts known to Officer Marti at the time of the arrest, there was probable cause to believe that Moore had committed the offense of disturbing the peace.

Officer Marti's use of force was justified and authorized under § 28-1412. Moore was informed of the reason for Officer Marti's presence at the scene and was later informed of the reason for the arrest by Officer Marti. Also, under the circumstances presented in this case, the force used by Moore was clearly prohibited by § 28-1409(2), inasmuch as Moore knew that the arrest was being made by a peace officer. Moore's assignment of error regarding Officer Marti's lack of justification for use of force and justification for Moore's use of force is without merit.

Moore argues that his conviction for disturbing the peace was based solely upon speech which is protected by the 1st and 14th amendments to the U.S. Constitution. Nothing in the record supports Moore's claim that he was arrested for disturbing the peace solely as the result of his using the word "fuck" while yelling at Officer Marti. We need not, and do not, decide whether Moore's use of such word under the circumstances was constitutionally protected speech. The record clearly shows that the basis for Moore's arrest for disturbing the peace was his conduct in the presence of Officer Marti, such as yelling at, threatening, and violently arguing with the officer. Moore's assignment of error concerning a claim of protected speech has no merit.

Moore's final assignment of error is that there was insufficient evidence to support his convictions.

> [I]n determining the sufficiency of the evidence to sustain a conviction, it is not the province of this 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. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. . . . Further, in a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn

such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment. *State v. Schroder*, 218 Neb. 860, 869-70, 359 N.W.2d 799, 806 (1984). There is sufficient evidence to sustain Moore's convictions, and, therefore, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT EARL RIVERS, APPELLANT.
411 N.W.2d 350

Filed August 28, 1987. No. 86-1080.

1. **Postconviction.** When a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required.
2. **Postconviction: Appeal and Error.** A motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal.
3. _____: _____. A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and the findings of the district court in denying relief will not be disturbed on appeal unless they are clearly erroneous.
4. **Postconviction.** Although an evidentiary hearing is not always necessary on an application for postconviction relief, such a hearing is usually advisable to avoid protracted litigation.
5. **Pleas.** A voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional.
6. **Effectiveness of Counsel.** This court has adopted a two-part test to determine whether a defendant received effective counsel: first, the attorney must perform at least as well as an attorney in that area with ordinary skill in criminal law, and second, the attorney must conscientiously protect the client's interests. Additionally, the defendant must show that there is a reasonable probability that but for the attorney's error the result of the case would have been different.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

E. Michael Slattery of Case, Reinsch & Slattery, P.C., for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a postconviction proceeding under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985). Defendant, Robert Earl Rivers, appeals an order denying him an evidentiary hearing and postconviction relief, claiming an evidentiary hearing was required upon his motion that contained factual allegations which, if proved, constituted a violation or infringement of constitutional rights, and citing *State v. Malek*, 219 Neb. 680, 365 N.W.2d 475 (1985).

We note that a further statement of the *Malek* rule includes: "When a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required." *State v. Bean*, 224 Neb. 278, 280, 398 N.W.2d 104, 107 (1986). Such files and records include the presentence report. *State v. Waterman*, 215 Neb. 768, 340 N.W.2d 438 (1983).

On December 29, 1983, Rivers entered a plea of guilty to one count of first degree sexual assault, Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1985), the victim being under 16 years of age. On August 23, 1984, a sentence of not less than 5 and not more than 9 years was imposed, to be served in the Nebraska Penal and Correctional Complex. There was no direct appeal. Rivers was represented by attorney Oliver Pollak, of Omaha, Nebraska. We affirm.

On July 16, 1983, defendant Rivers, age 35 years, was residing at a trailer court in Eagle, Cass County, Nebraska, with his wife, Janette, and her two daughters, Marjie, age 15 years, and Cheri, age 13 years. About 8 p.m., Rivers suggested to Marjie that they go out to the edge of town, and Marjie agreed. She rode her moped, and Rivers followed in his car. They went to a secluded place under a mulberry tree, where Marjie voluntarily removed her clothing and Rivers had anal intercourse with her. Marjie returned to the family home, where she showered and changed clothing. Soon, Janette became suspicious, and after some questioning, Marjie admitted the assault. Janette telephoned the State Patrol; Officer B.L.

Hobbs responded, and later placed Rivers under arrest. Both Marjie and Rivers had berry stains on their person. When first interviewed, Rivers denied the assault, but admitted being at the assault scene with Marjie and took the officer there. He explained the berry stains resulted from their falling down. The next day, still denying the July 16 assault, Rivers told officers that he had had prior anal intercourse with Marjie in the last 2 or 3 years. Marjie later confirmed this to an officer by saying that there had been several acts, the last being in October 1982.

Prior to accepting Rivers' guilty plea, the trial judge conducted an extensive allocution with Rivers, in full compliance with *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), and *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986).

At the time of sentencing, the trial judge reviewed a lengthy presentence report prepared by a state probation officer that included (1) Rivers' criminal record, beginning in 1965, showing more than 35 arrests, mostly alcohol-related, and two prior felony convictions, (2) copies of interviews and signed statements of Rivers, his wife, Janette, and his stepdaughter, Marjie, (3) numerous letters and copies of letters between Rivers and his former wife, Janette (their divorce became final in August 1983), showing a continued family bond between them and hope for reconciliation, and (4) an August 3, 1983, report from the Nebraska State Patrol laboratory that semen was identified in the anal specimens taken from Marjie.

On June 3, 1986, while still confined, Rivers filed a motion to vacate judgment. The court appointed E. Michael Slattery, attorney, of Plattsmouth, Nebraska, as counsel for Rivers. On September 16, 1986, Rivers filed a verified amended motion to vacate judgment, alleging numerous errors that we summarize as follows: (1) *ineffective counsel*, because Pollak did not advise Rivers of his defenses; particularly, that his conviction required corroboration of the victim's statement and proof of her age; that Pollak promised Rivers that he would be confined in the regional center and instructed Rivers to respond negatively when the judge asked him about possible threats and promises that induced his guilty plea; that there was animosity between Pollak and Rivers, shown when Pollak implied to the judge that Rivers was lying; and that Pollak had a conflict of interest in

offering to perform counseling between Rivers and Janette, while she was a potential witness; (2) *insufficient factual basis* to support the guilty plea; (3) *involuntary guilty plea*; and (4) *abuse of discretion* by the trial judge in the imposition of sentence.

A motion for postconviction relief may not be used to obtain review of issues which could have been raised on direct appeal. *State v. Evans*, 224 Neb. 64, 395 N.W.2d 563 (1986).

"A defendant seeking post conviction relief has the burden of establishing a basis for such relief, and the findings of the district court in denying relief will not be disturbed on appeal unless they are clearly erroneous." (Syllabus of the court.) *State v. Moore*, 217 Neb. 609, 350 N.W.2d 14 (1984).

The evidentiary hearing provided in § 29-3001 is a vehicle for a confined defendant to meet his or her burden of proof, and "although an evidentiary hearing is not always necessary on an application for post conviction relief, 'such a hearing is usually advisable to avoid protracted litigation.' " *State v. Waterman*, 215 Neb. 768, 774, 340 N.W.2d 438, 442 (1983). "A voluntary guilty plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional." *State v. Paulson*, 211 Neb. 711, 714, 320 N.W.2d 115, 117 (1982).

Pursuant to a court order, argument was had October 10, 1986, on the sole issue of whether or not an evidentiary hearing should be provided; no evidence was presented. On October 20, 1986, the judge made written findings, including:

> [T]he defendant was ably represented by his counsel at the time of the entry of the plea and prior thereto; that he has failed to show the ineffectiveness of counsel either in the records or the presentence report or that the items complained of could not have been used to secure the review of an issue on direct appeal.

Thereafter, he denied both an evidentiary hearing and the motion for postconviction relief, citing *State v. Birge*, 223 Neb. 761, 763, 393 N.W.2d 713, 714-15 (1986):

> This court has adopted a two-part test to determine whether a defendant received effective counsel: first, the attorney must perform at least as well as an attorney in that area with ordinary skill in criminal law, and second,

> the attorney must conscientiously protect the client's interests. . . . Additionally, the defendant must show that in the absence of the attorney's error the result of the case would have been different.

Although we believe it made no difference in this case, the correct rule is that the defendant must show that *there is a reasonable probability* that but for counsel's error the result of the case would have been different. *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

One general error is assigned for review: "The Court erred in not allowing Appellant to proceed with an evidentiary hearing in support of his Motion to Vacate." We review by referring to the summarized allegations in the motion.

Ineffective counsel: There is no merit to Rivers' claim that Pollak did not explain his possible defenses. The record shows the victim had been living in his household for more than 10 years; Rivers had admitted to investigating officers that the victim was 15 years old; his plea of guilty was an admission; corroboration was clearly available and known to Rivers in the testimony of Janette, to whom Marjie promptly described the assault; the presence of like berry stains on the person of Rivers and the victim; Rivers led the officers to the assault scene; the positive laboratory report finding semen in the victim's anal cavity; and, finally, this record:

> THE COURT: Did your attorney fully explain the charges in the Information to you?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And did you discuss all available defenses that you might have?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Did you withhold anything from him?
>
> THE DEFENDANT: Not that I know of.
>
> THE COURT: Well, you give him all the information that you have?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Are there any defenses that you think you might have that you haven't talked over with him?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Are you satisfied with the job that your

attorney has done for you?

THE DEFENDANT: Yes.

THE COURT: Do you feel he's competent?

THE DEFENDANT: Yes.

The record shows a searching court inquiry, *State v. Busse*, 186 Neb. 99, 181 N.W.2d 124 (1970), confirming that there were no promises or inducements made to Rivers:

> THE COURT: Has anyone connected with law enforcement or anyone else made any threat, direct or indirect, used any force or held out any promises to get you to waive or not have any of these rights that we've been discussing?
>
> THE DEFENDANT: No.
>
> THE COURT: You say they have not?
>
> THE DEFENDANT: They haven't.
>
> THE COURT: And are you waiving these rights that we've been discussing freely and voluntarily then?
>
> THE DEFENDANT: Yes.
>
> . . . .
>
> THE COURT: Are you pleading guilty then solely and only because of the fact that you did in fact do the things which are charged in the Information?
>
> THE DEFENDANT: Yes.

The claim of animosity between Rivers and Pollak refers to the following exchanges during sentencing:

> THE COURT: Is there anything that your attorney didn't bring out that you would like to relate to the Court before sentence is imposed here, Robert?
>
> THE DEFENDANT: Just that I know I'm charged in Lancaster County, but those charges are not good.
>
> THE COURT: You're not aware of what they are, you say? Have you been arraigned up there?
>
> THE DEFENDANT: No.
>
> THE COURT: Are you aware of what they are?
>
> MR. POLLAK: He's aware of what they are. He's denying the truth.
>
> THE DEFENDANT: I've been honest with everything that has happened but these are not honest charges over there.

Included in the presentence investigation report is a letter from the probation officer to Judge Case: "A warrant was issued for the above defendant on July 13, 1984 through the Lancaster County Court. . . . Mr. Rivers is accused of sexually assaulting a child. This event occurred sometime between May 1, 1984 and May 31, 1984."

Rivers initiated this line of inquiry apparently to advise the judge that the charges were unfounded. The judge's inquiry was limited to whether Rivers was aware that the charges were pending. Pollak's statement that Rivers was aware of the charges but that Rivers claimed they were not true was both responsible and proper under those circumstances.

Rivers claims that Pollak had a conflict since he offered to act as a counselor to reunite Rivers and his former wife, Janette, a potential witness against Rivers. The presentence report shows numerous letters between Rivers and Janette, all showing mutual continued love and affection, and that they attended counseling services together with no direct reference to participation by Pollak. The report does contain a letter from Pollak to the probation officer, enclosing a letter from Janette dated June 13, 1984, requesting leniency in sentencing, where Pollak says in his cover letter: "It appears from the letter that they are considering re-uniting and down the road bringing the family all back together. I hope you can take this into account in your pre-sentence investigation." There is no showing of either a conflict of interest or detriment to Rivers. See *State v. Williams*, 224 Neb. 114, 396 N.W.2d 114 (1986).

There was no error in the findings of the trial judge and the order denying Rivers' claims of ineffective counsel.

Insufficient factual basis, involuntary guilty plea (*State v. Terrell*, 220 Neb. 137, 368 N.W.2d 499 (1985)), and *abuse of discretion in sentencing*: These remaining claimed errors could have been raised on direct appeal; however, in view of the absence of an evidentiary hearing, we briefly address them.

The record abounds in factual bases, as shown by the presentence report, the statement of the county attorney made in open court, and Rivers' voluntary guilty plea. *State v. Bargen*, 219 Neb. 416, 363 N.W.2d 393 (1985).

The claimed involuntary plea resulting from the promises

and inducements was heretofore discussed and shown to be unfounded.

Defendant's guilty plea was affirmatively shown to have been understandingly and voluntarily made, with an intelligent choice of alternative choices open to him. *State v. Richter*, 220 Neb. 551, 371 N.W.2d 125 (1985).

The claimed abuse of discretion relates to sentencing, when the judge stated that he considered the information that there was an outstanding warrant for the arrest of Rivers from Lancaster County on a charge of sexual assault on a child. A sentencing judge has wide discretion in sentencing to consider presentence reports, police reports, affidavits, arrest records, personal observations, and other relevant information. See *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969). There was no abuse of discretion shown.

From a review of the motion, files, and records, they affirmatively show that Rivers was not entitled to an evidentiary hearing, and there was no error in dismissing the amended motion.

AFFIRMED.

DANIEL T. MEIS, APPELLANT, MARK PROSSER ET AL., APPELLEES, V. GARY GRAMMER ET AL., APPELLEES.

411 N.W.2d 355

Filed August 28, 1987. No. 87-016.

1. **Appeal and Error.** A generalized and vague assignment of error that does not advise the Nebraska Supreme Court of the issue submitted for decision will not be considered.
2. _____. Consideration of an appeal to the Nebraska Supreme Court is limited to the errors assigned and discussed.
3. **Constitutional Law: Prisoners.** Prisoners must be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration.
4. _____: _____. Maintaining institutional security and preserving internal order and discipline are essential prison goals which may require the limitation of some of a prisoner's constitutional rights.

5. _____: _____. Running a prison is an inordinately difficult undertaking, requiring expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.
6. _____: _____. In the absence of substantial evidence that prison officials have exaggerated their response to their concerns for internal security of the institution, courts should generally defer to their expert judgment.
7. _____: _____. Several factors are relevant in determining the reasonableness of prison regulations. First, there must be a valid, rational connection between the regulation and the legitimate and neutral governmental interest put forward to justify it; second is whether there are alternative means open to the prisoners for the right in question; third is what impact the accommodation of the asserted constitutional right will have on guards, other inmates, and the allocation of prison resources generally; and, finally, whether there are other ready alternatives for achieving the governmental interest.
8. **Constitutional Law: Equal Protection.** The guarantee of equal protection of the laws requires that the state's powers be applied in such a manner that all persons shall be treated alike under like circumstances and conditions.

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

Daniel T. Meis, pro se.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellees Grammer et al.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Plaintiff Daniel T. Meis appeals from a declaration by the district court that certain provisions of the challenged portion of a Department of Correctional Services operational memorandum relating to the disbursement of trust funds belonging to inmates at the penitentiary are valid. Meis assigns as error the district court's (1) determination that Neb. Rev. Stat. § 83-183(3) (Reissue 1981) mandates restrictions on the use of inmate wages, (2) "den[ial of] the relief requested," (3) failure to set a time within which the defendants, Warden Gary E. Grammer and various other named and unnamed employees of the penitentiary, are to correct the deficiencies in the portion of the operational memorandum declared to be impermissibly vague and not to be enforced, and (4) failure to find the entire

challenged portion of the operational memorandum to be in violation of Neb. Const. art. I, §§ 1, 15, 16, 25, and 26, and the 14th amendment to the U.S. Constitution. We affirm.

Meis and eight other inmates brought this suit on their own behalf and purportedly on behalf of all other inmates at the penitentiary. However, Meis appealed to this court only in his individual capacity. Thus, we are not concerned with any class action issues which might otherwise have been present. Moreover, as Meis is the sole appellant, we do not concern ourselves with those parts of the record which relate to the claims of the other named plaintiffs.

As part of the Department of Correctional Services, the penitentiary maintains a single trust fund in which all inmate money, from whatever sources, is deposited, disbursed, and accounted for. On December 6, 1979, the penitentiary administration adopted an "official," later to become known as an "operational," memorandum, No. 113.2.112, to provide "a documented accounting for the funds of offenders." The memorandum underwent a number of revisions, and as of October 7, 1985, the date of the most recent amendment, its stated purpose is to "set forth a system for the accounting and handling of funds to be credited to Penitentiary inmates." It states in relevant part:

> As provided by Statute and Agency regulations, inmates may withdraw funds to assist with family support, make purchases in the Canteen and from approved vendors, or for deposit in interest bearing accounts in designated financial institutions. . . .
>
> For the purpose of this Memorandum, "FAMILY" is defined as parent, brother, sister, son, daughter, or spouse. Any exception to this stated list must have the approval of the Warden.

Prior to the October 7, 1985, amendment, the memorandum did not define family and made no provisions for exceptions to the "stated list."

The penitentiary administrators testified that the operational memorandum was necessary for the "safety, security, and good order of the institution," in that it provides a means of controlling the flow of inmate funds and thereby helps control

illegal activities such as gambling, purchasing drugs, and the applying of pressure by one inmate against another. The administrators admitted, however, that although policies as to the transfer of property from one inmate to another exist, it would be possible for an inmate to use canteen purchases as a means of paying off another inmate. An inmate could also deposit funds in an outside financial institution and deal with those funds without being subjected to the restrictions imposed by the memorandum.

Meis testified that on or about October 12, 1985, he requested that $5 be disbursed from his trust funds to pay a debt to a friend and that the request was denied by the penitentiary administration. Although there exists within the Department of Correctional Services an appeal procedure from the denial of disbursements, Meis did not avail himself of it. Defendants, however, raised no issue at trial in this regard. At the time of his request, Meis had approximately $135 in the fund. He had earned approximately $72 of the total while at the penitentiary; the balance came from sources outside the penitentiary through gifts or the payment of money owed him. Meis also testified he had successfully sent $4 to his friend on a prior occasion, but it is not clear when, as he had at one time alleged he had been prevented from using his money as he wished on August 27, 1985. Meis offered no evidence which documents the existence of the debt or which explains why or when it came into existence.

The district court concluded that the challenged portion of the operational memorandum was valid except for the single "sentence which reads 'Any exception to this stated list must have the approval of the Warden.' " The court found that provision to be vague and to therefore deprive the plaintiffs of due process, and thus enjoined the warden

> (a) from granting any exceptions which allow disbursements from the Inmate Trust Fund for family support or assistance to any persons other than those specifically included within the definition of "family", i.e., a parent, brother, sister, son, daughter, or spouse; and (b) from granting any exceptions to other portions of Operational Memorandum 113.2.112 dated October 7,

1985.

The court held the remainder of the challenged portion of the memorandum to be valid and enforceable and, accordingly, denied Meis' request that enforcement of the remainder be enjoined as well.

Meis' first assignment claims the district court's finding that § 83-183(3) "mandates certain restrictions on the use of wages earned by the inmates and money which is in the Inmate Trust Fund" is erroneous. No claim is made that § 83-183(3) is itself unconstitutional or that the challenged portion of the memorandum does not comply with the requirements of § 83-183(3); the only claim in connection with this assignment of error is that § 83-183(3) imposes no limitation on the use of inmate funds.

Section 83-183(1) provides for the employment of inmates in the "[Department of Correctional Services] facilities, for state use and for other purposes authorized by law." Section 83-183(3) states:

> Except as provided in section 83-183.01, wage payments to a person committed to the department shall be set aside by the chief executive officer of the facility in a separate fund. The fund shall enable the offender to contribute to the support of his dependents, if any, to make necessary purchases from the commissary, and to set aside sums to be paid to him at the time of his release from the facility.

Neb. Rev. Stat. § 83-183.01 (Cum. Supp. 1986) concerns itself with the treatment of wages earned by inmates paid "at least minimum wage." The evidence does not suggest that Meis earned at least minimum wage; thus, § 83-183.01 has no application. The language of § 83-183(3) does indeed undertake to limit the use of inmate wages to the support of dependents (not "family"), purchases from the commissary, and savings to be paid to the inmate upon release from the penitentiary. The district court's finding that § 83-183(3) mandates certain restrictions on the use of inmate wages is therefore patently correct.

The second assignment merely laments the denial of the relief sought. Such a purported assignment is so generalized and vague that it does not advise us of the issue submitted for

decision; thus, it is not considered. *Coyle v. Janssen*, 212 Neb. 785, 326 N.W.2d 44 (1982).

Meis next complains of the district court's failure to set a time limit within which the defendants are to provide standards for determining the circumstances under which exceptions to the family limitation are to be made. However, he presents no legal argument in connection with this assignment, and, as consideration of an appeal to this court is limited to the errors assigned and discussed, we do not address the matter. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986); *State v. Jackson*, 225 Neb. 843, 408 N.W.2d 720 (1987).

However, since we do not know that any mechanism to provide for exceptions to the family limitation will be adopted, nor what such a mechanism, if adopted, will be, we base our analysis of the fourth and last assignment of error, that the district court erred in not finding the challenged portion of the memorandum violative of designated portions of the Constitutions of the United States and Nebraska, on the existence of only those provisions of the challenged portion of the memorandum found valid and enforceable by the trial court.

Meis first argues that said remainder of the challenged portion of the memorandum deprives him of a variety of rights guaranteed by the Constitution of this state. Specifically, he cites to that portion of Neb. Const. art. I, § 15, which states: "All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate"; to § 16, which states: "No bill of attainder, ex post facto law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities shall be passed"; to that portion of § 25 which states: "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment, or descent of property"; and to § 26, which states: "This enumeration of rights shall not be construed to impair or deny others, retained by the people, and all powers not herein delegated, remain with the people."

In considering this phase of Meis' argument, we take instruction from the U.S. Supreme Court's consideration of

prisoners' rights under the federal Constitution.

Accordingly, we recognize that prisons "are not beyond the reach of the Constitution" and that prisoners must be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration. *Hudson v. Palmer*, 468 U.S. 517, 523, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). However, simply because prison inmates retain certain constitutional rights does not mean that those rights are not subject to restrictions and limitations. Maintaining institutional security and preserving internal order and discipline are essential prison goals which may require the limitation of some of a prisoner's constitutional rights. *Whitley v. Albers,* 475 U.S. 312, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986); *Bell v. Wolfish,* 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). As the U.S. Supreme Court emphasized in *Bell*:

> "[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." [Citations omitted.] Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. [Citations omitted.]

441 U.S. at 546-47.

Moreover, as the U.S. Supreme Court has recognized, courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform; the problems are complex, intractable, and not readily susceptible of resolution by decree. Running a prison is an inordinately difficult undertaking, *Cleavinger v. Saxner,* 474 U.S. 193, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985), requiring expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. *Turner v. Safley*, ____ U.S. ____, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). In the absence of substantial evidence that prison officials have exaggerated their response to

their concerns for internal security of the institution, courts should generally defer to their expert judgment. *Block v. Rutherford*, 468 U.S. 576, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984); *Hudson v. Palmer, supra.*

Turner v. Safley held a regulation limiting correspondence between inmates at different institutions was reasonably related to valid corrections goals, but that a regulation preventing an inmate from marrying another inmate or civilian unless the prison superintendent determined there were compelling reasons was not. In making those determinations the *Turner* Court noted that several factors were relevant in determining the reasonableness of the regulations in question. First, there must be a valid, rational connection between the regulation and the legitimate and neutral governmental interest put forward to justify it; second is whether there are alternative means open to the prisoners for the right in question; third is what impact the accommodation of the asserted constitutional right will have on guards, other inmates, and the allocation of prison resources generally; and, finally, whether there are other ready alternatives for achieving the governmental interest.

Those considerations lead us to conclude that, as applied to Meis, there is a valid, rational connection between the remainder of the challenged portion of the memorandum and the internal security of the penitentiary. There is no evidence as to when the debt on which Meis wished to make payment was incurred or the creditor's relationship, if any, to the prison's other inmates. So far as the record shows, the payment might be for an illegal debt incurred while the creditor was Meis' fellow inmate or might be tribute exacted from Meis for and on behalf of another present inmate. Under the circumstances, it cannot be said application of the remainder of the challenged portion of the memorandum to Meis impermissibly deprives him of the Nebraska constitutional rights he has enumerated. The fact the procedure for controlling illegal and security-threatening activities by the inmates may not be perfect does not mean that it must be abandoned and management of the penitentiary turned over to the prisoners.

Finally, Meis argues that he has been denied the equal protection guaranteed him by the "First and Twenty Fifth

Sections of the Nebraska Bill of Rights, and the Fourteenth Amendment to the United States Constitution" (Brief for Appellant at 17) because inmate accounts within the penitentiary are treated differently than inmate accounts at outside financial institutions.

Neb. Const. art. I, § 1, provides: "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty and the pursuit of happiness. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed." Neb. Const. art. I, § 25, provides: "There shall be no discrimination between citizens of the United States in respect to the acquisition, ownership, possession, enjoyment or descent of property. The right of aliens in respect to the acquisition, enjoyment and descent of property may be regulated by law." The relevant portion of the 14th amendment to the U. S. Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The guarantee of equal protection of the laws requires that the state's powers be applied in such a manner that all persons shall be treated alike under like circumstances and conditions. See, *Grosvenor v. Grosvenor*, 206 Neb. 395, 293 N.W.2d 96 (1980); *Hartford Co. v. Harrison*, 301 U.S. 459, 57 S. Ct. 838, 81 L. Ed. 1223 (1937). The difficulty in attempting to apply that principle to this case is that no equal protection issue exists. There is absolutely no evidence that the penitentiary administration arbitrarily determined which inmate could place funds in outside financial institutions and which could not, or that Meis was himself prevented from placing his funds in an outside institution. In short, there has been no proof that the state has applied its powers in such a manner as to discriminate against Meis.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PATRICIA J. BECKER, RESPONDENT.

411 N.W.2d 361

Filed August 28, 1987. No. 87-545.

Original action. Judgment of disbarment.

BOSLAUGH, C.J., Pro Tem., HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an original action. On June 12, 1987, the Counsel for Discipline filed formal charges against respondent, Patricia J. Becker, alleging that she failed to pay the medical creditors of her client, Kevin A. Eglseder, in the aggregate amount of $383, and also that she made intentionally false and misleading statements to the Counsel for Discipline concerning the matter. The formal charges state that the actions of the respondent constitute a violation of Canon 1, DR 1-102, and Canon 7, DR 7-101, of the Code of Professional Responsibility.

On August 20, 1987, Counsel for Discipline filed a motion for judgment on the pleadings, the respondent having failed to file an answer to the formal charges within 20 days after service as required by Neb. Ct. R. of Discipline 10(H) (rev. 1986).

After a careful review of the record we find that there exists no issue of fact or law. Therefore, pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 1986), it is the judgment of this court that the respondent, Patricia J. Becker, be, and hereby is, disbarred from the practice of law effective September 1, 1987.

JUDGMENT OF DISBARMENT.

BRUCE F. EVERTSON, APPELLANT, V. ROBERT D. CANNON ET AL., APPELLEES.

411 N.W.2d 612

Filed September 4, 1987. No. 85-679.

1. **Trusts: Property: Equity.** A constructive trust may be imposed where one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a case, equity will convert the legal titleholder into a trustee holding the title for the benefit of those entitled to ownership.
2. **Joint Ventures: Words and Phrases.** A joint venture arises when there is an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other.
3. **Joint Ventures: Intent.** The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. The mere pooling of property, money, assets, skill, or knowledge does not create the relationship.
4. **Joint Ventures.** A joint venture can exist only by voluntary agreement of the parties, and cannot arise by operation of law.
5. _____. The existence of a joint venture is a question of fact.
6. _____. The existence of a close business relationship may be a factor to be considered in determining whether a fiduciary relationship exists, but it alone is not generally sufficient.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed.

Donald J. Tedesco, and W. Perry Dray of Dray, Madison & Thomson, P.C., for appellant.

Steven C. Smith and Thomas D. Brower of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., for appellees Robert D. Cannon, Elaine Cannon, and Marilyn Caldwell.

Gerald E. Matzke of Martin, Mattoon, Matzke & Mattoon, for appellees Dale Cannon, Eileen Evertson, and Arlene Meredith.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

This case involves a dispute concerning several oil leases in

Morrill County, Nebraska. The plaintiff, Bruce F. Evertson, claims an interest in the leases on the theory that he was engaged in a joint venture with the principal defendant, Robert D. Cannon, who will be referred to as the defendant. The other defendants include various members of the Cannon family: his father, Dale Cannon; his wife, Elaine Cannon; two sisters, Eileen J. Evertson and Arlene C. Meredith; and his mother-in-law, Marilyn J. Caldwell. The defendant's sister, Eileen J. Evertson (Jeannie), was formerly married to the plaintiff.

The record shows that in 1981 or 1982, the defendant, who was engaged in the oil well service business with the plaintiff, decided that he wanted to acquire some oil production. The defendant and his father were acquainted with an oil well known as the "Exeter well" which was unusual because it had produced a large amount of oil over a period of years from only 2 feet of pay sand. The defendant's father had acquired the Matador unit, which was located just west of the Exeter well. The leases on the land to the north and east of the Exeter well were held by the Gulf Oil Co. The defendant acquired a farmout agreement from Gulf which would give him the right to drill wells on a 200-acre tract if he drilled a producing well in the tract.

A well known as the Willson-State No. 1 was the first well drilled under the farmout agreement, and it proved to be a producing well. The defendant acquired additional leases on land adjacent to the 200-acre tract, and additional wells were drilled.

The plaintiff commenced this action to impose a constructive trust on the leases obtained by the defendant from Gulf and on land adjacent to the 200-acre tract. The plaintiff contends the parties had an agreement to pursue the entire project as joint venturers. The defendant contends the plaintiff's interest in the project was limited to an interest in the first well.

The trial court found generally in favor of the defendant and dismissed the petition. The court found specifically that the plaintiff had failed to prove his case; that the statute of frauds was applicable to the transaction; that there was no written contract between the parties and no fiduciary relationship between them; and that there was no proof of a joint venture.

The court found that the defendant was not a constructive trustee of the oil and gas leases and that the evidence presented by the plaintiff was not clear and convincing.

The plaintiff has set forth seven assignments of error, but has failed to brief the assignments of error concerning the release of approximately $600,000 prior to trial and the contention that the trial court erred in overruling the motion for a new trial. Accordingly, those assignments of error will not be discussed. Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). See, also, *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987). The remaining assignments of error, in essence, contend the trial court erred in finding that there was no agreement between the parties to acquire acreage for exploration and development, that the statute of frauds applied to any agreement between the parties, and that there was no joint venture with respect to the Gulf farmout acreage and the adjacent additional acreage.

The plaintiff contends that since the trial court found there was a fiduciary relationship with regard to the first well, the court should have found such a relationship existed as to the other leases. This contention is without merit. The trial court specifically stated, when overruling the motion for new trial, "[O]nce Mr. Cannon gave Mr. Evertson the 30% interest in the first well, he became a fiduciary with respect to the *operation* of that first well. . . . [O]nce that was given, there was a joint venture to that extent in the first well . . . ." (Emphasis supplied.)

The plaintiff next contends the evidence was sufficient to support a finding that a fiduciary relationship existed as to all of the leases because the parties were joint venturers. The plaintiff argues there was a community of interest and common purpose between the parties and that his claim is supported by the evidence, which included evidence of custom in the industry. The plaintiff further argues that the parties had an oral agreement concerning the venture, that the actions of the parties support a finding that such an agreement existed, that such informal agreements are common in the industry, and that it is an uncommon practice to split a 40-acre segment out of a larger acreage, as the defendant did in this case.

The following is a summary of the evidence presented at the

trial.

The plaintiff testified that he hired the defendant to work for Evertson Well Service, Inc., in 1975. The two men had previously worked together for C & C Well Service, a firm owned by Dale Cannon. The defendant became a part owner of Evertson Well Service, Wyoming, in 1976, and ran the day-to-day operations of that business. The two men later formed Evertson Oil and Gas Well Service and owned equal shares in that company. The two men personally guaranteed a line of credit to enable the corporation to purchase needed equipment, and bought out the other stockholders in 1979. The defendant supervised the rigs in southwest Wyoming, and the plaintiff supervised the rigs in the area of the D-J basin in Nebraska. The two men had known each other for about 20 years.

The plaintiff described their relationship as being "[v]ery, very close" and stated that he trusted the defendant, had confidence in his abilities, and relied on him in their business operations through 1982. The plaintiff testified both men had interests in other businesses and were not jointly interested in all of each other's affairs.

The plaintiff testified that a "working interest owner" pays for his interest in a leasehold, pays his share of the monthly bills, and receives some percentage of the oil and gas production. He testified that a royalty interest is an overriding interest in production which does not require the payment of costs.

The plaintiff testified that the two men had entered into oral agreements in the past as a normal course of conduct and that it was a usual and customary practice in the industry to send working interest owners bills which indicated the proportionate share of expenses.

The plaintiff testified that from June 1982 to May 1983, the personal relationship between the two men was "the same as it had always been. We were partners and very close." He testified that they began to discuss offsetting the Exeter well in the summer of 1982. It had been his understanding they would undertake the project as equal partners. According to the plaintiff, the defendant subsequently discussed the project with a geologist, Alexander Boardman, who advised them as to the

best spot on which to drill or offset the Exeter well and that Gulf held the leases on that acreage. The defendant then determined Gulf did control the land, and eventually contacted Gulf and obtained an offer for a farmout agreement. A farmout agreement is one in which the owner or lessor who does not wish to drill conditions an economic interest in the lease upon the drilling of a producing well on the property by another party. The deal was confirmed by Gulf in November 1982, and the written farmout agreement was received by the defendant in December of that year.

The farmout agreement provided that if a producing well was drilled on the property, Gulf would retain an 8-percent override on the lease, and the defendant would have the right to drill on the 200 additional acres. After the plaintiff was informed Gulf had approved the farmout agreement, he contacted several drilling contractors to bid on the well and sent one of his employees to examine the site. He then contacted a dirt contractor, and a drill site was chosen. The drilling contract identifies the parties as "Evertson & Cannon" and "Banner Drilling Company." A notice of intent to drill was filed with the state November 30, 1982. The operator of the well was listed as Evertson Well Service, Inc. The well was identified as Willson-State No. 1. Drilling commenced December 3, 1982, and proceeded normally. The two men discussed which pipe casing would be appropriate, and the plaintiff ordered it. The plaintiff testified that Dale Cannon was never on the site and did not make decisions regarding running the pipe.

At some point the geologist gave the two men his recommendations concerning perforating the well and the advisability of obtaining additional acreage. The plaintiff asked a business acquaintance, Ebb Lueck, to contact a landman, and Lueck then contacted Tommy Lee. Lee recommended that Lee obtain a "top lease" on certain property and later assign it to the parties. The plaintiff testified they agreed to follow Lee's recommendations. The parties then determined the proper place to perforate the well, without any help from Dale Cannon, and the well was completed. The parties determined what equipment was necessary and made all of the arrangements for the well, again, without the assistance

of Dale Cannon.

In early December 1982, when the plaintiff learned the defendant had not actually received the farmout agreement itself, but had only a letter of intent from Gulf, he contacted his attorney regarding the matter. The drilling expenses were later paid by the defendant's and plaintiff's accountant, in late December 1982. At some point the defendant decided he wanted to be the operator of the well and began to process all of the bills himself. The bills from the well, which included invoices made out to Dale Cannon, were received in evidence.

The plaintiff testified he received an invoice which disclosed his working interest in the well in early January 1983, which he paid by a check dated December 28, 1982. He testified that he was not aware that his interest was listed as 30 percent at that time, but assumed it was approximately 48 percent until he received his second bill in January 1983. The plaintiff stated he confronted the defendant about the discrepancy and was told the latter had decided to let his dad in on the deal. The plaintiff testified he told the defendant to "straighten it out." Subsequent invoices continued to show the plaintiff's interest as 30 percent.

The plaintiff testified that he realized there was a problem with the farmout acreage in June 1983, when his attorney notified him that the defendant had assigned an interest to him in only the first well. The plaintiff learned the defendant had top-leased additional acreage in his own name during that same time. The plaintiff believed this was contrary to the parties' earlier agreement with Tommy Lee. Further, the plaintiff was not offered a chance to participate in a well subsequently drilled on the Gulf farmout acreage and stated that his offer to pay his share of the drilling costs of that well was refused. Also, the plaintiff was refused participation in wells drilled on acreage subsequently acquired by the defendant.

The plaintiff testified his offer to pay a proportionate share of expenses was contained in a letter from his attorney to the defendant. The letter concerned the East Matador land, Gulf farmout land, and adjoining acreage. The plaintiff testified that in the letter he had asked for a 30 percent share because he was still hoping the matter could be settled without resort to

litigation, but when litigation was the only possible avenue he decided to sue on the terms of the original deal.

The plaintiff testified he was active in the search for and negotiations with the ultimate purchaser of the oil and that Dale Cannon had not been involved in such negotiations. The plaintiff further testified that immediately prior to his divorce settlement his relationship with the defendant changed drastically. He stated there was also a problem when the defendant quit working for him during the last week in February 1983. The plaintiff testified that Arlene Meredith, Elaine Cannon, Marilyn Caldwell, and his ex-wife, Eileen Evertson, were not working interest participants in the first well.

Exhibit 9 is an assignment by the defendant and his wife to the plaintiff, Dale Cannon, and Melvin Brunet of interests in the first well. The plaintiff testified that he had contacted the state to obtain a new field designation for the whole Gulf farmout and additional acreage of the East Matador unit, which was granted. The letter from the state was directed to the plaintiff and the defendant. The plaintiff later testified that only the first well had been drilled when the state granted the designation, and the limits of the new field were not designated.

On cross-examination the plaintiff testified that his offer to pay the expenses on the additional wells was contained in the following language of the letter from his attorney to the defendant:

> 1. Mr. Evertson considers himself to be a partner (30% working interest owner) in the entire lease described herein, and any adjoining acreage acquired by you or in your behalf;
>
> 2. In the event that any additional drilling or exploration is performed on any of the leased acreage, or adjoining acreage, by you or on your behalf, Mr. Evertson will be a partner as stated above (whether it be a producing well or a dry hole) . . . .

According to the plaintiff, the offer to pay was implied by the use of the term "30% working interest." The plaintiff testified that he fired the defendant only once, in June 1983. He also testified that both men had occasionally used company

facilities to make private deals. The plaintiff testified there were some problems between him and the defendant when his divorce was filed on January 12, 1982. He then testified the Gulf farmout lease was requested in the summer of 1982, the leases on Sections 10 and 15 were acquired in June 1983, and the Juelfs lease was acquired in September 1983. The plaintiff also testified that the allegation in his pleadings that at the time all of the leases were acquired there was a relationship of trust and loyalty was not true, at least as to the Juelfs lease.

The plaintiff also testified that Evertson Well Service was listed as the operator of the first well because it had the bond required by Nebraska law, and, at that time, the defendant did not. The plaintiff stated that later that year, when the defendant obtained a bond, he then became the operator.

When asked whether, if the defendant had never offered him an interest in the first well, he would have felt "gypped, robbed, or [that the defendant had] violated his trust," the plaintiff answered, "No."

The plaintiff admitted that in a deposition taken prior to the divorce settlement he made a statement that he was supposed to have a 30-percent interest in the first well. The plaintiff also admitted that he had assigned a 15-percent interest in the first well to his former wife as a part of the property settlement and had represented that amount as half of his interest. Plaintiff also stated he had signed a division order from the Permian Corporation which stated that he owned a 15-percent working interest. He later testified that at the time his deposition was taken in his divorce case, June 9, 1983,

> it was pretty evident on that day that Rob had been working with Jeannie for quite some time.
>
> Q. What do you mean by working with Jeannie?
>
> A. Well, I think Jeannie stated in there that I tried to sell the companies out from under Rob, or something to that effect, and that just wasn't true.
>
> Q. Were you convinced at that time, on June 9, 1983, at the time of the taking of your deposition, that Rob was working against you?
>
> A. It sure looked like it to me.

Under the terms of the property settlement the corporations

were divided between the two men and Mrs. Evertson.

On redirect plaintiff was asked about his statement that had the defendant not offered him an interest in the first well, plaintiff would not have felt gypped or cheated. The plaintiff explained that statement by stating his feelings would depend upon the stage of the proceedings, in that once he paid his portion of the expenses on a drill-to-earn farmout arrangement, he would feel cheated if denied the opportunity to participate in the whole farmout.

The plaintiff then called the defendant, who testified the two men had had an extremely close relationship for many years. The defendant testified the first well was drilled on the initial 40-acre tract leased from Gulf, and, because that well was successful, 200 additional acres were earned. A second well was drilled on the additional (or farmout) acreage, known as Cannon-State No. 1, which became a producer. The defendant testified he was unaware plaintiff claimed an interest in the well until he received a letter from plaintiff's attorney. The defendant testified he assigned interests in that well to his wife, Elaine, Dale Cannon, Arlene Meredith, Jeannie Evertson, and Melvin Brunet. The defendant testified he believed the two men were partners on the first well only and that he had never stated he was giving the plaintiff an interest in the entire Gulf farmout.

The plaintiff next called the geologist used on the project, Alexander Boardman. Boardman testified his first business relationship with the two men occurred during the drilling of the first well. Boardman testified the defendant initially contacted him about the project in about July 1982. He then investigated the possibilities and advised the defendant where to drill. Boardman testified he had not spoken with plaintiff during this time.

Boardman testified he later told both men that to maximize their position the best acreage to obtain would be the southeast quarter of Section 9, the west half of Section 10 or any part of 10, and the northwest half of Section 15. His next proposed location was the northeast quarter of the northeast quarter of Section 16. Boardman defined an "area of mutual interest" as an area where two or more individuals have a mutual interest to acquire assets, jointly, as quickly as possible. Boardman

testified that, in his opinion, the acreage he recommended the two men acquire was an area of mutual interest. Boardman testified he had then asked the two men for an overriding interest because he had recommended the additional acreage and asked for the royalty in the new leases rather than the Gulf farmout acres, and the two men agreed. Boardman testified he was receiving an override royalty on the Coop lease at the time of trial. Boardman testified that he gave all of his information concerning the well and recommendations concerning the acquisition of additional acres to both men. Boardman believed, based on his experience in the industry, that the two men were joint operators.

Boardman testified he was unaware of any problem between the two men until the fall of 1983, when Dale Cannon contacted him about drilling on Section 16 and informed him the well would not be called the Willson-State No. 2. Boardman testified he subsequently set the Juelfs No. 2 well for Dale Cannon on Section 15, State No. 1 on the northeast quarter of the northeast quarter of Section 16, and Coop No. 1 on Section 10.

Boardman testified there are customs and practices in the industry concerning informal and oral agreements, that verbal agreements are very often used because of time constraints, and that it was customary in situations involving more than one person for one to act as the operator, do the correspondence and negotiations, and later assign interests when the well produces. Boardman testified there are customs and normal practices in the industry concerning the participation of the working interest owner in the first well and his subsequent participation in wells located within the area of mutual interest. He testified it was customary, in this area, depending on one's interest in the first well, to participate in all subsequent wells on that lease or farmout plus any additional acreage acquired on adjoining lands. Boardman also testified such a practice was more economical because it limits competition and therefore "the partnership that goes with the first well, continues throughout, assuming each partner pays their own way and does not renege."

On cross-examination Boardman testified that an

individual's entitlement to an interest in subsequent wells after the first well is drilled depends upon what interests the parties agreed to share, either in writing or orally, when the first well was drilled. Boardman did not know what agreement the parties had concerning the interests in the first well.

Boardman testified that, all things considered, he would pay considerably more for a working interest in the Cannon-State well than for such an interest in the Willson-State.

The plaintiff then called Daniel Matthews, a former accountant of Evertson Well Service. Matthews testified he did the plaintiff's personal books and tax returns, and tax returns for defendant for 1 year. He was supervised by both men but worked more closely for the plaintiff. He considered himself a close friend of the defendant's until February or March 1983, when he was told defendant considered him "crooked." Matthews testified that from 1977 through 1983 the plaintiff and defendant were like brothers. Matthews testified he had listened to the property settlement discussions wherein it was discussed that the two men could no longer work together and have a working relationship and, therefore, they wanted to split up the corporations. He stated the Gulf farmout agreement and the first well were discussed at both meetings. Matthews also testified he had once heard defendant tell plaintiff that he was planning to do something on the Willson Ranches and that plaintiff indicated he would be interested.

Matthews further testified that he had asked the defendant whether a drilling permit had been filed on the first well, and when defendant indicated he had not done so, the latter asked if Matthews could do so. Matthews then asked the defendant whether he had an operator's bond, and when the latter said no, Matthews told him Evertson Well Service did have a bond and he could fill out the drill permit with Evertson Well Service as the operator. Matthews testified he had spoken with Tommy Lee about the acreage both men wanted to be checked. Matthews testified Tommy Lee returned the next evening and told the two men about the owners on the various sections. Matthews testified that he and the defendant had reviewed the bills from the wells and summarized them for the working owners on December 28, 1982. Matthews testified that when

plaintiff paid the first bill representing his interest in the first well, the invoice which set out plaintiff's working interest percentage was not submitted to plaintiff along with the check. Matthews testified that at that time he did not know what percentages the two men had agreed upon. Matthews testified he became aware of the problem in January or February of 1983 after plaintiff saw one of the invoices and called Matthews to ask him about it.

Matthews testified he was unaware that Dale Cannon was involved in the first well until December 28, 1982, when the defendant told him the distribution of interests. Matthews testified the two men had previously drilled wells together without first entering into written agreements.

The next witness was Stanley Pierson, an earth-moving contractor who worked on the first well. Pierson had been contacted by plaintiff. On cross-examination, Pierson testified he had discussed the well with Dale Cannon at some time during the drilling of the first well and dealt with Dale Cannon on the wells subsequently drilled.

Plaintiff's next witness was Ebb Lueck, who testified he had a conversation with the two men wherein the two were discussing the possibility of acquiring more acreage and had asked Lueck to contact his landman for them. Lueck testified it was customary in the industry for parties to enter into informal and oral agreements, and written agreements are not entered into until the parties have committed to the deal. Lueck testified that in situations where people invest in a first well, they generally own their proportionate share of additional acreage.

On cross-examination Lueck testified that when giving his opinions as to the customs of the industry he was relying on his experiences, which involved mostly promoted deals. A promoted deal is a deal in which a promoter finds a drilling prospect and all of the people who buy into the deal pay their share of the costs. Lueck testified he did not have any understanding of the terms of the deal between the parties in this case. He also testified that, in a promoted deal, the initial well is drilled with the participants' money, and they would have agreed in advance as to the scope of the agreement as to the mutual area of interest, meaning they would have agreed in

advance to participate on subsequent wells. Prior to drilling, in deals he organizes, Lueck puts the agreement and operating agreements in writing, and such agreements contain the right to participate in additional wells.

Tommy Lee then testified for the plaintiff. Lee testified he had met with Dan Matthews on December 7, 1982, and was told to check out Sections 9, 10, 15, and 16, in Morrill County. He returned to Evertson Well Service later that evening and gave the information he had obtained to both men. When the three men met again the next night, Lee gave specific suggestions concerning the acquisition of the leases. It was his understanding that the three then agreed upon a plan of action. Lee testified the plans were never realized, he later billed Evertson Well Service for his services, and he did not receive his compensation until sometime within 6 months prior to trial. It was his impression the two men were partners, although he did not know the specifics of their relationship. Lee testified he had often taken leases in his own name and later assigned them pursuant to oral agreements. He also testified that a person involved in the first venture, who spent his money on the front end, should earn the same opportunity in subsequent lands involved. He testified that such a practice was common in the industry and would apply to a farmout situation, in that once the initial well was compieted, the normal procedure would be to go back to the people involved in the first well.

The plaintiff's next witness was Paul Roberts, a petroleum engineer employed by the Nebraska Oil and Gas Conservation Commission. Roberts testified he was aware of the customs and acceptable practices in the industry in the area of western Nebraska and eastern Wyoming. He testified that in a situation where working owners participate in the first well in the area, those same people normally participate in subsequent wells. On redirect examination, Roberts testified that if he was a working interest owner in the first well on a 200-acre farmout and was not assigned or offered a chance to participate in other wells, he would feel he had been treated unfairly. On recross-examination Roberts testified his entitlement to the additional acres would depend upon the agreements between the participants.

The next witness called was Craig Camozzi, who testified that he had asked the two men about the structure of their deal and what kind of acreage could be earned by drilling. The defendant answered that "they got a 200 acre farmout from Gulf Oil." Camozzi presumed the word "they" referred to both men. Both men indicated there could be additional drilling north of the well, as an offset. Camozzi testified that, on one occasion, both men said they were partners in the well, and that people who participate in the first well in a project usually participate in subsequent wells, but such participation is normally subject to an agreement between the parties.

The next witness was Simmons Cook, who testified the defendant had asked him to set up a meeting for him with Frank Baumgartner. Cook later attended the meeting, along with the two men and Tommy Lee. Cook testified he had previously been part of a deal with Dale Cannon wherein one producing well was drilled which earned additional acres. No additional wells had been drilled, but Cook received an assignment of interests in the entire acreage.

The plaintiff next called Leon Birdwell, who was then employed as a superintendent for Evertson Well Service. Birdwell examined the terrain upon which the first well was located, prior to its drilling. On cross-examination Birdwell testified Dale Cannon's equipment was used to remove snow at the first well.

Randy Nielsen, the plaintiff's former attorney, was then called by plaintiff, and the parties stipulated he was authorized to testify and that any confidential privilege was waived. Nielsen had been asked by both men to review a letter from Gulf concerning the farmout and advise them of its legal ramifications. Nielsen advised the defendant at that time that he was representing the plaintiff in the divorce proceeding between the plaintiff and the defendant's sister. The defendant had stated there was no problem and that he wanted to stay out of the divorce. There was also a discussion about and a request that Nielsen do some title work for the two men. Nielsen testified that Dale Cannon brought some papers from Gulf to his office for additional work. Nielsen subsequently prepared an assignment and forwarded it to the defendant, and then a

second copy mailed on April 8, 1983. Nielsen received the second copy of the assignment back approximately 3 months later, after several delays because the defendant's wife had been out of town. He thought the original document might have been destroyed.

Nielsen became aware of a dispute between the parties when he received a letter concerning the assignment, which assigned only an interest in the original 40 acres, the first well, to the plaintiff. Nielsen subsequently prepared a letter addressed to Thomas Brower, the defendant's attorney, concerning the lease and operating agreement, stating both were unacceptable to the plaintiff.

The letter stated the operating agreement was unacceptable because it did not cover all of the land contained in the farmout lease. The letter was dated August 25, 1983. Brower responded to this letter by requesting Nielsen return the original signed copies of the operating agreement and a copy of any document evidencing an agreement between the parties.

On cross-examination Nielsen testified that no one had told him the entire 200-acre tract was part of the deal between the two men, but he had assumed that it was. He was unaware the plaintiff had claimed more than a 30-percent interest in the first well until the lawsuit was filed. Nielsen further testified that Dale Cannon had given him papers, including a note which indicated the various interest holders. The note was taken at some point by the plaintiff and was not produced at trial. Nielsen testified he filed the assignment as written by the defendant so that the plaintiff could receive his money.

The plaintiff then called Roland Champion as an expert witness. He had reviewed the depositions, talked with the plaintiff, and met with the plaintiff's counsel to review the case, and believed that he was familiar with it. Champion stated he understood the defendant's theory of the case, and was familiar with farmout agreements in general and with the area in question. He testified he had never seen an operator limit the interest of a working owner to the area of the first well. Champion testified such a right of participation could be inferred from ownership, and was practical, because it is viewed as a joint venture wherein everyone shares equally losses and

profits, and it prevents competition.

On cross-examination, Champion testified it was the present custom in the industry to reduce agreements to writing. He also testified that the scope of any venture, including the number of acres and wells, depends upon the agreement between the parties.

The next witness was Norman Adams, a consulting petroleum engineer, called as an expert witness. Adams had evaluated the East Matador and filed reserves upon the request of Lueck, who acted on instructions from the plaintiff. The growth reserves for the first well were 102,000 barrels. He also testified as to potential prices and drainage concerns.

Plaintiff then called Jerry Simmons, who testified that a "40 acre deal" was a situation where only 40 acres are involved in a farmout arrangement. He had never seen such an agreement in the D-J basin.

On cross-examination, Simmons testified that an area of mutual interest was generally determined by agreement of the parties, which, in his experience, was generally a written agreement. He testified that an individual's right to participate in wells drilled after the first well was dependent upon the agreement of the parties.

On redirect examination, Simmons stated that it was his practice to give participants who invest in the first well an opportunity to participate in all additional drilling on the same basis as the first one. Such a practice eliminates competition among the participants. He further testified that generally he first enters into an oral agreement in oil deals, which may not be committed to writing for some time.

On recross-examination, Simmons testified such oral agreements are generally reduced to writing before the well is drilled, and such agreements generally include any rights to participate in later wells. On redirect examination, Simmons testified it was not uncommon to drill on an oral agreement, particularly in yearend deals.

The plaintiff then called Dale Cannon, who testified that he acquired an interest in the first well in 1983, after the well was drilled, but he had an agreement to acquire that interest in 1982. He testified he was a working interest owner in the Cannon-

State No. 1 well, had acquired that interest in 1983, and had a working interest in the Coop No. 1 well, which had been acquired in 1984.

The plaintiff then rested.

The defendant moved for a directed verdict on the grounds the plaintiff had failed to prove, by clear and convincing evidence, that there was an agreement as alleged in the petition which had been violated by the defendants. The remaining defendants also moved for a directed verdict on the grounds the agreement involved an interest in real estate, and therefore had to be in writing to satisfy the statute of frauds and that the plaintiff had presented no evidence of any relationship between himself and these defendants upon which to base a constructive trust. The court took the motion under advisement and directed the defendants to proceed.

The defendants first called Dale Cannon, who testified he and the defendant had begun to discuss a joint drilling project in the spring of 1982. The two later investigated prospective drilling sites and decided to check out land titles on property adjacent to the Exeter well. Dale then recommended the defendant call Alex Boardman for advice. Dale testified the defendant handled all of the negotiations but kept him advised of his progress. Dale stated that he and the defendant discussed the Gulf deal together before deciding to take it. It was his understanding, at that point, that he, the defendant, and Melvin (Coonie) Brunet would be the only participants in the deal. Dale stated he was unaware plaintiff would have an interest in the well until shortly before a drilling rig had moved onto the site. At that time he understood the plaintiff would have only a 15-percent interest in the first well. Dale stated that although he was not involved in the day-to-day drilling activities of the first well because he was involved in drilling three other wells in Kansas, he had made arrangements for Powers Elevation to stake the well. Dale testified he and the defendant discussed the acidizing and fracing of the well, and he loaned the defendant a tank of crude oil for use in acidizing the well.

Dale testified that in January 1983 he advised his son not to assign any interests out and to make sure the oil purchasers sent

their payments before he paid any money out. He stated that at that time they also discussed the size of the acreages. He testified they agreed they should let other people in on 40-acre locations,

> because— We had discussed the possibility of this being a dry hole— And Rob said, "I'm going over right away and drill another one then and I'll try to find it; at least one more, maybe two."
>
> Evidently, he had told me that he had discussed this with Evertson; he told Evertson the same story, and Evertson said well, "That's kind of stupid. I wouldn't go drill two more dry holes." Rob said, "No, it's not stupid, to my way of thinking, because I know that it's there. It's just a matter of finding it."
>
> Well, that shows right there that anybody interested in that first well could have backed out on the next well or two and, therefore, you've got the lease tied up because they don't want to put their money in. So, you know, it's better to assign it, on this type of a deal, to 40 acres where we knew that we were going to drill at least two or three wells if the first one was dry.

Dale testified he would have invested in a second well if the first one had been dry. Dale testified that he and the defendant worked together on the second well. Dale paid for the drilling and completion of the well and was repaid by Arlene Meredith, the defendant, and Jeannie Evertson in exchange for interests in the well. Dale had previously paid the defendant for his interest in the first well.

Dale testified that he paid for the "wash-down" of Juelfs No. 1 and was later repaid by Eileen Evertson and the defendant. The next well was Juelfs No. 2, which was ultimately abandoned, and the same payment arrangements were made.

The next well drilled was the Coop No. 1 well, which was a producer. Similar payment arrangements were made on this well. On cross-examination Dale testified he had taken some action to increase the productivity of the Willson-State No. 1 well, after which production rose from about 32 barrels per day to 75 to 80 barrels per day.

Dale testified that he and the defendant did not have any written agreement concerning their interests in the first well. He believed Brunet knew it was a 40-acre deal and that Brunet had an interest in the first well and the Cannon-State No. 1 and Coop No. 1 wells. He also testified that he did not trust the plaintiff.

The defendant testified that the plaintiff had asked to participate in the Gulf deal just after the defendant had struck a deal with Gulf. The defendant testified he had told plaintiff at that time,

> it was just a one shot deal. You know, if it made a dry hole, I was going to step off and drill another one directly right by it. He said, "Well, he didn't have no problem with that because it was kind of stupid to drill two dry holes in the same place anyway."

The defendant testified that plaintiff clearly stated he wanted either 15 or 20 percent, because that was the figure needed for yearend tax purposes. The defendant did not tell the plaintiff they would be equal partners in the first well, and he told the plaintiff that his dad would be involved. The defendant testified the two men disagreed as to which drilling contractor to use, and defendant made the ultimate decision himself. The plaintiff lined up some contractors, while the defendant lined up others.

The defendant testified he decided upon the percentages to assign to the participants in December, and gave the plaintiff a greater interest than he had requested to repay him for past dealings and because the plaintiff's marriage seemed on firmer ground. At this time the defendant knew the first well was a good one. The defendant testified that after he was fired by the plaintiff for the first time on February 20, 1983, he decided not to offer the plaintiff interests in any wells subsequent to the first well.

Melvin Brunet testified that when he learned Gulf had given the defendant an offer which he planned to accept, Brunet told him he was still interested and would probably take a one thirty-sixth interest. He later discovered the defendant had let the plaintiff in on the deal, which surprised him. Brunet testified the defendant told him the defendant would have the

controlling interest in the well and operate it. Brunet said it was his understanding that the deal involved only the 40 acres upon which the first well was located, and everyone would be in on the same deal with regard to the first well. The parties later agreed that Brunet would have a 3.13-percent interest. Brunet testified he has working interests in the Cannon-State and Coop leases and obtained those interests prior to the drilling of the wells. The defendant had told him each well was a separate deal. Brunet testified he was offered an opportunity to participate on the first Juelfs well but declined to do so, and was not offered an opportunity to participate in the second Juelfs well. Brunet testified he received no correspondence concerning the first well, but received written correspondence concerning the subsequent wells prior to drilling.

Brunet testified that he did not believe, at any time, that he had any right or entitlement to an interest in acreage or well sites other than those offered to him by the defendant.

On cross-examination Brunet testified he had never discussed the agreement between the parties with plaintiff. In a deposition Brunet had stated that his interest was initially limited to the 40-acre tract.

Arlene Meredith testified she had worked for the defendant since 1980, first for Evertson Well Service, then for Cannon Oil Well Service. She testified her sister, plaintiff's former wife, had told her that the plaintiff had said the Gulf farmout deal was not his deal and had later stated he would take 10 to 15 percent of it. She testified the defendant told her that he had let the plaintiff in on the deal to repay him for letting the defendant in on deals in the past. He also told her plaintiff's participation was limited to the 40 acres.

Eileen Cannon, the defendant's mother, testified that the defendant had told her the plaintiff had a 15- to 20-percent interest in the first well only.

A constructive trust may be imposed where "one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property." *Ford v. Jordan*, 220 Neb. 492, 494, 370 N.W.2d 714, 716 (1985). In such a case, equity will convert the legal titleholder into a trustee holding the title for the benefit of

those entitled to ownership. Such a suit is reviewed by this court de novo on the record, "giving consideration, where the evidence is in conflict, to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite." *Id.*

A joint venture arises when

> "there [is] an agreement to enter into an undertaking in the objects of which the parties have a community of interest and a common purpose in performance, and each of the parties must have equal voice in the manner of its performance and control of the agencies used therein, though one may entrust performance to the other."

Fangmeyer v. Reinwald, 200 Neb. 120, 131, 263 N.W.2d 428, 434 (1978), citing and quoting from *Soulek v. City of Omaha*, 140 Neb. 151, 299 N.W. 368 (1941).

> The relationship of joint venturers depends largely upon the intent of the alleged parties as manifested from the facts and circumstances involved in each particular case. The mere pooling of property, money, assets, skill, or knowledge does not create the relationship; there must be something more than mere sharing of profits, some active participation in the enterprise, and some control of the subject matter thereof or property engaged therein. "Each member of a joint adventure has a dual status — that of principal for himself, and as an agent for the others."

Fangmeyer, supra at 131, 263 N.W.2d at 434.

In *Soulek* we stated a joint venture can exist only by voluntary agreement of the parties, and cannot arise by operation of law. We also stated that the agreement need not be express, but may be implied, in whole or in part, from the apparent purposes and the acts and conduct of the parties. The relationship depends upon the legal intent of the parties as determined by examining the facts and circumstances of each case. The primary criterion is that the parties enter into an agreement, express or implied, as owners or principals in the endeavor. The arrangement must be for the parties' mutual benefit, "in the pursuit of which each has equal voice, control and authority, although performance may be entrusted to one. There must be a community of interest in the objects and

purposes of the enterprise, without which there can be no joint adventure." *Soulek, supra* at 156-57, 299 N.W. at 372.

The existence of a joint venture is a question of fact. *Rossbach v. Bilby*, 155 Neb. 575, 52 N.W.2d 747 (1952). Once a joint venture is created, each party has a right to expect the utmost good faith and square dealing in all matters which relate to the common interest, because the venturers stand in a fiduciary relationship to each other. *Alexander v. Turner*, 139 Neb. 364, 297 N.W. 589 (1941).

The U.S. Court of Appeals for the Eighth Circuit applied Nebraska law in *Kelley Inv. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 386 F.2d 595 (8th Cir. 1967), to determine whether a joint venture was created by an oral agreement. After summarizing Nebraska law, the court concluded that an oral agreement in which money contributed by one party was combined with the skill and knowledge of the other, in a common enterprise of speculating in the stock market for their mutual benefit, had created a joint venture. The parties had agreed to share profits and losses, and, although one party had been entrusted with performance, the court found there was mutuality of control. The latter finding was based on the party's admissions and the agreement that either party could liquidate the contracts.

This court addressed the issue of the existence of a joint venture in *Carey v. Humphries*, 171 Neb. 578, 107 N.W.2d 20 (1961). In *Carey*, we held:

> "The existence of a joint adventure is a question of fact under the evidence, and further, more convincing evidence is required to prove existence of a joint adventure where alleged joint adventure parties are the only litigants than where the controversy is between a third party and the joint adventurers. The burden of establishing the joint adventure is on the plaintiff."

Id. at 596, 107 N.W.2d at 31.

In *Carey* the facts established that defendant Dan Reinfried had acted as a principal in the transaction, and not as an agent or representative of anyone else. Reinfried acted only on his own behalf in securing the leases and dry-hole money and in selling them to Robert Braden. To establish a joint venture the

proponent must show its existence by clear and convincing evidence. On those facts we held a joint venture was not created and Reinfried had not breached a fiduciary duty by entering into certain other leases without advising Braden, the person who had purchased the first leases.

The plaintiff argues there is a distinction between *Carey* and this case because in *Carey*, unlike here, the court found there was no venture. The plaintiff argues that *Carey* is also distinguishable because there, unlike here, the parties presented no evidence of custom in the industry.

This argument is unpersuasive. In *Carey* the court found there was no joint venture relationship because the transactions at issue were wholly separate and not subject to an agreement between the parties to act as joint venturers. The trial court made a similar finding in this case, that the transactions were separate and not subject to an agreement between the parties. The court specifically found that a fiduciary relationship in this case arose only as to the operation of the first well.

To establish the existence of a joint venture in this case plaintiff had the burden to prove, by clear and convincing evidence, the existence of an agreement between the parties in which the parties had a community of interest, common purpose in performance, and equal control. *Fangmeyer v. Reinwald*, 200 Neb. 120, 263 N.W.2d 428 (1978). Such an agreement can be either express or implied from the conduct of the parties.

The plaintiff initially alleged in his petition that he and the defendant had entered into an oral agreement whereby they agreed to act as joint venturers as to the entire project. The plaintiff contends such agreements are customary in the industry and are enforceable through the imposition of a constructive trust, notwithstanding the statute of frauds.

The evidence concerning the existence of such an agreement and its terms was conflicting, and resolution of the many conflicts rested in determinations of credibility. There were no witnesses who had personal knowledge of an oral agreement between the parties, no writings evidencing its terms, and inconsistent versions of events.

The plaintiff testified that it was his understanding that the

parties would be equal partners in the entire project; that he was involved in the preliminary investigations for a drilling site; that the defendant had agreed to handle the negotiations with Gulf; and that, for that reason, the farmout agreement named the defendant as the lessee. There was evidence the two men had explored the possibilities of acquiring additional acres with an independent landman and the geologist on the project. Although there was some evidence of custom in the industry, that evidence was not particularly helpful to the plaintiff because each witness conceded participation in such ventures is dependent upon the agreement of the parties. Further, the plaintiff stated, in various independent actions, that his interest was limited to a 30-percent interest in the Willson-State well.

The defendant's evidence completely contradicted the plaintiff's. The defendant testified he had never told plaintiff they would be equal partners in the project, but had offered him only a limited interest in the first well. Several of the other working owners testified they had been offered the deal on a similar basis. There also was evidence that the two men had frequently been involved in separate transactions in the past, in which the other party often was offered only limited participation.

It seems clear that the parties had some agreement that the plaintiff would participate in the project prior to the drilling of the first well. The evidence, when taken as a whole, indicates the agreement was that the plaintiff would have a percentage ownership in only the first well. The evidence tends to show that the defendant, like the defendant in *Carey v. Humphries*, 171 Neb. 578, 107 N.W.2d 20 (1961), entered into the agreement with Gulf as a principal representing only his own interests, rather than as an agent representing the plaintiff's interests as well. There is no evidence the parties had an agreement to jointly acquire leases generally. In fact, the evidence supports a contrary finding. The two men often acquired separate interests which they were free to share, or not.

The plaintiff's alternative argument, that the close relationship between them created an implied joint venture, is also nonpersuasive for several reasons. First, as noted above, the relationship was premised on the right of each person to

enter into separate deals without the obligation of including the other. Second, while the existence of a close business relationship may be a factor to be considered in determining whether a fiduciary relationship exists, it alone is not generally sufficient. For example, in *Tyra v. Woodson*, 495 S.W.2d 211 (Tex. 1973), the court held that the fact that one businessman trusts another and relies on his promise to perform a contract does not create a constructive trust. The court held the plaintiff had to prove the existence of a fiduciary relationship separate from the agreement forming the basis of the suit to overcome the effect of the statute of frauds.

In *Greenbaum v. Kirkpatrick*, 129 F. Supp. 648 (W.D. Okla. 1955), the plaintiff sought to impose a constructive trust over certain oil and gas leases obtained by the defendant on the grounds of an alleged joint venture based on an oral agreement. The plaintiff alleged the parties had agreed to be equal partners, in that the defendant would obtain leases, plaintiff would obtain investors, and ownership would be divided equally. The plaintiff alleged he contacted investors and defendant contacted landowners, but after the defendant had acquired the leases he repudiated their agreement and gave an interest to a third party. The plaintiff contended the latter lessees held their interests on a constructive trust for plaintiff. The court held that the plaintiff had failed to prove the existence of the alleged agreement by clear and convincing evidence and that the preliminary negotiations between the parties were held with a view toward a future course of conduct rather than a present binding contract wherein their minds had met.

In *Hoover v. Cooke*, 566 S.W.2d 19 (Tex. Civ. App. 1978), a geologist brought suit against another geologist to impose a constructive trust upon certain mineral interests. In examining the types of relationships which must be proven to recover on an alleged abuse of such a relationship, the court made several observations.

> " 'A constructive trust is a relationship with respect to property, subjecting the person by whom the title to the property is held to an equitable duty to convey it to another, on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly

enriched if he were permitted to retain the property.' "
Id. at 26 (quoting *Talley v. Howsley*, 142 Tex. 81, 176 S.W.2d 158 (1943)). The court further stated a constructive trust does not arise from the existence of a confidential relationship, but only where such a relationship was violated by an abuse of confidence rendering the acquisition or retention of property by one party unconscionable. The court stated such a remedy is not available for every moral wrong, and mere subjective trust alone will not suffice; the fact that one businessman trusts another is not enough.

" 'The fact that people have had prior dealings with each other and that one party subjectively trusts the other does not establish a confidential relationship. . . .' " *Hoover v. Cooke, supra* at 27. The opinion reasoned that " ' "[b]usinessmen generally do trust one another, and their dealings are frequently characterized by cordiality. . . ." ' " *Id.*

The court also deemed important the fact that, as a general rule, in arm's-length transactions where both businessmen stand on equal footing in terms of "education, ability, experience and business acumen . . . each party must exercise due care for the protection of his own interests, and a failure to do so is not excused by mere subjective trust or confidence in the honesty and integrity of the other party." *Id.*

Fiduciary duties extend only to dealings within the scope of that relationship. *Fuqua v. Taylor*, 683 S.W.2d 735 (Tex. App. 1984). In *Fuqua* the parties had entered into a written agreement whereby the defendant, a geologist, was designated as an operator for the drilling project. He later acquired a lease on a well, which the venture had allowed to expire, without informing his co-venturers. He had also acquired leases on nearby property. The court found he had breached his fiduciary relationship as to the expired lease but not as to the new lease on nearby land, because the latter was not within the scope of his fiduciary duties.

The evidence in this case fails to show the breach of a fiduciary duty. The parties were businessmen with equal stature, education, and experience. Their prior dealings, apart from the Evertson Well Service companies, were characterized by individual, rather than joint, undertakings. The plaintiff

could have protected his perceived interest in the project at the beginning. His involvement in the farmout agreement was on a limited, rather than an equal, basis, and the plaintiff did not object to those terms in a timely fashion or exercise due diligence to support his claims. Moreover, the plaintiff's actions and admissions in separate proceedings are in direct contravention to his claims here.

The plaintiff's evidence falls short of being clear and convincing.

The judgment is affirmed.

AFFIRMED.

ROSE J. ZYBACH, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

411 N.W.2d 627

Filed September 4, 1987. No. 86-358.

1. **Ordinances: Administrative Law: Judicial Notice: Appeal and Error.** Courts ordinarily refuse to take judicial notice of municipal ordinances or internal operating rules of administrative agencies.
2. **Principal and Agent.** An attorney in fact has no implied or apparent authority to do that which the principal himself would not be authorized to do.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

Robert M. Spire, Attorney General, and Royce N. Harper, for appellant.

Joseph S. Ramirez of Legal Aid Society, for appellee.

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

GRANT, J.

The State of Nebraska, Department of Social Services (hereinafter Department), appeals the decision of the Platte County District Court reversing the finding and order of the director of the Department. The director's order had denied the

appellee, Rose J. Zybach, assistance to the aged, blind, and disabled, and medical assistance (AABD/MA).

The underlying procedural facts show that on June 5, 1985, Walter C. Zybach, the son of appellee, filed an "Application for Assistance" on behalf of appellee with the Department's Columbus, Nebraska, local office. The application sought AABD/MA benefits for appellee. The application was completed with the aid of department employees, was signed by Walter "for Rose Zybach," and showed that appellee was born on July 29, 1891, and had lived in a nursing home in Columbus since October 9, 1973. The application also set out that appellee had $3,359.01 in a checking account, a $5,000 certificate of deposit as a burial fund, and a burial space.

The Department's Columbus office investigated the situation and on August 5, 1985, issued its "Notice of Finding," determining that appellee was not eligible for assistance. This notice set out that the reason for such action was:

> As per 469 NAC 2-009.10 - An individual is ineligible if she deprives herself of resources by giving them away or by disposing of them for less than fair market value for the purpose of qualifying for assistance. The client [appellee] had been in a nursing home for a number of years; the son add [sic] Power of Attorney was well aware of her needs during the time the client's resources were being used by the POA for his own personal expenses. You may reapply when resources disposed of have been used to meet your mother's needs.

On August 9, 1985, Walter Zybach filed a "Notice and Petition for Fair Hearing" with the Department. This notice constituted an appeal to the director from the denial of assistance to appellee by the Department's local office, pursuant to Neb. Rev. Stat. § 68-1016 (Reissue 1986).

A hearing was held on this appeal, apparently by an administrative judge, on August 21, 1985. On September 18, 1985, the director of the Department issued a "Finding and Order" affirming the action of the Columbus local administrative office rejecting appellee's claim. Pursuant to Neb. Rev. Stat. § 84-917 (Cum. Supp. 1984), appellee timely appealed to the district court for Platte County by filing a

petition seeking reversal of the director's order. Defendants, Gina C. Dunning, Director, and the Department, answered by general denial.

The matter was submitted to the court on the certified "transcript of the proceedings in the matter of the administrative appeal of ROSE J. ZYBACH . . . ."

On March 31, 1986, the district court reversed the Department's order of September 18 and held that "the Plaintiff [appellee] should be entitled to benefits from August 5, 1985." The Department timely appealed to this court, assigning as error that "[t]he district court erred in holding that the action taken by the Department of Social Services in rejecting appellee's application for public assistance was unsupported by competent, material and substantial evidence and was arbitrary and capricious." We affirm.

The facts, as shown by the "transcription of the oral testimony given at the administrative hearing of August 21, 1985," and the exhibits received at that hearing, are as follows.

Appellee was first placed in the Columbus nursing home in 1973 at the suggestion of appellee's physician after appellee was found by her daughter-in-law, Walter's wife, Marjorie, "in bed, no clothes on, and her, and she and the scissors, her clothes were all cut up. There were frying pans on the stove, turned on, things were smoking . . . ." The son testified further that "we called our doctor in Omaha and he suggested we do this, put her in a home."

Walter testified that the appellee was incompetent at the time she entered the nursing home, that she had gotten much worse since entering the home, and that now she did not recognize him most of the time.

On May 25, 1974, a formal, 20-paragraph power of attorney was signed by the appellee, before a notary public, appointing her son, Walter Zybach, to act as her attorney in fact. Walter testified that he was advised appellee needed one "[t]o, to, when I had to borrow money that's the only way it could be done, the way I understood it." Walter further testified that when he took control of appellee's property with the power of attorney, "I understood we could use it any way we seen fit, that's the way I understood it."

At the time of the application for assistance, Walter and Marjorie Zybach explained to the worker processing appellee's application:

> [T]his was a different situation than a lot of people have with their parents. . . . [T]hat in about 1950, [appellee] had asked them to stay around Columbus and not take a job with a company in California, and that she would "make it right with them" if they took care of her and helped her out.

Walter testified that appellee did not talk about salary or inheritance but that her statement meant appellee would financially take care of them.

On June 6, 1985, a Department worker checked with the register of deeds and determined that appellee originally owned a tract of farmland, with several small tracts sold between the years of 1953 and 1981 "from which proceeds she had paid nursing home care, as stated by the son in the original interview." The worker further reported that in 1981 the remainder of appellee's land was sold for $194,990.

The land was sold by Walter Zybach as appellee's attorney in fact. The net proceeds of the sale were $140,126.68 after expenses from the sale, except for income tax. On July 7, 1981, appellee, by her attorney in fact, gave gifts of $10,000 to appellee's daughter and $9,500 each to Walter and Marjorie from the proceeds of the sale of appellee's land. Walter told appellant's employees that appellee told Walter they were to receive some of the proceeds from the sale of the farm.

Walter testified that after the sale of the land he paid off a $35,000 loan on the farm and paid a capital gains tax of $28,000. Walter kept very few records or canceled checks and testified that he did not know what happened to the rest of the money, but stated that he "used it for [appellee's] care, I used some for ours."

The record shows that on December 31, 1984, appellee had remaining assets of $35,045 in certificates of deposit. Walter submitted a statement of expenditures detailing how the $35,045 was spent. It included a $10,000 stone and funeral fund in Walter and Marjorie's name, which Walter testified was held in a certificate of deposit; auto, home, accident, and life

insurance for Walter and Marjorie, $856; prescription drugs for appellee, $163.26, and for Walter and Marjorie, $1,301; doctor bills for Walter and Marjorie, $3,893; beauty shop bills for appellee, $150.50; an irrevocable funeral trust for appellee, $3,000; nursing home costs for appellee, $9,063; and miscellaneous living expenses, $4,552.50; with a balance in appellee's checking account of $2,066. On June 3, 1985, the appellee had a checking account balance of $3,302.42.

Both Walter and Marjorie testified that they have heart conditions. On June 11, 1985, they told the Department worker that Marjorie had "heart surgery in Omaha 3 weeks ago that cost $18,000" and that "Walter had been . . . disabled since 1971. At that time he suffered a heart attack and was told to do very little work."

It was on this evidence that appellant, in its finding and order, found that appellee "had available for her use at the time of the application . . . $3,302.42 and the $10,000 certificate of deposit held by her attorney in fact in his and his wife's name. This gave [appellee] resources in excess of program guidelines." The director further found that appellee "deprived herself of resources in the amount of $10,602.24 since January" and that "the $35,045 . . . available for her care . . . was disposed of in order to qualify for public assistance."

We note that in an appeal to the district court from a final decision of an administrative agency, under the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 to 84-919 (Reissue 1981 & Cum. Supp. 1984), the district court

> may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is:
>
> (a) In violation of constitutional provisions;
>
> (b) In excess of the statutory authority or jurisdiction of the agency;
>
> (c) Made upon unlawful procedure;
>
> (d) Affected by other error of law;
>
> (e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or

(f) Arbitrary or capricious.

§ 84-917(6) (Cum. Supp. 1984); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

The Supreme Court's review of an administrative agency's decision is de novo on the record. § 84-918 (Reissue 1981); *Haeffner v. State, supra; In re Complaint of Federal Land Bank of Omaha*, 223 Neb. 897, 395 N.W.2d 488 (1986). We have recognized that the scope of review from administrative agencies pursuant to statutes that provide specific procedures for appeal may be different. See *In re Application A-15738, ante* p. 146, 410 N.W.2d 101 (1987). In this case, no specific method of appeal is provided, and the scope of our review is de novo on the record.

Appellant argues in the brief on appeal that we need only consider the issues (1) whether appellee's resources were exhausted below the $1,600 maximum permitted to qualify for AABD/MA, on June 5, 1985, when appellee applied for assistance, and (2) whether appellee or her representative disposed of appellee's resources for the purpose of qualifying for public assistance.

With regard to its first contention, appellant asserts that at the time of appellee's application for assistance, her checking account was in excess of $3,000, which was over the $1,600 prescribed guideline for public assistance pursuant to Neb. Admin. Code tit. 469, ch. 2, §§ 2-009.08 and 2-009.09 (1985).

Section 2-009.09, which is set out in the record, concerns the consideration of the resources of a parent toward the eligibility of a child 18 or younger and has no application to appellee's case. Section 2-009.08 was not made a part of the record before us.

We have held:

> Courts have ordinarily refused to take judicial notice of municipal ordinances or internal operating rules of administrative agencies or other courts, and have required a party seeking the benefit of such provisions to plead and prove the existence of the ordinance or rule. [Citations omitted.] Where such rules and regulations do not appear in the record nor in the bill of exceptions in this court, the court will not take judicial notice, nor consider the

> validity, of the rule or rules or their application to the facts in the case.

Nevels v. State, 205 Neb. 642, 646, 289 N.W.2d 511, 513 (1980).

Such rules or regulations must be introduced in evidence and the party claiming under them has the burden of pleading and proving their existence and validity. *State v. Surber*, 221 Neb. 714, 380 N.W.2d 293 (1986); *Nevels v. State, supra*. We do not take judicial notice of § 2-009.08. Since § 2-009.08 does not appear in the record, we do not consider this issue.

We next consider appellant's contention that the next question to be resolved is whether the appellee or her representative, Walter Zybach, appellee's attorney in fact, disposed of appellee's resources for the purpose of qualifying for public assistance.

We first determine that appellant's question does not properly frame the issue. In this approach, appellant is relying on the provisions of Neb. Rev. Stat. § 68-1002 (Reissue 1986), which provides: "In order to qualify for assistance to the aged, blind or disabled, an individual: . . . (3) [must prove that the individual has] not deprived himself directly or indirectly of any property whatsoever for the purpose of qualifying for assistance to the aged, blind or disabled . . . ."

In applying this section of the statutes, appellant has adopted a regulation, which is in the record before us, entitled Neb. Admin. Code tit. 469, ch. 2, § 2-009.10 (1985), and which provides in part:

> An individual is ineligible if s/he deprives himself/herself of resources by giving them away or by disposing of them for less than fair market value for the purpose of qualifying for assistance. . . .
>
> . . . .
>
> The worker may also allow the client to produce evidence that may indicate the resource was disposed of for reasons other than to qualify for assistance (e.g., to repay debts) and, therefore does not affect eligibility.

In both the statute and the regulation, the disqualifying act is the act of depriving oneself of resources "for the purpose of qualifying for assistance." "Purpose," as used in both the statute and the regulation, means an "intention, or aim, object,

plan, project." 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.

In our de novo review, we find that appellee, Rose Zybach, did not at any pertinent time have sufficient mental capacity to do anything with any "purpose." While there was no medical testimony before the Department at the time of the administrative hearing, all the evidence submitted was to the effect that appellee was incompetent at the time she was admitted to the nursing home in 1973 and had gotten worse mentally with the passing years. The record also shows that at the time she allegedly acted with the "purpose of qualifying for assistance," appellee was nearly 94 years old and had been a resident of the nursing home for 12 years.

The only possible basis for holding that appellee had so acted would be that appellee had acted through her attorney in fact. Assuming, arguendo, that the attorney in fact had been properly appointed in May of 1974 and that appellee's incompetency had not terminated any power of attorney, the law is clear that any attorney in fact or agent has no implied or apparent authority to do that which the principal himself would not be authorized to do. *Johnson v. Shenandoah Life Insurance Company*, 291 Ala. 389, 281 So. 2d 636 (1973); 3 Am. Jur. 2d *Agency* § 71 (1986). In *Cooley v. Eskridge*, 125 Colo. 102, 113, 241 P.2d 851, 856-57 (1952), the Colorado Supreme Court stated: " 'It has been held that a servant can have no implied authority to do that which it could not be lawful, under any circumstances, for either him or his employer to do. . . .' " Section 68-1002(3) provides that it is unlawful for one to dispose of resources in order to qualify for assistance.

The dispositive fact that must be kept in mind is that appellee and her son, Walter, who is allegedly her attorney in fact, are two separate and distinct persons. Appellee apparently has no guardian. Appellee is a vulnerable older person who clearly needs assistance, either legal or financial. Through no fault of her own she has reached an age where she must rely on others. The carelessness or inattention of others cannot and should not be attributed to appellee.

We agree with the holding of the court in *Lee v. State*

Department of Public Health & Welfare, 480 S.W.2d 305, 309 (Mo. App. 1972), where the court stated: "Ergo, the statute condemns transfers produced or at least acquiesced in by a claimant; it does not undertake to discipline a claimant who is wholly passive in the matter and where the transfer results from the independent acts of third persons."

The fact is that this claimant needs assistance. That assistance must be provided to her, and the State may then take whatever steps it deems necessary to correct the situation. We find that appellee was entitled to assistance from the date of her application for assistance and that the order of the district court should be affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. CASEY J. SLEZAK, APPELLANT.
411 N.W.2d 632

Filed September 4, 1987. No. 86-815.

1. **Prior Convictions: Right to Counsel: Waiver: Pleas.** To use a prior conviction as a basis for enhancement, the State need only show that the convicted defendant had, or waived, counsel at the time of such prior conviction and that defendant entered a plea to the charge resulting in the conviction.
2. **Prior Convictions: Pleas: Drunk Driving.** For a prior conviction based on a plea of guilty to be used for enhancement purposes in an action under Neb. Rev. Stat. § 39-669.07 (Reissue 1984), the record must show that the defendant entered the guilty plea to the charge.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

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

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

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

GRANT, J.

Defendant, Casey J. Slezak, appeals his convictions and sentences for driving while intoxicated, for which the court enhanced the penalty to that for third offense driving while intoxicated, and for attempted possession of a controlled substance. We affirm in part and reverse and remand in part.

On July 16, 1986, pursuant to a plea agreement, the State filed an amended information against defendant on two counts. Count I alleged that the defendant, "[o]n or about the 22nd day of February, 1986 . . . did . . . unlawfully and knowingly or intentionally attempt to possess a controlled substance other than marijuana, to wit: Cocaine . . . ." Count II alleged that the defendant,

> [o]n or about the 22nd day of February, 1986 . . . did then and there unlawfully operate or be in the actual physical control of a motor vehicle while under the influence of alcoholic liquor, or of any drug, or while the said person had ten hundreths [sic] of 1% or more by weight of alcohol in his blood, breath or urine, and further defendant has been previously convicted at least twice of Driving While Intoxicated, to wit: on or about June 12, 1982 in Grand Island, Nebraska and on or about September 24, 1983 in Seward, Nebraska.

Defendant entered a plea of guilty to each count on July 18, 1986. An enhancement hearing on count II was held on July 25. At this hearing the State offered exhibits 1 and 2, evidencing the alleged prior convictions of defendant for driving while intoxicated. Both exhibits were offered and received into evidence. Defendant's attorney stated defendant had no objection as to foundation of the two exhibits.

Exhibit 1 contains a certified copy of a complaint filed by the city of Grand Island against defendant for operating a motor vehicle while under the influence of alcohol and a journal entry from the Hall County Court with the judgment of conviction of defendant on July 9, 1982, for driving while intoxicated.

Exhibit 2 contains a copy of a "Uniform Citation and

Complaint" issued to defendant for speeding and unlawfully operating a motor vehicle while under the influence of alcohol, an arraignment checklist, and a sentencing order in the county court for Seward County for the defendant's conviction on November 7, 1983, for driving while intoxicated.

Defendant then offered facts in mitigation of the prior convictions, challenging only the validity of exhibit 1. Defendant argued that the 1982 conviction was not valid for purposes of the enhancement hearing because the defendant's guilty plea in that proceeding was not knowingly, voluntarily, and intelligently entered. Defendant's counsel asserted, "On the face of this Exhibit, Exhibit 1, it's extremely clear the parties appeared for trial, a hearing in chambers was held," and the attorney representing defendant at that time "withdrew the plea of not guilty and entered a plea of guilty. It says on the face of this, Your Honor, that Mr. Slezak never entered a plea of guilty in this case, it appears his attorney did on his behalf."

The journal entry in exhibit 1 states in pertinent part:

> On June 23, 1982, the above matter came on for hearing. The Defendant was present in Court with his attorney . . . . The Defendant was informed of his rights. A plea of not guilty was entered and the matter was set for trial.
>
> On July 9, 1982, the matter came on for trial. The Defendant was represented by [his attorney]. A hearing in chambers was held. [Defendant's attorney] withdrew the plea of not guilty and entered a plea of guilty. A factual basis was presented by the City for the charge. The Court accepted the plea and entered a finding of guilty.
>
> On September 1, 1982, sentencing was held on the above matter. The Defendant was present in Court accompanied by his attorney . . . .

The defendant testified at the enhancement hearing that he never entered a plea in the proceedings on July 9, 1982.

On July 25, 1986, the court found that "this is the defendant's third offense for driving while intoxicated and that the defendant is guilty of Count II as charged and judgment of conviction is entered."

On September 26, 1986, the court sentenced defendant to 3

months in the Sarpy County jail on each count, with the provision that the sentences be served concurrently; a $250 fine on count II; and revocation of the defendant's operator's license for a period of 15 years on count II. The defendant timely appeals.

Defendant assigns two errors: (1) The district court erred in improperly enhancing defendant's conviction on count II to driving while intoxicated, third offense; and (2) since the conviction was improperly enhanced, the sentence imposed was improper. Defendant does not challenge his conviction and sentence on count I.

Defendant contends that it is the burden of the State to prove the prior convictions on enhancement of a charge of driving while intoxicated. Defendant asserts that the State could not do so because the defendant's guilty plea in the Hall County proceedings was not entered knowingly, intelligently, and voluntarily, thereby making defendant's conviction invalid.

This court has held that the State's burden in proving a valid prior conviction for enhancement purposes is only to show that the defendant had counsel or knowingly and voluntarily waived counsel at the time of such conviction. *State v. Thompson*, 224 Neb. 922, 402 N.W.2d 271 (1987); *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987); *State v. Foster*, 224 Neb. 267, 398 N.W.2d 101 (1986); *State v. Hamblin*, 223 Neb. 469, 390 N.W.2d 533 (1986).

Defendant asserts that Neb. Rev. Stat. § 39-669.07 (Reissue 1984) provides that a defendant may "make objections on the record regarding the validity of such prior convictions" and is not limited to "invalid convictions without legal representation." Brief for Appellant at 13. Defendant further asserts that objection to a conviction which shows on its face that the defendant was neither arraigned nor had explained to him the consequences of the waiver of his constitutional rights does not constitute a collateral attack upon that conviction.

We determine that the enhancement of defendant's sentence in this case was improper. The record before us does not show that defendant entered any plea to the 1982 charge. The record does not state that defendant was present when the plea was made and shows only that defendant's attorney entered a plea

of guilty for defendant to the charge. The record is silent as to whether defendant was informed by the trial court as to this plea.

There is not before us any allegation that defendant's attorney was acting on the directions of defendant or that defendant ratified the plea made by his attorney, and we need not consider herein such problems.

We adhere to our earlier rulings as set out above that to prove a prior conviction the State need only show that a defendant had, or waived, counsel. We add only that for a prior conviction based on a plea of guilty to be used for enhancement purposes in an action under § 39-669.07, the record must show that the defendant entered the guilty plea to the charge.

Defendant's conviction on count I is affirmed. Defendant's conviction on count II is reversed and the cause remanded, on that count only, for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CENTER STATE BANK, SPECIAL CONSERVATOR OF THE ESTATE OF ROBERT J. HAWK, A MINOR, APPELLANT, V. DANA, LARSON, ROUBAL & ASSOCIATES, INC., A CORPORATION, APPELLEE.

411 N.W.2d 635

Filed September 4, 1987. No. 86-917.

1. **Negligence: Minors.** If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances.
2. _____: _____. Regarding negligence, the special standard to be applied in the case of children arises out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them.
3. _____: _____. What is required of a minor is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.
4. **Negligence: Trial.** The question of the existence of negligence or contributory

negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence; it is only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury.

5. **Negligence.** Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what a reasonably prudent person under the same circumstances would or should, in the exercise of reasonable care, have anticipated.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Reversed and remanded for a new trial on the issue of damages.

M.J. Bruckner and John V. Hendry of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., and Patrick J. Birmingham, for appellant.

Jewell, Gatz, Collins & Dreier, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a negligence action brought by plaintiff, Center State Bank, as special conservator of the estate of Robert J. Hawk, a minor born September 20, 1970, against Dana, Larson, Roubal & Associates, Inc., a corporation (hereafter DLR), for personal injuries received in the explosion and fire of propane gas escaping from an underground supply tank. Robert J. Hawk (Robert) was seriously burned. DLR was the architectural firm involved in the 1973-76 planning and construction of the Santee Elementary School, Santee, Nebraska. A $281,415.65 jury verdict was entered in favor of plaintiff against DLR.

Plaintiff's motion for a new trial on the issue of damages and defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial were both denied. Plaintiff appeals, assigning as errors that the trial court erred in (1) submitting the issue of contributory negligence of Robert in these particulars: in failing to leave an area which he knew, or in the exercise of reasonable care should have known, was

dangerous, and in going from a place of safety to a place of danger; (2) refusing to admit nine affidavits describing misconduct of the jury foreman; (3) failing to grant a new trial for jury misconduct; (4) failing to grant a new trial because the jury foreman failed to follow instructions when he reduced past damages as well as future damages to present value; (5) failing to submit to the jury Robert's past and future disfigurement; (6) failing to grant a new trial when the verdict was clearly inadequate and the result of passion, prejudice, mistake, and misconduct; and (7) failing to grant a new trial on the issue of damages only.

Propane gas is a commercial name given to liquefied petroleum gas. It is a gaseous heating material that, for transportation and storage, is liquefied under pressure. In the unpressurized liquid state it is about -40 °F, and it is stored in pressurized tanks. When used by the consumer, the pressure is released and the liquid is warmed by a vaporizer, which returns it to its original gaseous state for ignition.

At about 4 p.m. on August 26, 1983, Sam Ruiter, an employee of Dan Dugan Transport Company (Dugan), arrived with Dugan's truck at the Santee school grounds to deliver propane fuel into the school's underground storage tank. He parked the truck near a fence that surrounded a manhole where the intake valves for the storage tank were located. After connecting the hoses from the truck to the storage tank connections, he started the truck engine and commenced pumping the pressurized liquid propane into the pressurized storage tank. After about 20 minutes, he heard a popping noise; upon investigation, he discovered that propane was bubbling up out of the manhole, forming a white cloud that continued to grow until it finally covered most of the truck. Later investigation determined that a storage system connecting line in the manhole had split, allowing the liquid propane to escape. As a fire precaution, Ruiter immediately shut off the truck engine and shut off the valves on the truck to the delivery hoses. The cold temperature of the escaping propane and the cloud prevented him from closing the valves on the storage tank, leaving propane gas escaping from the storage tank. Ruiter went to the rear of the truck, proceeded toward the street, and

called to a man across the street, later identified as Marvin Buzzard, to get the Santee firetruck. Ruiter returned to the truck, and for the first time he saw children standing at the rear of the truck. Ruiter stayed in the truck area until after the explosion. He estimated the time from discovery of the leak to the explosion took 3 to 5 minutes. He received some burns to his body from the explosion.

The children that he saw were Robert J. Hawk, almost 13 years of age; Earl Crane, age 12; Lisa Crane, age 15; John Crane, age 10; Chris Campbell, age 4; Lonnie Campbell, age 7; and Angela Henry, age 6. They had left Robert's home and were walking across the school grounds en route to a nearby playground. The Dugan truck was parked across their path. As they neared the truck, Earl and John went to the front of the truck and Robert and the other children went around to the back of the truck and stood there observing a white cloud emerging under the truck.

Robert testified that he saw a white cloud that looked like burning leaves and asked the truckdriver, who was standing near the truck, "what was wrong." The driver did not answer, but only walked away. Ruiter denies this incident. Robert said that the cloud had a smell that he could not describe, but it was "awful"; that he had never smelled it before; that he did not know anything about propane; and that he did not know it was dangerous.

On cross-examination, Robert admitted that in an earlier deposition he gave answers indicating that the cloud smelled like rotten eggs; that the cooking stove at his home had the same smell, but not as strong; and that he held his nose because of the smell. He also said that he knew the truck was delivering material used to heat the school. On redirect Robert explained that he did not know why there was a smell around the stove at home and that he did not know that the smell was a warning of the presence of propane gas.

Soon, Robert decided to locate John and Earl. He walked up to the white cloud, looked in, and, not seeing anyone, he was walking away when the explosion occurred. In an earlier deposition, Robert had said that he took two steps into the white cloud and then stepped back, when the explosion

occurred. He described the white cloud as feeling cool. It was above 90 °F that day.

Ruiter testified that after noticing the children, who were all standing behind him at the back of the truck, he twice told them that they had better leave "because this would probably explode or it would explode" and that when he turned around the explosion occurred. Ruiter described the gas as having a smell, but the vapor "won't hurt" you when you are in it for a brief time.

Buzzard testified that when he first saw the white cloud, he drove his pickup truck down to the area where the propane facility was. He did not see any children near the truck when he talked to Ruiter, the truckdriver. Buzzard then drove to the fire department, encountering Richard Kitto on the way. By the time Buzzard came out of the fire department, the initial explosion had already taken place. A reenactment of Buzzard's actions, from the time of his first contact with Ruiter until after he came out of the firehouse, was timed to have taken 2 minutes and 45 seconds.

Kitto testified that he had just left the nearby community center building when he exchanged words with Buzzard. At that time he looked toward the Dugan truck and saw one figure that looked like an adult near the cab of the truck and two or three small figures at the back of the truck. He hollered loudly to the children, warning them that it was dangerous. The children did not react to his shouting, and he did not know if they heard him. Seconds after his last yell, the explosion occurred.

Angela Henry, one of the children, who was almost 7 years old at the time of the explosion, testified by deposition that Kitto told them twice to get away, and the explosion occurred right after the last warning. She said that Ruiter never said anything to the children and that all of the children except Lisa and herself were running in and out of the white cloud.

Edward McLean, an industrial engineer with 47 years of experience with propane systems, including 12 or 14 propane leaks similar to this case, described the changes in the leaking propane:

> What takes place is . . . the liquid is escaping under pressure. Whatever the temperature of the gas is in there

creates a pressure and on a hot day it could go as high as 140 pounds per square inch, that would be an 80 degree day. So with that kind of pressure squirting this liquid out even through a narrow opening it's still liquid at that point but as soon as it hits the atmosphere at the lower pressure it tends to vaporize. The vaporization is not complete and so in seeking warm air to boil this liquid there is a fog created just like a fog up on the lake here. That same type of fog is consistent of a lot of bubbles that haven't vaporized. It's simply breaking down of the liquid structure from a white, colorless liquid, like water, to a fog and when that is created it's seeking temperature to boil it into a colorless gas. And so that's why we have the fog that we talk about as having been created in this instance that—we have these small particles are seeking heat to boil at the outside temperature into a gas and, again, we're talking about seeking of about a thousand BTU of heat for every gallon of liquid that escapes.

It forms a fog.

Q- . . . Can the average individual be within the vapor area without really knowing it?

A- No.

Q- Can you see— I guess, does some of it become invisible toward the outer edge?

A- Yes, outer edge is where it gets enough temperature to vaporize these little fog bubbles, sure. It then turns into a gas and it's colorless.

Q- That's what I mean. So at the outer perimeters it can be there and you can't see it; is that right?

A- That's right.

Q- So you might think you're standing along the edge and you are actually standing in it?

A- Well, you wouldn't be standing in it very long because you can't breathe very well. You get out of it as soon as you realize that you're in it. You get farther away from it. But you see, it has no oxygen and therefore your lungs won't take it. But from the standpoint of the gas being formed, there is gas outside of this vapor fog, yes.

Q- Once that is ignited, if you are in it do you have any

chance at all to get out of it?

A- No, it's very fast. You can't run that fast.

A later investigation at the site revealed a crack in a pipe near the hub of a valve on the school's propane storage system. This pipe, which was the cause of the propane leak, the explosion, and Robert's injuries, was shown to be a "Schedule 40" type pipe, and the evidence established that it should have been a heavier "Schedule 80" pipe. Since DLR dismissed its cross-appeal on the trial court's failure to grant a directed verdict, no further facts are shown concerning the liability issue.

From the explosion and fire, Robert received extensive and severe burns to most of his body, requiring months of hospital care and medical expenses in excess of $84,000. There was evidence, if believed, showing he had other permanent injuries and damages exceeding $500,000.

Dugan, an original party defendant, was dismissed as a party during the trial.

We first discuss the issue of contributory negligence.

> "The special standard to be applied in the case of children arises out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, as a practical matter, to determine what is to be expected of them. . . ."

Camerlinck v. Thomas, 209 Neb. 843, 858, 312 N.W.2d 260, 268 (1981).

> "If the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person of like age, intelligence, and experience under like circumstances." . . .
>
> . . . .
>
> ". . . Likewise to be taken into account are the circumstances under which the child has lived, and his experience in encountering particular hazards, or the education he has received concerning them. . . ."

Id. at 858-59, 312 N.W.2d at 268.

What is required of a minor is the exercise of that degree of care which an ordinarily prudent child of the same capacity to appreciate and avoid danger would use in the same situation.

Caradori v. Fitch, 200 Neb. 186, 263 N.W.2d 649 (1978); *Camerlinck v. Thomas, supra.*

"Negligence must be measured against the particular set of facts and circumstances which are present in each case." *Krehnke v. Farmers Union Co-Op. Assn.*, 199 Neb. 632, 638-39, 260 N.W.2d 601, 606 (1977).

"Knowledge is fundamental to liability for negligence. The very concept of negligence presupposes that the party charged therewith either fails to foresee an unreasonable risk of injury to another, or could have foreseen it had he conducted himself as a reasonably prudent person." *Farmer v. S.M.S. Trucking Co.*, 180 Neb. 779, 782, 145 N.W.2d 922, 924 (1966).

> [T]he question of the existence of negligence or contributory negligence is for the trier of fact whenever different minds may reasonably draw different conclusions from the evidence . . . . It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to the jury.

Fangmeyer v. Reinwald, 200 Neb. 120, 124-25, 263 N.W.2d 428, 431 (1978).

" 'Where contributory negligence is pleaded as a defense, and there is no competent evidence to support it, it is prejudicial error to submit to the jury issues involving contributory and comparative negligence.' " *Oberhelman v. Blount*, 196 Neb. 42, 45, 241 N.W.2d 355, 358 (1976).

> "Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated."

Lock v. Packard Flying Service, Inc., 185 Neb. 71, 73-74, 173 N.W.2d 516, 518-19 (1970).

The court's instruction No. 2 relating to the issues, burden of proof, and affirmative defenses generally follows NJI 2.02, including the affirmative defense of contributory negligence:

a. Plaintiff's ward Robert J. Hawk was himself negligent in one or more of the following particulars:

1. In failing to leave an area which he knew, or in the exercise of reasonable care should have known, was dangerous;

2. In going from a place of safety to a place of danger;

which were the proximate cause or a proximately contributing cause of his damages.

As to the second allegation of contributory negligence, "In going from a place of safety to a place of danger," there is no supporting evidence as to either the description, location, or limits of a safe area; however, the giving of that instruction was not prejudicial to plaintiff, since it is generally included in the first allegation of contributory negligence.

This limits the first claimed error to the statement, "In failing to leave an area which he knew, or in the exercise of reasonable care should have known, was dangerous."

In addition to the defendant's burden to prove this particular allegation of contributory negligence as fixed by the court's instructions, the unusual circumstances of this case require supporting evidence of (1) the location, description, and attributes identifying the alleged "dangerous area," and (2) the time when and if Robert became aware of being in the dangerous area.

Witness McLean testified that the gas continued to have dangerous burning capabilities after it mixed with air and became clear; the gas in all forms may have covered 50,000 square feet at the time of the explosion. Although the evidence does not establish any definitive limits of a "dangerous area" or "dangerous areas" before the explosion, it is clear that the known area affected by the after-the-fact explosion of the gas was a dangerous area which included an area 20 feet from the truck where Ruiter, the children, and Robert were standing at the time. Robert was always in that area from the time of his arrival until the explosion.

The only direct evidence about Robert's knowledge and awareness of the dangerous area is his own testimony that he did not know what propane was, that he did not know the area around the truck where he was standing and walking was

dangerous, and that he did not know the propane cloud was dangerous. At most, when he arrived he observed the white cloud, under the truck, that looked like burning leaves, and, exercising a child's inquisitive nature concerning this first-time situation, he asked Ruiter "what was wrong." At most, that question recognized an unusual circumstance not before seen by him; it was not a recognition of either danger or being in a dangerous area.

That brings us to the alternative questions. In the exercise of reasonable care, should Robert have known that he was in a dangerous area, and, if so, when should Robert have so known? These questions should be measured by the knowledge of a reasonable person under like circumstances.

Robert was almost 13 years of age at that time. His IQ was at least average, although he had a reading disability and he was about to repeat the sixth grade in school. He had no special skills or interests. He lived on the Santee Indian Reservation with his mother, Ardith Hawk.

The explosion scene, as it developed, was very unusual. First, none of the propane properties were known to Robert, and little was generally known to the public except that it was a heating fuel stored in tanks under pressure. Certainly, the changes that occurred to liquid propane when it was exposed to the open air, as described by McLean, were not generally known by the public or Robert. The leaking propane gas created an emergency situation that resulted in an explosion in about 3 minutes after Robert came upon the scene. The only adult present was the driver, Ruiter, who stayed around the truck as did Robert and the other children. Ruiter never left or attempted to leave the truck area, and he made no effort to get the children to leave except his warning, which occurred immediately before the explosion. The 3-minute time element and the fact that the adult, Ruiter, stayed in the truck area are important circumstances when considering Robert's conduct.

Defendant relies on Robert's testimony that he knew that the material coming out of the Dugan truck was used to heat the school; that the white cloud smelled bad; and that when he was in it, it was cool and he held his nose. Also, in retrospect, Robert admitted that the unlighted gas from the family

cookstove at his home smelled the same as the white cloud, but not as strong. None of this evidence identifies the explosive capabilities of propane gas under the existing circumstances.

There is evidence concerning warnings given to Robert and the children. Kitto testified that he yelled a warning to the children, but he did not know if they heard him. Angela Henry testified that she heard Kitto tell them twice to "get away." Robert did not hear such warnings. Ruiter testified that he warned the children. Whether or not these were effective warnings of the danger need not be determined, since in both instances the evidence shows that the explosion occurred within seconds (Kitto) or immediately (Ruiter), and for a warning to be effective it must be given in time to allow the person so warned to protect himself. *Schmidt v. Orton*, 190 Neb. 257, 207 N.W.2d 390 (1973).

After favoring defendant with resolution of conflicts and all reasonable inferences, we find that reasonable minds can draw but one conclusion, that Robert J. Hawk, under the circumstances, exercised the degree of care required of him, a child just under 13 years of age, *Camerlinck v. Thomas*, 209 Neb. 843, 312 N.W.2d 260 (1981), and that he neither knew nor in the exercise of reasonable care should have known that he was in an area that was dangerous. For those reasons, the issue of Robert's contributory negligence should not have been given to the jury. Further, absent a special verdict on the issue, the giving of the companion instruction on comparative negligence was prejudicial to plaintiff on the issue of damages.

It is not necessary to discuss the other assigned errors.

Since the jury verdict established the liability of defendant, DLR, this cause should be remanded for a new trial on the limited issue of damages.

REVERSED AND REMANDED FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.

STATE OF NEBRASKA, APPELLANT, V. BRYANT C. SMITH, APPELLEE.

411 N.W.2d 641

Filed September 4, 1987. No. 87-635.

1. **Search Warrants: Evidence.** Absent a showing of pretext or bad faith on the part of the police or the prosecution, invalidity of part of a search warrant does not require the suppression of all the evidence seized pursuant to the valid portions of the warrant.
2. **Constitutional Law: Search and Seizure.** Fourth amendment rights are personal rights, which may not be vicariously asserted.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded for further proceedings.

Ronald L. Staskiewicz, Douglas County Attorney, and Robert C. Sigler, for appellant.

Thomas M. Kenney, Douglas County Public Defender, and Thomas C. Riley, for appellee.

BOSLAUGH, C.J., Pro Tem.

This is an appeal by the State under Neb. Rev. Stat. § 29-824 (Reissue 1985) from the order of the trial court sustaining the defendant's motions to suppress.

The defendant is charged with first degree murder and use of a firearm in the commission of a felony. On June 30, 1987, the defendant filed motions to suppress the use of any and all evidence obtained as a result of the searches of 4821 Boyd Street, Apartment 3, and 3216 North 24th Street, on February 26, 1987, by members of the Omaha Police Division. Paragraph 5 of the motions alleged that the warrants which authorized the searches were "John Doe" warrants, defective on their face, and invalid under the Constitutions of the United States and the State of Nebraska.

The trial court sustained the motions under the allegations contained in paragraph 5, but overruled the motions as to all other grounds alleged. It is from that order that the State has appealed.

The record shows that on February 26, 1987, the Omaha police applied for and obtained two search warrants. The first warrant authorized the search of

> 4821 Boyd Street, Apt. #3, Omaha, Douglas County, Nebraska, a red brick multifamily dwelling which is an apartment complex and any and all storage areas connected with that location . . . AND/OR the person of Bryant C. SMITH, black male, DOB 07-15-60, 5'5", 135 lbs., OPD#91017, Social Security #508-88-2880 and/or John or Jane DOE.

The second search warrant authorized the search of

> 3216 North 24th Street, Omaha, Douglas County, Nebraska, white wooden frame single family dwelling and all storage areas connected with this location, AND/OR the person of Ernestine MAPP, black female, DOB 03-14-51, 5'5", 202 lbs., black hair, brown eyes, Social Security number 508-66-7462 and/or John or Jane DOE.

The execution of these warrants resulted in the seizure of evidence from both of the above-mentioned premises. No evidence was seized from anyone's person. The defendant, Bryant C. Smith, was subsequently charged with first degree murder and use of a firearm to commit a felony.

In sustaining the motions to suppress, the trial court relied upon our decision in *State v. Pecha*, 225 Neb. 673, 407 N.W.2d 760 (1987). In the *Pecha* case we held that the search of the defendant was invalid where he was not identified in the warrant other than as " 'John . . . DOE . . . who resides or is in control of the afore described premises,' " *id.* at 676, 407 N.W.2d at 763, and the affidavit upon which the warrant was obtained disclosed no probable cause for a search of the defendant.

The defendant argues that *Pecha* should be read to mean that the warrants in this case were facially invalid and therefore *any* search authorized under such a warrant was invalid. As in *Pecha*, the affidavits filed in this case made no reference to a belief by the affiant that unknown individuals were involved in illegal activity on the premises, nor was any evidence presented that unknown individuals were residing in or in control of the premises to be searched. The critical difference, however, is that *Pecha* involved a search and the seizure of evidence from a John Doe, for which no probable cause existed. In the present case no John Doe was searched.

The State contends that evidence seized in an otherwise valid search of the premises should not be suppressed where no John Doe was actually searched.

The issue is whether the *Pecha* decision should be interpreted to hold that the inclusion of John/Jane Doe language renders the *entire* warrant defective on its face (as a general warrant) or whether *Pecha* held the warrant to be defective as a general warrant only *as to the John Doe actually searched.* More specifically, does the inclusion of John/Jane Doe language invalidate an otherwise valid search of the premises?

In *United States v. Fitzgerald, on reh'g en banc* 724 F.2d 633 (8th Cir. 1983), the U.S. Court of Appeals for the Eighth Circuit held that the general parts of a warrant may be severed, and only those items seized which would not have been seized pursuant to the specific parts of the warrant should be suppressed. The court said at 636-37:

> Accordingly, we follow the approach which the First, Third, Fifth, Sixth, and Ninth Circuits, and several states, have adopted, and hold that, absent a showing of pretext or bad faith on the part of the police or the prosecution, the invalidity of part of a search warrant does not require the suppression of all the evidence seized during its execution. More precisely, we hold that the infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant (assuming such evidence could not otherwise have been seized, as for example on plain-view grounds during the execution of the valid portions of the warrant), but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized—on plain-view grounds, for example—during their execution). This approach, we think, complies with the requirements of the fourth amendment.

In *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984), we held: "Absent a showing of pretext or bad faith on the part of the police or the prosecution, invalidity of part of a search warrant does not require the suppression of all the evidence seized pursuant to the valid portions of the warrant." (Syllabus of the court.) See, also, *Com. v. Truax*, 397 Mass. 174, 490

N.E.2d 425 (1986); *People v. Hicks*, 49 Ill. App. 3d 421, 364 N.E.2d 440 (1977); *People v. Paul*, 96 Misc. 2d 1085, 410 N.Y.S.2d 516 (1978); *Fowler v. State*, 128 Ga. App. 501, 197 S.E.2d 502 (1973); *Saunders v. State*, 199 Md. 568, 87 A.2d 618 (1952); *Salmon v. State*, 2 Md. App. 513, 235 A.2d 758 (1967); *State v. Masco*, 103 N.J. Super. 277, 247 A.2d 136 (1968); *State v. Halverson*, 21 Wash. App. 35, 584 P.2d 408 (1978).

There is a further issue of standing insofar as the search of the North 24th Street premises is concerned. The record does not show any basis upon which the defendant could have an expectation of privacy at that location.

As we held in *State v. Kenny*, 224 Neb. 638, 640-41, 399 N.W.2d 821, 824 (1987), quoting from *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969), " 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.' "

The order sustaining the motion to suppress upon the grounds alleged in the fifth paragraph of the motion was erroneous. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CLAYTON RAHMIG, APPELLEE, V. MOSLEY MACHINERY COMPANY, INC., APPELLANT.

412 N.W.2d 56

Filed September 11, 1987. No. 85-529.

1. **Products Liability: Actions: Negligence.** In products liability, there is a significant distinction between a manufacturer's liability as the result of negligent manufacture and liability for the manufactured product on account of strict liability in tort. In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous.
2. _____: _____: _____. In a cause of action for products liability on account of a design defect, the test for a manufacturer's strict liability in tort is the user-contemplation test or consumer-contemplation test reflected in Restatement (Second) of Torts § 402 A (1965).
3. **Products Liability: Proof.** To recover on a claim of strict liability in tort for a defectively designed product, a plaintiff is required to prove by a preponderance of evidence: (1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) plaintiff's damages were a direct and proximate result of the alleged defect.
4. _____: _____. In a products liability action, the plaintiff has the burden to prove that the alleged defect existed when the product left the manufacturer.
5. _____: _____. Whether a product is in a defective condition unreasonably dangerous to its user is, generally, a question of fact.
6. **Rules of Evidence: Negligence.** Regarding Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)), encouragement of remedial measures is the principal reason for the rule excluding evidence that such measures were taken. The policy underlying Neb. Evid. R. 407 encourages people to take safety precautions.
7. **Rules of Evidence: Negligence: Proof.** Whereas the Nebraska Evidence Rules, generally, are inclusionary and favor admission of relevant evidence rather than exclusion of evidence with probative value, Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) excludes from admissible evidence certain matters which occur after a particular event in question, where negligence or culpable conduct is sought to be proved in connection with such event.
8. **Rules of Evidence: Impeachment.** Neb. Evid. R. 407 (Neb. Rev. Stat. § 27-407 (Reissue 1985)) does not require exclusion of evidence concerning subsequent

repairs, alterations, or precautions when such evidence is offered for the purpose of impeachment affecting credibility of the witness impeached.

9. **Directed Verdict.** In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court may properly direct a verdict on such issue or question.
10. **Products Liability.** Assumption of risk, under appropriate circumstances, may be an affirmative defense in an action brought for a manufacturer's strict liability in tort for a design defect.
11. **Products Liability: Words and Phrases.** In the law of products liability, misuse is use of a product in a way not reasonably foreseeable by the supplier or manufacturer, while assumption of risk is a user's willingness or consent to use a product which the user actually knows is defective and appreciates the danger resulting from such defect.
12. **Products Liability.** A user's knowledge about the general danger or hazard in using a product will not support the defense that the user knew the product's specific defect and dangerous condition resulting from such defect.
13. _____. In a products liability case, misuse is not an aspect of assumption of risk.
14. **Negligence: Directed Verdict.** Initially, in a jury trial of a negligence action, the trial court must decide whether a plaintiff is guilty of negligence, and, if so, must then decide whether evidence is such that only one reasonable conclusion is permissible—the plaintiff's contributory negligence which, as a matter of law, bars recovery and authorizes a directed verdict for the defendant. If, as the result of such initial consideration of the evidence, the trial court determines that the jurors may reasonably draw different conclusions from the evidence, existence of the plaintiff's negligence or contributory negligence and comparative negligence are questions of fact for the jury.
15. **Products Liability: Negligence.** Contributory negligence, which consists merely of a plaintiff's failure to discover a defect or guard against the possibility of a defect's existence, is not a defense in an action based on strict liability for a defective and unreasonably dangerous product.
16. **Trial: Appeal and Error.** In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal.
17. _____: _____. Generally, in the absence of an offer of proof, unless the substance of the evidence is apparent from the context in which the question is asked, no error may be predicated upon a court's ruling in excluding testimony.
18. **Rules of Evidence: Jurors: Affidavits.** Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial.
19. _____: _____: _____. Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during deliberations, which enter into the verdict.
20. **Products Liability: Proof: Case Overruled.** Insofar as *Nerud v. Haybuster*

Mfg., 215 Neb. 604, 340 N.W.2d 369 (1983), requires a plaintiff to prove a feasible or practicable alternative and safer design before such plaintiff may recover on strict liability in tort for a manufacturer's design defect, *Nerud v. Haybuster Mfg., supra*, is overruled. Also, regarding the requirement that a plaintiff prove feasibility or reasonable alternative design to prevail on a cause of action for negligent design in a products liability case, *Nerud v. Haybuster Mfg., supra*, is overruled.

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

Francis L. Winner of Winner, Nichols, Douglas and Kelly, for appellant.

Robert P. Chaloupka of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., and Michael J. Javoronok of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, for appellee.

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

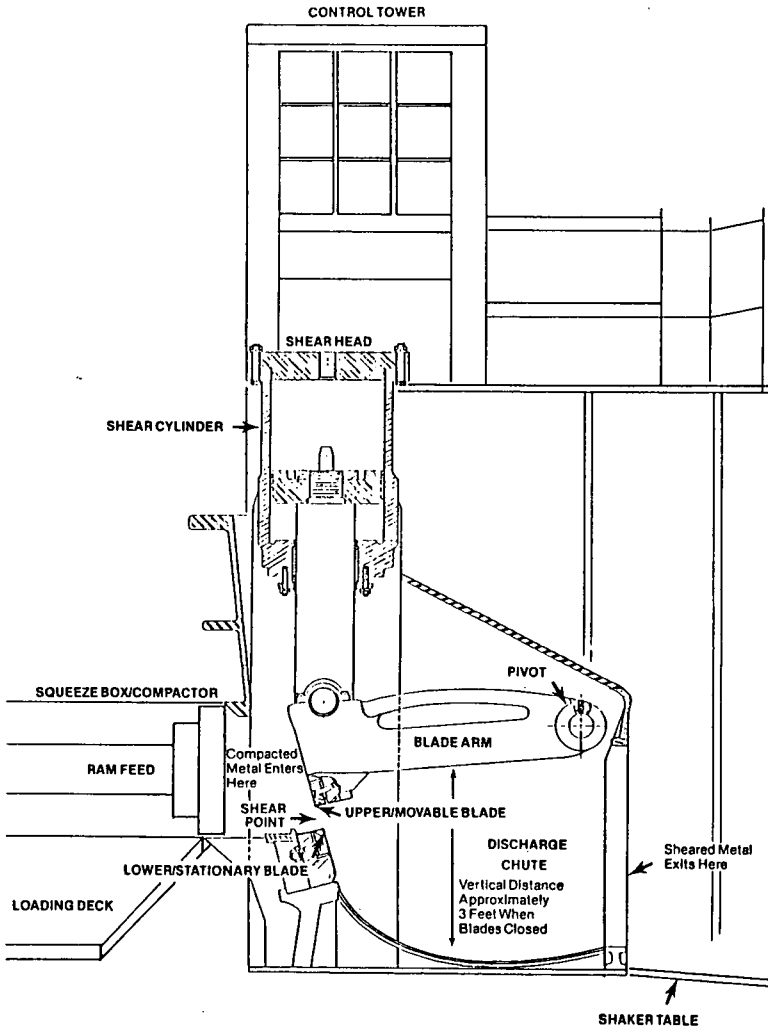
SHANAHAN, J.

Mosley Machinery Company, Inc., appeals the judgment entered on the verdict for Clayton Rahmig in a personal injury action based on a products liability claim for damages caused by a guillotine metal scrap shear manufactured by Mosley. We affirm.

THE MONSTER

In 1979, Mosley manufactured a 500-ton guillotine scrap shear for use in the scrap metal business, marketed the shear with the trade name "Monster," and delivered one such shear to Rahmig's employer, Scottsbluff Pipe & Supply, Inc. The Monster was "capable of sizing and shearing two car frames simultaneously" and could "crush car blocks . . . or break engine blocks." The Monster had several parts and points important to Rahmig's claim: a loading deck; ram feed; squeeze box, or compactor; shear head, containing a shear cylinder and blades for cutting the compacted scrap metal; shear point, where the blades came together; discharge chute, as a conduit for metal sheared by the Monster; and a shaker table, where sheared metal, having moved from the Monster, came to rest

before removal by a crane. The Monster was operated from a control tower above the shear head.



Scrap metal, having been placed on the Monster's loading deck, was compacted (squeeze box) and then pushed (ram feed) into an opening at the shear point in the Monster's cutting chamber, where a 30-inch blade, located at the end of a 2-ton pivoting blade-arm, was pushed downward by a piston in the hydraulic shear cylinder. The movable blade, or shear, made contact with a stationary blade at the shear point, cutting the compacted scrap metal in an action similar to a scissors or guillotine. After metal had been sheared by the two blades, the sheared metal dropped into a slightly descending discharge chute or funnel located adjacent to the bottom, or stationary, blade. When the movable blade is at the shear point, the blade-arm is in a nearly horizontal plane, reducing the size of the cutting chamber to a height of 3 feet, which corresponds with the height of the discharge chute. As metal was cut, any previously sheared metal in the discharge chute was forced through and out the chute onto the shaker table for removal by a crane. The piston then raised the blade-arm to repeat the cycle. The Monster was not self-cleaning, that is, it contained no mechanical apparatus for expulsion or extraction of sheared metal. Any change in the type of metal being processed through the Monster required that previously sheared metal remaining in the discharge chute be removed manually from the chute before a different metal was inserted into the shearing process of the Monster.

MECHANICS OF THE MONSTER AND ACCIDENT

The owner's manual for the Monster did not contain any recommended procedure for removing sheared metal from the area at the shear point or discharge chute. The manual, however, did provide a two-step procedure for changing the Monster's blades, namely, remove or "clean out" all metal in the discharge chute and, after raising the movable blade, use a block, such as a 4-inch by 4-inch oak block, between the raised blade and the floor of the discharge chute to prevent downward movement of the movable blade. Such procedure required someone to enter the chute, fix the block, and remove "blade bolts from inside the discharge box."

According to Henry Buhr, Rahmig's foreman at the scrap yard, there were no tools available for cleaning out the cut scrap

iron—"all we had was our hands." For some time before the accident, Buhr and other employees at the scrap yard had observed that the Monster's upper, or movable, blade would "stay up" if the machine were left running with its controls in the "up" position, which maintained hydraulic pressure in the shear cylinder and kept the blade-arm elevated. Without hydraulic pressure, the blade-arm would slowly descend and eventually come to rest at the shear point. Throughout past operation of the Monster at the scrap yard, the upper, or movable, blade had never unexpectedly descended. Sometime before the accident, Buhr noticed the Monster's main cylinder in the shear head was leaking oil and had "blown" some O-rings, apparently some type of gasket on the shear cylinder. One of Rahmig's fellow employees, Lee Navorette, described the usual situation in manually removing the sheared metal from the cutting chamber and discharge chute as "cramped and really oily . . . you had no place to put your hands," with no way to maintain balance within the chute except by placing one's hand on the "bottom part of the blade," that is, on the stationary, or lower, blade in the cutting chamber.

In August 1980, Rahmig, 21 years of age, had been operating the Monster to shear cast iron when Buhr decided to change from cast iron to steel as the metal being processed by the Monster. While the Monster was left running, with its controls locked in the "up" position, Rahmig descended from the control tower to help Buhr in removing sheared metal from the discharge chute. With the Monster's controls locked in the "up" position, Rahmig as well as his coemployees understood that the machine was "safe" and that the blade-arm would not descend.

Buhr and Rahmig stood beside the Monster, near the end of its discharge chute, and manually removed most of the sheared metal from the discharge chute. When sufficient metal had been removed to permit someone's entry into the chute, Buhr went to a nearby crane to load scrap metal. Rahmig crawled inside the Monster's discharge chute, where he crouched and started "kicking the iron out" with his boot. Pieces of sheared metal weighed between 25 and 50 pounds. To steady himself in such cramped quarters, Rahmig put his left hand on the

stationary blade in the cutting chamber and resumed cleaning metal from the chute. Without any forewarning, the upper blade suddenly descended, traumatically amputating three of Rahmig's four fingers on his left hand and so crushing a fourth finger that Rahmig had to "finish tearing . . . off" that finger to extricate himself from the blades. Rahmig climbed from the Monster and went to Henry Buhr, to whom he yelled that "I had cut my fingers off." Buhr drove Rahmig to the hospital.

PLEADINGS

In his petition, Rahmig alleged that the Monster was a defective product manufactured by Mosley and asserted that the Monster was "unsafely designed" without safeguard against unexpected descent by the movable blade, making the Monster "unreasonably dangerous." Rahmig further alleged that the defects in the Monster "could have been easily and economically remedied by devices within the state of art of design of machines of similar types." Also, Rahmig asserted that Mosley was negligent in designing the Monster and, with reference to the sudden and unexpected descent of the Monster's upper blade, in "failing to adequately warn . . . foreseeable users, of dangers inherent in the design and use of the product, and not readily apparent to foreseeable users of the product." Rahmig, therefore, sought damages from Mosley on account of its strict liability (design defect) and negligence (defective design and failure to warn) regarding manufacture of the Monster.

In its amended answer, which, for the most part, was a general denial, Mosley denied liability and raised the affirmative defenses of contributory negligence and assumption of risk. Mosley then specifically alleged that there were no defects in the Monster's design, which conformed with the "state of the art" existing at the time of manufacture.

PRETRIAL MOTION

At a pretrial hearing on Mosley's motion in limine to preclude certain evidence, the court asked Mosley's lawyer whether Mosley "is going to make feasibility an issue in this case?" Mosley's lawyer responded: "No, we're not." Mosley then objected to Rahmig's prospective presentation of evidence about Mosley's alterations on the Monster after Rahmig's

accident. The prospective evidence was two photographs (exhibits 56 and 57), which depicted a lockpin safety device installed in Mosley's shear machines sometime after Rahmig's accident, and exhibit 16, an intracompany memorandum, dated March 27, 1981, which directed that warning signs must be placed on any Monster shipped after the date of the memorandum. Mosley contended that the prospective evidence related to subsequent remedial measures for the Monster.

Directing the court's attention to *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), one of Rahmig's lawyers told the court: "We are offering [lockpin evidence] to show state of the art . . . that the state of the art would have required something like [the lockpin]." Still referring to *Nerud*, another of Rahmig's lawyers called the court's attention to the burden of proof placed on a plaintiff in a products liability case based on negligent design: "In the proper application of a risk versus utility analysis to a negligent design case, one of the factors which must be weighed is the feasibility of eliminating the risk and the existence of practicable alternative designs," *id.* at 612-13, 340 N.W.2d at 375, and a case based on strict liability (design defect): "[A] plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer," *id.* at 614, 340 N.W.2d at 375.

After the preceding excerpts from *Nerud*, Rahmig's counsel continued:

> And since that is a *new element of proof*, the Supreme Court has said that *must be shown*, then we have to show feasibility, not just to rebut the defenses, but also through the front door of showing feasibility . . . technologically and economically feasible design as part of our case in chief.

(Emphasis supplied.) The court took Mosley's motion under advisement and overruled that motion on the morning of trial, when Mosley's lawyer then renewed the objection reflected in the motion in limine. During trial, Mosley objected when exhibits 56, 57, and 16 were offered and received into evidence, on the basis that those exhibits related to Mosley's remedial measures taken after the Rahmig accident.

BACKGROUND OF DESIGN DEFECT

As general background regarding the Monster's use at the scrap yard, Rahmig called witnesses who established that, throughout the Monster's operation at Scottsbluff Pipe & Supply, the movable blade had never unexpectedly descended during the course of manual cleaning. Because there was minimal clearance in the cutting chamber when the blade-arm was in a lowered position, it was standard procedure in the cleaning process to leave the Monster running, with its controls locked in the "up" position. Attempted use of wooden blocks resulted in crushed blocks or a situation where the blocks would "kick out" of their propped position as the blade-arm slowly descended. Mosley admitted that it did not provide any tool or instrument to remove sheared metal from the cutting chamber or discharge chute.

John McDonough, a service manager for Mosley but called as a Rahmig witness, testified that cleaning scrap metal from the Monster did not require anyone's entry into the discharge chute if a tool of some nature were utilized, although Mosley had already admitted it did not supply any cleaning tool with the Monster. McDonough acknowledged that no information was given to the Monster's purchasers regarding acquisition of such unspecified tool. McDonough admitted that the Monster was not self-cleaning, that is, once any metal was cut, "you're going to be left with whatever the last materials were that were processed in the discharge chute," and that cleaning the Monster necessitated manual removal of metal from the discharge chute. McDonough further acknowledged that when the Monster was running with its controls in the "up" position, one is justified in believing that the upper, or movable, blade will remain in its elevated position.

RAHMIG'S EXPERT WITNESS

As an expert witness, Dr. Igor L. Paul testified for Rahmig. Dr. Paul, a professor of mechanical engineering at Massachusetts Institute of Technology, was a design consultant specializing in hydraulic systems such as that found in the Monster and other scrap shears. According to Dr. Paul, "foreseeability for a human to act, not necessarily to his best interest, is one of the prime reasons for providing safety

controls and safety devices on all kinds of machinery." Dr. Paul expressed:

> [T]he very basic premise . . . is essentially that a machine or a product should not provide a hazard or risk of serious injury to the user or somebody around the machine under foreseeable use of the equipment, or the product. And, any machine that retains such a hazard should at the very least have warnings.

In view of the Monster's design, Dr. Paul felt that the "primary and largest hazard" of the machine was the "shear point of the cutting blade . . . so that both the cutting blade and the arm are extreme dangers to anybody who is either near the shear point or in the chamber of the shear." Dr. Paul observed that

> it was clear to me and would have to be clear to any engineer, that in fact a person has to go inside the [Monster's] chamber . . . to . . . clean out the scrap . . . .
>
> Scrap, cleaning out of scrap inside the chamber has to be performed both in terms of normal cleaning out, and prior to maintaining the cutting shear.

To prevent unexpected descent of the blade-arm, there should have been a "mechanical interlock" or "lockpin" on the Monster, but there was none. Dr. Paul described an interlock system and lockpin device as alternative safety measures which should have been incorporated into the Monster. An interlock is a hydraulic system in addition to and independent of a machine's basic hydraulic system, which mechanically locks the shear in a safe position, regardless of the "conditions of the controls" on the Monster. At a cost of $300 to $400, such interlock system would have prevented Rahmig's accident. As an alternative to the interlock system, a "safety pin," or lockpin, might have been used, that is, a metal bolt or shaft inserted from the outside and into an opening in the Monster's side, thereby obstructing the descent of the blade-arm. However, there was the possibility that forceful downward movement of the blade-arm might shear such "lockpin" inserted as a safety measure. As designed, the Monster's blade-arm was held up by a "dubious hydraulic circuit." Dr. Paul expressed an opinion that Mosley should have placed "an effective and distinct warning" on the Monster,

calling attention to the hazard resulting from the unexpected descent of the blade-arm. Dr. Paul expressed a further opinion that, from an "engineering standpoint," it was "certainly foreseeable" that removal of scrap from the Monster's cutting chamber would involve someone's presence inside the machine—likely someone who was unfamiliar with the "inner workings of a hydraulic system" and unaware of the "inherent danger" in the deficient hydraulic system in relation to the Monster's upper blade in an elevated position. From an engineer's standpoint in view of the Monster's design, it was foreseeable that a person's presence within the cutting chamber or discharge chute necessitated placing one's hand on the surface of the stationary blade, which was the "only surface" available for support to steady one inside the "cramped chamber."

COURT'S ORAL ADMONITION TO JURY

In the course of his testimony, Dr. Paul referred to two photographs, which showed a lockpin safety device incorporated by Mosley, apparently in 1981 or 1982, into its scrap shears. At the conclusion of Dr. Paul's testimony, the court orally and generally informed the jury about Rahmig's two "theories of recovery"—negligence and strict liability—and the jury's permissible consideration of the photographs in reference to Rahmig's two causes of action. Mosley made no response to the court's oral admonition to the jury.

ADVERSE WITNESS MAYNE

Rahmig also called John Mayne, assistant to the president of Mosley Machinery Co., who characterized Scottsbluff Pipe & Supply's employees as "foreseeable" users of the Monster and persons who reasonably could expect that the Monster's blade-arm would "stay up" as a result of the machine's controls in the "up" position. Mayne admitted that technology for a mechanical interlock system existed in 1979, when the Monster was manufactured, and that technology also existed in 1979 regarding a lockpin as a safety device on shear machines. Mayne acknowledged that unexpected descent of the Monster's upper blade was one of the hazards of the machine. According to Mayne, "blocking or using pins" was the standard in the

industry for preventing unexpected descent of the upper blade in machines such as the Monster, and a broom or some other instrument should have been used for cleaning or removal of sheared metal, rather than personal entry into the Monster. Mayne believed that anyone who had observed the Monster in operation would appreciate the danger of "putting any part of his body" into the opening at the shear point. Mayne testified that the Monster reflected the "state of the art" in shear machines, although the state of the art was set by Mosley and one other major manufacturer of shear machines. In answer to a question by Rahmig's lawyer, whether lockpins would have been an economically prohibitive feature of the Monster, which sold for $217,000, Mayne expressed his opinion that such safety device would have cost less than $1,000, an additional cost which would not deter potential buyers from purchasing the Monster. Rahmig's lawyer then questioned Mayne about two photographs (exhibits 56 and 57), which depicted a lockpin installed in a Mosley shear machine after Rahmig's accident. Over objection, those photographs were admitted into evidence.

Still as an adverse witness, Mayne acknowledged that a manufacturer "has got the duty to utilize all steps which are technically available and cost feasible to make his machine as safe as possible." Mayne testified that the Monster did comply with the "state of the art" as such existed in 1979. Further, Mayne agreed that Mosley, as a manufacturer, had a duty to recognize and follow the "warning standards" published by the American National Standards Institute, Inc. (ANSI), which standards represented the "state of the art" in 1979, when the Monster was manufactured. At page 7 of ANSI standard Z35.1-1972, the following appears: "Hazards should be eliminated wherever possible, but if they cannot be eliminated, the employee should be informed of the hazard by signs posted to give warning." However, when asked about warning signs on the Monster shipped to Scottsbluff Pipe & Supply, Mayne answered that he did not know what warning signs were on the Monster because "I did not see the machine when it was shipped." Rahmig's lawyer produced a memorandum from a Dennis Fortino, Mosley's vice president of marketing, to "three

individuals within the company." The memo was dated March 27, 1981, and directed: "Enclosed is a listing of safety signs to be used on the machines with drawings shown where they go. No machine should ship without these signs being on them." As directed by the memorandum, various warning signs were to be placed on Mosley's shears, such as in the area of a Monster's discharge chute, warning against climbing on the machine "With Power On," and "DANGER—Keep Away." No particular sign warned about the possibility of an unexpected descent by the upper, or movable, blade.

CROSS-EXAMINATION OF RAHMIG'S WITNESS

During cross-examination of Lee Navorette, Mosley's counsel interrogated concerning Navorette's presence in the Monster's cutting chamber and whether Navorette had refrained from placing his hand on the stationary blade "because it was dangerous." Navorette responded, "I suppose so." On redirect examination, Navorette acknowledged that the stationary blade was "probably where you would put your hand," inasmuch as the blade afforded the only place to "lean" in the discharge chute. At the conclusion of redirect examination of Navorette, Mosley's counsel asked: "Could I ask a question?" The court responded: "No, you would probably get into a new area, this is proper redirect, and the last time everybody started asking too many questions. We'll just go to direct, cross and redirect. And, therefore, [Navorette] may step down." Mosley made no offer of proof or otherwise expressed any further question to be asked of Navorette.

MOSLEY'S EXPERT

As part of its defense, Mosley called Bob Schliem, an expert witness. Schliem was a consultant engineer and accident reconstructionist regarding machine failure such as occurred with the Mosley Monster. Schliem testified that the Monster was not "designed defectively," and "shoring" (using blocks) was an acceptable precaution minimizing the hazard involved in the Monster's shearing function and cycle. Under the circumstances, Schliem believed it was "[v]ery dangerous" for Rahmig to put his hand on the Monster's lower blade. Concerning Dr. Paul's testimony, Schliem acknowledged that installation of an interlocking system as a safety device on a

shear machine had "certain merits," but "I would be leary about putting a device on without considerable direct feedback as to what that device was doing when it's supposed to be doing [its] thing." [?] Schliem expressed his doubt concerning the alternative safety devices suggested by Dr. Paul, namely, the interlocking system and lockpins. The use of a wooden block, according to Schliem, was a "reasonable accident prevention measure." Schliem felt that the responsibility for warning about potential dangers of the Monster rested primarily on the owner of the Monster rather than on the manufacturer, especially since any warning sign might be covered by paint applied by the manufacturer or the user of the machine.

RAHMIG'S DAMAGES

At the time of the accident, Rahmig was earning $214 per week. After the accident and on account of his injury, Rahmig was unable to work for approximately 10 weeks, and incurred medical expenses of $2,300. An orthopedic surgeon testified that Rahmig had permanent impairment estimated at 24 percent of Rahmig's entire left hand, taking into account "pain and disability doing things" and including "problems in cold weather." Rahmig testified that he had occasional numbness in his left hand, with hypersensitivity during cold weather, thereby restricting any employment requiring outdoor work the year around. A former employer refused to hire Rahmig after the accident because Rahmig had difficulty in handling tools and working outside in cold weather. When Rahmig's hand bumped into anything, he experienced pain. Rahmig has displayed an inability to handle tools and grip objects. For example, on account of his poor or impaired grip, Rahmig dropped two fishing poles over the side of a boat.

Rahmig, with a high school education at the time of trial, had been active in athletics, but no longer participated in such activities because he continues to experience restricted dexterity with his left hand. Other recreational activities are more laborious as the result of Rahmig's poor grip. Rahmig has become severely depressed and remains self-conscious of his injury when he is around other people.

JURY VERDICT

In its instruction on any damages which might be awarded on

Mosley's liability, the court informed the jury concerning various permissible elements of damages under the circumstances. The damages instruction did not mention that a fee for Rahmig's attorneys or tax consequences of an award were not proper considerations in determining the amount of damages. The jury returned a general verdict for $120,000.

MOSLEY'S MOTION FOR NEW TRIAL

In its motion for a new trial, Mosley alleged jury misconduct and excessiveness of the verdict. Mosley offered affidavits from three jurors, stating that during deliberations a juror remarked that Rahmig would have to pay his attorneys a fee, as well as pay income tax on any award. Such remark influenced the jurors, who increased their award to Rahmig. The court sustained Rahmig's objection to the affidavits.

ASSIGNMENTS OF ERROR

Mosley's first assignment of error may be summarized as expressed in its brief: "The theory of strict liability should not have been submitted to the jury, being not only barred by the plaintiff's assumption of the risk, but also not having been proven by a preponderance of the evidence. There was no submissible cause of action" regarding strict liability (design defect). Brief for Appellant at 21.

Mosley's other assignments of error are allegations that the trial court erred in (1) admitting exhibits 56 and 57 (photographs) and the March 27, 1981, memorandum reflecting postaccident matters; (2) denying Mosley a directed verdict, because Rahmig assumed the risk and his contributory negligence, as a matter of law, barred recovery; (3) giving oral instructions to the jury on Rahmig's "theories of recovery"; (4) prohibiting Mosley's recross-examination of Lee Navorette; (5) precluding use of affidavits reciting the jury's consideration of an attorney fee for Rahmig's counsel and the possible effect of income taxation regarding an award to Rahmig; and (6) denying a new trial on account of an excessive verdict.

STRICT LIABILITY FOR DEFECTIVE DESIGN

As expressed in *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 610-11, 340 N.W.2d 369, 373-74 (1983):

> In products liability litigation the notion of a defective product embraces two separate concepts. The first,

> commonly labeled a manufacturing defect, is one in which the product differs from the specifications and plan of the manufacturer. . . .
>
> The second concept of a defective product is one in which the product meets the specifications of the manufacturer but the product nonetheless poses an unreasonable risk of danger. This condition is generally characterized as a design defect. . . .

In products liability, there is a significant distinction between a manufacturer's liability as the result of negligent manufacture and liability for the manufactured product on account of strict liability in tort. In a cause of action based on negligence, the question involves the manufacturer's conduct, that is, whether the manufacturer's conduct was reasonable in view of the foreseeable risk of injury, whereas in a cause of action based on strict liability in tort, the question involves the quality of the manufactured product, that is, whether the product was unreasonably dangerous. See, *Dart v. Wiebe Mfg., Inc.*, 147 Ariz. 242, 709 P.2d 876 (1985); *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. 1986).

In *Kohler v. Ford Motor Co.*, 187 Neb. 428, 436, 191 N.W.2d 601, 606 (1971), this court, recognizing a manufacturer's strict liability in tort, stated: "We hold that a manufacturer is strictly liable in tort when an article he placed in the market, knowing that it is to be used without inspection for defects, proves to have a defect which causes an injury to a human being rightfully using that product."

Also, in *Kohler*, this court adopted the user-contemplation test contained in Restatement (Second) of Torts § 402 A (1965) and, for a recovery based on strict liability in tort, approved the following instruction:

> "To recover against the defendant, the plaintiff must prove by a preponderance of the evidence: 1. The defendant placed the [product] in question on the market for use, and the defendant knew, or in the exercise of reasonable care should have known, that the [product] would be used without inspection for defects . . . ; 2. The [product] was in a defective condition at the time it was placed on the market and left the defendant's possession;

> 3. The plaintiff was unaware of the claimed defect; 4. The claimed defect was the proximate cause or a proximately contributing cause of any injury to the plaintiff occurring while the [product] was being used in the way and for the general purpose for which it was designed and intended; 5. The defect, if it existed, made the [product] unreasonably dangerous and unsafe for its intended use; 6. The plaintiff sustained damages as the direct and proximate result of the claimed defect . . . ."

187 Neb. at 436, 191 N.W.2d at 607.

After *Kohler v. Ford Motor Co., supra*, this court decided *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979), which involved causes of action for negligence and strict liability regarding a manufacturer's "defectively designed" automobile bumper. After reaffirming the user-contemplation test (the Restatement, *supra*) adopted in *Kohler*, the *Hancock* court referred to the elements of strict liability enunciated in *Kohler, supra*, and stated: "[A] plaintiff in a strict tort liability case is not required to plead and prove he was unaware of the defect." (Emphasis omitted.) 204 Neb. at 486, 283 N.W.2d at 38. Further, in *Hancock*, and referring to a "strict liability case," this court also commented on "reasonable and economical alternatives" in relation to a claim based on strict liability for defective design of a product:

> The question therefore is not whether anyone else was doing more, although that may be considered, but whether the evidence disclosed that anything more could reasonably and economically be done. [Citations omitted.] Plaintiff tendered evidence that there were alternatives which could be used and which, if used, would have prevented the enhanced injury. There was evidence that Paccar was using some of the alternatives itself and that both the material and the knowledge to design a safer alternative existed. That evidence included the use of a shorter bumper, a breakaway bumper, or a stronger bumper, all of which could have been designed in 1969. The jury was not required to accept any of those suggestions. Nevertheless, those were questions of fact which the jury had to resolve.

204 Neb. at 480, 283 N.W.2d at 35.

Four years after *Hancock v. Paccar, Inc., supra*, this court decided *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), which involved a claim for products liability as the result of a design defect. Nerud alleged two causes of action—one based on negligent design and the other based on strict liability—concerning a haystacking machine. In *Nerud* the court noted a "paucity of precedent" on the question whether, in a negligent design case, a plaintiff must demonstrate how the defectively designed product could have been made safer, but suggested that "such a requirement [was] hinted at in *Hancock v. Paccar, Inc.*, [*supra*]." 215 Neb. at 612, 340 N.W.2d at 374. Regarding strict liability (design defect), the *Nerud* court then concluded:

> Restatement (Second) of Torts § 402A at 347-48 (1965) in relevant part provides: "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . ."
>
> This court has defined the term "unreasonably dangerous" to mean that the product has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics. *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979).
>
> We have not, however, had an opportunity to define the term "defective condition." . . . Our review of the cases has led us to the conclusion that a plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer. . . . As such, Nerud has failed to show that the haystackers in question were defective. Absent such a showing, his recovery under a strict liability theory cannot be successful.

215 Neb. at 614-15, 340 N.W.2d at 375-76.

Therefore, when Rahmig's case was tried, to recover on a claim of strict liability in tort for a defectively designed product,

a plaintiff was required to prove by a preponderance of evidence: (1) The defendant placed the product on the market for use and knew, or in the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect was the proximate or a proximately contributing cause of plaintiff's injury sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; (5) some practicable way or feasible alternative to make the product safer; and (6) plaintiff's damages were a direct and proximate result of the alleged defect. See, *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979); *Nerud v. Haybuster Mfg., supra.*

In a products liability action, the plaintiff has the burden to prove that the alleged defect existed when the product left the manufacturer. See *Shaffer v. Honeywell, Inc.*, 249 N.W.2d 251 (S.D. 1976). Whether a product is in a defective condition unreasonably dangerous to its user is, generally, a question of fact. *Thiele v. Faygo Beverage, Inc.*, 489 N.E.2d 562 (Ind. App. 1986).

The user-contemplation test embodied in Restatement (Second) of Torts § 402 A (1965) has been criticized by an increasing number of courts and commentators.

As expressed in Prosser and Keeton on the Law of Torts, *Products Liability* § 99 (5th ed. 1984), at least three reasons exist to show the general inadequacy of the user-contemplation test in determining whether a design makes a product dangerous:

> (1) Under this test, a victim could never recover for harm suffered as a result of a design hazard that was open or obvious or one with respect to which the purchaser was adequately informed. So, the test can result in finding products to be not defective that could easily have been designed safer without great expense or effect on the benefits or functions to be served by the product;

(2) This test can result in the identification of products as being defectively dangerous that are clearly not, as when a new drug is a great boon to humanity but a few are victimized by a side effect or adverse reaction that was an unknowable risk;

(3) The meaning is ambiguous and the test is very difficult of application to discrete problems.

Id. at 698-99.

To respond to the inadequacies of the user-contemplation test for strict liability in tort, a different test developed, namely, the risk-utility test, that is, a product is defective as designed only if the magnitude of the risk or danger outweighs the utility of the product, when various factors are considered. See, *Ortho Pharmaceutical Corp. v. Heath*, 722 P.2d 410 (Colo. 1986); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983); *Rix v. General Motors Corp.*, ____ Mont. ____, 723 P.2d 195 (1986). See, further, Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825 (1973) (confusing terminology employed in the user-contemplation test; factors to be considered in the risk-utility test); Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 Mo. L. Rev. 579 (1980) (inadequacies of user-contemplation test); Uniform Product Liability Act § 104(B) (factors concerning an unreasonably unsafe design). In *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978), the Supreme Court of California adopted alternative tests for a manufacturer's strict liability in tort for a product's defective design, that is, the user-contemplation test or, if the plaintiff demonstrates that the product's design proximately caused injury, the defendant has the burden of proof to establish that the benefits of the challenged design outweigh the risk of danger inherent in such design.

Regarding products liability cases, Nebraska has yet to adopt the risk-utility test for strict liability in tort. Neither Rahmig nor Mosley suggests that such risk-utility test should be adopted to impose strict liability on a manufacturer of a defectively designed product. Whether Nebraska should or will adopt the risk-utility test for strict liability in tort is a matter for the future

in an appropriate case brought to this court. We mention the risk-utility test only to indicate the evolving law of products liability and to place in perspective Nebraska's present law concerning a manufacturer's strict liability in tort for a design defect.

STANDARD OF REVIEW: SUFFICIENCY OF EVIDENCE FOR VERDICT

In considering whether evidence in a civil case is sufficient to sustain findings necessary for a verdict, the Supreme Court does not reweigh evidence, but considers the verdict in a light most favorable to the successful party and resolves evidential conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. See *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). In reviewing sufficiency of evidence to sustain a verdict, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a civil case must be sustained if the evidence, viewed and construed most favorably to the prevailing party, is sufficient to support that verdict. See, *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985); *Armstrong v. Hartford Life Ins. Co.*, 219 Neb. 128, 361 N.W.2d 511 (1985). Cf. *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987) (Supreme Court's review of a conviction by verdict).

FACTUAL BASIS FOR VERDICT

Without repetitious reference to the facts already set forth in this opinion, the evidence is sufficient to support the jury's findings adverse to Mosley on the issue of strict liability for a design defect.

As a result of the Monster's design, it was foreseeable by Mosley that its product would be used by people such as Rahmig and that the cleaning procedure for the Monster would require personal presence of Rahmig in the Monster's cutting chamber or discharge chute. The risk from one's entry into the Monster's cutting chamber or discharge chute is beyond reasonable question or dispute in view of the Monster's dangerous condition or hazard—the sudden and unexpected

descent of the upper blade. Based on the Monster's history of operation at the scrap yard, workmen were justified in their reliance that the blade-arm of the Monster, with power on, would not unexpectedly descend—a fact admitted by Mosley. The Monster's design demanded that one who had entered the area of the shear point or discharge chute would seek some way to retain balance and, therefore, reach for some place on the Monster for support. It was further foreseeable, from an engineer's point of view, that a worker, in an effort to attain balance, would place a hand on the Monster's mechanical mandible, there to be injured by the unexpectedly descending blade. Dr. Paul's testimony graphically demonstrated practicable ways or feasible alternatives in which the Monster could have been made safer. As admitted by Mosley, the technology for those alternative safety systems was available when Mosley manufactured the Monster in 1979. Under the circumstances, the expense involved in incorporating those alternative safety devices was virtually nominal and posed no threat to the Monster's marketability. A case of strict liability in tort for design defect has been clearly established by Rahmig.

STATE OF THE ART

Concerning products liability actions, Neb. Rev. Stat. § 25-21,182 (Reissue 1985) states:

> In any product liability action based upon negligent or defective design, testing, or labeling, proof establishing that such design, testing, or labeling was in conformity with the generally recognized and prevailing state of the art in the industry at the time the specific product involved in the action was first sold to any person not engaged in the business of selling such product shall be a defense. State of the art as used in this section shall be defined as the best technology reasonably available at the time.

NEBRASKA EVIDENCE RULE 407: SUBSEQUENT REMEDIAL MEASURES

Mosley contends that exhibits 56 and 57, depicting the lockpin device incorporated into Mosley's scrap shears, and exhibit 16, the memorandum regarding placement of warning signs on Mosley's scrap shears, were evidence of subsequent remedial measures inadmissible under Nebraska Evid. R. 407

(Neb. Rev. Stat. § 27-407 (Reissue 1985)), which provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. Negligence or culpable conduct, as used in this rule, shall include, but not be limited to, the manufacture or sale of a defective product.

Before adoption of the Nebraska Evidence Rules, prohibition against evidence concerning postaccident repairs or safety precautions was expressed in *Pribbeno v. Chicago, B. & Q. R. Co.*, 81 Neb. 657, 116 N.W. 494 (1908): "Evidence of subsequent repairs made or precautions taken after an accident or the infliction of an injury is not admissible to prove antecedent negligence." (Syllabus of the court.) "The testimony would naturally impel the jurors to believe the [defendant] had ascertained its fault and was endeavoring to repair its dereliction, hence without question it had admitted its negligence." *Id.* at 659, 116 N.W. at 495. See, also, *Lindley v. Wabash R. Co.*, 120 Neb. 195, 231 N.W. 812 (1930).

Regarding Fed. R. Evid. 407, the federal counterpart to Neb. Evid. R. 407, the advisory committee noted:

> The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. . . . The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.

"The encouragement of remedial measures . . . is the principal reason for the rule excluding evidence that such measures were taken." McCormick on Evidence § 275 at 817 (E. Cleary 3d ed. 1984).

According to Weinstein, the more generally accepted ground for exclusion under Rule 407 "is the policy of encouraging people to take safety precautions." 2 J. Weinstein & M. Berger,

Weinstein's Evidence ¶ 407[02] at 407-11 (1986). See, also, 2 J. Wigmore, Evidence in Trials at Common Law § 283 (J. Chadbourn rev. 1979).

The reason for Fed. R. Evid. 407, expressed by McCormick, and the policy consideration for Fed. R. Evid. 407, noted by Weinstein, are equally applicable to Neb. Evid. R. 407.

Whereas the Nebraska Evidence Rules, generally, are inclusionary and favor admission of relevant evidence rather than exclusion of evidence with probative value, Neb. Evid. R. 407 excludes from admissible evidence certain matters which occur after a particular event in question, where negligence or culpable conduct is sought to be proved in connection with such event. Cf. *Young v. Illinois Cent. Gulf R. Co.*, 618 F.2d 332, 337 (5th Cir. 1980) (Federal Rules of Evidence " 'favor the admission of evidence rather than its exclusion if it has any probative value at all' ").

In a products liability case based on negligence and the duty to warn:

> A manufacturer or other seller is subject to liability for failing either to warn or adequately to warn about a risk or hazard inherent in the way a product is designed that is related to the intended uses as well as the reasonably foreseeable uses that may be made of the products it sells.

Prosser and Keeton on the Law of Torts, *Products Liability* § 96 at 685 (5th ed. 1984).

> [A] manufacturer's duty to produce a safe product, with appropriate warnings and instructions when necessary, is no different from the responsibility each of us bears to exercise due care to avoid unreasonable risks of harm to others. . . .
>
> . . . .
>
> . . . [T]he duty of the manufacturer to warn of latent dangers inherent in its product goes beyond the precise use contemplated by the producer and extends to all those which are reasonably foreseeable.

Moran v. Faberge, 273 Md. 538, 543, 545, 332 A.2d 11, 15-16 (1975). See, also, NJI 11.04 (duty/failure to warn regarding a defective product); Restatement (Second) of Torts § 388 (1965).

Whether "state of the art" is applicable regarding claimed

negligence in failure to warn about a defective product, we need not presently decide. See Neb. Rev. Stat. § 25-21,180 (Reissue 1985) (products liability actions in which "state of the art" may apply). An appeal is disposed on the basis of the theory presented by the pleadings on which the case was tried in the district court. *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985); *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987). The record shows that Rahmig and Mosley conducted the trial of the negligence issue (failure to warn) with reference to "state of the art."

Mayne, as an adverse witness for Rahmig, testified that the Monster, when manufactured in 1979, conformed with the existing "state of the art," which included the ANSI standards concerning warning signs, namely, notice posted on a machine when a dangerous or hazardous defect existed in a machine. However, Mayne was unable to state that warning signs were on the Monster shipped to Scottsbluff Pipe & Supply. Without our deciding whether such intracompany memorandum was an admission by Mosley that all machines manufactured before March 27, 1981, were shipped without warning signs, including the Monster shipped to Scottsbluff Pipe & Supply, the memorandum tends to impeach Mayne and contradicts his testimony that the Monster in question conformed with the "state of the art"—a sign to warn an employee about the Monster's dangerous condition resulting from the design defect. Neb. Evid. R. 407 does not require exclusion of evidence concerning subsequent repairs, alterations, or precautions when such evidence is offered for the purpose of impeachment affecting credibility of the witness impeached. See, *Public Service Co. v. Bath Iron Works Corp.*, 773 F.2d 783 (7th Cir. 1985) (subsequent plans for product were admissible to contradict testimony that the product in question adequately conformed with prior successful design); *Runkle v. Burlington Northern*, 188 Mont. 286, 613 P.2d 982 (1980) (postaccident installation of an automatic flashing signal light contradicted testimony of railroad's expert who testified that a crossing was not extrahazardous); *Daggett v. Atchison, T. & S. F. Ry. Co.*, 48 Cal. 2d 655, 313 P.2d 557 (1957) (railroad's signal expert testified that a wigwag signal device, in use at the time of the

accident, was the safest type of automatic warning device; held, subsequent signal with flashing red lights was admissible for impeachment purposes). See, also, Annot., 74 A.L.R.3d 1001 (1976).

Consequently, the memorandum of March 27, 1981, was admissible under Neb. Evid. R. 407 to impeach Mayne and contradict his testimony that the Monster conformed with the state of the art.

In *Kurz v. Dinklage Feed Yard, Inc.*, 205 Neb. 125, 128, 286 N.W.2d 257, 260 (1979), and referring to Neb. Evid. R. 407, this court stated: "Feasibility . . . means more than capable of being done. It includes effectiveness and practicality." Feasibility may also relate to physical possibility, ultimate utility, and success of intended performance. See *Anderson v. Malloy*, 700 F.2d 1208 (8th Cir. 1983).

As noted earlier, regarding a cause of action against a manufacturer for strict liability in tort on account of a design defect: "[A] plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer." *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 614, 340 N.W.2d 369, 375 (1983). As also expressed in *Nerud*: "Absent evidence that the risk could have been avoided by adopting a reasonable alternative design, [a plaintiff's] case in negligence based upon a defective design must fail." *Id.* at 613, 340 N.W.2d at 375. Therefore, Rahmig was required to prove a feasible substitute or practicable alternative as a safe design for the Monster in order to prevail on his strict liability claim against Mosley. Although the court in *Nerud* did not immediately and directly confront the evidential problem involving subsequent remedial measures and Neb. Evid. R. 407, such inevitable problem now confronts us in Rahmig's case. If Rahmig is required to prove a feasible alternative for a safer Monster, as required by *Nerud*, there is no better evidence of feasibility than the measures taken by Mosley after Rahmig's accident, namely, the lockpin device which Mosley found to be a practical solution for the hazardous problem with the sudden and unexpected descent of the Monster's upper blade. The exclusion sometimes warranted by Neb. Evid. R. 407 is, therefore,

subordinated to the type of proof required by *Nerud*, Nebraska's case law existing at the time of trial, lest Rahmig be prevented from proving requisite feasibility of a safer product and thereby risk an adverse directed verdict or forfeiture of a favorable verdict on account of such absence of proof. In view of *Nerud*, the same evidential requirement necessitates admissibility of subsequent remedial measures as proof for Rahmig's "theory" or cause of action based on Mosley's negligent design of the Monster.

Consequently, there was no error in admitting evidence regarding the Mosley matters which occurred after Rahmig's accident.

STANDARD OF REVIEW: DIRECTED VERDICT

A party against whom a motion to dismiss is directed is entitled to have all such party's relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence. See, *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985); *Teegerstrom v. H. J. Jeffries Truck Line*, 216 Neb. 917, 346 N.W.2d 411 (1984). A court should not decide an issue as a matter of law unless the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom. *Foltz v. Northwestern Bell Tel. Co., supra*. Thus, in a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court may properly direct a verdict on such issue or question.

RAHMIG'S ASSUMPTION OF RISK

Mosley contends that, as a matter of law, Rahmig assumed the risk regarding the Monster's design defect and any hazard or danger consequent to such defect. Mosley also alludes to misuse of a product as a "corollary to assumption of risk." Brief for Appellant at 20.

Assumption of risk, under appropriate circumstances, may be an affirmative defense in an action brought for a manufacturer's strict liability in tort for a design defect. See *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979). Ordinarily, the question of assumption of risk is for the jury, but, where the evidence is such that only one reasonable

conclusion is permissible, namely, a risk was assumed, a court, as a matter of law, may properly direct a verdict on such question. See, *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986); *Garcia v. Howard*, 200 Neb. 57, 262 N.W.2d 190 (1978).

" ' "One who knows of a dangerous condition, appreciates its dangerous nature, and deliberately exposes himself to the danger assumes the risk of injury from it." ' " *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 670, 345 N.W.2d 12, 15 (1984). See Prosser and Keeton on the Law of Torts, *Negligence: Defenses* § 68 at 487 (5th ed. 1984) (" 'Knowledge of the risk is the watchword of assumption of risk' ").

In contrast with contributory negligence (fault or breach of a duty to exercise such care as an ordinary prudent person would have exercised under the same or similar circumstances), assumption of risk " 'involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care . . . .' " *Sandberg v. Hoogensen*, 201 Neb. 190, 197, 266 N.W.2d 745, 750 (1978), quoting *Landrum v. Roddy*, 143 Neb. 934, 12 N.W.2d 82 (1943). See *Utsumi v. City of Grand Island, supra*. In the law of products liability, misuse is use of a product in a way not reasonably foreseeable by the supplier or manufacturer, while assumption of risk is a user's willingness or consent to use a product which the user actually knows is defective and appreciates the danger resulting from such defect. See 3 T. Travers, American Law of Products Liability 3d § 42:17 (1987). See, also, *Heil Co. v. Grant*, 534 S.W.2d 916 (Tex. Civ. App. 1976). A user's knowledge about the general danger or hazard in using a product will not support the defense that the user knew the product's specific defect and dangerous condition resulting from such defect. *Heil Co. v. Grant, supra*. Thus, misuse is not an aspect of assumption of risk. See *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 261 N.E.2d 305 (1970). See, also, *Reese v. Chicago, Burlington & Quincy R.R. Co.*, 5 Ill. App. 3d 450, 283 N.E.2d 517 (1972).

There is no evidence that Rahmig knew about the Monster's latent design defect which caused the upper blade to descend suddenly and unexpectedly. Without knowledge that the

Monster's hydraulic system was deficient and, therefore, without his appreciation of the danger consequent to that condition in the machine, Rahmig could not assume the risk from the Monster's particular design defect. As pointed out by Dr. Paul, it was certainly foreseeable that an employee unfamiliar with the "inner workings of a hydraulic system" would enter the Monster to remove sheared metal. Given the absence of warning about the defect and the history of the Monster's operation at the scrap yard, as related by Rahmig and his coemployees, there was justified expectation that, with the Monster's power running and its controls in the "up" position to secure the blade-arm in an elevated position, it was safe to enter the Monster's cutting chamber or discharge chute to remove sheared metal. Under the circumstances, Mosley was not entitled to a directed verdict that Rahmig had assumed the risk of the Monster's design defect.

RAHMIG'S CONTRIBUTORY NEGLIGENCE

Mosley claims that, as a matter of law, Rahmig was guilty of contributory negligence sufficient to bar recovery on his negligence claim. See Neb. Rev. Stat. § 25-21,185 (Reissue 1985) (contributory negligence; comparative negligence).

Initially, in a jury trial of a negligence action, the trial court must decide whether a plaintiff is guilty of negligence, and, if so, must then decide whether evidence is such that only one reasonable conclusion is permissible—the plaintiff's contributory negligence which, as a matter of law, bars recovery and authorizes a directed verdict for the defendant. See, *Utsumi v. City of Grand Island, supra; Garcia v. Howard, supra; Bartosh v. Schlautman*, 181 Neb. 130, 147 N.W.2d 492 (1966). If, as the result of such initial consideration of the evidence, the trial court determines that the jurors may reasonably draw different conclusions from the evidence, existence of the plaintiff's negligence or contributory negligence and comparative negligence are questions of fact for the jury. See *Poppe v. Petersen*, 221 Neb. 877, 381 N.W.2d 534 (1986).

However, contributory negligence, which consists merely of a plaintiff's failure to discover a defect or guard against the possibility of a defect's existence, is not a defense in an action

based on strict liability for a defective and unreasonably dangerous product. See, *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973).

"One who is capable of understanding and discretion but fails to exercise ordinary care and prudence to avoid obvious dangers is negligent or contributorily negligent." *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 127, 403 N.W.2d 335, 339 (1987). "To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in conduct and may vary depending on the circumstances." *Id.* at 126, 403 N.W.2d at 339.

Whether some type of tool or instrument should have been used to clean or remove the sheared metal from the cutting chamber or discharge chute, rather than personal entry into the Monster, at the best for Mosley was a question of fact for the jury on the issue of Rahmig's reasonable care under the circumstances (no defect known to Rahmig, the Monster's history of general operation, and absence of warning about the defect). Evidence in this case did not compel only one conclusion—Rahmig's contributory negligence, as a matter of law, which barred recovery. Therefore, the jury was required to decide whether Rahmig's conduct was reasonable under the circumstances, a factual question answered adversely to Mosley.

ORAL ADMONITION TO JURY

After the trial court's oral admonition to the jury regarding Rahmig's causes of action or theories for liability, Mosley did not object to or otherwise protest such admonition. We decline to consider alleged error regarding an issue never presented at trial and submitted for disposition by the trial court. See, *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987); *Norris v. Iowa Beef Processors*, 224 Neb. 867, 402 N.W.2d 658 (1987); *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

RECROSS-EXAMINATION OF LEE NAVORETTE

Mosley's counsel did not state the additional question which

he desired to ask Navorette, nor did counsel make an offer of proof indicating the line of questioning and information to be elicited in recross-examination of Navorette.

Neb. Evid. R. 611 (Neb. Rev. Stat. § 27-611 (Reissue 1985)) provides in part: "(1) The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time . . . ."

In the absence of an abuse of discretion, a trial court's ruling regarding the extent, scope, and course of cross-examination will be upheld on appeal. See, *Nixon v. Harkins*, 220 Neb. 286, 369 N.W.2d 625 (1985); *Chicago Lumber Co. v. Gibson*, 179 Neb. 461, 138 N.W.2d 832 (1965).

Generally, in the absence of an offer of proof, unless the substance of the evidence is apparent from the context in which the question is asked, no error may be predicated upon a court's ruling in excluding testimony. See Neb. Evid. R. 103(1)(b) (Neb. Rev. Stat. § 27-103(1)(b) (Reissue 1985)). See, also, *Birkel v. Hassebrook Farm Serv.*, 219 Neb. 286, 363 N.W.2d 148 (1985); *Morris v. Laaker*, 213 Neb. 868, 331 N.W.2d 807 (1983).

From the record presented, we are unable to fathom what question Mosley's counsel wished to ask or what area of inquiry would have been explored by any further questioning on recross-examination. The trial court committed no error in refusing to allow continuation of Mosley's recross-examination of Lee Navorette.

CONDUCT DURING JURY DELIBERATION

Mosley contends that the jury's apparent consideration of an attorney fee for Rahmig's counsel and possible tax consequences of an award to Rahmig necessitates setting aside the verdict.

Neb. Evid. R. 606(2) (Neb. Rev. Stat. § 27-606(2) (Reissue 1985)) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to

> assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

In *McDonald v. Pless*, 238 U.S. 264, 267-68, 35 S. Ct. 783, 59 L. Ed. 1300 (1915), the U.S. Supreme Court, rejecting allegations of a quotient verdict, refused to set aside the verdict and stated:

> If the facts were as stated in the affidavit, the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.

In reference to Fed. R. Evid. 606(b), which is the pattern for Neb. Evid. R. 606(2), McCormick states:

> First [Rule 606(b) does] not equate with, or govern, grounds for a new trial, but merely govern[s] the competency of jurors to testify concerning the jury process. Second, in addition to jurors' thought processes, discussions, motives, beliefs, and mistakes, [Rule 606(b)

> excludes] irregular juror conduct in the jury room. Third, [Rule 606(b) does] not exclude juror testimony of extraneous prejudicial influences. Fourth, [Rule 606(b) does] not preclude testimony of others about their knowledge of jury misconduct.

McCormick on Evidence § 68 at 166-67 (E. Cleary 3d ed. 1984). Fed. R. Evid. 606(b) "does serve to protect in some measure the finality of verdicts, and it is this policy that has doubtless led to its survival." McCormick, *supra* at 166.

As expressed in 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 606[03] at 606-26 (1987):

> Rule 606(b) seeks to reach an accomodation [sic] between policies designed to safeguard the institution of trial by jury and policies designed to insure a just result in the individual case. It does so by drawing the dividing line between inquiry into the thought processes of the jurors on the one hand, and inquiry into the existence of conditions or the occurrence of events calculated to exert an improper influence on the verdict, on the other.

In Neb. Evid. R. 606(2), the important phrase is "extraneous prejudicial information," and within that phrase the crucial word is *extraneous*, which means "existing or originating outside or beyond : external in origin : coming from the outside . . . brought in, introduced, or added from an external source or point of origin." Webster's Third New International Dictionary, Unabridged 807 (1981).

In *Klein v. Wilson*, 167 Neb. 779, 94 N.W.2d 672 (1959), which was a negligence action regarding an automobile-truck accident, two jurors conducted experiments to ascertain the stopping distance of a vehicle and, during jury deliberations, informed the other jurors about the results of the experiments. In *Klein*, this court concluded that "the making of statements of fact by jurors which are not in evidence is error and is to be condemned." *Id.* at 788, 94 N.W.2d at 678. See *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982) (in an action against a wiring manufacturer, a juror conducted an experiment of his home's wiring and communicated the results to other jurors, contradicting evidence at trial; held: the juror's experiment was extraneous prejudicial information).

An attempt by juror affidavits to impeach a plaintiff's verdict (wrongful death of a minor) was reviewed in *Selders v. Armentrout*, 192 Neb. 291, 220 N.W.2d 222 (1974), where, during deliberations, members of the jury discussed life insurance on their minor children. This court rejected such affidavits and stated:

> The general rule is that affidavits or other sworn statements of jurors will not be received to impeach or explain a verdict, to show on what grounds it was rendered, to show a mistake in it, to show the jurors misunderstood the charge of the court, or to show they mistook the law or the result of the finding because such matters inhere in the verdict.

Id. at 294, 220 N.W.2d at 224.

Affidavits by two jurors, alleging impermissible punitive damages and a quotient verdict, were brought to the court's attention in *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980 (5th Cir. 1983). Ruling that such affidavits could not be considered to impeach the verdict, the court observed: "[A] jury's verdict should not be open to searching the minds and motives of the jurors . . . ." 709 F.2d at 998 n.16.

Discretionary prejudgment interest was included in a jury's award of compensatory damages in *Michaels v. Michaels*, 767 F.2d 1185 (7th Cir. 1985), but the court, relying on *McDonald v. Pless*, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915), affirmed the trial court's rejection of a juror's affidavit as an attempt to impeach the verdict. See, also, *Martinez v. Food City, Inc.*, 658 F.2d 369 (5th Cir. 1981) (during jury deliberations, a juror stated that defendant-employer should be "taught a lesson" in a wage and hour dispute; held: a juror's possible prejudices or improper motives were not "extraneous influences" and could not be used to impeach the verdict).

From the foregoing cases, it becomes clear that Neb. Evid. R. 606(2) permits use of a juror's affidavit to establish that the jury considered prejudicial information emanating from a source other than evidence presented at trial. However, it is just as clear that Neb. Evid. R. 606(2) prohibits a juror's affidavit to impeach a verdict on the basis of jury motives, methods, misunderstanding, thought processes, or discussions during

deliberations, which enter into the verdict.

The affidavits offered by Mosley related to an expression of a general opinion held by some jurors, based on common experience or knowledge, and perhaps even mistaken belief. The affidavits did not reflect "extraneous prejudicial information" entering into the verdict. The court properly excluded the jurors' affidavits offered to impeach the verdict for Rahmig.

EXCESSIVE VERDICT

A verdict will not be set aside on appeal unless it is so clearly exorbitant as to indicate that it was the result of passion, prejudice, or mistake, or it is clear that the trier of fact disregarded the evidence or rules of law. See, *Duncza v. Gottschalk*, 218 Neb. 879, 359 N.W.2d 813 (1984); *Caradori v. Fitch*, 200 Neb. 186, 263 N.W.2d 649 (1978); *Johnson v. Schrepf*, 154 Neb. 317, 47 N.W.2d 853 (1951).

In view of all the evidence, we are unable to conclude that the verdict is excessive.

NERUD V. HAYBUSTER MFG., REVISITED

On account of its impact in the present case, we now reexamine *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983).

One reason for adopting strict liability in tort regarding products liability claims is exoneration of a claimant from what is frequently an insurmountable burden of proof.

Through Judge Tobriner, the Supreme Court of California stated in *Barker v. Lull Engineering, Co.*, 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978):

> [O]ne of the principal purposes behind the strict product liability doctrine is to relieve an injured plaintiff of many of the onerous evidentiary burdens inherent in a negligence cause of action. Because most of the evidentiary matters which may be relevant to the determination of the adequacy of a product's design under the "risk-benefit" standard—e.g., the feasibility and cost of alternative designs—are similar to issues typically presented in a negligent design case and involve technical matters peculiarly within the knowledge of the manufacturer . . . .

Accord *Toliver v. General Motors Corp.*, 482 So. 2d 213 (Miss. 1985).

In his frequently-quoted article, *On the Nature of Strict Tort Liability for Products*, Professor John W. Wade observes:

> It is often difficult, or even impossible, to prove negligence on the part of the manufacturer or supplier. True, res ipsa loquitur often comes to the aid of the injured party. But it is normally regarded as a form of circumstantial evidence, and this means that there must be a logical inference of negligence which is sufficiently strong to let the case go to the jury. This is often not present, and strict liability eliminates the need of the proof.

44 Miss. L.J. 825, 826 (1973).

As previously pointed out, Nebraska still adheres to the user-contemplation test generally reflected in Restatement (Second) of Torts § 402 A (1965) and has not, as yet, adopted the risk-utility test, which among its factors includes feasibility. See Wade, *supra* at 837.

In *Nerud v. Haybuster Mfg.*, *supra*, to formulate a requirement that "a plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer," 215 Neb. at 614, 340 N.W.2d at 375, the court relied heavily on *Wilson v. Piper Aircraft Corporation*, 282 Or. 61, 577 P.2d 1322 (1978), a products liability case *based on strict liability* (design defect) rather than negligent design. As acknowledged in *Wilson v. Piper Aircraft Corporation, supra*, Oregon had adopted the risk-utility test for a manufacturer's strict liability in tort. Wilson claimed that Piper had incorporated a defectively designed carburetor as a component in its aircraft, namely, a carburetor not using fuel injection to prevent or protect against carburetor icing, and alleged an alternative safer design. In *Wilson*, the Supreme Court of Oregon stated:

> [T]he court should balance the utility of the risk against its magnitude in deciding whether to submit a design defect case to the jury. One of the factors to be weighed in making this determination is the manufacturer's ability to

eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility. In other words, the court is to determine, and to weigh in the balance, whether the proposed alternative design has been shown to be practicable. . . .

. . . .

. . . *It is not proper to submit such allegations* [feasible and safer design] to the jury unless the court is satisfied that there is evidence from which the jury could find the suggested alternatives are not only technically feasible but also practicable in terms of cost and the over-all design and operation of the product. It is part of the required proof that a design feature is a "defect" to present such evidence. . . .

. . . .

There is not, however, any evidence about what effect the substitution of a fuel injected engine in this airplane design would have had upon the airplane's cost, economy of operation, maintenance requirements, over-all performance, or safety in respects other than susceptibility to icing. . . .

. . . .

. . . [W]e hold that plaintiffs did not produce sufficient evidence that a reasonably prudent manufacturer who was aware of the risks of carburetor icing would not have designed this model of aircraft with a carbureted engine, or that substitution of a fuel injected engine was practicable.

(Emphasis supplied.) 282 Or. at 68-71, 577 P.2d at 1326-28.

However, in *Wilson, supra*, the Oregon Supreme Court made the further observation and statement:

As pointed out above, the court's task is to weigh the factors bearing on the utility and the magnitude of the risk and to determine whether, on balance, the case is a proper one for submission to the jury. In this case we focus on the practicability of a safer alternative design and hold that the evidence was insufficient to permit the trial judge to consider that factor. *Our holding should not be*

> *interpreted as a requirement that this factor must in all cases weigh in plaintiff's favor before the case can be submitted to the jury.* There might be cases in which the jury would be permitted to hold the defendant liable on account of a dangerous design feature even though no safer design was feasible (or there was no evidence of a safer practicable alternative). If, for example, the danger was relatively severe and the product had only limited utility, the court might properly conclude that the jury could find that a reasonable manufacturer would not have introduced such a product into the stream of commerce. We hold here only that, given the nature of the product and of the defects alleged, it was improper to submit the issue of a defect in the engine design to the jury in the absence of appropriate evidence that the safer alternative design was practicable.

(Emphasis supplied.) 282 Or. at 71 n.5, 577 P.2d at 1328 n.5.

Even the court in *Wilson* acknowledged that in some cases, for instance, where danger from a product is relatively severe and the product has limited utility, a jury may find the manufacturer liable, although no safer design was feasible. Again, we are reminded that Nebraska has adopted the user-contemplation test of the Restatement (Second) of Torts § 402 A (1965), while Oregon has adopted the risk-utility test, with its various factors.

After criticizing the user-contemplation test, the Supreme Court of New Jersey, in *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983), applied the risk-utility test, reviewed various aspects of a products liability claim based on strict liability for design defect, and stated:

> By implication, risk-utility analysis includes other factors such as the "state-of-the-art" at the time of the manufacture of the product. . . . The "state-of-the-art" refers to the existing level of technological expertise and scientific knowledge relevant to a particular industry at the time a product is designed. . . .
>
> State-of-the-art relates to both components of the risk-utility equation . . . . Although the focus is on the product, our attention is drawn to the reasonableness of

> the manufacturer's conduct in placing the product on the market. . . . In that regard, the risk side of the equation may involve, among other factors, risks that the manufacturer knew or should have known would be posed by the product, as well as the adequacy of any warnings. The utility side generally will include an appraisal of the need for the product and available design alternatives. . . . As we proceed, as we must, on a case-by-case basis, risk-utility analysis provides the flexibility necessary for an appropriate adjustment of the interests of manufacturers, consumers, and the public.
>
> . . . The ultimate burden of proving a defect is on the plaintiff, but the burden is on the defendant to prove that compliance with state-of-the-art, in conjunction with other relevant evidence, justifies placing a product on the market. Compliance with proof of state-of-the-art need not, as a matter of law, compel a judgment for a defendant. State-of-the-art evidence, together with other evidence relevant to risk-utility analysis, however, may support a judgment for a defendant. In brief, state-of-the-art evidence is relevant to, but not necessarily dispositive of, risk-utility analysis. That is, a product may embody the state-of-the-art and still fail to satisfy the risk-utility equation.
>
> The assessment of the utility of a design involves the consideration of available alternatives. If no alternatives are available, recourse to a unique design is more defensible. The existence of a safer and equally efficacious design, however, diminishes the justification for using a challenged design.
>
> . . . .
>
> . . . *To establish sufficient proof to compel submission of the issue to the jury for appropriate fact-finding under risk-utility analysis, it* [*is*] *not necessary for* [*a*] *plaintiff to prove the existence of alternative, safer designs.*

(Emphasis supplied.) 94 N.J. at 182-85, 463 A.2d at 305-06.

Other courts have concluded that proof of a feasible substitute or an alternative safe design is not part of a plaintiff's indispensable burden in a products liability action based on

design defect. See, *Seward v. Griffin*, 116 Ill. App. 3d 749, 766, 452 N.E.2d 558, 571 (1983) ("evidence of alternative design feasibility is relevant and admissible in a design defect case, but it is not an essential element of such case"); *Mitchell v. Fruehauf Corp.*, 568 F.2d 1139, 1144 (5th Cir. 1978) ("specific proof of the economic and technical feasibility of alternative designs" is not required); *Siruta v. Hesston Corp.*, 232 Kan. 654, 667, 659 P.2d 799, 808 (1983) (a products liability plaintiff "may properly show the *feasibility* of a safer design"); *Toliver v. General Motors Corp.*, 482 So. 2d 213 (Miss. 1985) (in a design defect case, the plaintiff may introduce evidence of an alternate design to show feasibility).

A requirement that a plaintiff prove feasibility, as a part of the plaintiff's burden of proof in a case based on strict liability for design defect, weighs down the plaintiff with the onus to provide evidence of those matters which are usually within the knowledge of the manufacturer, and is restoration of the exact burden to be avoided by the doctrine of strict liability in tort for a product's design defect.

Of no small importance is § 25-21,182, which clearly and emphatically states that, if a product conforms with the "best technology reasonably available at the time," such condition or status "shall be a defense." Technology is characterized or defined as the "application of scientific knowledge to practical purposes in a particular field." Webster's Third New International Dictionary, Unabridged 2348 (1981). Noting the characterization or definition of "state of the art" contained in § 25-21,182, Professor Keeton has stated: " 'State of the art' is also frequently used to mean that which is feasible in light of the technology which existed at the time the product was designed. . . . This definition requires consideration of what was reasonably capable of being done technologically and economically to reduce the risk of hazard." Keeton, *The Meaning of Defect in Products Liability Law—A Review of Basic Principles*, 45 Mo. L. Rev. 579, 595 (1980).

To avoid nonsuit as the consequence of *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), a products liability plaintiff must prove feasibility or practicality of another safer design, although feasibility and practicality are components of

technology which may constitute a statutory defense to the plaintiff's claim. As the result of *Nerud*, the products liability plaintiff can succeed on a claim based on design defect if, and only if, such plaintiff presents the initial evidence concerning state of the art, a question which the Legislature has statutorily directed shall be raised by the defendant-manufacturer. Thus, the plaintiff must present evidence pertaining to a defense before the defendant evidentially presents such defense. We would assuredly find irony in a requirement that a plaintiff, seeking recovery on account of negligence, must present evidence to negative contributory negligence before the defendant's evidence properly injects such defense into the trial—or suffer nonsuit of the plaintiff's case. A similar irony exists as the result of the burden of proof imposed by *Nerud* on a products liability plaintiff who seeks to recover on account of a product's design defect.

Therefore, insofar as *Nerud v. Haybuster Mfg., supra* at 614, 340 N.W.2d at 375, requires that "a plaintiff, in order to prove that a particular product is defective in its design, must show that there was some practicable way in which the product could have been made safer," *Nerud v. Haybuster Mfg., supra*, is disapproved and overruled.

In further examination of *Nerud v. Haybuster Mfg.*, we note *Nerud's* additional language:

> In the proper application of a risk versus utility analysis to a negligent design case, one of the factors which must be weighed is the feasibility of eliminating the risk and the existence of practicable alternative designs. . . .
>
> . . . Absent evidence that the risk could have been avoided by adopting a reasonable alternative design, [a plaintiff's] case in negligence based upon a defective design must fail.

Id. at 612-13, 340 N.W.2d at 375.

As a result of *Nerud*, in products liability cases there has been a fifth element added to the otherwise standard four elements of negligence, namely, the additional essential element of a feasible substitute product free from defect or a practical and reasonable alternative but safer design.

We also observe that, after *Nerud*, this court decided *Hilt*

Truck Line v. Pullman, Inc., 222 Neb. 65, 382 N.W.2d 310 (1986), where we reiterated that, in a products liability case based upon negligent design, "to establish a prima facie case in negligence, a plaintiff need only establish some evidence of duty, breach, causation, and damages." *Id.* at 69, 382 N.W.2d at 313.

In cases other than products liability based on negligence, a plaintiff need only prove the basic four elements in a negligence case, namely, duty, breach of duty, proximate causation, and damages. See, *Ames Bank v. Hahn,* 205 Neb. 353, 287 N.W.2d 687 (1980) (attorney's alleged negligence in drafting a deed); *Floridia v. Farlee,* 201 Neb. 39, 266 N.W.2d 204 (1978) (automobile accident); *Wilbur v. Schweitzer Excavating Co.,* 181 Neb. 317, 148 N.W.2d 192 (1967) (excavator's alleged negligence in striking a buried gasline).

At the present, therefore, we find there is a five-element requirement to establish negligence in a products liability claim for defective design, while simultaneously other claims based on negligence are governed by the long-established requirements—duty, breach of that duty, proximate causation, and damages. Injecting a new requirement into a negligent design case, namely, the plaintiff's proof of a reasonable alternative design to avoid a dangerous product, obliterates a well-defined demarcation between negligence and strict liability in tort for design defect. Also, in cases for negligent design, where a plaintiff is required to prove an alternative and safer design or other feasible substitute for a manufacturer's product, evidence of feasibility in the form of the manufacturer's postaccident remedial measures, alterations, or precautions will provide classic evidence to establish the manufacturer's liability. Requiring a plaintiff to prove feasibility or a practicable alternative but safer product in a negligent design case unnecessarily invites perilous and unfairly prejudicial evidence of postaccident matters excludable under Neb. Evid. R. 407. The reason and policy consideration for Neb. Evid. R. 407 would be frustrated, if not totally annihilated. Therefore, we must also disapprove and overrule *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), insofar as feasibility or reasonable alternative design

must be proved by a plaintiff to prevail on a cause of action for negligent design in a products liability case.

In this manner, Nebraska's products liability law is harmonized with our previous decisions based on the user-contemplation test of Restatement (Second) of Torts § 402 A (1965), so that products liability claims may be proved by evidence admissible in accordance with Neb. Evid. R. 407.

AFFIRMED.

KRIVOSHA, C.J., and BOSLAUGH, J., concur in the result.

RAMONA M. DOBBINS, APPELLEE, V. WILLIS E. DOBBINS, APPELLANT.

411 N.W.2d 644

Filed September 11, 1987. No. 86-1107.

1. **Modification of Decree: Child Support.** Modification of child support is an issue entrusted to the sound discretion of the trial court.
2. _____: _____. The paramount concern regarding child support issues, whether in the original dissolution action or in proceedings for modification, remains the best interests of the children.
3. _____: _____. 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.
4. _____: _____. Evidence of the increased age of children alone will not furnish a satisfactory basis for modification of an award of child support unless accompanied by competent evidence of the actual increase in the cost of maintaining the children.
5. _____: _____. Although as a general rule a decree awarding child support will not be modified because of a change of circumstances which was in the contemplation of the parties at the time the original or preceding order was made, that rule includes only those anticipated changes which were specifically noted on the record made at the time of entry of the previous order.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

David W. Jorgensen of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Frank E. Piccolo of Murphy, Pederson, Piccolo & Pederson, for appellee.

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

PER CURIAM.

The respondent, Willis E. Dobbins, has appealed from the order of the district court increasing the amount of child support he must pay under the decree dissolving his marriage to Ramona M. Dobbins.

The original decree of dissolution was entered on June 29, 1982. The court granted custody of the parties' two daughters to Ramona. Pursuant to the parties' stipulation, Willis was ordered to pay child support of $150 per child per month.

On July 28, 1986, Ramona filed an application to modify the decree to increase the award of child support. She alleged that the increase was required in the best interests of the children due to material changes in the parties' circumstances since entry of the original decree. Specifically, she alleged that Willis had realized numerous increases in his earnings over the years, whereas her own income had remained the same or decreased. She also alleged that the parties' two daughters had grown in years and their needs increased, thereby increasing the financial demands on her.

On October 20, 1986, a hearing was had on the application to modify. Prior to receiving any evidence, the trial court stated that it would not hear any evidence regarding increased financial needs of the children and their mother due to the daughters' growth in years. This limitation was based on the trial court's reading of an unidentified opinion of this court. The evidence was thus restricted to that regarding the allegation of increased earnings to Willis.

After hearing the testimony of both Willis and Ramona, the trial court on October 27, 1986, increased Willis' child support obligations under the decree to $175 per child per month.

On appeal, Willis maintains there was not sufficient evidence of a material change of circumstances since the time of the original decree which would justify the increase in child support.

Modification of child support is an issue entrusted to the sound discretion of the trial court. *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987). Our review of such issues is de novo on the record, but absent an abuse of discretion by the trial court, its decision will be affirmed on appeal. *Wilson, supra*. Our de novo review is also qualified by the fact that where there is a conflict in the evidence, weight is given to the fact that the trial court saw and heard the witnesses and accepted one version of the facts as opposed to the other. *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985).

It is also necessary to keep in mind that the paramount concern regarding child support issues, whether in the original dissolution action or in proceedings for modification, remains the best interests of the children. *Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986).

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. *Graber v. Graber, supra*.

Previously, this court has held that a "material change in circumstances" is a concept which eludes precise, concise definition. *Wilson v. Wilson, supra*. There are certain factors, however, which the district court may consider in determining whether a material change has occurred or not. Among those factors are: changes in the financial position of the parent obligated to pay support; the needs of the children for whom support is paid; good or bad faith motive of the obligated parent in sustaining a reduction in income; and whether the change is temporary or permanent. *Wilson v. Wilson, supra*.

In a similar vein, this court in *Meyers v. Meyers*, 222 Neb. 370, 374, 383 N.W.2d 784, 787 (1986), stated: "The determination of whether such a change has occurred involves a consideration of whether there has been a change in the financial resources of the parents, the needs of the child for whom support is paid, and whether the change in circumstances is temporary or permanent."

Willis contends that the evidence here was insufficient to support a modification because the record is silent as to the needs of the minor children in question. In fact, there is no such

direct evidence in the record. Ramona responds that an inference of the children's increased needs arises from the fact that she is now unemployed, which was not the case when the stipulation and decree were entered.

The lack of direct evidence regarding the children's needs is due to the fact that the trial court refused to hear evidence regarding Ramona's allegation that her minor daughters' growth in years had resulted in an increase in their financial needs. Any evidence that Ramona had on this issue should not have been excluded.

In *Graber v. Graber, supra* at 819, 374 N.W.2d at 10, this court stated:

> Indeed, 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.

Subsequently, in *Wagner v. Wagner, supra*, we indicated that the above quoted language from *Graber* was an overstatement. The better view, as stated in *Wagner, supra* at 157, 396 N.W.2d at 283, is that "evidence of the increased age of children alone will not furnish a satisfactory basis for modification of child support *unless* accompanied by competent evidence of the actual increase in the cost of maintaining the children." (Emphasis supplied.)

In view of *Wagner*, an opinion released subsequent to the hearing of this case, the trial court committed plain error in refusing to permit evidence on this issue. See Neb. Rev. Stat. § 25-1919 (Reissue 1985).

Nevertheless, the evidence before the court was sufficient to show a material change of circumstances. Specifically, the evidence reflected that Willis' gross income had increased from $28,894.58 in 1982, when the decree was entered, to $32,544.41 in 1985. The evidence also showed that while Ramona was employed as a gas station attendant when the decree was

entered, she was unemployed at the time of the modification hearing and had been so since August of 1986. Her unemployment was due to a heart condition which had caused her problems for 14 years. She could not work at the time of the hearing because her physicians would not sign a work release. Ramona also testified that the child support she received under the decree was her only source of income.

While there is indeed no direct evidence of the children's increased financial needs, the existence of that circumstance can reasonably be inferred from the fact that Ramona no longer is able to supplement the child support paid by Willis with outside income to care for the children. If Ramona needed $300 per month to provide for the children when she had additional income, it is reasonable to infer that the children would need more money from their father when Ramona could no longer supplement that amount.

In view of Ramona's decreased earning ability and Willis' increased earnings, it cannot be said the trial court abused its discretion in increasing Willis' child support obligations as it did.

Willis also argues that the increase in his income was contemplated by the parties at the time of the decree. This contention is based on Ramona's testimony that at the time of the decree she was aware of his annual raises and contemplated that he would receive such raises in the future.

Willis contends that under *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985), changes in circumstances within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify modification.

Graber was subsequently limited by our opinion in *Wagner v. Wagner*, 224 Neb. 155, 158, 396 N.W.2d 282, 284 (1986), wherein we stated that the rule regarding contemplated changes in circumstances is limited "to anticipated changes which were specifically noted on the record at the time."

The record before us does not indicate that Willis' increase in salary was noted on the record at the time the decree was entered. While Ramona may have then been aware that Willis' income would increase in the future, that was not a factor which

clearly entered into their efforts to reach the stipulation which was approved by the court in its decree.

Even assuming Ramona's testimony was sufficient to show that the parties had then contemplated the future increase of Willis' earnings, it is clear that Ramona's complete reduction in income was not expected by the parties. The change in Ramona's relative financial position justifies the increase in child support ordered, even disregarding the increase in Willis' income. The trial court did not abuse its discretion in granting Ramona's request for increased child support.

Finally, Ramona requests an award of attorney fees on appeal. Given the parties' relative financial positions and the fact that the amount in controversy involved a relatively small increase in Willis' obligations, Ramona is allowed $1,000 for the services of her attorney in this court.

AFFIRMED.

KRIVOSHA, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL E. MODEROW, APPELLANT.

411 N.W.2d 647

Filed September 11, 1987. No. 87-010.

Licenses and Permits: Notice. Under Neb. Rev. Stat. § 39-669.28 (Reissue 1984), which provides that notice of revocation of an operator's license may be served by mailing it to the "last-known residence" of the operator, the notice should be sent to the last address of the licensee as shown by the files of the department.

Appeal from the District Court for Adams County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Arthur C. Toogood, Adams County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The defendant, Russell E. Moderow, was fined $10 and costs for operating a motor vehicle while his operator's license was suspended, and his operator's license was suspended for 1 year. Upon appeal to the district court the judgment was affirmed.

Upon appeal to this court the defendant has set forth two assignments of error: (1) that the verdict is not sustained by sufficient evidence and (2) that he has been deprived of property without due process of law. Both assignments are based on the contention that the Department of Motor Vehicles (DMV) failed to give proper notice of the suspension because the notice was not mailed to his last known address.

The record shows the defendant was stopped for driving in excess of posted speed limits. When he was asked to produce his driver's license and failed to do so, the officer checked with the station and learned the defendant's license had been suspended. The defendant gave the officer a sales slip for the vehicle, which listed his address as Marquette, Nebraska.

When the DMV suspended the defendant's license, it mailed a notice to him which requested that he forward his operator's license, No. G08-266; license plates; and registration certificate to the department. The notice stated his operating privileges would be restored upon proof of financial responsibility. The notice was sent to Marquette, Nebraska, 68854, and was returned unclaimed. The DMV records also showed that the defendant's license had previously been revoked and reinstated on condition that proof of financial responsibility be maintained until July 5, 1988. The records contain a copy of a notice of cancellation of insurance sent to the DMV by the defendant's insurance company, which listed the defendant's driver's license number as E28-5964 and his address as Marquette, Nebraska. The abstract of the defendant's driving record, also in evidence, listed his address as 1022 W. Koenig, Grand Island, and his operator's license number as G08-266.

The issue is whether the notice from the DMV was sent to the defendant at his last known address. The statute provides that the notice shall be served by mailing by either registered or certified mail to "the last-known residence of such person or, if such address is unknown, to the last-known business address of

such person." Neb. Rev. Stat. § 39-669.28 (Reissue 1984).

The defendant argues the DMV incorrectly sent the notice to Marquette, Nebraska, the address listed on the notice of cancellation of insurance, which listed his driver's license number as E28-5964.

The State contends the judgment is supported by sufficient evidence because the discrepancy in the driver's license numbers was due to the fact that the defendant was issued a new driver's license on July 11, 1985, which was after he had received his insurance policy. The State contends the DMV had records of both numbers and properly notified the defendant that his new license was suspended because his insurance had been canceled. The State further contends that defendant's last known address was Marquette, Nebraska, because that was the address listed on the insurance company's notice of cancellation, sent 4 months after the defendant had received his second driver's license, and that notice was in the department's files.

State v. Garst, 175 Neb. 731, 123 N.W.2d 638 (1963), involved a similar issue. In *Garst* the defendant was convicted of driving while under suspension and contended on appeal that he had not received proper notice of the suspension. The record contained abstracts of court records involving violations of the law relating to the operation of motor vehicles, a letter notifying the defendant of suspension, and its return, unclaimed. The address which appeared on the abstract for conviction was the address to which the notice had been sent. The defendant testified his mother had told him she had received a letter from the State which she believed related to his license, and he had sent her his operator's license, but alleged he did not know what his mother then did with it. The license was on file with the State when the defendant was charged with driving on a suspended license.

We stated the record established the notice had been mailed to the defendant's last known address as shown by "such records in the Department of Motor Vehicles." *Garst, supra* at 736, 123 N.W.2d at 641. That address was the address shown on the certified copy of the abstract for conviction report. We held that the statute requiring notice to the last known address does not require that a driver receive actual notice, and the Director

of Motor Vehicles should rely on the last known residence as shown by "the files in his office." *Garst, supra* at 737, 123 N.W.2d at 642.

The statute does not require that notice of revocation or suspension of an operator's license be actually received, or that the person involved have actual knowledge of the suspension or revocation of his license. *State v. Garst, supra*. In this case the defendant knew or should have known that his license had been reinstated upon the condition that he maintain proof of financial responsibility until July 5, 1988. When he failed to maintain insurance coverage or otherwise furnish proof of financial responsibility, he knew that his license would be suspended again.

The Marquette, Nebraska, address that was shown on the "Financial Responsibility Notice of Cancellation or Termination," dated November 14, 1985, and sent to the department by Dairyland Insurance Company, was the most recent information in the files of the department as to the defendant's address. It was the "last known residence," and the mailing of the notice to that address by the department satisfied the requirements of the statute.

The judgment is affirmed.

AFFIRMED.

WHITE, J., dissents.

STATE OF NEBRASKA EX REL. S.B., APPELLEE, V. JOHN DYBDALL, APPELLANT.

411 N.W.2d 649

Filed September 11, 1987. No. 87-240.

1. **Paternity: Appeal and Error.** A paternity action is an action at law, and, when a jury has been waived, the findings of the court have the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong.
2. **Evidence: Appeal and Error.** The credibility of the witnesses is a matter for the trial court. It is not within the province of this court to resolve conflicts in or to weigh evidence.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Randall T. Smith, for appellant.

Patrick M. Heng, Deputy Lancaster County Attorney, for appellee.

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

HASTINGS, J.

The defendant appeals the judgment of the district court for Lancaster County, which found him to be the father of D.A.B. and which ordered him to pay $75 per month in child support.

The sole assignment of error is that the trial court erred in concluding that the defendant is the father of the child. We affirm.

A jury was waived and the case was tried to the district court. The mother of the child, S.B., testified that she began dating the defendant in August of 1983 and continued to do so through March 1984. She further testified that during this time period she had sexual intercourse with the defendant and with no other males. The child was born on August 31, 1984, a full-term baby. K.B., the mother's father, testified that the defendant and his daughter were dating from August 1983 through March 1984 and that during that time she was not dating anyone else. Further corroboration of the defendant's paternity was provided by the blood testing results, which show that the odds are 48 to 1 in favor of the defendant's being the biological father of the child, which translates into a probability of paternity of 97.9 percent.

The defendant, on the other hand, testified that he did not date or have sexual intercourse with the mother until February of 1984. He also stated that he could not have dated her until then because he had both knees operated on between August and December of 1983 and had to wear full leg casts which required him to use crutches or a wheelchair. Although he stated that this surgery was performed at the VA hospital in Lincoln, no corroborative medical evidence was offered.

A paternity action is an action at law, and, when a jury has

been waived, the findings of the court have the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong. *Glass v. Harper*, 195 Neb. 724, 240 N.W.2d 48 (1976); *Stauffer v. Wilson*, 182 Neb. 129, 153 N.W.2d 454 (1967). Furthermore,

> [t]he credibility of the witnesses is a matter for the trial court. It is not within the province of this court to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence this court will review the judgment rendered, will presume that controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly wrong.

Stauffer, supra at 131, 153 N.W.2d at 456.

With that in mind, suffice it to say that there was sufficient evidence to sustain a judgment against the defendant. Although the evidence conflicted over whether the defendant and the child's mother had sexual intercourse during the necessary time period, the court apparently believed the mother's version of the story. Her version was corroborated both by her father and by the blood tests. Although in his brief the defendant makes much ado about the mother's garbled and inconsistent testimony, she never wavered from her story that the defendant was the only man who could have fathered her child.

The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.

JOHN A. TYLLE, APPELLANT, V. CYRIL ZOUCHA, DOING BUSINESS AS ZOUCHA AUCTION & REALTY COMPANY, APPELLEE.

412 N.W.2d 438

Filed September 18, 1987. No. 85-492.

1. **Real Estate: Brokers: Limitations of Actions: Negligence: Words and Phrases.** For purposes of Neb. Rev. Stat. § 25-222 (Reissue 1985), real estate brokerage is not a profession and, therefore, is not to be afforded protection under the statute of limitations governing actions for professional negligence.
2. **Constitutional Law: Statutes: Presumptions.** All statutes are presumed constitutional, and the party challenging the constitutionality of the statute has the burden of showing the statute is unconstitutional.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded for further proceedings.

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

Douglas R. Milbourn of Tessendorf, Milbourn & Fehringer, P.C., for appellee.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for amicus curiae State of Nebraska.

Thomas J. Fitchett of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for amici curiae National Association of Realtors and Nebraska Realtors Association.

Richard L. Boucher, for amicus curiae Nebraska Dental Association.

David R. Buntain and Kathleen A. Jaudzemis of Cline, Williams, Wright, Johnson & Oldfather, for amici curiae Nebraska Medical Association, Nebraska Society of Certified Public Accountants, Nebraska Society of Architects, and Nebraska Society of Professional Engineers.

KRIVOSHA, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

This is an appeal from the district court for Platte County. Appellant, John A. Tylle, originally brought this suit in the

district court against the appellee, Cyril Zoucha, doing business as Zoucha Auction & Realty Company, alleging that the appellee negligently failed to sell land the two had contracted to sell by auction.

In the fall of 1980 the parties to this appeal contracted to sell by auction land the appellant owned. The terms provided that the sale would be "with reserve," i.e., a minimum price of $3,000 per acre. In the event the price was not obtained, Zoucha Auction & Realty Company was granted exclusive listing of the land until February 15, 1981. The land was not sold at the auction conducted by Zoucha, nor was it sold in a later auction conducted by another auctioneer. The appellant finally sold the property himself at a price of $2,500 per acre. Tylle filed suit against Zoucha for negligently failing to sell his property, alleging damages in the amount of $20,908.

On April 17, 1985, the defendant moved for summary judgment. The district court judge granted the motion for summary judgment on the basis that the suit against Zoucha was not brought within the applicable statute of limitations governing actions for professional negligence under Neb. Rev. Stat. § 25-222 (Reissue 1985). Zoucha was also granted his cross-claim for damages in the amount of $812.04. Tylle's motion for new trial was denied. This appeal was originally heard on January 28, 1987. A rehearing on the issue of the constitutionality of § 25-222 was ordered and took place on May 28, 1987.

Appellant assigns as error that the trial court incorrectly found that the appellee was a professional and therefore was to be afforded the protection of the professional negligence statute of limitations as set out in § 25-222. Appellant also contends that the trial court erred in granting the appellee's motion for summary judgment on the ground that the appellant's case was not brought within 2 years from the date of the damage caused by appellee's negligence and, finally, that the trial court erred in failing to grant appellant's motion for new trial. We reverse and remand.

Tylle's assignments of error basically revolve around the question of whether a real estate broker is a professional. From our investigation of the applicable case law we note that the

question of whether a real estate broker is a professional has never been specifically addressed by this court. Looking to the law of other states, although the issue can certainly not be said to have arisen often, several cases have explicitly held that real estate brokers are not professionals. The Michigan Supreme Court, in *Pennock v. Fuller*, 41 Mich. 153, 155, 2 N.W. 176, 177 (1879), stated:

> Real estate agencies are no more professions than any other business agencies. A commission merchant, or an agent for the sale of any particular kind of personal property acts in an analogous capacity. Any one can assume and lay down such business at pleasure, and any one can conduct it in his own way on such terms and conditions as he sees fit to adopt. There is nothing in our laws which would enable any court to draw a line between such business agencies. They are not classed as professions by popular usage or by law.

Pennock was followed in a 1977 case from the Michigan Court of Appeals. In *Coats v Uhlmann*, 87 Mich. App. 385, 274 N.W.2d 792 (1978), the Michigan Court of Appeals stated that the state's malpractice statute of limitations included only licensed professionals as opposed to any licensed occupation, noting the *Pennock* decision. A 1912 Iowa Supreme Court decision, *Cummings v. Penn. Fire Ins. Co.*, 153 Iowa 579, 134 N.W. 79 (1912), citing *Pennock*, held that real estate brokers are not professionals.

The clear majority of judicial holdings that a real estate broker is not a professional are in cases involving interpretations of zoning law. In *Village of Riverside v. Kuhne*, 335 Ill. App. 547, 82 N.E.2d 500 (1948), the Illinois Appellate Court held that real estate brokers were not professionals as that term is defined for purposes of Illinois zoning laws. Citing the *Pennock* decision, the Illinois court stated: "Real estate brokerage is not claimed to be, and at any rate is not, a 'profession' within the meaning of that term as used in the zoning ordinance." 335 Ill. App. at 560, 82 N.E.2d at 506. See *City of Rockford v. Eisenstein*, 63 Ill. App. 2d 128, 211 N.E.2d 130 (1965).

The issue of whether a real estate broker is a professional has

been similarly addressed in other states, with the unanimous conclusion that real estate brokers are not professionals. *Hackett v. Gale*, 104 N.H. 90, 179 A.2d 451 (1962); *Hancock v. Concord*, 111 N.H. 413, 285 A.2d 791 (1971); *Seaman v. Zoning Board of Appeals of Holliston*, 340 Mass. 488, 165 N.E.2d 97 (1960); *Capman v. Long Beach Tp.*, 95 N.J. Super. 523, 231 A.2d 852 (1967); *Jones v. Robertson*, 79 Cal. App. 2d 813, 180 P.2d 929 (1947). Finally, in the case of *Dlugos v. Zoning Bd. of Appeals of Trumbull*, 36 Conn. Supp. 217, 416 A.2d 180 (1980), the Connecticut Superior Court stated: "A plethora of decisions from other jurisdictions clearly indicates that a real estate broker simply cannot be categorized as a professional person." 416 A.2d at 182. The weight of the case law is clearly against the appellee's claim that a real estate broker is a professional.

Zoucha urges upon us the definition of professional set out in the opinions of this court, the most recent of which is *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985). There, we defined profession as an act or service arising out of a " 'vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.' " *Id.* at 229, 369 N.W.2d at 75. Appellee argues that real estate brokerage is an occupation which is predominantly mental or intellectual, as opposed to manual or physical. While we agree that this is true, we do not agree that this alone qualifies an occupation as being a profession. Appellee attempts to bolster his argument by citing to us Neb. Rev. Stat. § 21-2202 (Reissue 1983), the definition section of the Nebraska Professional Corporation Act, Neb. Rev. Stat. §§ 21-2201 to 21-2222 (Reissue 1983). Section 21-2202 states in pertinent part:

> As used in sections 21-2201 to 21-2222, unless the context otherwise requires:
>
> (1) Professional service shall mean any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which, except for the services of a real estate broker, prior to the passage of

> sections 21-2201 to 21-2222 and by reason of law could not be performed by a corporation, including, but not limited to, personal services rendered by a certified public accountant, public accountant, dentist, osteopath, physician and surgeon, veterinarian, real estate broker, associate real estate broker, real estate salesperson, or attorney at law; and for purposes of sections 21-2201 to 21-2222, those professions pertaining to the diagnosis, care, and treatment of humans shall be considered to be of the same profession.

Aside from the fact that the definition of professional services is explicitly limited to use in the Nebraska Professional Corporation Act, we find this definition to also be unacceptable, as a profession is far more than the mere possession of a license to ply one's trade. Webster's Third New International Dictionary, Unabridged 1811 (1981), defines profession as:

> 4 a : a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service . . . .

In our opinion, this language best defines a profession. The definition stresses the long and intensive program of preparation to practice one's chosen occupation traditionally associated only with professions. It does not stress the difference between manual and intellectual labor which, while a trademark of the traditional professions, would seem to exclude some occupations commonly considered to be professions even though manual or physical. This definition also does not rely on the mere possession of a license. To rely solely on the possession of a license distorts the definition, as it would include many occupations which were traditionally not considered to be professions simply because they were licensed.

For each of these reasons we hold that a real estate broker

cannot be considered to be a professional for the purpose of the professional negligence statute of limitations. By so finding, we need not address the remainder of the appellant's assignments of error. Section 25-222 provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

On rehearing the appellant argued that the statute of limitations governing professional negligence no longer serves the purpose for which it was adopted, to prevent a crisis in the medical profession due to the rise of malpractice litigation. That need, argues the appellant, was later met by the Nebraska Hospital-Medical Liability Act. The appellant also argues that the statute is unconstitutionally vague as ordinary men are required to guess at the meaning of the word "professional."

We note that the constitutionality of § 25-222 has previously been upheld on several separate occasions. In *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976), we upheld this statute against challenges that it was unconstitutionally vague. There, we stated: "The legislative purpose is clear and although questions may arise as to who are professionals and what are professional services, we do not find the statute to be so imperfect or deficient as to render its enforcement impossible." *Id.* at 586, 244 N.W.2d at 204-05. In *Colton v. Dewey*, 212 Neb.

126, 321 N.W.2d 913 (1982), we again upheld the constitutionality of this statute against the same challenges, finding that the appellant's assignments of error were meritless. Finally, in *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984), this statute was upheld against a challenge based on the open courts doctrine. See *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987).

The unconstitutionality of a statute must be clearly established. All statutes are presumed constitutional, and the party challenging the constitutionality of the statute has the burden of showing the statute is unconstitutional. *Weiner v. State ex rel. Real Estate Comm.*, 217 Neb. 372, 348 N.W.2d 879 (1984); *In re Guardianship and Conservatorship of Sim*, 225 Neb. 181, 403 N.W.2d 721 (1987). As we have already passed on the issue of the constitutionality of this statute, we will not again go into an extended discussion of the constitutionality of § 25-222. We conclude by holding that the statute's presumption of validity has not been overcome.

We conclude that the district court judge incorrectly applied the professional negligence statute of limitations to this case and incorrectly granted the appellee's motion for summary judgment. We therefore reverse and remand for further proceedings consistent with these findings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., not participating.

CAPORALE, J., concurring.

I concur in the result reached by the majority, not because real estate brokers are not professionals, but because the meaning of the word "professional" is so nebulous that the phrase "professional negligence," as used in Neb. Rev. Stat. § 25-222 (Reissue 1985), has no real meaning. As a result, § 25-222 contains no classificatory scheme which the courts may constitutionally apply.

The term "profession" originally contemplated only theology, law, and medicine, but as applications of science and learning extended to other human endeavors, other vocations came to be designated as such, a designation which implied professed attainments in special knowledge as distinguished from mere skill; a practical dealing with affairs as distinguished

from mere study and investigation; and an application of such knowledge to uses for others, as a vocation, as distinguished from its pursuit for its own purposes. *United States v. Laws*, 163 U.S. 258, 16 S. Ct. 998, 41 L. Ed. 151 (1896) (holding that a chemist was one belonging to a recognized profession for purposes of an act controlling the employment of foreign nationals). Accordingly, in addition to the traditional professions of law, *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984), and medicine, *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983), this court has applied the professional period of limitations contained in § 25-222 to architects and engineers, *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985); accountants, *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983); medical technicians, *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976); and, without discussion, to those giving investment advice, *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974).

On the question of whether a real estate broker is a professional, the authorities are split. Generally, older cases and cases involving zoning regulations which allow "professionals" to maintain offices in their homes have found that a real estate broker is not such. *Jones v. Robertson*, 79 Cal. App. 2d 813, 180 P.2d 929 (1947); *Dlugos v. Zoning Bd. of Appeals of Trumbull*, 36 Conn. Supp. 217, 416 A.2d 180 (1980); *Village of Riverside v. Kuhne*, 335 Ill. App. 547, 82 N.E.2d 500 (1948); *Cummings v. Penn. Fire Ins. Co.*, 153 Iowa 579, 134 N.W. 79 (1912); *Seaman v. Zoning Board of Appeals of Holliston*, 340 Mass. 488, 165 N.E.2d 97 (1960); *Pennock v. Fuller*, 41 Mich. 153, 2 N.W. 176 (1879); *Coats v Uhlmann*, 87 Mich. App. 385, 274 N.W.2d 792 (1978) (citing *Pennock v. Fuller, supra*, in footnote); *Hancock v. Concord*, 111 N.H. 413, 285 A.2d 791 (1971); *Hackett v. Gale*, 104 N.H. 90, 179 A.2d 451 (1962); *Capman v. Long Beach Tp.*, 95 N.J. Super. 523, 231 A.2d 852 (1967).

More recent cases, however, have found real estate brokers to be professionals. *Speigner v. Howard*, 502 So. 2d 367 (Ala. 1987) (real estate brokers held to professional standards); *Bevins v. Ballard*, 655 P.2d 757, 763 (Alaska 1982) ("Real estate

brokers are licensed professionals, possessing superior knowledge of the realty they sell and the real estate market generally"); *Baker v. Leight*, 91 Ariz. 112, 117, 370 P.2d 268, 271 (1962) ("real estate profession"); *Easton v. Strassburger*, 152 Cal. App. 3d 90, 199 Cal. Rptr. 383 (1984) (real estate brokers possess professional knowledge and have professional obligations and duties); *Stoltz v. Delaware Real Estate Com'n*, 473 A.2d 1258 (Del. Super. 1984) (real estate brokers subject to professional self-regulation); *Falovitch v. Adrienne Realty, Inc.*, 345 So. 2d 839, 841 (Fla. App. 1977) ("A real estate broker is a professional person employed to use his professional knowledge . . ."); *Umphrey v. Sprinkel*, 106 Idaho 700, 682 P.2d 1247 (1983) (assumes, without deciding, that real estate brokers are professionals covered by the 2-year statute of limitations for professional malpractice); *Belleville National Bank v. Rose*, 119 Ill. App. 3d 56, 61, 456 N.E.2d 281, 285 (1983) (defendant "is a professional real estate broker"); *Menzel v. Morse*, 362 N.W.2d 465 (Iowa 1985); *Vislisel v. Bd. of Adjustment of Cedar Rapids*, 372 N.W.2d 316 (Iowa App. 1985) (in Iowa, realtors fall in the classification of professional persons; *Cummings v. Penn. Fire Ins. Co., supra*, thus no longer valid law in Iowa); *Mallet v. Maggio*, 503 So. 2d 37, 38 (La. App. 1986) ("A real estate broker is a trained professional"); *Evanoff v. Hall*, 310 Mich. 487, 17 N.W.2d 724 (1945) (language that real estate broker is employed professionally calls into question the validity of *Pennock v. Fuller, supra*); *Briggs v. Johnson*, 293 Minn. 49, 53, 196 N.W.2d 470, 472 (1972) ("professional real estate brokers"); *Johnson v. Brown*, 401 N.W.2d 85, 87 (Minn. App. 1987) ("professional real estate agent"); *McCarty v. Lincoln Green, Inc.*, ____ Mont. ____, ____, 620 P.2d 1221, 1225 (1980) ("real estate brokers' profession"); *N.J. State Bar Ass'n v. N.J. Ass'n of Realtor Bds.*, 93 N.J. 470, 474, 461 A.2d 1112, 1114 (1983) ("realty and legal professions"); *Paris of Wayne v. Richard A. Hajjar Agency*, 174 N.J. Super. 310, 416 A.2d 436 (1980) (calling *Capman v. Long Beach Tp., supra*, into doubt because real estate agents found to be professionals); *People v. Bacon*, 133 Misc. 2d 771, 508 N.Y.S.2d 138 (1986) (zoning law includes real estate brokers as professionals); *Melgard v. Hanna*, 45 Or. App. 133, 607 P.2d 795 (1980)

(professional malpractice case against attorney and real estate broker); *Hamilton Bank v. Rulnick*, 327 Pa. Super. 133, 475 A.2d 134, 135 (1984) (" 'profession of a real estate broker' "); *O'Brien v. R-J Development Corp.*, 387 N.W.2d 521, 524 (S.D. 1986) (alleged violation of duties as "professional real estate agents"); *Hurney v. Locke*, 308 N.W.2d 764, 768 (S.D. 1981) ("A real estate agent is a licensed professional . . ."); *Hoffman v. Connall,* 108 Wash. 2d 69, 75, 736 P.2d 242, 245 (1987) ("no persuasive reason to hold real estate brokers to a higher standard of care than other professionals"); *Walter v. Moore*, 700 P.2d 1219 (Wyo. 1985) (real estate profession). Recent legal scholarship also supports the conclusion that real estate brokers are professionals. A. Gaudio, Real Estate Brokerage Law § 272 at 332 (1987) ("A broker is a licensed professional"); R. Kratovil & R. Werner, Real Estate Law § 8.04 at 91 (8th ed. 1983) ("Today's broker is a highly skilled professional with a great breadth of knowledge of real estate law"); *Mandatory Disclosure: The Key to Residential Real Estate Brokers' Conflicting Obligations*, 19 J. Marshall L. Rev. 201 (1985) (buyer hires real estate broker on a professional basis).

This court has also already described "a professional farm manager, real estate broker, and appraiser." *Overbeck v. Estate of Bock*, 198 Neb. 121, 124, 251 N.W.2d 872, 874 (1977). And as the majority acknowledges, real estate brokers are identified among those rendering professional services as defined in the Nebraska Professional Corporation Act, Neb. Rev. Stat. §§ 21-2201 et seq. (Reissue 1983). Thus, I must conclude that real estate brokers are professionals, whatever "professional" may mean.

It is clear that in everyday common parlance professional has come to mean something other than that contemplated by *United States v. Laws*, 163 U.S. 258, 16 S. Ct. 998, 41 L. Ed. 151 (1896), or as defined by Webster's Third New International Dictionary, or as recently defined by us in *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985); that is, an act or service arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. People speak of

"professional bowlers," "professional musicians," "professional mechanics," "professional drivers," and the like. Our own statutes use the word "professional" in a variety of contexts to modify designated occupations, including a "professional artist or historian," Neb. Rev. Stat. § 14-2004 (Reissue 1983); "professional advisor," Neb. Rev. Stat. § 28-613 (Reissue 1985); "professional sport," Neb. Rev. Stat. § 28-614 (Reissue 1985); "professional assistants" from the Department of Roads, Neb. Rev. Stat. § 39-2107 (Reissue 1984); "professional investor," Neb. Rev. Stat. § 58-321 (Reissue 1984); "professional finders' fee," Neb. Rev. Stat. § 69-1317 (Reissue 1986); "professional counselors," Neb. Rev. Stat. §§ 71-102, 71-107, 71-110, 71-112, and 71-162 (Reissue 1986); "professional examiners," Neb. Rev. Stat. § 71-114 (Reissue 1986); "professional nursing," Neb. Rev. Stat. §§ 71-1,132.04, 71-1,132.06, 71-1,132.07, 71-1,132.11, 71-1,132.13, 71-1,132.16, 71-1,132.24, and 71-1,132.25 (Reissue 1986); "professional educators," Neb. Rev. Stat. § 79-332 (Reissue 1981); and, not least of all, "professional wrestling or boxing," Neb. Rev. Stat. §§ 81-8,129, 81-8,130.01, 81-8,132, 81-8,134, 81-8,135, 81-8,139, and 81-8,139.01 (Reissue 1981), and § 81-8,133.01 (Cum. Supp. 1986). In addition, other courts have described other occupations as professional, including an ambulance service, *Curtis Ambulance v. Shawnee Cty. Bd. of Cty. Com'rs*, 811 F.2d 1371 (10th Cir. 1987), and the installation of a computerized betting system at a racetrack, *Autotote Ltd. v. N. J. Sports & Expo. Auth.*, 85 N.J. 363, 427 A.2d 55 (1981).

Thus, professional, as commonly used today, really means nothing more than an activity by which one earns his or her livelihood. Since Neb. Rev. Stat. § 25-207 (Reissue 1985) provides a general 4-year period of limitations for tort actions, the word professional, as used in § 25-222, is ambiguous and therefore subject to interpretation, *North Star Lodge #227 v. City of Lincoln*, 212 Neb. 236, 322 N.W.2d 419 (1982), making necessary an examination of the legislative history, including the floor explanation or debate. *Spence v. Terry*, 215 Neb. 810, 340 N.W.2d 884 (1983).

The introducer's statement of purpose identifies physicians,

surgeons, and medical personnel as needing legislative protection, Statement of Purpose, L.B. 1132, Judiciary Committee, 82d Leg., 2d Sess. (Jan. 17, 1972), and doctors were specifically mentioned in the floor debates. Floor Debate, L.B. 1132, 82d Leg., 2d Sess. (Feb. 25, 1972). Why it was thought necessary to enact § 25-222 to protect physicians and surgeons is not at all clear, for Neb. Rev. Stat. § 25-208 (Reissue 1985) then provided a 2-year period of limitations for "malpractice" actions, as it still does. Whatever problems there may be in defining "malpractice," see, *Interholzinger v. Estate of Dent,* 214 Neb. 264, 333 N.W.2d 895 (1983), and *Stansbery v. Schroeder, post* p. 492, 412 N.W.2d 447 (1987) (refer to negligence actions against lawyers as legal malpractice actions), to date the malpractice portion of § 25-208 has been applied only to medical doctors, *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976), *Toman v. Creighton Memorial St. Josephs Hosp., Inc.*, 191 Neb. 751, 217 N.W.2d 484 (1974), *Acker v. Sorensen*, 183 Neb. 866, 165 N.W.2d 74 (1969), *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964), *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962), and *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941), and a lawyer, *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d 753 (1984) (applies both §§ 25-208 and 25-222 to lawyer failing to seasonably file an annexation document). During the Judiciary Committee hearings, architects were also mentioned as being within the scope of § 25-222. Judiciary Committee Hearing, L.B. 1132, 82d Leg., 2d Sess. (Jan. 17, 1972). In Senator Luedtke's words, the statute "would also cover the lawyers, the architects, *and everybody*." (Emphasis supplied.) *Id.* at 19.

Section 25-222 has been challenged as being unconstitutional in five cases.

In *Taylor v. Karrer, supra*, this court was asked to determine whether § 25-222 was unconstitutional special legislation in violation of Neb. Const. art. III, § 18, and as being unconstitutionally vague as applied to two medical doctors.

In finding "substantial reasons for legislative discrimination" in regard to professional negligence, the *Taylor* court said:

We have seen in recent years the growth of malpractice

> litigation to the point where numerous insurance companies have withdrawn from this field. Insurance rates are practically prohibitive so that many professional people must either remain unprotected or pass the insurance charges along to their patients and clientele in the form of exorbitant fees and charges. This unduly burdens the public which requires professional services. On the other hand, a victim of malpractice is frequently unaware of it, or deceived in regard to it, for long periods of time. Such a person's situation is different from that sustained by persons subjected to ordinary personal or property injury. The situation of professional people and of those to whom they render services is substantially different from the normal situation encountered in the rendering of ordinary services and injuries sustained thereby. Public policy dictates diverse legislation in regard to professional services.

196 Neb. at 586, 244 N.W.2d at 204. The court consequently found that the statute was not unconstitutional as special legislation.

Turning its attention to the challenge on grounds of vagueness, the *Taylor* court noted that an otherwise valid statute will not be held void or unintelligible and meaningless unless it is so imperfect and deficient in its terms as to render it impossible of execution and enforcement. The court held that § 25-222 was not unconstitutionally vague as applied, noting that

> [t]he legislative purpose is clear and although questions may arise as to who are professionals and what are professional services, we do not find the statute to be so imperfect or deficient as to render its enforcement impossible. Such questions are faced in regard to many statutes and on occasion require construction.

196 Neb. at 586, 244 N.W.2d at 204-05.

The statute was also upheld on a constitutional challenge of vagueness in a case involving architects and engineers. In *Horn v. Burns and Roe*, 536 F.2d 251 (8th Cir. 1976), a steamfitter, who was injured when a heavy steamline failed, sued the engineering and architectural firm which had designed and

prepared the plans and specifications for the power plant and an organization of engineers which had been retained to approve the materials used in the construction of the power plant. The defendant engineering and architectural firm, as well as the organization of engineers, filed motions to dismiss, asserting that the steamfitter's action was barred by § 25-222. The steamfitter asserted that § 25-222 was so vague and indefinite as to be incapable of application and that it therefore unconstitutionally deprived him of his substantive right of action against the defendants. The U.S. District Court for the District of Nebraska sustained the defendants' motions to dismiss, holding that the practice of both engineering and architecture was "professional" within the ambit of the statute of limitations and that the work which was the subject of the complaint was "professional" in nature.

On appeal to the U.S. Court of Appeals for the Eighth Circuit, the court observed:

> The Supreme Court has recognized that a noncriminal statute is unconstitutionally vague under the due process clause of the Fifth or Fourteenth Amendments when its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding or practice. [Citations omitted.] A noncriminal statute is not unconstitutionally vague, however, where its terms are such that the ordinary person exercising common sense can sufficiently understand and fulfill its prescriptions. [Citations omitted.] A finding of vagueness will thus result only where "the exaction of obedience to a rule or standard * * * was so vague and indefinite as really to be no rule or standard at all * * *", *A. B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239, 45 S. Ct. 295, 297, 69 L. Ed. 589 (1925), or where the statute is written in such terms that "men of common intelligence must necessarily guess at its meaning and differ as to its application * * *". *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322 (1926). [Citations omitted.]

Horn, 536 F.2d at 254.

The court further stated at 255:

> The requirement of reasonable certainty does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding. The terms "professional negligence" and "professional services" are utilized in this manner in Section 25-222. They are directed to acts of those engaged in occupations applying specialized knowledge and intellectual skills to the performance of their duties. *Swassing v. Baum*, 195 Neb. 651, 656, 240 N.W.2d 24, 27 (1976).

The court of appeals concluded that "[t]he ordinary meaning of 'professional negligence' and 'professional services' is thus not 'so vague and indefinite as really to be no rule or standard at all' and the statute cannot be said to be unconstitutional and void on its face." *Horn* at 256. The court of appeals affirmed the order of the district court sustaining the defendants' motions to dismiss, because "the statute was not shown to have been unconstitutionally applied to the architectural and engineering services involved in this case . . . ." *Id.*

The 10-year period of repose, also found in § 25-222 but not relevant to this appeal, was challenged on constitutional grounds as well. In *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982), the 10-year period of repose was upheld as applied to a physician against challenges that it constituted unconstitutional special legislation, that the 10-year period violated the equal protection clause of the U.S. Constitution and due process clause of the Nebraska Constitution, and that it violated the open courts requirement of Neb. Const. art. I, § 13. The enactment of the 10-year period of repose was held to be a valid exercise of legislative power.

Two subsequent cases then followed *Colton v. Dewey, supra*. In *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983), another claim that the 10-year statute of repose denied the right of access to the courts guaranteed by Neb. Const. art. I, § 13, was dismissed by reference to *Colton v. Dewey, supra*. The same claim of unconstitutionality again arose in *Williams v. Kingery Constr. Co.*, 225 Neb. 235, 404 N.W.2d 32 (1987), where we stated our adherence to *Smith v. Dewey, supra*, and *Colton v. Dewey, supra*, and thus again rejected the

constitutional challenge to the 10-year period of repose.

Thus, from all the challenges against § 25-222, the imprecise meaning of the word "professional" has only been argued twice: first, in *Taylor v. Karrer*, 196 Neb. 581, 244 N.W.2d 201 (1976), where we found that the word was not vague as applied to doctors, and second, in *Horn v. Burns and Roe*, 536 F.2d 251 (8th Cir. 1976), where the federal court of appeals found § 25-222 to not be vague as applied to engineers and architects. The legislative history supports those results.

Although Senator Luedtke said § 25-222 applied to "everybody," the legislative history cannot reasonably be understood to have intended a 2-year statute of limitations for, as examples, professional bowlers, drivers, or wrestlers. If so, we would have a 2-year period of limitations for all negligence claims resulting from one's occupation and a 4-year period of limitations for other causes of action based on negligence. There is nothing in the legislative history which suggests such a result was intended.

Neb. Const. art. II, § 1, distributes the powers of government into three separate and coequal departments or branches and prohibits one branch from exercising any power belonging to another branch. *State v. Burling*, 224 Neb. 725, 400 N.W.2d 872 (1987). Accord, *Copple v. City of Lincoln*, 210 Neb. 504, 315 N.W.2d 628 (1982); *Williams v. County of Buffalo*, 181 Neb. 233, 147 N.W.2d 776 (1967). It has been specifically noted that the Legislature may not impose upon the courts the performance of nonjudicial duties nor delegate to them any legislative power. *Nebraska P.P. Dist. v. City of York*, 212 Neb. 747, 326 N.W.2d 22 (1982); *C. R. T. Corp. v. Board of Equalization*, 172 Neb. 540, 110 N.W.2d 194 (1961).

The power of classification rests with the Legislature, not with the courts. Neb. Const. art. III, § 18; *McDonald v. Rentfrow*, 176 Neb. 796, 127 N.W.2d 480 (1964). Accord, *State v. Hunt*, 220 Neb. 707, 371 N.W.2d 708 (1985); *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 300 N.W.2d 181 (1980). See, also, *School Dist. No. 46 v. City of Bellevue*, 224 Neb. 543, 400 N.W.2d 229 (1987). The Legislature's failure to adequately define the class which is to be given the benefit of a shortened period of limitations imposes upon the courts the task of

determining what there is about various occupational activities, if anything, which justifies such preferential treatment. This attempted delegation of the Legislature's classificatory power to the courts offends Neb. Const. art. II, § 1.

Experience has demonstrated that this court's initial thought that it could preserve the Legislature's effort in enacting § 25-222 by making a case-by-case analysis of the occupational activities to which the statute applies, *Taylor v. Karrer, supra*, was overambitious. It is now clear that the Legislature's failure to articulate a meaningful classificatory scheme requires the courts to do more than engage in the judicial act of applying a legislatively defined classification to a particular set of facts.

SHANAHAN and GRANT, JJ., join in this concurrence.

LON WENDELL STANSBERY, APPELLANT AND CROSS-APPELLEE, V. DAVID T. SCHROEDER, APPELLEE AND CROSS-APPELLANT.

412 N.W.2d 447

Filed September 18, 1987. No. 85-703.

1. **Negligence: Attorney and Client: Proof.** As in any negligence case, a plaintiff in a suit for negligence of his or her attorney must prove the duty that existed, a breach of that duty, proximate cause, and resulting damages.
2. **Negligence: Attorney and Client: Proof: Guaranty.** In basing an action for attorney negligence on failing to obtain the signatures of guarantors on a loan, the burden is on the plaintiff to prove that such guaranties would have prevented the loss.

Appeal from the District Court for Keith County: JOHN P. MURPHY, Judge. Reversed and remanded with directions to dismiss.

Leroy P. Shuster, for appellant.

Marvin O. Kieckhafer of Kay and Kay, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

The plaintiff appeals from a verdict of $66,346.48 in his favor in a malpractice action against his former attorney. The defendant attorney also cross-appeals.

David T. Schroeder began representing Lon Wendell Stansbery in various legal matters in 1976 or 1977. In April of 1978, Stansbery began to serve some time in the Nebraska Penal and Correctional Complex for a driving while intoxicated conviction and gave Schroeder a durable power of attorney so Schroeder could handle Stansbery's affairs while he was in prison. Stansbery is an alcoholic, which Schroeder knew.

In August of 1979 Stansbery considered lending $110,000 to Albert and Judy Leisy so they could buy a trailer park from BCDJ Investments, Inc. As a part of that transaction, Stansbery was to receive a limited guaranty of the loan by Albert Leisy's mother. Schroeder was an officer, director, and majority shareholder of BCDJ at that time. During negotiations for the deal, Schroeder represented both BCDJ and Stansbery, as is evidenced by the bills he submitted to both.

Schroeder went out of town, and when he came back on October 17, 1979, he discovered that the loan had fallen through. He informed Stansbery of this and spoke to him about just lending BCDJ the money instead. On October 19 Schroeder borrowed $5,000 from Stansbery. Schroeder then presented Stansbery with some loan papers which Stansbery eventually rejected because he did not like the 10-percent interest or the 30-year term of the loan. After this, several more discussions were had about Stansbery's lending money to BCDJ, and Stansbery eventually agreed to a loan of $110,000 at 12 percent for a term of 10 years. The note was signed only by James R. Kohl as president of BCDJ. This $110,000 was applied to an outstanding loan BCDJ had with the Keith County Bank & Trust Company. Schroeder had personally guaranteed this loan with the bank.

As part of Stansbery's loan to BCDJ, Stansbery thought he was to receive a first mortgage on the trailer park BCDJ owned and a second mortgage on the Leisy ranch to secure the debt. He testified that he would not have agreed to loan the money with only the trailer park mortgage, or if he had known that the

Leisys were not involved, or if he could not look to Richard Dudden or the Kohls. However, there is nothing in the record to indicate that the Leisys ever had anything to do with the proposed loan to BCDJ, nor were guaranties of Dudden or the Kohls ever proposed. Stansbery had to know when he received the loan papers that there were no guaranties other than the execution of the note and mortgage by Kohl as president of BCDJ. In actuality, he received no mortgage on the Leisy ranch, and, except for a very small portion of the trailer park, his mortgage on that park was inferior to a $190,000 mortgage to the profit sharing retirement plan for Dudden Elevator, Inc. Both Schroeder and Stansbery thought that Stansbery was to receive a personal guaranty from Schroeder at that time, but a written document to that effect was never found. In any event, any personal guaranty was discharged in Schroeder's bankruptcy.

The mortgage and promissory note for the loan were prepared at Schroeder's office under his instructions. Stansbery and Schroeder discussed the loan arrangements several times. Schroeder testified that during the second or third conversation, when Schroeder brought the documents to Stansbery to sign, Schroeder told Stansbery that he could not represent Stansbery in this transaction and that Stansbery should go talk to another attorney. Stansbery testified that Schroeder only told him he could talk to another attorney if he wanted to, but gave him no reason why he should, and that Stansbery responded that one attorney was enough, that was all he could afford. Stansbery did admit he knew Schroeder was an officer and had an ownership interest in BCDJ.

Stansbery signed the documents, and BCDJ made regular payments on the loan from November 1979 until sometime in 1982. Subsequently, the loan went into default for nonpayment. The certified public accountant who testified for Stansbery stated that based on BCDJ's tax returns and statement of debt of the corporation, BCDJ had insufficient cash coming into the corporation to pay either the debts it owed or the real estate taxes on the property it owned at the time Stansbery made the loan to BCDJ.

Stansbery brought suit against Schroeder, and a jury trial

was had on the issue of Schroeder's negligence. Contrary to Schroeder's wishes, the jury was not given instructions regarding Stansbery's alleged contributory negligence or failure to mitigate damages. The jury found for Stansbery in the amount of $66,346.48.

The issues raised by Stansbery regarding the foregoing facts are whether the trial court erred (1) when it instructed the jury that it should not determine the amount of interest, if any, to which the successful party may be entitled, and (2) when it did not add accrued interest due on the promissory note to the amount of the jury's verdict. Schroeder, on cross-appeal, contends the trial court erred (1) in excluding evidence and failing to instruct the jury on the issue of Stansbery's contributory negligence, (2) in excluding evidence and failing to instruct the jury on the issue of Stansbery's failure to mitigate damages, and (3) in giving instruction No. 12 regarding the durable power of attorney. Both parties have raised one additional assignment of error each which does not deal with the above facts, so each will be addressed separately.

Stansbery's two assignments of error can be dealt with together—that is, whether Stansbery is entitled to recover as part of his damages the amount of accrued interest on the promissory note he obtained from BCDJ. We believe the trial court correctly ruled that he was not so entitled. However, in arriving at this conclusion it was necessary for us to make general inquiry into the area of proximate cause. Having done so, we note as plain error under Neb. Ct. R. of Prac. 9D(1)d (rev. 1986) that Stansbery did not prove that the loss of the unpaid principal or interest was proximately caused by Schroeder's negligence. Accordingly, that issue should never have been submitted to the jury, and we must reverse the judgment of the district court and order the cause dismissed.

In his brief Stansbery argues that he is entitled to the interest on the note as well as the balance of the unpaid principal which the jury awarded him. He then cites us to cases in which we determined that accrued interest on a promissory note was a proper element of damages. See, e.g., *First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985); *Bank of Axtell v. Johnson*, 125 Neb. 154, 249 N.W. 302 (1933). Those cases were,

however, suits based on breach of contract—failure to pay a note—while this case is one based on negligence.

In a contracts case the proper measure of damages is an amount which will compensate the injured person for loss which a fulfillment of the contract would have prevented or breach of it has entailed. *May v. Marijo Corp.*, 207 Neb. 422, 299 N.W.2d 433 (1980). Thus, in an unpaid note case, one of the elements of damages is the amount of interest the aggrieved party would have obtained had the breach not occurred. In a negligence case, however, the proper measure of damages is that which will place the aggrieved party in the position in which he or she would have been had there been no negligence. 25 C.J.S. *Damages* § 71 (1966). See R. Mallen & V. Levit, Legal Malpractice § 303 (2d ed. 1981). Thus, each of the plaintiff's allegations of negligence must be addressed in order to determine whether any evidence was presented from which it can be inferred that had the defendant not been negligent, Stansbery would have received either the balance of the unpaid principal, or the accrued interest on the note, or both.

Stansbery alleged that Schroeder breached his duty to Stansbery in the following manner: (1) that Schroeder negligently prepared the mortgage and note accompanying the loan; (2) that Schroeder negligently failed to advise Stansbery of the character of the documents; (3) that Schroeder negligently failed to get personal guaranties for the loan from the other shareholders of BCDJ; (4) that Schroeder negligently failed to fully and completely disclose his involvement in BCDJ to Stansbery; (5) that Schroeder negligently failed to obtain Stansbery's consent to Schroeder's conflicting representation of Stansbery and BCDJ; (6) that Schroeder negligently failed to withdraw his representation of either Stansbery or BCDJ, when Schroeder knew or should have known that such representation of both was adverse to the interest of the other; (7) that Schroeder negligently entered into business transactions which were in conflict with Stansbery's interest; and (8) that Schroeder negligently failed to follow Canon V, DR 5-101(A), 5-104(A), and 5-105(B) and (C), of the Code of Professional Responsibility.

In a malpractice action against an attorney for negligence,

we see no reason why the same general elements as are necessary in any other case based on negligence must not be alleged and proved; i.e., duty, breach of duty, proximate cause, and resulting damages. *Floridia v. Farlee*, 201 Neb. 39, 266 N.W.2d 204 (1978). The general rule regarding an attorney's duty to his or her client is that " 'the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. . . .' " *Ishmael v. Millington*, 241 Cal. App. 2d 520, 523, 50 Cal. Rptr. 592, 593 (1966). See, also, *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980). Specifically dealing with the issue of attorney malpractice is *Wooddy v. Mudd*, 258 Md. 234, 237, 265 A.2d 458, 460 (1970), which stated as follows: " 'In a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) The attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client.' . . ."

Allegations (1) and (2) can be dealt with summarily. The record reflects no evidence upon which a jury could find that Schroeder either had negligently prepared the mortgage and note or that he failed to advise Stansbery of the character of those documents. Thus, neither claim could have been the basis for the jury's verdict of the balance of the unpaid principal, let alone for interest.

Allegation (3), that Schroeder negligently failed to get personal guaranties for the loan from the other shareholders of BCDJ, presents more of a problem. Robert Coupland, one of Stansbery's expert witnesses, testified that Schroeder was negligent in failing to get the other shareholders to personally guarantee the loan. But assuming that the jury could have found that Schroeder breached his duty does not mean that Stansbery was automatically entitled to the unpaid principal and accrued interest on the money he loaned to BCDJ. Stansbery also had to present evidence that Schroeder's failure to obtain the personal guaranties proximately caused Stansbery's loss.

As we stated in *Greening v. School Dist. of Millard*, 223 Neb. 729, 735, 393 N.W.2d 51, 57 (1986): " ' "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." ' " In this case, the reason Stansbery could not collect on the note was because BCDJ and Schroeder both went bankrupt. Unless Stansbery could prove that the personal guaranties of the other shareholders would have prevented his loss, Schroeder's negligence in failing to obtain those guaranties was not the cause of Stansbery's loss. This Stansbery did not do. He presented no evidence with regard to the financial condition of the other shareholders. In the absence of any evidence that the guaranties of the other shareholders would have prevented his loss, Stansbery was not entitled to either the unpaid principal or accrued interest under this allegation of negligence.

Somewhat analogous to this situation is *Pickens, Barnes & Abernathy v. Heasley*, 328 N.W.2d 524 (Iowa 1983). This was a suit for attorney fees and a counterclaim for damages for legal malpractice arising out of a lawsuit which the attorneys had handled for Heasley against a third party. The jury, in returning a verdict for Heasley, determined the damages to be the amount of the judgment Heasley would have obtained against the third party but for the negligence of the attorneys.

The Iowa Supreme Court held that it was error to let the verdict stand because a party seeking damages in such a situation has the burden not only of proving the amount of the judgment he or she would have obtained, but, also, what amount could be collected. In doing so, the court stated at 526:

> Heasley did not introduce substantial evidence from which a jury could reasonably find that a judgment against Weavers would be collectible in full or in an ascertainable part. The jury was left to speculation except for contrary evidence Pickens introduced indicating that the Weavers were insolvent. A jury must be provided with facts affording a reasonable basis for ascertaining the loss.

Allegations (4) to (8) all deal with Schroeder's alleged

negligence in handling the conflict of interest that occurred when he represented both sides of this loan transaction. As stated in *Ishmael v. Millington*, 241 Cal. App. 2d 520, 526-27, 50 Cal. Rptr. 592, 595-96 (1966):

> A lawyer owes undivided loyalty to his client. Minimum standards of professional ethics usually permit him to represent dual interests where full consent and full disclosure occur. The loyalty he owes one client cannot consume that owed to the other. Most descriptions of professional conduct prohibit his undertaking to represent conflicting interests at all; or demand that he terminate the three-way relationship when adversity of interest appears. Occasional statements sanction informed representation of divergent interest in "exceptional" situations. Even those statements demand complete disclosure of all facts and circumstances which, in the attorney's honest judgment, may influence his client's choice, holding the attorney civilly liable for loss caused by lack of disclosure.

See, also, *Crest Inv. Trust v. Comstock*, 23 Md. App. 280, 327 A.2d 891 (1974). The evidence reflects that Schroeder did not fully explain the problems with his dual representation to Stansbery. Stansbery's expert witness also testified that it was negligent for Schroeder to have continued to represent Stansbery given the facts in the case. Thus, there was sufficient evidence in the record to support a finding that Schroeder breached his duty to Stansbery. But, once again, breach of a duty is not enough. An attorney can only be civilly liable for losses to his or her client proximately caused by the breach of that duty.

In this case Stansbery never presented any evidence that had Schroeder fully disclosed his involvement with BCDJ, obtained Stansbery's consent to the dual representation, withdrawn from representation of Stansbery, not entered into business transactions which conflicted with Stansbery's interest, or followed Canon V, DR 5-101(A), 5-104(A), and 5-105(B) and (C), of the Code of Professional Responsibility, Stansbery would not have loaned BCDJ his money, or that BCDJ would not have defaulted on the loan. Without this necessary showing

of how Schroeder's conduct caused Stansbery's loss, there was nothing upon which the jury could base its verdict. Thus, we believe the verdict for the plaintiff in this case was improper and must be reversed. We thus do not need to address Schroeder's assignments of error on cross-appeal.

Stansbery has also assigned as error that the trial court erred in sustaining Schroeder's demurrer to the allegations of negligence contained in Stansbery's third amended petition regarding a school land lease deal. The third amended petition, filed on December 6, 1984, for the first time raised the issue of Schroeder's negligence regarding a school land lease of which Schroeder was to effect the renewal in the fall of 1981. On January 7, 1985, Schroeder filed a demurrer to the third amended petition, which demurrer was sustained on February 1, 1985, for the reason that the statute of limitations had run on that part of the pleading. On February 6, 1985, Stansbery filed an election to stand on his third amended petition. But then, on May 6, 1985, the court considered Stansbery's motion to amend his petition, which was granted instanter. Stansbery filed his fourth amended petition the same day. The portion dealing with the school land lease was not included in that petition. Schroeder answered on May 16, 1985, and trial was had on May 28 to 31.

Stansbery contends the court erred in sustaining Schroeder's demurrer because Stansbery had a continuing attorney/client relationship with Schroeder until 1983, which would have tolled the running of the statute of limitations on the school land lease issue. We need not address that issue in light of the fact that Stansbery elected to amend his third amended petition to leave out any reference to the school land lease issue. Had Stansbery wished to preserve that issue for appeal, he should not have filed a fourth amended petition which did not make any reference to that issue.

This then brings us to the last issue asserted by Schroeder on his cross-appeal, that being that the trial court erred in giving the supplemental instruction to the jury. The court instructed the jury that if it returned a verdict during the first 6 hours of deliberation, the verdict must be agreed to by all of the jurors, and if, after deliberating for 6 hours, the jurors were unable to

arrive at a unanimous verdict, 10 or 11 of the jurors could return a verdict. The instruction then stated that the case was submitted to the jury at 12:31 p.m., at which time the jury's deliberations were deemed to commence. But then at 6:35 p.m., the trial court gave a supplemental instruction to the jury, which stated that its deliberations had commenced upon the jurors' return from lunch at 2 p.m. It is this instruction that Schroeder contends was conflicting and prejudicial. In light of the fact that we have reversed the jury's verdict, it is not necessary to a determination of this case that we address that issue. However, we do make reference to *Keating v. Klemish*, 214 Neb. 458, 463-64, 334 N.W.2d 440, 443 (1983), in which this court stated:

> It is noted that in *Cartwright and Wilson Constr. Co. v. Smith*, 155 Neb. 431, 442, 52 N.W.2d 274, 281 (1952), it was held that the length of time devoted to meals "while the jurors are deliberating upon their verdict cannot be shown for the purpose of proving that they did not deliberate for the prescribed length of time."

We therefore reverse the judgment of the district court and remand the cause with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

JERI KAY OWEN, APPELLANT, V. WALTER OWEN, APPELLEE.
412 N.W.2d 82

Filed September 18, 1987. No. 85-820.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Affirmed.

George Rhodes, Custer County Attorney, for appellant.

Marsha E. Fangmeyer of Knapp, Mues, Beavers & Luther, for appellee.

BOSLAUGH, C.J., Pro Tem., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The petitioner, Jeri Kay Owen, appeals the order reducing the child support obligation of the respondent-appellee, Walter Owen. We have, as required in cases of this nature, reviewed the record de novo to determine whether the district court abused its discretion in rendering its order. *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987).

We find no such abuse; accordingly, the judgment of the district court is affirmed.

AFFIRMED.

NOEL L. CHADD AND GLORIA J. CHADD, APPELLANTS, V. MIDWEST FRANCHISE CORP., A NEBRASKA CORPORATION, APPELLEE.

412 N.W.2d 453

Filed September 18, 1987. No. 85-840.

1. **Summary Judgment.** Summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt.
2. _____. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.
3. **Contracts: Leases.** A lease is to be construed as any other contract.
4. **Contracts.** The proper construction of a written contract is generally a question of law to be determined by the courts.
5. _____. An agreement which depends upon the wish, will, or pleasure of one of the parties is unenforceable. Mutuality of obligation is an essential element of every enforceable agreement.
6. **Contracts: Leases.** Reasonableness or good faith can be inferred with respect to the terms of a lease, which must be acceptable to the tenant.
7. **Contracts.** Where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed.
8. **Breach of Contract.** A party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party.
9. _____. A condition is excused if the occurrence of the condition is prevented by

the party whose performance is dependent upon the condition.

10. **Contracts: Juries.** The issues of reasonableness and good faith as to performance by the parties are questions of fact for a jury.
11. _____: _____. The questions of responsibility for delay and whether performance was prevented or delayed by an adverse party are questions of fact for a jury.
12. **Breach of Contract.** An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an intention to refuse performance in the future.
13. _____. Where a party's repudiation contributes materially to the nonoccurrence of a condition of one of his duties, the nonoccurrence is excused.
14. **Breach of Contract: Juries.** The question of whether there has been repudiation or whether repudiation was justified is a question of fact for the jury.
15. **Breach of Contract: Damages.** As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded.

Louis Michael Thrasher, for appellants.

David A. Blagg and Harold L. Hadland of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

WHITE, J.

Noel L. and Gloria J. Chadd appeal from an order of the Douglas County District Court sustaining Midwest Franchise Corp.'s motion for summary judgment.

This case arises out of a contract dispute between the Chadds and the appellee, Midwest Franchise Corp., a Nebraska corporation. Evidence was received by the district court in support of and in opposition to a motion for summary judgment. Taking a version most favorable to the appellants, the facts appear to be as follows. After some preliminary negotiations the parties executed a document entitled "Lease Agreement" on May 9, 1979. Chadds agreed to lease their land and a building, to be constructed, to Midwest. The building was to be used as a Bonanza restaurant. Chadds were to erect a

building, or subcontract the construction, in accordance with plans and specifications provided by Midwest. Chadds were responsible for obtaining bids (including a bid by Chadds themselves) and submitting the same to Midwest for its approval.

The facts are in dispute as to the problems which arose after the lease agreement was executed. Apparently, Chadds were furnished with a standard Bonanza building floor plan, the B-76 plan, which originated from Bonanza International in Dallas, Texas. Midwest made a decision to alter the B-76 plan for the Nebraska area. At least in part, the dispute in this case involves difficulties surrounding the acquisition of final plans for the purpose of an accurate construction bid.

Noel Chadd alleges that he was unable to obtain a complete working set of drawings required for an accurate bid. He notified the principals of Midwest, Larry Miller and Charles Shada, of this problem on several occasions. Both Miller and Shada admit that there had been considerable problems in obtaining final plans from Midwest's architect. Shada, however, believed that Chadd eventually received a complete, final set of plans from the architect. Chadd alleges that he never received an acceptable set of plans and specifications.

Chadds solicited one bid from Belmont Construction Company based on incomplete plans. They did not advertise generally for the bids, nor submit a bid themselves, because they were waiting for a resolution to the problem with the drawings. The one bid which Chadds received was above the estimated cost of construction set forth in the lease agreement. However, that cost apparently could have been reduced if modifications were allowed, and that would not be known without a final set of plans.

On or about August 22, 1979, Noel Chadd received a letter from Midwest which indicated Midwest's desire to rescind the lease agreement. In addition, on August 15, 1979, Chadd was informed by another landowner, Bill Lesoing, that Midwest had been negotiating with Lesoing and that it had signed a contract with him. Apparently, Midwest had been negotiating the Bonanza construction project with two other landowners besides Chadds. All three parcels of land were in close

proximity.

Chadds concluded the agreement with Midwest was breached as of August 22, 1979. The evidence is ambiguous, at best, as to Midwest's intention when it sent the attempted rescission letter. Operating under the assumption that the agreement was not going to materialize, Chadds began to explore other options for their land. Eventually, the Chadds conveyed the land to other parties by executing a joint tenancy warranty deed on July 26, 1983.

The district court, following the words of Neb. Rev. Stat. § 25-1332 (Reissue 1985), found that there were no genuine issues of material fact and that Midwest was entitled to judgment as a matter of law. The court's order did not elaborate as to the basis for its decision. This court was compelled to search the record and examine every conceivable issue which might have been the deciding factor for the lower court's determination.

Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. *Cornhusker Agrl. Assn. v. Equitable Gen. Ins. Co.*, 223 Neb. 618, 392 N.W.2d 366 (1986). Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law. *In re Estate of Thompson*, 225 Neb. 643, 407 N.W.2d 738 (1987). The burden is on the moving party to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled. *Schrodt v. Sullivan Transfer & Storage Co.*, 222 Neb. 347, 383 N.W.2d 767 (1986). Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear. *Id.* In considering a motion for summary judgment, the evidence is to be viewed in the light most favorable to the party against whom the motion is directed, giving to that party the benefit of all reasonable inferences which may be drawn from the evidence. *In re Estate of Thompson, supra.*

The first issue that must be addressed in this action is whether there was an enforceable contract under which the appellants could recover. A lease is to be construed as any other contract. *Omaha Country Club v. Dworak*, 186 Neb. 336, 183 N.W.2d 264 (1971). The proper construction of a written contract is generally a question of law to be determined by the courts. *Dockendorf v. Orner*, 206 Neb. 456, 293 N.W.2d 395 (1980).

Of particular concern in this action is whether, as a matter of law, paragraph 3 of the lease agreement negates the enforceability of the instrument. Paragraph 3 states in part:

> 3. CONSTRUCTION. Upon execution of this Lease, Owners [Chadds] shall proceed to obtain bids (including a bid by Owners) for the construction of the building in accordance with the attached plans and specifications which have been prepared and approved by Tenant [Midwest]. Upon Owners' acceptance and approval of a construction bid, *the same shall be submitted to Tenant for acceptance and approval.* It is estimated that the cost of the building will be between $240,000 and $260,000.

(Emphasis supplied.)

Approval or satisfaction clauses such as that found in the highlighted language above often give rise to arguments that the agreement is too vague or illusory. An agreement which depends on the wish, will, or pleasure of one of the parties is unenforceable. *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984). Mutuality of obligation is an essential element of every enforceable agreement. *Id.* In the present case the question becomes whether Midwest was required to accept or approve any bid at all if submitted by Chadds. In other words, Was Midwest's obligation to perform merely illusory?

Such satisfaction or approval clauses are generally held not to be too vague or illusory. The party to be satisfied must act in good faith or not unreasonably disapprove the subject matter. Reasonableness or good faith can be inferred with respect to the terms of a lease, which must be acceptable to the tenant. See, *In re Wonderfair Stores, Inc. of Arizona*, 511 F.2d 1206 (9th Cir. 1975); *Mattei v. Hopper*, 51 Cal. 2d 119, 330 P.2d 625 (1958). The inference of good faith or reasonableness provides a

standard against which a party's performance is measured. Such "on approval" or "satisfaction" clauses are not used as a vehicle to defeat contracts. " ' "[S]uch contracts have been almost universally upheld.". . .' " *In re Wonderfair Stores, Inc. of Arizona, supra* at 1210. The bid approval clause in the case at bar does not invalidate the entire agreement.

Appellee contends that several conditions precedent exist, in this lease agreement, which were not performed by appellants. For this reason, appellee asserts, the agreement is not enforceable. It is true that where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed. *K & K Pharmacy v. Barta*, 222 Neb. 215, 382 N.W.2d 363 (1986). Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party. *Brown v. Alron, Inc.*, 223 Neb. 1, 388 N.W.2d 67 (1986).

However, it is equally true that a condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition. That person must put forth a good faith effort to obtain the condition. Additionally, if a promisor prevents or hinders the occurrence of a condition precedent, the condition is excused. *Id.*

Midwest asserts that Chadds never submitted a bid as required, could not keep construction costs within the stated cost estimate, never attached a required addendum setting forth exact rental costs, and did not complete the building or deliver possession of such to Midwest for its acceptance. Chadds allege that these conditions precedent were not fulfilled because Midwest prevented or hindered Chadds from performing as required. Therein lies the basis for this court's conclusion that a summary judgment in this case was inappropriate. The record reflects a number of genuine issues of material fact.

There is evidence that Midwest or its architect delayed completion of finalized plans. The evidence is conflicting as to whether Chadds ever received final plans and specifications. Noel Chadd asserts that he could not generally advertise for

bids nor obtain an accurate bid due to inadequate drawings. In short, all of the unfulfilled conditions precedent asserted by Midwest were arguably contingent upon Chadds obtaining final plans. The issues of reasonableness and good faith as to performance by the parties are questions of fact for a jury. 17A C.J.S. *Contracts* § 630 (1963). In addition, the questions of responsibility for delay and whether performance was prevented or delayed by an adverse party are questions of fact for a jury. *Id.*

Appellants further contend that they were unable to ever satisfy these conditions precedent due to the appellee's repudiation of the contract. The record indicates that Noel Chadd received a letter of desire to rescind from Midwest dated August 22, 1979. Chadd was informed on August 15, 1979, by another landowner that Midwest had signed an agreement to construct the planned Bonanza on that individual's land. There is some evidence that Chadd was told by one of the principals of Midwest, Larry Miller, that Midwest "wanted out" of the lease agreement.

An anticipatory breach of contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evincing an intention to refuse performance in the future. *Hooker and Heft v. Estate of Weinberger*, 203 Neb. 674, 279 N.W.2d 849 (1979).

In a case such as this where one party (Chadds) has not fulfilled certain conditions precedent to the other party's (Midwest's) duty to perform, a special rule of law applies. Where a party's repudiation contributes materially to the nonoccurrence of a condition of one of his duties, the nonoccurrence is excused. Restatement (Second) of Contracts § 255 (1981).

The question of whether there has been repudiation or whether repudiation was justified is a question of fact for the jury. 17A C.J.S. *Contracts* § 630(e) (1963); 17 Am. Jur. 2d *Contracts* § 443 (1964); *Farwell Construction Co. v. Ticktin*, 84 Ill. App. 3d 791, 405 N.E.2d 1051 (1980). In this case, whether the words or acts of Midwest evinced an intention to refuse performance in the future is a genuine issue of material fact which cannot be disposed of by summary judgment.

Appellee has raised the issue of whether appellants can recover damages in this action. As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach. *Quad-States, Inc. v. Vande Mheen*, 220 Neb. 161, 368 N.W.2d 795 (1985). Of particular importance to this appeal from a summary judgment, it should be noted that appellee has challenged appellants' version of the measure of damages. Where the measure of damages has been challenged by objections to the pleading or evidence, such objections require submission of the correct measure of damages to the jury if there is competent evidence to support it. *Beveridge v. Miller-Binder, Inc.*, 177 Neb. 734, 131 N.W.2d 155 (1964).

This court declines to determine the materiality of the facts or issues which bear on damages without a more complete trial record. The appropriateness of damages may be affected by parol evidence of subsequent modifications of the contract, and this court will not discuss such issues in the absence of proof.

The depositions, pleadings, and interrogatories offered to support and oppose the motion for summary judgment raise numerous factual disputes. Certainly the inferences to be drawn from these material facts are not clear. Midwest Franchise Corp. has failed to meet its burden of establishing conclusively the lack of any material issue of fact in this case. Accordingly, the judgment is reversed and the cause remanded for trial.

REVERSED AND REMANDED.