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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 23, 1983 and APRIL 5, 1984

IN THE

Supreme Court of Nebraska

VOLUME CCXVI

DONALD C. PATTON

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By Donald C. Patton, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT

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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 81-690: **State ex rel. NSBA v. Matt.** Motion for reinstatement sustained; applicant reinstated.

No. 82-582: **State v. Neal.** Affirmed; see Rule 7A.

No. 83-011: **Nebraska Public Service Commission v. Saber, Inc.** Stipulation allowed; appeal dismissed.

No. 83-066: **In re Estate of Flicker, Flicker v. Newell.** Motion and stipulation to reverse and remand appeal sustained; reversed with directions.

No. 83-131: **Zivny v. Saga Corp.** Stipulation allowed; appeal dismissed.

No. 83-155: **State v. Janousek.** Affirmed; see Rule 7A.

No. 83-158: **State v. Wilson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-176: **Jorgensen v. Gish.** Stipulation allowed; appeal dismissed.

No. 83-214: **Woehl v. American Family Insurance Group.** Stipulation allowed; appeal dismissed.

No. 83-263: **State v. Bruns.** Appeal dismissed for failure to file briefs.

No. 83-328: **State v. Kelley.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-339: **Matthews v. Matthews.** Affirmed as modified by order of the court.

No. 83-344: **Haave v. Prothman.** By order of the court, appeal dismissed.

No. 83-354: **Bittner v. Prothman.** By order of the court, appeal dismissed.

No. 83-356: **Bedford Marketing Group, Ltd. v. Northwestern Bell Telephone Co.** Dismissed for

failure to file briefs.

Nos. 83-359, 83-360: **Washington County Bank v. Kolterman.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 83-361: **State v. Bryant.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-370: **State v. Jones.** Affirmed; see Rule 7A.

No. 83-379: **State v. Boudonck.** Affirmed; see Rule 7A.

No. 83-380: **State v. Huls.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-390: **Skochdopole Agency v. Baker.** Stipulation allowed; appeal dismissed.

No. 83-456: **State v. Ellis.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-458: **AFSCME v. Dakota County.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-459: **Commercial Natl. Bank & Trust Co. v. Mayhew Products Corp.** Appeal dismissed at costs of appellant.

No. 83-465: **State v. Klinginsmith.** Affirmed; see Rule 7A.

No. 83-474: **In re Water Appropriation, Sheridan-Wilson Irrigation District v. State Department of Water Resources.** Affirmed as modified by order of the court.

No. 83-477: **Bilstein v. Ehler.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 83-488: **Hanson v. Pioneer Federal Savings and Loan.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-489: **State ex rel. Hood v. Massa.** By order of the court, appeal dismissed as moot.

No. 83-496: **State v. Buller.** Motion of court-appointed counsel for leave to withdraw appearance

sustained; judgment affirmed; see Rule 3B.

No. 83-511: **State v. Doak.** By order of the court, appeal dismissed for failure to file briefs.

No. 83-538: **Union Pacific Motor Freight v. First National Bank of Omaha.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 83-539: **State v. Gulans.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-555: **Weber v. Weber.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-558: **In the Interest of Ingham, State v. Ingham.** Stipulation allowed; appeal dismissed.

No. 83-564: **State v. Pate.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-565: **State v. Nance.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-571: **State v. Stickney.** Affirmed; see Rule 7A.

No. 83-572: **State v. Wetzel.** By order of the court, appeal dismissed for failure to file briefs.

No. 83-586: **State v. Pettinger.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-589: **State v. Morris.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-595: **State v. Flying Hawk.** Affirmed; see Rule 7A.

No. 83-596: **Bittner v. Prothman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-597: **Haave v. Prothman.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 83-605: **State v. Rutt.** Motion of court-appointed counsel for leave to withdraw appearance

sustained; judgment affirmed; see Rule 3B.

No. 83-607: **Grady v. Grady.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-609: **State v. Carlson.** Affirmed; see Rule 7A.

No. 83-613: **Cavanaugh v. A. C. & S., Inc.** Stipulation allowed; appeal dismissed.

No. 83-616: **State v. Petersen.** Affirmed; see Rule 7A.

No. 83-618: **State v. Billingsley.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-619: **State v. Velder.** Affirmed; see Rule 7A.

No. 83-628: **Gritzfeld v. Proctor Silex SMC Corp.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 83-630: **Younger v. State ex rel. State Real Estate Commission.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-632: **State v. Harrington.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-633: **State v. Brown.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-638: **Haase v. Dubuque Packing Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-641: **State v. Fitzgerald.** Affirmed; see Rule 7A.

Nos. 83-642, 83-643: **State v. Joseph.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-645: **Dall v. Dall.** By order of the court, appeal dismissed for failure to file briefs.

No. 83-647: **State v. Apodaca.** Affirmed; see Rule 7A.

No. 83-649: **Exchange Bank v. Prochaska.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-655: **State v. Titus.** Affirmed; see Rule 7A.

No. 83-660: **Bellevue Insurance Agency v. Rose.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-662: **Schroll v. Fulton.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-664: **State v. Troy.** Dismissed for failure to file briefs.

No. 83-673: **Chalmers v. Seward Civil Service Commission.** Stipulation allowed; appeal dismissed.

No. 83-680: **State v. Woodcook.** Affirmed; see Rule 7A.

No. 83-682: **State v. Harris.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-698: **Equitable Life Assurance Society of United States v. Trotter.** Stipulation allowed; appeal dismissed.

No. 83-702: **State v. Miller.** By order of the court, appeal dismissed for failure to file briefs.

No. 83-709: **Davis v. City Exterminators, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-718: **State v. Wickard.** Affirmed; see Rule 7A.

No. 83-720: **State v. Chesbrough.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-737: **State v. Schmid.** Affirmed; see Rule 7A.

No. 83-741: **State v. Woodhull.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

Nos. 83-742, 83-743: **State v. Robinson.** Motion of court-appointed counsel for leave to withdraw ap-

pearance sustained; judgment affirmed; see Rule 3B.

No. 83-745: **England v. England.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-746: **State v. Luna.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-750: **State v. Prunty.** Judgment affirmed; see Rule 7A.

No. 83-755: **Vittitoe v. Pacific Intermountain Express Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-761: **State v. Lespreance.** Stipulation allowed; appeal dismissed.

No. 83-763: **Colorado National Bank of Denver v. Roseboom.** Affirmed as modified by order of the court.

No. 83-764: **Jungbluth v. Jungbluth.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. 83-765: **State v. Rose.** By order of the court, appeal dismissed for failure to file briefs.

No. 83-766: **In re Application, Upper Republican NRD v. Seward.** Stipulation allowed; appeal dismissed.

No. 83-767: **State v. Clark.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-768: **State v. Boyer.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-769: **Stratton v. Stratton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-770: **Osmera v. Osmera.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-772: **Action Pig Co., Inc. v. Prime Swine, Inc.** Stipulation allowed; appeal dismissed.

No. 83-776: **State v. Davis.** By order of the court, appeal dismissed for failure to file briefs.

No. 83-783: **State v. Rose.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-784: **Black v. Black.** Stipulation allowed; appeal dismissed.

No. 83-788: **State v. Whitcomb.** Judgment affirmed; see Rule 7A.

No. 83-792: **Beatrice Natl Bank & Trust Co. v. Grancer.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 83-796: **State v. Wilson.** Judgment affirmed; see Rule 7A.

No. 83-801: **State v. Derrick.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-802: **State v. Harrington.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-803: **State v. Russell.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-804: **State v. Neal.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 83-814: **State v. Clark.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-816: **Equico Lessors, Inc. v. Hoss.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 83-818: **State v. Denker.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-827: **Snyder Industries, Inc. v. Walkers, Inc.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 83-835: **Commercial National Bank & Trust Co. v. Jones.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 83-837: **State v. Ryan.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-838: **State v. Johnson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-839: **State v. Wilson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-842: **State v. Wagner.** Motion of appellee to confess error granted; by reason of State confessing error, case is reversed and dismissed.

No. 83-845: **Commercial National Bank & Trust Co. v. Jones.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 83-846: **State v. Platt.** Stipulation allowed; appeal dismissed.

No. 83-847: **State v. Chapa.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-850: **State v. Wilson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-855: **Manning v. Farm Bureau Insurance Co.** Stipulation allowed; appeal dismissed.

No. 83-857: **Hearne v. Hearne.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-858: **State v. Reiling.** Affirmed; see Rule 7A.

No. 83-861: **State v. White.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-863: **Williams v. Williams.** Appeal dismissed as being premature.

No. 83-864: **Cordel v. Cordel.** Stipulation allowed; appeal dismissed.

No. 83-866: **State v. Patterson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-873: **In re Guardianship and Conservatorship of Sim v. Comiskey.** On court's sua sponte motion, appeal is dismissed as being premature.

No. 83-874: **Circle 76 Fertilizer, Inc. v. Nelsen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-889: **Aliano v. Medi-Centers of America, Inc.** Stipulation allowed; appeal dismissed.

No. 83-890: **State v. Turner.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-891: **Vigil v. City of Kimball.** Stipulation allowed; appeal dismissed.

No. 83-893: **Mikesell v. Mikesell.** Affirmed as modified by order of the court.

No. 83-895: **State v. Brown.** By order of the court, appeal dismissed for failure to file briefs.

No. 83-897: **State v. Womochil.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 83-904, 83-926: **Williams v. John Deere Co.** Stipulation allowed; appeal dismissed.

No. 83-905: **Piper v. Sweet Manufacturing Co.** Stipulation allowed; appeal dismissed.

No. 83-906: **In re Application United Telephone Co. v. Tracy Corp. II.** Affirmed as modified by order of the court.

No. 83-910: **State v. Blunt.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-912: **State v. Smith.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-919: **State v. Youngstrom.** Stipulation allowed; appeal dismissed.

No. 83-921: **State v. Dittman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-922: **Wiesegarth v. Sorensen.** By order of the court, stipulation allowed; appeal dismissed.

No. 83-925: **Griess v. Griess.** By order of the court, case is dismissed; see Rule 7.

No. 83-927: **State v. Keithley.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-934: **Evans v. Thomas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-936: **State v. Clark.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-937: **State v. Smith.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

Nos. 83-939, 83-940, 83-941: **State v. Tiller.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-945: **Campbell v. Campbell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-946: **Barker v. Riibe.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-949: **Roberts v. Roberts.** Affirmed as modified by order of the court.

No. 83-951: **Stromsburg Bank v. Nuttelman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-959: **Goergen v. Goergen.** Stipulation allowed; appeal dismissed.

No. 83-963: **State v. Devries.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-968: **Noell v. Noell.** Stipulation allowed; appeal dismissed.

No. 83-971: **State v. Short.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-974: **Jensen v. Lewandowski.** Appeal dismissed as being premature.

No. 84-002: **Church of the Holy Spirit v. Bevco, Inc.** Stipulation allowed; appeal dismissed.

No. 84-007: **Klein v. Scherer.** Judgment affirmed; see Rule 7A.

No. 84-015: **Haas v. Haas.** Stipulation allowed; appeal dismissed.

No. 84-021: **Elznic v. Elznic.** Stipulation allowed; appeal dismissed.

No. 84-024: **State v. Thomas.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-026: **Region IV Mental Health Services District v. Board of Adjustment of the City of Norfolk.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 84-028: **Painter v. G M Auto Parts, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 84-036: **Kurtzer v. Reardon.** Judgment affirmed; see Rule 7A.

No. 84-041: **State v. Bradford.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-069: **In re Interest of Johnson.** Stipulation allowed; appeal dismissed.

No. 84-073: **American Charter Federal Savings & Loan Assoc. v. Chart Management Co.** Stipulation allowed; appeal dismissed.

No. 84-075: **Wicks v. Adams.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-087: **Malone v. Benson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-088: **Jennum v. Jennum.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-174: **State v. Matthes.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

LANGE BUILDING AND FARM SUPPLY, INC., A CORPORATION, APPELLEE, V. OPEN CIRCLE "R", INC., A CORPORATION, APPELLANT.

342 N.W.2d 360

Filed December 23, 1983. No. 82-412.

1. **Directed Verdict.** A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the verdict is sought, and the party must be given the benefit of every inference which can reasonably be drawn therefrom.
2. _____. Where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, such issue must be submitted to the jury.
3. **Contracts: Substantial Performance.** Substantial performance must be shown before an action on the contract can be brought.
4. _____: _____. There is substantial performance of a building contract where all of the essential elements necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete strict performance that the owner obtains substantially what is called for by the contract.
5. **Jury Instructions.** Jury instructions must be considered together, and if when considered as a whole they state the law correctly, they are not erroneous. In the framing of jury instructions it is not necessary that the trial court follow the exact language used by this court in stating a rule of law.
6. **Trial: Witnesses: Motions for Mistrial.** Where plaintiff's counsel on cross-examination of defendant's witness propounds a question which calls for proper evidence, the fact that an irresponsive or inadvertent answer includes reference to insurance will not be grounds for declaring a mistrial.
7. _____: _____: _____. A party to an action cannot be heard to complain if reference to insurance is interjected by his own witness and the other party's counsel is in no way responsible for it.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

Sidwell & Shofstall, for appellee.

BOSLAUGH, WHITE, and HASTINGS, JJ., and BROWER and MCGINN, D. JJ.

BROWER, D.J.

This action was brought by Lange Building and Farm Supply, Inc. (builder), to recover for breach of a written contract for the repair of a grain storage bin and, for its second cause of action, to recover money for improvements made to a second grain bin under an oral contract.

Open Circle "R", Inc. (owner), denied generally the claims of builder's first cause of action, admitted there had been a written agreement for such work, but alleged that builder had failed to substantially perform the contract. By way of cross-petition, counterclaim, and setoff, owner claimed damages, alleging that builder had damaged steel panels while attempting to repair the bin; had impliedly warranted its work; in breach of said warranty had caused damage, which was the fair and reasonable value of the labor and material required to repair the bin; and had, in addition, damaged a grain auger, which had to be replaced.

In answer to the second cause owner admitted the performance by builder of the oral contract to provide improvements for the second grain bin, but disputed the consideration due builder for the performance.

This case had previously been before the court for review, *Lange Building & Farm Supply, Inc. v. Open Circle "R", Inc.*, 210 Neb. 201, 313 N.W.2d 645 (1981), where this court had reversed the dismissal of the builder's suit by the trial court and remanded the case for further proceedings. The case was retried

to a jury, at the conclusion of which a verdict was rendered for builder in the amount of $5,714.05. Upon the overruling of owner's motions for a new trial and judgment notwithstanding the verdict, appeal was made to this court.

The owner-appellant assigns certain errors in the proceeding below, and they are as follows: (1) The court failed to sustain owner's motion for a directed verdict at the close of builder's case; (2) The court erred in failing to give certain instructions to the jury proposed by owner; and (3) The court erred in failing to declare a mistrial.

The law is clear that a motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the verdict is sought, and the party must be given the benefit of every inference which can reasonably be drawn therefrom. *El Fredo Pizza, Inc. v. Roto-Flex Oven Company*, 199 Neb. 697, 261 N.W.2d 358 (1978); *Settell's, Inc. v. Pitney Bowes, Inc.*, 209 Neb. 26, 305 N.W.2d 896 (1981).

"[W]here reasonable minds may differ as to conclusions or inferences to be drawn from the evidence . . . such issues must be submitted to the jury." *Hansen v. Hasenkamp*, 192 Neb. 530, 534, 223 N.W.2d 44, 47 (1974); *Gerhardt v. McChesney*, 210 Neb. 351, 314 N.W.2d 258 (1982).

We must therefore review all of builder's evidence and the pleadings in this posture. The evidence discloses that the parties had entered into a contract to repair a storm-damaged grain bin following an inspection of the building by builder. Builder's president, who had discussed the repairs with Robert Cruise, president of owner, testified that they had discussed various ways that repairs might be made. This discussion took place in December of 1977. Following that discussion, builder conveyed a proposal to owner, which was delivered by mail in February of 1978.

After builder's proposal had been delivered to owner, the parties discussed three plans contained in the proposal. The first plan set out in the proposal provided for the removal of damaged steel sheets from the structure, and for the replacement thereof. The testimony shows that this plan would involve a high degree of risk, and no attempt was to be made to repair the bin in this fashion.

The second plan, which was designated as "Option I" in the contract or proposal, provided that the roof section, including the top two rings, was to be lifted off the damaged structure and the damaged plates replaced, followed by the lowering of the top rings and roof to the structure. "Option I" provided for consideration in the amount of $5,539.05.

The contract also contained a third plan, designated "Option II." This plan involved the jacking down of the entire bin and replacing the damaged steel sheets as the bin was reconstructed. The contract sets forth that the consideration for this "Option II" was $6,739.05.

Builder's testimony disclosed that if the attempted repairs under "Option I" did not succeed, it would then proceed to make the repairs under the plan provided in "Option II." Builder's testimony indicates that owner had agreed to such plan, provided owner was notified before builder proceeded with "Option II."

The contract or proposal that was signed by both parties does not specify which method of repair was to be undertaken by builder.

Builder did proceed to do the repair work on the first grain bin by resorting to the plan set forth in "Option I." The roof and top two rings were lifted off by a large crane, and the damaged panels were replaced. Upon attempting to lower the top two rings and roof sections to the bottom portion of the bin, an auger was damaged, which is admitted by builder. The testimony reflects that builder agreed

to adjust for this damage, but the parties could not agree as to the value of the auger.

When builder attempted to refasten the repaired top section of the bin and roof to the lower section, it was determined that the removed section would not fit the lower portion. Chains, clamps, and various tools were used in an attempt to draw the bin sections together, but all such efforts failed, and owner, after viewing the building, instructed builder to stop work. By use of a transit it was discovered at this time by builder that the foundation on one side of the bin had settled, thus causing the top of one side of the lower section of the bin to be lower than the other. For this reason the removed section could not be reattached to the lower portion.

Builder then instructed owner that there was no point in proceeding any further with "Option I" and that it would have to proceed with "Option II" if the bin were to be repaired. At this juncture owner informed builder that owner wanted to consult with others first.

No further directions came from owner, and owner employed another contractor to make the repairs under "Option II" set forth in the contract. After builder submitted its bill for work performed under "Option I" and owner failed to pay, this action was commenced.

Performance of the work as to the second grain bin was admitted, and there appears only a dispute as to what builder was to receive for the work performed.

All of the evidence thus adduced, together with the pleadings, in builder's case, viewed in the light most favorable to that party, could reasonably show that builder had substantially performed its part of the agreement as far as it could go when owner refused to permit builder to proceed under "Option II" when the method of repair outlined under "Option I" failed to accomplish the desired result. The trial

court was correct when it overruled owner's motion for a directed verdict.

We next proceed to the question raised by the failure of the court to submit to the jury owner's tendered instruction No. 6. The trial court in its instruction defined substantial performance as follows: "Each party to a contract has a duty to perform his obligations under the contract. Performance may be substantial even though every detail is not in strict compliance with the terms of the contract; something less than perfection is required. Some measure of nonperformance will be tolerated if the defendant has received, with relatively minor and unimportant deviations, what he bargained for. But if the defect or uncompleted performance is of such extent and nature that there has been no practical fulfillment of the terms of the contract, then there has been no substantial performance."

At the jury instruction conference owner's attorney offered in lieu thereof the following instruction No. 6: "A party cannot maintain an action on contract without a prior substantial performance on his part. Substantial performance is shown when the following circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform his part of the contract. (2) The results of the endeavor are beneficial to the other party. (3) Such benefits are retained by the party. If any one of the circumstances is not established, performance is not substantial and the party has no right of recovery. Or alternatively, substantial performance is shown in a building contract when all of the essentials necessary to the full accomplishment of the purpose for which the thing contracted for has been constructed and performed with such an approximation to complete performance that the owner then obtains substantially what is called for by the contract."

This court has held that substantial performance must be shown before an action on the contract can

be brought. *Schweitz v. Robatham*, 194 Neb. 668, 234 N.W.2d 834 (1975). The court has also held that substantial performance is shown in a building contract when all of the essential elements necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed and performed with such an approximation to complete strict performance that the owner obtains substantially what is called for by the contract. *Jones v. Elliott*, 172 Neb. 96, 108 N.W.2d 742 (1961); *Tibbs v. Fisher*, 208 Neb. 306, 303 N.W.2d 293 (1981).

Owner in this action cites *Alliance Tractor & Implement Co. v. Lukens Tool & Die Co.*, 194 Neb. 473, 233 N.W.2d 299 (1975), for the proposition that substantial performance is shown when the following circumstances are established by the evidence: (1) The party made an honest endeavor in good faith to perform its part of the contract; (2) The results of the endeavor are beneficial to the other party; and (3) Such benefits are retained by the other party. If any one of the circumstances is not established, the performance is not substantial and the party has no right to recover.

It is noted that the rule taken from that case was discussed by the court previously in *Rickertsen v. Carskadon*, 172 Neb. 46, 108 N.W.2d 392 (1961), when this court ruled that the three elements, standing by themselves, required something further.

The court ruled in *Rickertsen v. Carskadon*, *supra*, that substantial performance was shown where the jury could believe the plaintiff in good faith substantially performed the terms of his contract, but that if there were some slight omissions or defects which were not so essential as to defeat the object of the parties, but could be readily remedied, then the plaintiff could recover the contract price less the damages occasioned by the omission or defect. Such damages were what it would have cost the defendant to remove the defect or omission, and thus give to the defendant what his contract called for.

The question, then, before the court is whether or not the instruction as given, including all other instructions given in the proceeding by the trial court, properly sets forth the requirement of substantial performance.

Instruction No. 2 sets forth that the plaintiff was required to substantially perform the work to be performed under the terms of the contract and that the burden was upon it to show such substantial performance. Instruction No. 2 also contained the following: "If the jury determines that the plaintiff is entitled to recover against the defendant on the claims of the plaintiff and that the defendant is entitled to recover against the plaintiff on its counterclaim, then you should deduct the lessor [sic] amount from the greater amount and return your verdict in favor of the party entitled to the greater amount for the difference only."

It is noted that owner-appellant did not object to this instruction.

Instruction No. 6 states that each party has a duty to perform its obligations under the contract. The first requirement would be that the party make an honest endeavor to perform. The second would be that the other party receive some benefit which was retained. It is noted that the instruction as given provides that some measure of nonperformance would be tolerated if the defendant has received, with relatively minor and unimportant deviations, what was bargained for.

It would appear to the court that although the instruction given is somewhat different than that submitted by owner, nothing really has been omitted when all of the instructions given are considered together.

Our court has ruled that jury instructions must be considered together, and if when considered as a whole they state the law correctly, they are not erroneous. *Gee v. Dinsdale Brothers, Inc.*, 207 Neb. 224, 298 N.W.2d 147 (1980). This court has also held

that in framing the instructions it is not necessary that the trial court follow the exact language used by this court in stating a rule of law. *Segebart v. Gregory*, 160 Neb. 64, 69 N.W.2d 315 (1955).

In view of the above we believe that the instruction given, although not set forth in the same terms as that offered by owner, was sufficient.

The court comes next to the question of whether or not the trial court erred in failing to sustain owner's motion for mistrial. Owner sets forth that the court committed prejudicial error in failing to sustain the motion for mistrial where builder's attorney in cross-examination of owner's president obtained responses to questions wherein insurance was injected into the case.

Owner cites *Motis v. Manning*, 200 Neb. 593, 264 N.W.2d 844 (1978), in support of the proposition that where insurance has been interjected into the case, the court must admonish the jury, and upon proper motion by the adverse party dismiss the case. In the present case the reference to insurance first came up during the cross-examination of owner's president by builder's counsel. The questions leading up to the disclosure were as follows: "Q During the first visit that Bill Lange made to your farm when you first talked about this option 1 for repairs to the grain bin, was there anyone present other than you and your son and Bill Lange? A Not at the moment we were talking. There was another man on the farm also examining the tanks. Q What was his name? A I don't know. He's with MFA Insurance."

No objection was made by owner's counsel at the time this response was made, nor did the court admonish the jury to disregard such statement.

In a later cross-examination of the same witness by builder's counsel, the questions and answers were as follows: "Q Now, Mr. Cruise, you've not paid the Langes for any of the work that they did? A No, I haven't. Q In your cross-petition and in the evi-

dence that you've offered here, you're asking that Langes pay for the repairs done by Quail and by the electricians and all of those other people, is that correct? A Yes, damages that were occurred [sic]. Q Now when the wind damaged your bin, Mr. Cruise, damaged the bin belonging to Open Circle R, didn't you expect to have to pay somebody for those repairs? A That is what I carry insurance for, and I carry a lot of insurance."

This court notes that these responses injecting the reference to insurance into the case were answers unsolicited by builder's counsel and were not responsive to the questions asked.

The reference to insurance in *Motis v. Manning*, *supra*, came as a result of statements made by plaintiff's own witness in response to plaintiff's counsel's question. In that situation the error could have been avoided had counsel admonished his own witness prior to examination. That situation can be distinguished from the situation involved here because builder's counsel could not have anticipated such response from a hostile witness, especially where the answer was never solicited and was not responsive.

The general rule appears in Annot., 4 A.L.R.2d 761, 784 (1949), and has been adopted by most jurisdictions. "By weight of authority . . . the fact that an irresponsive or inadvertent answer includes a reference to insurance will not be ground for declaring a mistrial."

Where counsel propounds questions which call for proper evidence, the fact that an irresponsive or inadvertent answer includes reference to insurance will not be a ground for declaring a mistrial. This is especially true where the question is propounded by plaintiff's counsel on cross-examination of defendant's witness. *Muehlbach v. Mercer Mortuary and Chapel, Inc.*, 93 Ariz. 60, 378 P.2d 741 (1963); *McCaffery v. St. Louis Pub. Serv. Co.*, 363 Mo. 545, 252 S.W.2d 361 (1952); *Stewart v. Hilton*, 247 Iowa 988, 77

N.W.2d 637 (1956). Nor can the defendant complain if it is interjected by his own witness and the plaintiff is in no way responsible for it. *Flatt v. Hill*, 379 S.W.2d 926 (Tex. Civ. App. 1964); *El Rancho Restaurants, Inc. v. Garfield*, 440 S.W.2d 873 (Tex. Civ. App. 1969).

In the first instance builder's counsel asked for the names of persons present at the initial examination of the premises. In the second incident involved, builder's counsel asked who was to pay for the repairs, which would appear to be a relevant fact inasmuch as owner had refused to pay builder and had sought, coincidentally, in its countersuit, repair cost to be paid by builder to another contractor hired to proceed with "Option II." Builder's counsel had not interjected the insurance through any witness he could have admonished. The trial court did not abuse its discretion when it ruled that owner-appellant was not entitled to a mistrial.

The judgment of the trial court is affirmed.

AFFIRMED.

YALE RICHARDS, TRUSTEE, AN INDIVIDUAL, FOR AND ON BEHALF OF WESTSIDE SUPPLY COMPANY, APPELLEE, V. ROBERT L. ARTHALONEY AND KAREN K. TAYLOR, APPELLANTS.

342 N.W.2d 642

Filed December 23, 1983. No. 82-602.

Usury. Under Illinois law the question of whether a loan is usurious is a question of fact, and in determining that question equity will look to the substance of the transaction and disregard the form, and will not permit parties to evade the statute by any scheme or expedient.

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

Monte Taylor and Clayton Byam, for appellants.

Steven J. Riekes of Richards, Riekes, Brown & Zabin, P.C., for appellee.

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

KRIVOSHA, C.J.

The instant action was commenced in the district court for Douglas County, Nebraska, in which the plaintiff sought to foreclose upon a real estate mortgage dated September 16, 1976, covering three separate tracts of land which had been delivered by the appellants, Robert L. Arthaloney and Karen K. Taylor (formerly Karen K. Arthaloney) (Arthaloneys), then husband and wife, to the appellee, Yale Richards, as trustee for and on behalf of Westside Supply Company, to secure a certain note executed by the Arthaloneys. The note, also dated September 16, 1976, which was executed and delivered by the Arthaloneys to Richards, was in the principal sum of $45,067.82. Robert L. Arthaloney was the sole stockholder of Robert's Sheet Metal Co. (Robert's), a corporation, and the corporation was operated by the Arthaloneys during all the times relevant to this action.

Following the trial, the district court found that the Arthaloneys were indebted to Richards in the sum of $16,582.90, and ordered a foreclosure of the real estate in satisfaction of the debt. The Arthaloneys have now appealed to this court, assigning five specific errors allegedly committed by the trial court. We have reviewed all of the assigned errors and will discuss them hereafter in detail. Our examination of the assignments, however, leads us to the conclusion that the trial court was essentially correct in its decision and, except as modified herein, the judgment should be affirmed.

The evidence discloses that Robert's, a heating and air-conditioning business located in Elkhorn, Nebraska, and a customer of Westside Supply Company, was having financial difficulty in 1976. Ap-

parently, Robert's had experienced such difficulty on previous occasions, but it had succeeded, at least temporarily, in working out those difficulties. In 1976 Robert's was indebted to Westside in the amount of $35,000 for material supplied by Westside to Robert's. Westside determined to terminate Robert's credit with Westside, and so advised Robert's. Because Westside was a principal supplier of Robert's, such action would have been extremely detrimental to Robert's and would have resulted in the company, in all probability, having to discontinue its operations.

In an effort to assist Robert's out of its financial difficulties, Westside agreed to arrange a loan for Robert's with a lending institution known as Financial Management Services, Inc. (FMSI). The evidence discloses that FMSI was an Ohio corporation with its principal place of business in Illinois. As the FMSI membership agreement offered in evidence discloses, FMSI was in the business of providing financing plans for wholesale suppliers who were members of FMSI, as well as for the customers of such members. Westside was a member of FMSI, and therefore Robert's, as a customer of Westside, was eligible for such a loan. In fact, the evidence discloses that in both 1974 and 1975 Robert's had borrowed money from FMSI through this method and was still indebted to FMSI for these loans.

Under the terms of the agreement the customer, Robert's, was required to sign a note with FMSI, and the supplier member, Westside, was required to guarantee the note. Pursuant to this arrangement, the Arthaloneys, on September 16, 1976, signed a promissory note in favor of FMSI in the principal sum of $45,067.82 (Illinois note). While the note itself was not personally signed by the Arthaloneys, they did sign a power of attorney which appointed Joe McLaughlin, "with right of substitution," to physically execute the note within the State of Illinois, where FMSI was located. Apparently, this

was done to have the note signed in the state where FMSI conducted its business, and therefore to subject the transaction to the laws of the State of Illinois. This note, the Illinois note, was an installment note which obligated Robert's to make 36 monthly payments of $1,251 to FMSI.

Westside agreed to guarantee the loan to FMSI, but, as a condition of guaranteeing that loan, it required the Arthaloneys to sign a note in Nebraska in favor of Westside in the amount of the Illinois note. Furthermore, to secure the Nebraska note, Westside required the Arthaloneys to execute and deliver to Westside a mortgage. The mortgage covered the three tracts of land owned by the Arthaloneys. Additionally, the Arthaloneys were required to execute an indemnity agreement whereby the Arthaloneys agreed to indemnify and hold Westside harmless from any payments which Westside would be required to make for and on behalf of Robert's in the event that Robert's defaulted in payment.

The Arthaloneys made monthly payments to FMSI from October 15, 1976, to April 15, 1978, at which time they defaulted in payment, and FMSI required Westside to continue making payments on the note. The evidence discloses that the balance due on April 15, 1978, when Robert's defaulted, was in the amount of $19,141.32. Pursuant to the membership agreement entered into between Westside and FMSI, FMSI took monthly payments from Westside's dealer reserve account in payment of the Illinois note. Westside then, through its trustee, sought to recover from the Arthaloneys on their Nebraska note and mortgage.

In perfecting their appeal to this court the Arthaloneys have assigned five specific errors. We shall discuss each of them in disposing of the appeal.

We believe that the first and most significant issue which must be addressed is assignment No. 3. In that assignment the Arthaloneys maintain that the trial court erred in not finding that Westside was obligated to raise the defense of usury with FMSI on

the Illinois note and that by failing to do so waived its right to reimbursement from the Arthaloneys. In arriving at its decision the trial court found that although the Illinois note to FMSI was usurious, Westside had no obligation to raise the defense absent a request from the Arthaloneys. We need not, however, reach the question of Westside's obligation as guarantor to raise the defense of usury because we believe the trial court was in error in concluding that the Illinois note was usurious.

The Arthaloneys alleged that under the provisions of Ill. Ann. Stat. ch. 74, § 4 (Smith-Hurd 1966), the Illinois note exceeded the lawful rate of interest which could be charged under Illinois law. While on its face that may be true, the same section of the Illinois statute relied upon by the Arthaloneys provides for certain exceptions to the limitation on the amount of interest that may be charged, much like the Nebraska law. Neb. Rev. Stat. § 45-101.04(2) (Reissue 1978). Section 4(c) of the Illinois Interest Act provides as follows: "It is *lawful* to charge, contract for, and receive any rate or amount of interest or other compensation with respect to the following transactions: . . . (c) Any business loan to a business association or copartnership or to a person owning and operating a business as sole proprietor or to any persons owning and operating a business as joint venturers, or to any limited partnership, or to any trustee owning and operating a business or whose beneficiaries own and operate a business, transacted solely for the purpose of carrying on or acquiring the business of such business association, copartnership, joint venture, limited partnership, trustee, beneficiaries, or person . . . ." (Emphasis supplied.) The trial court concluded that the exceptions enumerated did not apply to the facts of this case because the loan to the Arthaloneys was not a loan to any of the specific individuals or entities named in subsection (c). We believe, however, that a reading of the Illinois cases establishes

that if, in fact, the loan is a "business loan," as opposed to a "nonbusiness loan," the exemption applies even though the Arthaloneys individually signed the note through their agent.

The evidence introduced at trial makes it quite clear that although the Arthaloneys individually authorized the execution of the various documents, the loan was clearly a business loan made for and on behalf of Robert's, the corporation. Exhibit 1, for example, the FMSI membership agreement under which the loan was made, specifically provides that the purpose of the plan is to provide financing for members "and the customers of such Members," implying that the loans are limited to business purposes. Section 2 of the same agreement, entitled "Operating Procedures," provides in part, "From time to time, with the voluntary consent of the customer, the Member may select certain accounts owed to the Member by its customer for financing in accordance with the Plan," again implying that these loans are only made for the purpose of paying off customer business accounts. In fact, one of the conditions of the loan agreement is that the member must, simultaneously with the making of the loan, assign to FMSI the customer's unpaid business accounts.

Exhibit 5 was the indemnity agreement executed by the Arthaloneys in favor of Westside. It recited in part, "WHEREAS, Arthaloneys have executed and delivered to Financial Management Services, Inc., an Ohio corporation, a certain promissory note of even date herewith, in the principal sum of Forty-Five Thousand Sixty-Seven and 82/100 Dollars ($45,067.82) *for Robert's Sheet Metal Co.*, and . . . ." (Emphasis supplied.) Again, this establishes the fact that the loan was made on behalf of the business and not the individuals.

Exhibit 7, the minutes of a special meeting of the board of directors of Robert's, provided in part as follows: "Mr. Arthaloney explained to the meeting

that he and Mrs. Arthaloney had been called upon to execute certain documents of indemnification and indebtedness in favor of Financial Management Services, Inc. and Yale Richards, Trustee, for the benefit of Westside Supply Company, which documents he then proceeded to read to the meeting. He informed the meeting that he and Mrs. Arthaloney were willing to execute such documents, provided that the corporation [Robert's Sheet Metal Co.] should indemnify them and he then read an Indemnification and Hold Harmless Agreement which he requested the corporation execute in favor of Robert L. Arthaloney and Karen K. Arthaloney."

Exhibit 8 was the indemnification agreement signed by Robert's Sheet Metal Co. to Robert L. Arthaloney and Karen K. Arthaloney, and it recited the fact that the Arthaloneys had signed the loan documents, including the FMSI note, *on behalf of* Robert's Sheet Metal Co. The agreement specifically provided, "WHEREAS, said obligation arose out of the business affairs of ROBERT'S SHEET METAL CO. and but for the execution of said documents, the said WESTSIDE SUPPLY COMPANY would have filed suit for the collection of said obligations . . . ."

Finally, exhibit 9, an agreement signed by the Arthaloneys to FMSI, acknowledged that the principal amount of the loan was to pay an account owing from "the Debtor to Westside Supply Co. 'SUPPLIER' in the sum of $35000.00." The evidence is clear that the only debtor having an account with Westside Supply Company in the amount of $35,000 was Robert's Sheet Metal Co.

The evidence therefore is overwhelming that, regardless of how the documents may in fact have been executed, the loan was for the purpose of financing an open business account owed by Robert's, a corporation, to Westside Supply, in the amount of $35,000, plus some additional sums owed to FMSI. In fact, the evidence conclusively establishes that

the funds acquired through the FMSI loan were distributed as follows: (1) $9,115.28 to FMSI for a debt already outstanding from previous loans made in 1974 and 1975; (2) $4,483.76 for a past due floor plan account of Robert's; and (3) $26,934.72 to Westside on its current open account. As noted by the Illinois court in *Huss v. Maras*, 77 Ill. App. 3d 554, 556-57, 396 N.E.2d 92, 94 (1979): "Although no authority appears to have defined the word 'loan' in the context of the business loan exception, the term should be broadly read so as to effectuate the policy underlying the exception. It appears that the legislature intended to give vitality to business financing, to make financing more available to smaller business ventures by exempting such transactions, whether evidenced by loans in the conventional sense or by any other financing." And as noted in *Chicago Title & Trust Co. v. Jensen*, 271 Ill. App. 419, 422 (1933): "The question whether a loan is usurious is a question of fact, and in determining that question equity will look to the substance of the transaction and disregard the form, and will not permit parties to evade the statute by any scheme or expedient."

A reading of the various Illinois cases dealing with the question of usury leads one to the conclusion that certain factors are significant in determining whether a loan is in fact a business loan falling within the statutory exception, or otherwise invalid. Those factors are: (1) Is the transaction an attempt on the part of individual signatories of the promissory note to apply the proceeds of the loan to carrying on or acquiring any business of theirs? (2) Is there a representation by a borrower to the lender that the loan is a business loan within the meaning of the Illinois statute, thereby estopping the borrower from claiming that the note was not exempt? (3) Is the use of the loan proceeds to discharge business liabilities rather than personal or nonbusiness ones? (4) What is the purpose of the loan? See, *Metcoff*

v. Mutual Trust Life Insurance Co., 33 Ill. App. 3d 1059, 339 N.E.2d 440 (1975); *Ross v. Lake City Equity Finance Corp.*, 425 F.2d 1 (7th Cir. 1970); *Ehlers v. Frey*, 109 Ill. App. 3d 1004, 441 N.E.2d 651 (1982); *Northwest Fed. Sav. & Loan Ass'n v. Weisberg*, 97 Ill. App. 3d 470, 422 N.E.2d 1101 (1981). We believe that when these factors are examined in light of the evidence, one must conclude this was a business loan within the exemption provisions of the Illinois statute.

In *Rock River Sav. & Loan Ass'n v. Kelly*, 58 Ill. App. 3d 339, 374 N.E.2d 1141 (1978), the Illinois court held that a loan to individual shareholders came within the business exemption of the Illinois Interest Act, thereby precluding the defense of usury. In *Rock River* various individuals, who were stockholders of a corporation owning a motel, sought long-term financing for their motel. In order to obtain the financing they were required to individually sign the note and mortgage. The interest rate exceeded the then lawful rate to individuals. In the action to foreclose the mortgage the individuals defended on the grounds of usury. In rejecting the defense the Illinois court said: "In the instant case, the individual defendants contend that they . . . had no personal business interest in obtaining the loan. . . . It is . . . apparent that the improvement of the property owned by Sterling Motel was undertaken in anticipation of future financial gain by the corporation, and that such financial gain would inure to the benefit of the shareholders of Sterling Motel. It is also noted that the failure to obtain permanent financing for the improvements to the Sterling Motel property would have a detrimental impact upon the financial stability of Sterling Motel, and a consequential adverse impact on the value of the shares of Sterling Motel, which were held by the individual defendants. Therefore, while the proceeds of the loan may have been directed to be paid to the corporation by the individual defendants, as shareholders of such corpo-

ration, the individual defendants, in obtaining the loan, were acting collectively as a business association or joint venture in promotion of the project and their investments in the shares of Sterling Motel." 58 Ill. App. 3d at 342-43, 374 N.E.2d at 1143-44.

Further, in *Maywood-Proviso State Bk. v. Sotos*, 95 Ill. App. 3d 155, 419 N.E.2d 668 (1981), the Illinois court held that the interest charged on a loan was not usurious because the purpose of the loan was to assist a corporation by getting rid of a pressing creditor and thus constituted a "business loan" within the meaning of the Illinois usury exemption statute. In *Sotos* the evidence disclosed that the Sotoses were the sole shareholders and officers of a corporation known as Mr. George's Restaurant, Ltd. The corporation had an outstanding balance on its account with Consumers Packing Company, its supplier of meat. The president of Consumers suggested and encouraged the Sotoses to borrow money to pay off the account. Moreover, he arranged a bank loan for them and actually brought the note to the restaurant for the Sotoses to sign. When suit was later filed on the note, the Sotoses defended on the grounds that the rate charged them as individuals was usurious. Again, in rejecting the contention that the loan was made to the two individuals and not to the business, the court said: "While the defendants contend that the loan was for an existing debt of a corporation for which they had no liability and the proceeds went directly to Consumers and were never in their control, the purpose of the loan was obviously to assist the corporation by getting rid of a pressing creditor. In doing this they were clearly motivated by a desire to help the corporation, not a desire to help Consumers . . . . The fact that the Bank was apparently also motivated by a desire to help Consumers . . . in making the loan, rather than to help Mr. George's Restaurant, makes no difference in this regard—it was still a loan for

business purposes." 95 Ill. App. 3d at 160, 419 N.E.2d at 672.

Likewise, in the instant case the evidence makes it clear that FMSI would not have made a loan to the Arthaloneys unless it was for a business purpose on a business debt owed to one of the members of FMSI. In fact, part of the loan was used to repay what was already a delinquent business debt owed by Robert's to FMSI.

The Arthaloneys rely heavily upon the case of *Metcoff v. Mutual Trust Life Insurance Co.*, 33 Ill. App. 3d 1059, 339 N.E.2d 440 (1975). They, however, misread this decision. In *Metcoff* two sons of Metcoff desired to obtain a loan to develop a real estate investment. Because they were unable to obtain the loan individually, the prospective lender suggested that the sons enlist the financial support of their parents, and a loan was eventually negotiated with the parents while the sons signed as principals. The court adopted the view that the loan was made to the parents, who had no direct business interest in the real estate investment, and that the loan proceeds were then transferred to the sons for the sons' business purposes. The parents in that case were permitted to interpose the defense of usury for the reason that no business purpose of the parents was served by the loan. The court did not permit the sons, however, to interpose the defense.

In the instant case the Arthaloneys cannot maintain that, like the elder Metcoffs, they were innocent bystanders. The Arthaloneys recognized that the FMSI loan was a business loan to Robert's regardless of who signed the note. So direct was the loan to Robert's Sheet Metal Co. that although Robert Arthaloney was the sole stockholder of the corporation, he went through the steps of calling a formal meeting of Robert's and, as president of Robert's, signed an indemnity agreement to him and his wife individually.

The evidence in the record is simply overwhelm-

ing that the loan was a business loan to Robert's for a business indebtedness. The trial court therefore should have determined that the Illinois note was a business loan to Robert's and was not usurious. Having determined that the Illinois note was not usurious and was therefore valid, we now address the other assignments raised by the Arthaloneys.

The Arthaloneys contend that the trial court erred in finding that there was adequate consideration for the various notes. In this regard the Arthaloneys are themselves in error. Their argument is based upon a statement found in 11 Am. Jur. 2d *Bills and Notes* § 227 at 255-56 (1963), which provides: "No considerataion [sic] can be predicated upon a pre-existing obligation which has been fully performed or discharged, or an alleged obligation which is void or nonexistent . . . . These principles are particularly applicable to an instrument given for an obligation of a third person, and it has been held that an instrument is without consideration where given for a debt of a third person *where such debt is worthless and uncollectible.*" (Emphasis supplied.) The Arthaloneys maintain that because Robert's Sheet Metal Co. was suffering such severe business losses, the loan by FMSI to it created a debt which was worthless and uncollectible. That, of course, is not what the citation in 11 Am. Jur. 2d, *supra*, means. The evidence discloses that after the loan by FMSI was made Robert's continued operating as a business for a considerable period of time, and in fact made payments on the loan from October 15, 1976, to April 15, 1978. The evidence further discloses that the Arthaloneys took considerable moneys out of the corporation by way of salaries during that same period of time. To suggest that the debt was worthless and uncollectible, within the meaning of the American Jurisprudence citation, and therefore without consideration, is foolish beyond further discussion. The assignment is simply without merit.

A further assignment of error raised by the

Arthaloneys is that the Nebraska note was usurious. This, likewise, is simply without merit. The Nebraska note provided for no interest until default. The amount of the Nebraska note was identical to the principal amount of the Illinois note guaranteed by Westside, and specifically provided that "this note shall bear interest after maturity at the maximum lawful rate." The Arthaloneys argued that because the Illinois note was usurious, therefore the Nebraska note was usurious. But since we have already determined that the Illinois note was not usurious, it therefore follows that the Nebraska note was not usurious. See, also, *Moffitt-Harrison Builders, Inc. v. Sandman*, 177 Neb. 425, 129 N.W.2d 524 (1964); *Western Securities Co. v. Naughton*, 124 Neb. 702, 248 N.W. 56 (1933). The assignment must be overruled.

An additional assignment of error is generally to the effect that Westside was not entitled to reimbursement for the sums allegedly paid out by it to FMSI because there was no competent evidence introduced at trial to establish that such sums had actually been paid by Westside. Again, the record is to the contrary. The Arthaloneys' argument in this regard is based upon their claim that exhibit 20, a computer printout, should not have been admitted into evidence as a business record and that without exhibit 20 the record is devoid of any relevant evidence on this issue. Exhibit 20 consisted of both a computer printout and certain pencil notations apparently put on the document after the business record was prepared. Disregarding the pencil notations, it is clear that exhibit 20, as originally prepared, was a business record which was admissible in evidence in accordance with the Nebraska Evidence Rules. See Neb. Rev. Stat. § 27-803(5) (Reissue 1979). When one considers exhibit 20 without the pencil notations, together with the other evidence offered at trial, the amount due and owing to Westside was clearly established. Exhibit 11 indi-

cates the payments made by Westside to FMSI. This fact was further testified to by David Nowell, general manager of FMSI, who testified that exhibit 11 reflected the payments made by Westside through its dealer account after default by the Arthaloneys. The only objection made to exhibit 11 was that it represented a loan to Robert Arthaloney and not to Robert's, and therefore was irrelevant. This objection was correctly overruled. The evidence in the record clearly establishes what payments were made by Westside to FMSI. There is simply no merit to this assignment of error.

Having determined, however, that Richards did in fact introduce sufficient evidence from which it could be determined how much money was paid by Westside to FMSI on behalf of Robert's, we must reexamine the trial court's determination as to the amount due and owing to Richards by the Arthaloneys under the indemnity agreement. Pursuant to § 3 of the membership agreement, and the testimony with respect to the deductions made from the dealer reserve account, Westside is entitled to be reimbursed for the amount that it paid to FMSI as guarantor of the note. The trial court awarded a total sum of $16,582.90. Of this amount $3,965.32 plus interest was to satisfy Robert's open account to Westside, and $12,617.58 was to satisfy moneys presumably paid by Westside to FMSI. The court calculated the amount of reimbursement on the basis of § 4 of the membership agreement, which indicates that upon default Westside may repurchase the loan, and in doing so the interest was to be calculated at the rate that FMSI paid. Because the amount of the interest was not proved at trial, the court concluded that the amount was not to be included in the judgment. However, a review of the record indicates that pursuant to § 3 of the membership agreement, FMSI was entitled to and did in fact, after default by the Arthaloneys, deduct monthly installment payments from Westside's dealer reserve account in

lieu of payment. The record discloses that before default the Arthaloneys paid a total of $23,798.24, representing both principal and interest. This left an outstanding balance at the time of default in the amount of $19,141.32. Westside is entitled to be reimbursed the amount which was deducted from its dealer reserve account in payment of the note to FMSI. The record discloses that the deductions from the account were made, and therefore the amount to be reimbursed should be modified to reflect the amount deducted and paid to FMSI, which was in the sum of $19,141.32 plus interest in the sum of $2,128.26. Richards is entitled to foreclose the mortgage to satisfy the debt, which we determine to be in the amount of $25,234.90, representing $21,269.58 on the FMSI loan and $3,965.32 on the open account.

Likewise, the last assignment of error is without merit. The Arthaloneys contend that the court erred in finding that the FMSI note was signed by an authorized agent, because the power of attorney appointed Joe McLaughlin and, in fact, the note was signed by Frank T. Capalino, Jr. To begin with, the power of attorney appointed Joe McLaughlin "with right of substitution" by him. The evidence discloses that Mr. Capalino succeeded Mr. McLaughlin in the position of general manager of FMSI, and by his assuming this position he was in fact substituted for McLaughlin. Moreover, the Arthaloneys, with knowledge of who signed the note, did in fact accept the benefits from the loan and the note which had been executed. They also made 19 payments on the note without objection as to the signature. By acknowledging the debt, and making payments with no objection, the Arthaloneys ratified and authorized the signature and cannot now be heard to complain. See Neb. U.C.C. § 3-404 (Reissue 1980). See, also, *Farmers Union Coop Assn. v. Commercial State Bank*, 187 Neb. 376, 191 N.W.2d 168 (1971).

Having concluded, therefore, that all of the

Arthaloneys' assignments of error are without merit, the judgment of the trial court is affirmed as modified herein.

AFFIRMED AS MODIFIED.

MERWIN E. JAMESON ET AL., APPELLEES, V. GILBERT NELSON ET AL., APPELLANTS.

341 N.W.2d 596

Filed December 23, 1983. No. 82-610.

1. **Courts: Appeal and Error.** On remand by this court the trial court has no alternative but to follow the directions given.
2. **Judgments: Appeal and Error.** In the absence of any evidence that the relief ordered by the trial court's judgment on the mandate is in excess of that necessary to accomplish this court's directions, the judgment on the mandate must be affirmed.

Appeal from the District Court for Franklin County: BERNARD SPRAGUE, Judge. Affirmed.

Steven A. Russell of Jacobsen, Orr & Nelson, for appellants.

Tye, Worlock, Tye, Taylor & Hopkins, for appellees.

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

WHITE, J.

This is an appeal from a judgment on the mandate issued by this court in *Jameson v. Nelson*, 211 Neb. 259, 318 N.W.2d 259 (1982). The facts are sufficiently set forth in that opinion, and only those necessary to the disposition of the matter will be repeated.

At issue in the principal case was construction of a drainage system which "consisted of the ditch along the south line of the north half of Section 8 beginning at the point where the defendants contend the natural draw or depression begins and extending eastward approximately 3,000 feet. The ditch is

approximately 50 feet wide at the top with the sides sloping to a flat bottom approximately 12 feet wide. The ditch is 9 feet deep at its greatest depth. It is to be located wholly upon Nelsons' land. The completed project would also contain two branch drains extending northerly from the ditch into the northeast quarter to drain the pond and lagoon areas." *Id.* at 262, 318 N.W.2d at 262.

In reversing the judgment of the trial court, we held at 266, 318 N.W.2d at 264, that "a natural depression or draw into which surface waters were wont to flow in a state of nature does not exist at the point on the defendants' land where the proposed ditch empties. *We hold, therefore, that the defendants are not entitled to drain the ponds and other surface waters from the northeast quarter of Section 8 into the draw on the southwest quarter of Section 8.*" (Emphasis supplied.) We then remanded "for entry of a decree granting appropriate relief in accordance with this opinion." *Id.* at 267, 318 N.W.2d at 264.

On remand the trial court entered a judgment on the mandate. "IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the judgment of the Court in favor of the Defendants denying Plaintiffs' request for permanent injunction be, and the same is hereby reversed, the Defendants being hereby permanently enjoined from draining waters currently existing upon Defendants' lands as well as future surface and flood waters on or upon the lands of the Plaintiffs *and that the ditch running in an East and West direction upon Defendants' lands and just North of the property line between the properties of the parties hereto is hereby ordered to be closed and said lands returned to their original state prior to the beginning of construction of the ditch on or about the 5th day of February, 1980, said work to be done and completed and said lands restored in no more than sixty (60) days from the date hereof . . . .*" (Emphasis supplied.)

The single error assigned is, "The Judgment Upon Mandate of the Supreme Court entered by the trial court exceeded the scope of the original mandate." Brief for Appellants at 1.

Appellants argue, and we agree, that on remand the trial court has no alternative except to follow the directions given. *De Lair v. De Lair*, 148 Neb. 393, 27 N.W.2d 540 (1947); *Marksbury & Washington v. Board of Education*, 199 Neb. 283, 258 N.W.2d 242 (1977).

Our directions were of necessity general and designed to be remedial. In essence, appellants suggest in their brief that the remedy sought was to prevent water from the ditch and laterals from flowing on appellees' land and that a simple plug in the ditch at the point where it joined the existing ditch was sufficient to ensure the results ordered; that the ditch was helpful and beneficial to the appellants' land, even without an outlet; and that the lower court exceeded its authority in directing the entire ditch filled.

We note, however, that these factual matters are asserted in appellants' brief only, and there is no bill of exceptions.

Obviously, the complete closing of the ditch will afford the relief directed by this court. In the absence of any evidence that the relief ordered by the judgment on the mandate is in excess of that necessary to accomplish that result, the judgment on the mandate must be affirmed.

AFFIRMED.

JUNIATA FEEDYARDS, A JOINT VENTURE OF MORRISON-QUIRK GRAIN CORPORATION, A NEBRASKA CORPORATION, ROBERT G. GOTTSCH, AND GOTTSCH FEEDING CORPORATION, APPELLEE, V. VIC NUSS, APPELLANT.

342 N.W.2d 1

Filed December 23, 1983. No. 82-627.

1. **Jury Instructions.** It is the duty of the trial court, whether requested to do so or not, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence.
2. _____. An instruction which misstates the issues or defenses and has a tendency to mislead the jury is erroneous. Conflicting instructions are erroneous and prejudicial unless it appears that the jury was not misled.
3. **Motions for New Trial: Appeal and Error.** The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disburb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed with directions.

Jim Zimmerman of Atkins, Ferguson, Zimmerman, Carney & Law, for appellant.

Robert G. Pahlke of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

WHITE and CAPORALE, JJ., and BRODKEY, J., Retired, and BLUE, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a suit on an agister contract for damages for failure to redeliver cattle to plaintiff, Juniata Feedyards, a joint venture of Morrison-Quirk Grain Corporation, a Nebraska corporation, Robert G. Gottsch, and Gottsch Feeding Corporation. The jury returned a $16,385.85 verdict against defendant, Vic Nuss. Plaintiff's motion for new trial was granted and the verdict was set aside. The trial judge assigned as reasons that the verdict was contrary to the evidence and that there was patent error

in the instructions. From those assigned findings defendant appeals. We affirm.

After preliminary discussions in the fall of 1977 concerning defendant feeding cattle and providing adequate facilities, feed, and supervision, contracts were signed by the parties on December 23, 1977.

The first contract, effective December 15, 1977, provided that Nuss would care for, feed, and maintain 1,600 steers, of which 1,000 would be located at the Chauncey Ranch and 600 would be located at the Dukat Ranch. The second contract, effective January 1, 1978, provided for the care and maintenance of 800 heifers at the Renteria Brothers Ranch. Both contracts contained the same language.

Under the contract Juniata Feedyards was to pay Vic Nuss $20 per head of cattle upon delivery to Nuss, $20 per head at the end of the contract in June 1978, and 26 cents per pound on the gain of the cattle while in Nuss's care.

Nuss was to care for and maintain the cattle in accordance with generally accepted standards of animal husbandry, and under § 6 of the contract he was to be present or cause a responsible person to be present each day at the locations where the cattle were located.

In anticipation of some death loss during the course of the contract, the parties inserted the following § 7, which provides in part: "a. In case of death from lightning or sickness, or other natural causes which are not attributable to Nuss's negligence, Nuss shall provide Juniata Feedyards with the brand on the carcass. . . . If such losses do not exceed three percent (3%) of the total number of animals cared for by Nuss in accordance with this agreement, neither Nuss nor Juniata Feedyards shall be obligated to pay the other for either the loss of the animal or the loss of feed ingested by the animal or the loss of services in caring and maintaining for said cattle. Nuss shall be responsible for all losses caused by his neglect and for all death

losses, regardless of cause, in excess of three percent (3%) of the total animals cared for, said total losses to be determined at the termination of this agreement, except death losses caused by an Act of God, such as blizzard, lightning, or epidemic.

"b. Any other steers not accounted for at redelivery time shall be chargeable to Nuss [sic] account at the average weight per steer at the time of such redelivery. Price per pound is to be established by the average cost per head to Juniata at date of purchase." (The underlined portion was written in and initialed by Ken Morrison and Vic Nuss.)

In addition to the provisions discussed above, Juniata Feedyards was to pay the expense of all veterinary medicines determined by Nuss to be given the cattle in connection with their proper care.

Shortly after plaintiff began delivering calves, Nuss informed it that the Dukat Ranch would not be accepting cattle and that the extra cattle should be shipped to the Chauncey Ranch. Sometime after that, Nuss indicated that a Mr. Woods had agreed to take some of the cattle and that Chauncey could take more cattle.

Plaintiff contends the contracts were orally amended to provide for the additional cattle; defendant denies such agreement.

The parties stipulated that, in all, (1) 2,125 head of steers were delivered to the Chauncey Ranch; (2) 487 steers and 11 heifers were delivered to the Woods Ranch; and (3) 799 head of heifers were delivered to the Renteria Brothers Ranch.

During the course of the feeding agreement, the plaintiff made payments to Nuss in excess of $107,000.

There were several indications through the winter that there was a problem with the condition of the cattle, particularly those at the Chauncey Ranch. There was evidence that they were sick, unattended, thin, and poorly fed. One bunch of more than 300

head was discovered dead in a pile in such a condition they could not be identified or counted. After Nuss had given several assurances as to the good condition of the cattle, he finally admitted the same were not true. At the end of the feeding contract Nuss was short either 521 or 542 head of the 2,125 that were at the Chauncey Ranch, 75 head of those delivered to the Woods Ranch, and 5 head of those sent to the Renteria Brothers Ranch. Nuss argued that the losses were due to an epidemic of shipping fever complex and extreme cold weather and that therefore he was not responsible due to the "Act of God" clause in the contract. Plaintiff produced substantial evidence in support of its theory that the cattle were not fed or cared for properly, as the cause of their death. There was also a dispute as to who was responsible for branding and vaccinating the cattle.

Since the losses on the Renteria Brothers Ranch were minimal, the only real dispute regarding those cattle involved the amount due Nuss for the care and feeding. The significant dispute involves the cattle kept at the Chauncey Ranch and the Woods Ranch.

At the instruction conference neither party objected to the instructions here discussed. "Failure of counsel to object to proposed jury instructions after submission of them to him by the court for review precludes objection on appeal. . . . Noncompliance by counsel with the requirement however, does not bar this court from opting to consider plain errors in a record indicative of a probable miscarriage of justice." *Barta v. Betzer*, 190 Neb. 752, 754, 212 N.W.2d 352, 354 (1973). "[I]t is the duty of the trial court, whether requested to do so or not, to submit to and properly instruct the jury on all material issues presented by the pleadings and supported by the evidence." *Enyeart v. Swartz*, 213 Neb. 732, 735, 331 N.W.2d 513, 515-16 (1983).

Instruction No. 6 has three parts that we identify

by letter for discussion: (A) *Plaintiff's burden of proof.* No error is assigned.

(B) *Defendant's defenses.* "To establish his defenses, Nuss must prove one or more of the following propositions by a preponderance of the evidence:

"1. The animals supplied by Juniata were not reasonably suited for the purpose of the contract . . . .

"2. The parties agreed that Juniata was to immunize or vaccinate the animals before delivery and Juniata failed to do so.

"3. The parties agreed that Juniata was to brand the animals before delivery and Juniata failed to do so.

"4. The loss of animals was due to an 'Act of God' . . . ."

(C) *Method to compute amounts due either party, if any.* "If Nuss has proved any one or more of the foregoing propositions by a preponderance of the evidence, you shall deduct from the sum you found due Juniata, the animal death loss you find proximately resulted from Juniata's breach of that particular proposition. You shall then deduct the amount you find due Nuss on the Renteria contract, Exhibit B, and return a verdict for Juniata for the difference. If from these determinations the result is a balance in favor of Nuss, you shall return a verdict in that amount for Nuss and against Juniata.

"If Nuss has failed to prove any one or more of the foregoing propositions by a preponderance of the evidence, you will return a verdict for Juniata against Nuss for the amount you found due Juniata less the amount you find due Nuss on the Renteria contract, Exhibit B. If the result is a balance in favor of Nuss, you shall return a verdict in that amount for Nuss and against Juniata."

There was no separate damage instruction. We agree with the trial judge that a simplification of instruction No. 6 and a separate damage instruction would have been beneficial.

"The instructions of the court must be considered in toto and if so considered they cover the issues raised by the pleadings and supported by the evidence, they are adequate." *Kresha Constr. Co., Inc. v. Kresha*, 184 Neb. 188, 192-93, 166 N.W.2d 589, 592 (1969). Other applicable given instructions were No. 9, requiring a meeting of the minds for the formation of an agreement which may be determined from either words and acts at the time or from the later manner of performance, and No. 10, stating the implied promises and duties of the parties, including plaintiff's duty to provide cattle that were reasonably suited for the contract.

From a review of the instructions, we note these errors in instruction No. 6: (1) Item 3 in part (B), "The parties agreed that Juniata was to brand the animals before delivery and Juniata failed to do so." This was one of defendant's alleged defenses that such was the proximate cause of death losses; however, it was not supported in the evidence. "A litigant is entitled to have the jury instructed only upon those theories of the case which are presented by the pleadings and which are supported by competent evidence." *Vistron Corp. v. Scoular-Bishop Grain Co.*, 194 Neb. 696, 700, 234 N.W.2d 906, 909 (1975). That part of the instruction should not have been given.

(2) This is the error referred to by the trial judge as a patent error, and it relates to the first sentence in part (C), "If Nuss has proved any one or more of the foregoing propositions by a preponderance of the evidence, you shall deduct from the *sum you found due* Juniata, the animal death loss you find proximately resulted from Juniata's breach of that particular proposition." (Emphasis supplied.)

"An instruction which misstates the issues or defenses and has a tendency to mislead the jury is erroneous. . . . Conflicting instructions are erroneous and prejudicial unless it appears that the jury was not mislead [sic]." *Zimmerman v. Continental Cas.*

Co., 181 Neb. 654, 660, 150 N.W.2d 268, 272 (1967); *Hickman-Williams Agency v. Haney*, 152 Neb. 219, 40 N.W.2d 813 (1950).

Although the word "sum" is a common word, it is indefinite as used here. "The sense in which the term [sum] is most commonly used is 'money' . . . ." Black's Law Dictionary 1287 (5th ed. 1979). As above used, "sum" is capable of two different meanings. The jury could interpret it to mean "money you found due Juniata" or "number of cattle you found due Juniata." If the first interpretation is given, the instruction would mislead the jury by improperly directing the jury to subtract death losses from money. An explanation was necessary to guide the jury, and none was provided. The other given instructions do not correct this error.

"The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that no tenable grounds existed therefor." *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 720, 335 N.W.2d 758, 762 (1983).

Considering these errors, we conclude that the trial judge properly exercised his discretion in setting the verdict aside and granting a new trial for plain prejudicial errors that prevented plaintiff from having a fair trial.

It is not necessary to discuss the other assigned error.

It appears that the issue of defendant's liability on the contracts as amended was properly submitted to the jury and that upon retrial the issues should be limited to an accounting of money advanced by each party and the amount due under the contracts as amended, including the implied duty of plaintiff to deliver cattle reasonably fit for the purposes of the contract. *Caster v. Moeller*, 176 Neb. 30, 125

N.W.2d 89 (1963), *supp. op.* 176 Neb. 446, 126 N.W.2d 485 (1964).

AFFIRMED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. PAUL KARL GOLTER, APPELLANT.

342 N.W.2d 650

Filed December 23, 1983. No. 82-646.

1. **Wiretaps: Affidavits.** Under Neb. Rev. Stat. § 86-705(1)(c) (Reissue 1981), the "full and complete statement" required by the statute refers to a factual statement regarding investigative procedures.
2. _____: _____. An affidavit in support of an application for a wiretap order must include sufficient facts upon which a judge can independently determine whether a wiretap is a necessary investigative technique to be used by a law enforcement agency.
3. _____: _____. A court can authorize a wiretap only on a factual basis of necessity and not on factually unsupported and conclusory expressions of the affiant regarding investigative procedures.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded for a new trial with directions.

Richard J. Bruckner, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

SHANAHAN, J.

Paul Karl Golter was charged with conspiracy to deliver a controlled substance. Neb. Rev. Stat. § 28-202(1)(a) and (b) (Reissue 1979); § 28-416(2)(a) (Cum. Supp. 1982); § 28-405 sch. II(a)(4) (Cum. Supp. 1982); § 28-401(16)(a) and (c) (Cum. Supp. 1982). Golter's motion to suppress evidence obtained by the State of Nebraska as a result of a wiretap of Golter's residential telephone was overruled.

After a trial to the court and a conviction of the crime alleged, Golter appeals to this court. We reverse and remand for a new trial with directions.

On November 11, 1981, the county attorney of Antelope County, Nebraska, applied to the district court for an order authorizing a wiretap of the residential telephone of Paul Karl Golter of Antelope County, Nebraska. Attached to the county attorney's application was an affidavit of Manuel S. Gallardo, a drug investigator for the Nebraska State Patrol. That affidavit was also dated November 11, 1981. Gallardo's affidavit contained several allegations in support of the application for the wiretap. A criminal investigator for the State Patrol attempted to purchase ½ ounce of cocaine from Golter on December 6, 1980. In the investigator's car parked outside a tavern, Golter delivered ½ ounce of cocaine to the investigator, who paid Golter $1,125 for the delivery. At this meeting Golter mentioned he could deliver two kinds of cocaine. In the car Golter produced a vial of cocaine and proceeded to "snort" some. Golter then handed the vial of cocaine to the investigator, who simulated "snorting the cocaine." The investigator's refusal to "snort the cocaine" bothered Golter. Golter gave the $1,125 back to the investigator, who later returned the cocaine to Golter. After several contacts the investigator failed to make arrangements for a "deal" with Golter. The investigator's subsequent attempts to contact Golter were unsuccessful because Golter did not return the investigator's telephone calls. A second undercover purchase would create suspicion, according to the affidavit. The affidavit continued by reciting that Alan Golter, a relative of Paul Golter, was the subject of an investigation from October 7 to October 10, 1981, regarding the sale of marijuana, but there is no reference to participation by Paul Golter. Alan Golter, on October 8, 1981, detected an aerial surveillance by the State Patrol. (The exact site under aerial surveillance is not specified in the affidavit.)

William K. Golter, a brother of Paul Golter, was arrested for the sale of hashish and marijuana on December 13, 1973. Local police conducted a visual surveillance of a bar in Osmond, Nebraska, sometime in November and December 1980. An investigator of the State Patrol received information "from an ordinary, concerned citizen" that Paul Golter goes "to [the bar] in Osmond . . . and meets with [a named individual]" who has been observed by the Osmond Police Department "rolling or packaging marijuana on the bar" of the establishment in Osmond. (There is neither an allegation of a date for such occurrence(s) nor an allegation that Golter was present when such event(s) occurred.) A concerned citizen-informant observed one Robert Whitmer of La Puente, California, at the Golter ranch on January 15, 1981, but Whitmer's record did not reveal any drug conviction or drug-related activity. A subpoena of Golter's telephone records revealed that there were several telephone calls from September 1, 1980, to August 15, 1981, to individuals who had criminal records including convictions of drug-related offenses. Sometime after October 3, 1981, Gallardo interviewed an informant who related that drugs "are flown in to the Paul Golter ranch" and that the informant had "observed packages dropped out of an airplane over Paul Golter's ranch." (The affidavit does not specify the date of this observation by the informant.) Law enforcement officers had investigated Golter and his "associates" for 10 years. Gallardo was personally involved in the "investigative effort aimed at Paul Golter since September 8, 1978." Attempts were made but failed to directly involve Golter in a "controlled transaction." The investigator for the State Patrol failed "to make a case on account of Golter's paranoia and precautions." "Golter's residence is located in the country northwest of Orchard. This residence has no public access roads that affiant can use to get close to the residence without being seen. . . . Because there is

very little traffic, and what traffic there is is of a local nature and known to [Golter] and his friends, ground surveillance of the residence will not be possible. Were surveillance possible, it might produce information about the registered owners of vehicles, and the shape and size of parcels, but it is unlikely to produce, and in the collection experience of peace officers, has failed to produce information concerning arrangements for delivery of controlled substances, the time and place of their arrival, the location in which substances are kept, and the identities of those involved in the network. . . . Based on this accumulated training and experience, affiant is of the opinion that investigative techniques other than interception of wire communications have not been, and will not be, successful or if tried reasonably, appear dangerous and that interception of wire communications is necessary to attain the objectives of the investigation."

Relying solely on the preceding affidavit of Gallardo, on November 11, 1981, the district court authorized a wiretap of Golter's telephone for a period of 30 days. Pursuant to the order of November 11, there was a wiretap of Golter's telephone. On December 11, 1981, an application for an extension of the Golter wiretap was filed. A copy of Gallardo's affidavit of November 11 was attached to the application of December 11. The application of December 11 incorporated by reference the contents of Gallardo's affidavit dated November 11, 1981. On December 11 the trial court authorized an extension of the Golter wiretap for an additional 30 days.

Golter questioned the validity of the court's order authorizing the wiretap and filed a motion to suppress information obtained by the wiretap. At the hearing on the motion to suppress, Vernon Hickson, sheriff of Antelope County for 15 years, testified that he could conduct a visual surveillance of Golter's property and that there would not have been any problem regarding such visual surveillance. Hick-

son was well acquainted with the ranch area of Golter's residence and described the area as hilly, with many trees. In his deposition offered at this hearing on the motion to suppress, Gallardo acknowledged there was no reason for the absence of surveillance regarding Golter except the reasons stated in the affidavit of November 11, 1981. The motion to suppress was overruled. At a subsequent trial the State produced evidence attributable to information obtained through the wiretap. Golter was convicted as charged and appeals to this court.

The validity of the order authorizing a wiretap of Golter's telephone rests upon Neb. Rev. Stat. § 86-705(1)(c) (Reissue 1981), namely, that the application for the wiretap "shall include the following information: . . . (c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous"; and, further, upon the determination by the district court that a wiretap was necessary under the circumstances, in accordance with § 86-705(3)(c).

In *State v. Kolosseus*, 198 Neb. 404, 253 N.W.2d 157 (1977), we set out the background of Neb. Rev. Stat. §§ 86-701 et seq. (Reissue 1981), the Nebraska "wiretap" law, and its federal counterpart, 18 U.S.C. §§ 2510 et seq. (1976). In reference to the federal "wiretap" law, the U.S. Supreme Court in *United States v. Giordano*, 416 U.S. 505, 527, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974), stated: "The words 'unlawfully intercepted' are themselves not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." We make similar observations about the Nebraska

"wiretap" law, §§ 86-701 et seq., as have been made by the U.S. Supreme Court in *Giordano* regarding the federal law. A wiretap can be authorized only after there has been fulfillment of the specific requirements imposed by the Nebraska wiretap law. The standards imposed by state law may be more restrictive than federal law, but cannot be less restrictive. For this reason the requirements for a wiretap under state law may exceed constitutional mandates or minimums. See, J. Carr, The Law of Electronic Surveillance, *The Enactment and Constitutionality of Title III* at 21-50 (1977); C. Fishman, Wiretapping and Eavesdropping § 5 (1978). The bedrock of our wiretap law is stringent judicial monitoring of law enforcement agencies seeking to use and using electronic surveillance—an investigative technique highly intrusive upon the privacy of the citizenry.

In *State v. Kolosseus, supra*, we held that § 86-705(1)(c) "does not require the exhaustion of all other possible or reasonable avenues of investigation. It does not, in fact, require that other methods even be tried if the application demonstrates other procedures are unlikely to succeed or are too dangerous. The requirements are alternative, that is, other methods must have been tried and failed 'or' the second alternative must be demonstrated. . . . 'Investigators are not obliged to try all theoretically possible approaches. It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation. The government must, however, *fully explain* to the authorizing judge the *basis* for such a conclusion.' . . . We conclude that what is required under the first alternative is that the application make a *full and complete disclosure of all that has been done* so that the court may make a judgment as to whether more should be required before a tap is authorized." (Emphasis supplied.) *Id.* at 414-15,

253 N.W.2d at 163. See, also, *United States v. Vento*, 533 F.2d 838 (3d Cir. 1976).

Section 86-705(1)(c) does contain a "necessity" requirement in order to limit the use of wiretaps with their intrusive nature and to assure that wiretapping is not utilized in situations where traditional investigative techniques would suffice to expose the crime. See, *United States v. Kahn*, 415 U.S. 143, 94 S. Ct. 977, 39 L. Ed. 2d 225 (1974); *United States v. Bailey*, 607 F.2d 237 (9th Cir. 1979). The purpose of the necessity requirement, i.e., the "full and complete statement," is not to foreclose a wiretap until every conceivable investigative technique has been exhausted. Rather, the full and complete statement informs a court of the nature and progress of the investigation, explains the difficulties involved in normal investigative techniques, and assures that a wiretap is not obtained where conventional investigative techniques would be sufficient to expose a crime. *United States v. Lanza*, 341 F. Supp. 405 (1972); *United States v. Fury*, 554 F.2d 522 (2d Cir. 1977). Law enforcement agencies must provide the court with sufficient information by which the court can exercise the independent judicial determination required under the Nebraska wiretap law. See *United States v. Fury*, *supra*. The full and complete statement must include a factual basis "as to *why* normal investigative procedures are not being used." (Emphasis supplied.) *United States v. Bobo*, 477 F.2d 974, 981 (4th Cir. 1973). Affidavits in support of an application for a wiretap must contain a statement demonstrating (1) that other investigative procedures have been tried but have failed or (2) that other investigative procedures reasonably appear to be unlikely to succeed, if tried, or reasonably appear to be too dangerous. *State v. Lane*, 211 Neb. 46, 317 N.W.2d 750 (1982).

The "statement" required by § 86-705(1)(c) is a statement of fact. A recital regarding the difficulties of gathering usable evidence is not a sufficient

basis for a wiretap order. *United States v. Kerrigan*, 514 F.2d 35 (9th Cir. 1975). An application whose bases are general declarations and conclusory statements of affiants will not support authorization for a wiretap. See *United States v. Vento*, *supra*. A wiretap cannot be authorized on the factually unsupported assertion that general police experience indicates that ordinary investigative techniques are unlikely to succeed, if tried, or that such techniques appear to be dangerous. See *United States v. Spagnuolo*, 549 F.2d 705 (9th Cir. 1977). Where the application for a wiretap is silent regarding the status of investigation or where general conclusory statements are substituted for specific facts, the district court is not informed of the investigation by a law enforcement agency. An affidavit reciting conclusions unsupported by particular facts is no basis for a court's determination that there has been compliance with the statute governing issuance of a wiretap order. See, *Wilson v. State*, 377 So. 2d 237 (Fla. App. 1979); *United States v. Spagnuolo*, *supra*.

The affidavit in the present case states there can be no visual surveillance from automobiles driven along the road near Golter's residence. Beyond such reference to visual surveillance from automobiles, the affidavit contains no facts describing the existence, failure, or perils of visual surveillance of the Golter residence. See *State v. Kolosseus*, 198 Neb. 404, 253 N.W.2d 157 (1977). In essence, the balance of the affidavit regarding visual surveillance recites hypothesis and not history. It is reasonably inferable from the affidavit that visual surveillance is possible and practical under the circumstances. However, the affiant predicts that the quantity or quality of information obtainable through visual surveillance probably would not establish the elements of the crime alleged. Such investigative augury hardly reaches the stature of a statement of fact demonstrating exhaustion or unavailability of normal or conventional investigative techniques.

Golter's residence was the focal point of the investigation. The possibility and practicality of visual surveillance of Golter's residence is borne out by Sheriff Hickson. The affidavit in this case fails to negative the possibility and practicality of visual surveillance. See *State v. Lane, supra.* If factually unsupported and conclusory statements in an affidavit can supply the requirement of necessity for a wiretap, then it is the law enforcement agency, not a court, which determines when a wiretap is a necessary ingredient of an investigation. A court's relinquishing responsibility under the wiretap statutes and law enforcement's usurpation of judicial function will produce, as expressed in the words of Alexander Pope, a vice which our system will "first endure, then pity, then embrace." Good law enforcement requires enforcement of the law—even to the point that a law enforcement agency must obey the statute governing its investigations.

For the reasons stated the trial court did not have sufficient factual information with the application, as prescribed by § 86-705(1)(c), for an informed decision required under § 86-705(3)(c). The wiretap was therefore improperly authorized and the communications sought to be suppressed by the motion were "unlawfully intercepted" within the meaning of § 86-705(11). The motion to suppress should have been sustained.

Concerning Golter's claim of error regarding the sufficiency of evidence of a conspiracy, our holding in this case makes it unnecessary to consider such assignment of error.

All evidence gathered through electronic surveillance pursuant to the order of November 11, 1981, and its extension of December 11, 1981, shall not be admitted in subsequent proceedings. In view of the admission of evidence at trial, that is, evidence obtained in violation of § 86-705, the conviction of Paul Karl Golter is set aside, the judgment of the district court in these proceedings is reversed, and the cause

is remanded to the district court for a new trial consistent with our opinion in this case.

REVERSED AND REMANDED FOR A NEW TRIAL WITH DIRECTIONS.

McCOWN, J., not participating.

HASTINGS, J., dissenting.

The affidavit which the majority holds to be insufficient to support a wiretap order contains two important groups of facts.

First, it is apparent that as a result of subpoenas served on the telephone company, a record of long-distance calls charged to the defendant's number from September 1, 1980, to August 15, 1981, revealed that a number of highly suspicious calls were placed.

Six calls were made to a party in California who had a criminal record consisting of carrying a concealed weapon and trespassing; 5 calls to an O'Neill number, whose subscriber purchased $600 worth of cocaine from a go-between of the defendant, and who also was an associate of a pimp and drug dealer in South Dakota; 5 calls to a Brunswick, Nebraska, number, whose subscriber was involved in dealing in 80-pound marijuana sales, hashish, and cocaine amounting to $100,000 in a 2½-month period; 1 call to a Creighton, Nebraska, number to a subscriber who had been engaged in illicit drug operations; 42 calls to an Osmond, Nebraska, number, the subscriber of which, according to a reliable informant, was involved in the distribution of narcotics with the defendant; 12 calls to 5 South Dakota numbers, the subscribers of which, according to a reliable informant, were involved in the distribution of narcotics with the defendant, or were involved in narcotics in South Dakota, or owned a particular airplane which was observed by an ordinary citizen landing on a nearby airstrip and regularly met with the defendant; and 4 calls to a Yankton, South Dakota, number listed to a person who was a pilot of the airplane mentioned above, which was observed

on a particular day landing on an airstrip on which the defendant's pickup truck was parked. On one occasion this truck was backed up to the aircraft and a concerned citizen noticed articles being exchanged between the truck and the pickup, and as the citizen approached, the airplane took off before the second engine had been fully powered.

Additionally, 17 calls were made to a Baldwin Park, California, number to a subscriber who was an associate of the defendant and was suspected of being involved in drug dealings with the defendant; 1 call to a Plainview, Nebraska, number to a subscriber who the same informer previously mentioned said sold drugs obtained from the defendant; 13 various calls to 4 numbers in Texas, California, and Nebraska to subscribers, all of whom had records involving drugs and drug distribution.

The facts recited in the affidavit mentioned in the majority opinion are that the defendant's residence is located in a rural area near Orchard, Nebraska; that such residence has no public access roads that the affiant can get close to; that there is very little traffic, and what there is is of a local nature known to the defendant and his friends. It is true that the affiant then concludes that, because of those facts, ground surveillance of the defendant's residence would not be possible.

Even throwing out the affiant's conclusion, which we must, it seems apparent that there are facts from which a magistrate could reach the conclusion that the affiant did. Even though a local sheriff testified to the contrary, it was a factual issue which had evidence to support either conclusion. The applicable standard of review is that the findings of fact made by the district court will not be set aside on appeal to this court unless they are clearly erroneous. *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981).

Finally, it is extremely doubtful that surveillance would disclose any pertinent facts other than those

known to law enforcement agencies and which were mentioned in the majority opinion.

I would affirm the judgment of the trial court in overruling the motion to suppress.

I am authorized to state that Boslaugh, J., joins in this dissent.

LARRY J. DAY ET AL., APPELLEES, V. FRANK KOLAR ET AL., APPELLANTS.

341 N.W.2d 598

Filed December 23, 1983. No. 82-798.

1. **Notice: Waiver.** A failure to object to the form of a notice and acting on the notice generally waives any objection to the form of the notice.
2. **Leases.** A lease which may be terminated at any time at the will of either party is a tenancy at will.
3. **Leases: Fraud.** In the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the document.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with directions.

Richard E. Gee, for appellants.

Duane Burns of Mayer & Burns, for appellees.

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

PER CURIAM.

The defendants, Frank Kolar and David Kolar, appeal from the judgment of the district court affirming the judgment of the county court awarding the plaintiffs, Larry J. Day and Deborah L. Day, damages in the sum of $2,048 and $400 in attorney fees.

The action arose out of a controversy concerning a written lease of residential property in Grand Is-

land, Nebraska, owned by Frank Kolar. The lease was prepared on an "apartment agreement" form by David Kolar and signed on September 9, 1981. David signed Frank E. Kolar's name. Larry J. Day signed as the tenant.

The lease contained the following provision in regard to the term of the lease: "LANDLORD agrees to deliver possession of the following described premises, to-wit:
occupancy to commence on the 30 day of Sept., 1981, and to be continuous through the 30 day of Sept, 1982. This agreement will terminate upon the date agreed, or upon -0- days notice in writing by either party, or upon breach according to the terms of this agreement."

The plaintiffs obtained a key to the property on the day after the lease was signed, but about 2 weeks later, before the plaintiffs had moved into the property, they received word that the property had been sold and they would not be able to move into the property. The plaintiffs found another house to rent and then brought this action on November 10, 1981.

The plaintiffs' theory of the case is that they had a lease for a term of 1 year and are entitled to damages for the defendants' failure to "honor" the lease. The defendants contend that the cancellation clause in the lease which permits either party to terminate the lease "upon -0- days notice in writing" permitted the owner, Frank Kolar, to terminate the lease at any time.

Although the lease provided for written notice of termination, a failure to object to the form of the notice and acting on the notice generally waives any objection to the form of the notice. See, 49 Am. Jur. 2d *Landlord and Tenant* § 1002 (1970); *Kresha v. Kresha*, 211 Neb. 92, 317 N.W.2d 776 (1982).

The plaintiffs contend that the numeral zero in the cancellation clause was an indication that the cancellation clause was not to be applicable. This would be a logical conclusion if the entire clause had

been lined out. The blank had reference only to the number of days' notice of cancellation to be given, not to the right of cancellation.

The plaintiffs argue that a lease subject to cancellation is no lease at all. Though not a lease for a definite term of years, the law recognizes a tenancy at will. A lease which may be terminated at any time at the will of either party is a tenancy at will. *Sage v. Shaul*, 159 Neb. 543, 67 N.W.2d 921 (1955). See, also, Restatement (Second) of Property § 1.6 (1977). Since the right of cancellation was mutual, we think the proper construction of the document is that it was a written agreement for a tenancy at will.

Although the plaintiffs testified that they were unaware of the cancellation provision in the lease, their failure to read the document carefully before it was signed by Larry J. Day does not allow them to avoid its provisions. In the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the document. *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982).

The judgment is reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT P. CLARK, APPELLANT.

342 N.W.2d 366

Filed December 23, 1983. No. 82-839.

1. **Right to Counsel.** The right of an indigent defendant to counsel does not include the right to counsel of the defendant's own choosing.
2. _____. A defendant's mere distrust of, or dissatisfaction with, appointed counsel is not sufficient to require the appointment of substitute counsel.

3. _____. An indigent defendant who refuses to accept appointed counsel and elects to proceed pro se has not been deprived of his constitutional right to counsel.
4. **Motions for Continuance.** The denial of a continuance of a trial is a matter to be determined on the discretion of the trial court, and in the absence of an abuse of discretion such a denial will not be disturbed on appeal.
5. **Criminal Law: Evidence.** Unless there is specific material in a document necessary to the presentation of a defense or helpful to a defendant in mitigating his sentence, such a document need not be disclosed to a defendant personally, if harm to others is a possible result.

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

Steven D. Keist of Berry, Anderson, Creager & Wittstruck, for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

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

PER CURIAM.

Defendant-appellant, Robert P. Clark, was charged in an information filed September 2, 1981, in eight counts: count I - intentionally causing serious bodily injury to Joel Pauley (assault in the first degree as defined in Neb. Rev. Stat. § 28-308 (Reissue 1979)); count II - using a knife or other deadly weapon in the commission of the felony assault described in count I (in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1979)); count III - intentionally causing serious bodily injury to Steven Wilson; count IV - using a knife or other deadly weapon in the commission of the felony assault on Steven Wilson; count V - intentionally causing serious bodily injury to James Winner; count VI - using a knife or other deadly weapon in the commission of the felony assault on James Winner; count VII - intentionally engaging in conduct constituting a substantial step in a course of conduct intended to culminate in his

commission of the crime of intentionally causing serious bodily injury to Jay D. Smith (attempted assault in the first degree as defined in Neb. Rev. Stat. § 28-201(1)(b) (Reissue 1979)); count VIII - using a knife or other deadly weapon in the commission of his attempted assault in the first degree on Jay D. Smith.

Each count contained a further allegation that defendant had been twice convicted of earlier felonies and was therefore an habitual criminal. All counts alleged that the events had occurred on June 25, 1981. On the State's motion this case was joined for trial with the case of *State v. Zalme*, *post* p. 61, 342 N.W.2d 373 (1983). Both defendant Clark and defendant Zalme specifically agreed to this joinder, over the objection of counsel for defendant Clark. The cases were properly joined for trial pursuant to Neb. Rev. Stat. § 29-2002 (Reissue 1979), and no issue is raised on this appeal on this point.

Jury trial was held and defendant was found guilty on all counts by a jury verdict returned on September 20, 1982. In a later hearing the court found Clark to be an habitual criminal. Defendant was sentenced to a term of from 20 to 40 years on each of counts I, III, and V; to terms of from 10 to 15 years on each of counts II, IV, and VI; to a term of from 10 to 12 years on each of counts VII and VIII. All the sentences were to run consecutive to each other, and all were consecutive to the sentence defendant was serving at the time of the offenses in this case.

Defendant assigns four errors, alleging that the trial court erred (1) in failing to appoint different counsel for defendant at defendant's request; (2) in denying defendant's motion for a continuance of the trial; (3) in overruling defendant's motion to dismiss counts I, II, VII, and VIII, and in permitting such counts to go to the jury; and (4) in refusing to allow defendant the use of a certain ombudsman's report.

Evidence was adduced before the jury, which, if believed, established the facts hereinafter set out,

beyond a reasonable doubt. At about 7 p.m. on June 25, 1981, Joel Pauley, Steven Wilson, James Winner, and Jay Smith were working as state correction officers in various locations at the Nebraska State Penitentiary. Since each of the officers was working in the inmate population, none was armed. Pauley was working in the penitentiary library. Defendant Clark and John Zalme (defendant in *State v. Zalme*, *supra*), together with other penitentiary inmates whom Pauley could not identify, came toward Pauley. Clark had a bar in his hand. This bar was later determined to be a solid iron bar, 27 inches long and seven-eights of an inch in diameter. Pauley wheeled around and put his back to the door and bookcase. Zalme was right in front of Pauley, and Clark was standing close in and right behind Pauley. Zalme stabbed Pauley with a knife in the left upper quadrant of his abdomen, penetrating the abdominal wall and into the bowel. The knife was a crude, "homemade" weapon, 9 inches long with a 4½-inch blade, 1 inch in width at the hilt, and curving to a point. The knife was extremely sharp.

Pauley then ran out the door of the library, calling for help. Other guards assisted him, and he was taken to a hospital. His wound was described by the treating doctor as so serious that if it had not been treated it would have almost certainly led to death.

At the time of the above-stated events, Steven Wilson was working in the yard at the penitentiary. He saw Joel Pauley running from the library area. Pauley said he had been stabbed. Wilson ran toward the library in an effort to lock it, but ran into defendant Clark and Zalme before he could reach the library. Defendant Clark asked Wilson if he "would like some of the same." Officer Wilson ran into the gymnasium area, followed by defendant Clark and Zalme. Defendant Clark had a pipe raised above his head and was swinging at Wilson. Wilson fell in the middle of the basketball floor in the gymnasium. Wilson was stabbed by Zalme at

least four times with a knife. Wilson escaped, and another inmate helped him to the prison hospital. Treatment by the doctor disclosed major stab wounds, including one 4 inches in depth into the back of his neck, and one from his back into his chest. Wilson received 11 pints of blood in transfusion—his total blood supply plus 1 pint.

As Wilson fell to the floor of the gymnasium, he saw Officers James Winner and Jay Smith seated in the bleachers adjacent to the basketball floor. As Officer Winner started to radio for help, defendant Clark pointed his iron bar at the two officers and told them to sit down or they would get the same treatment. Clark said to both officers, "On second thought, we'll kill you now." Officer Smith ran and escaped as defendant Clark came toward Winner. Clark swung his bar at Winner's head. Winner raised his hand to deflect the bar, but the bar broke his hand and damaged his upper biceps. Winner ran down the bleachers into Zalme, who stabbed him four times. Winner also escaped, and at the hospital a doctor treated the four stab wounds, one of which was just below his collarbone into his chest from the front. The other three wounds were inflicted from the back. The knife penetrated from the back through Officer Winner's kidney and into his abdominal cavity. Winner required 9 pints of blood. His wounds presented a substantial risk of death to him.

Additional evidence on behalf of the State connected defendant Clark and Zalme with the weapons used to injure the officers, including statements by Clark and Zalme as to the location of the weapons. Neither defendant Clark nor Zalme testified in this case.

As to defendant Clark, it is obvious that the evidence directly involves him in the charges set out in counts III, IV, V, and VI—the assaults with a deadly weapon on Officers Wilson and Winner. Indeed, de-

fendant does not attack the sufficiency of the evidence with regard to those counts.

Concerning counts I and II (the knife attack on Pauley by Zalme), the evidence is sufficient to show that defendant Clark, armed with an iron bar, and Zalme approached Pauley together and that defendant Clark was standing very close to Pauley as Zalme stabbed Pauley. The trial court properly instructed the jury, by an instruction tailored after NJI 14.12, that one who aids or abets another in an unlawful act may be prosecuted and punished as if he were the principal offender. The evidence is overwhelming in this case that defendant Clark and Zalme participated together in an orgy of stabbing and wounding, resulting in serious injuries to three prison guards, in a totally senseless series of violent incidents. The trial court properly instructed the jury as to aiding and abetting criminal conduct, as provided in Neb. Rev. Stat. § 28-206 (Reissue 1979), and there was sufficient evidence for the jury to convict defendant Clark of the crimes set out in counts I and II.

With regard to counts VII and VIII the evidence is undisputed that after the attack on Officer Wilson the defendant Clark made grossly obscene remarks to Officers Smith and Winner, who were seated in the gymnasium, and directly stated to them, "On second thought, we'll kill you now." These words were accompanied by defendant Clark, with his iron bar in his hand, going toward Smith and Winner. When these words and this conduct of defendant Clark are coupled with the surrounding facts—that is, the beating and stabbing of Officer Wilson occurring before the guards' eyes—it is clear that defendant Clark is guilty of conduct which, as charged in count VII, "under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of intentionally or knowingly causing serious bodily injury to Jay D. Smith." It

is obvious that the only thing that saved Officer Smith from being stabbed or beaten was his escape while defendant Clark and Zalme were occupied in the stabbing and beating of Officer Winner. Defendant was properly charged and convicted pursuant to § 28-201(1)(b) as to counts VII and VIII.

The trial court did not err in overruling defendant's motion to dismiss counts I, II, VII, and VIII, and in submitting those counts to the jury.

The primary thrust of defendant Clark's appeal rests on his allegation that he was deprived of effective counsel because of the court's refusal to appoint different counsel for defendant at defendant's request.

In this connection the record shows the following. On July 2, 1981, James L. Foster, a deputy public defender from the office of the Lancaster County public defender, was appointed by the court to represent defendant Clark. On showing that the public defender had also been appointed to represent John Zalme, a codefendant, the court permitted James L. Foster to withdraw, and on July 22, 1981, appointed Stephen K. Yungblut to represent defendant. On July 29, 1981, in open court, defendant requested Mr. Yungblut to withdraw, apparently for the reason that Mr. Yungblut had been a member of the Lancaster County attorney's office at an earlier time when defendant had been prosecuted for a crime. Defendant's request was granted, and Stanley Cohen was appointed on the same day to represent defendant.

On September 30, 1981, Mr. Cohen filed a motion to withdraw as counsel, for the reason that defendant Clark "no longer desires his services." Hearing was held on this motion on October 7, 1981. Defendant stated to the court, "We just got different views on the case, you know. And we ain't getting along that good. . . . I feel long as I'm not paying him, you know, long as I'm not paying him, he's court-appointed, that I feel there's conflict right there. . . .

I just feel I'm being discriminated against because I'm a convict, and I ain't got no money. . . . I told him when I first met him I didn't trust him. I don't trust nobody in the system because I ain't got no money."

The trial court advised defendant that Mr. Cohen was a competent lawyer, and suggested defendant confer with Mr. Cohen to see if they could work things out. The private conference lasted 45 minutes, defendant then advised the court that he could work with Mr. Cohen, and the motion to withdraw was denied.

On February 1, 1982, defendant appeared again before the court with his court-appointed counsel for hearing on the State's motion to consolidate defendant's trial with the trial of John Zalme. Mr. Cohen advised the court that defendant wanted the two cases tried together, although Mr. Cohen personally opposed the joinder, and that defendant was acting against his attorney's advice. John Zalme and his counsel wanted the cases joined. As stated above, joinder was granted.

The defendant filed a handwritten motion on May 17, 1982, requesting an order dismissing Mr. Cohen. At the hearing on said motion on July 8, 1982, the defendant Clark also presented to the court another handwritten motion which stated that a "personality conflict" had developed between defendant and his lawyer and that Mr. Cohen "is not compatible with me as a counsel, and this tense relationship is aggravated by his defense plan." Defendant also complained that Mr. Cohen would not tell him what was contained in an investigative report prepared by the state ombudsman's office. Defendant also complained about lack of communication with Mr. Cohen. Evidence was presented at this hearing by defendant. Defendant was advised that his counsel could not release the contents of the investigative report because of a court order restraining him from doing so. (This report and its effect are discussed

below.) Defendant further stated to the court that he was not asking that another attorney be appointed and that, while he would accept another attorney, defendant would be willing to represent himself. The court found that good cause had not been shown for the discharge of Mr. Cohen and the appointment of different counsel. The court gave the defendant the option of discharging Mr. Cohen and representing himself or permitting Mr. Cohen to continue to represent him. Defendant chose to represent himself, after inquiry by the court as to defendant's knowledge of the charges against him and the possible penalties.

At the same hearing codefendant Zalme also requested that his court-appointed counsel be discharged. This request was also granted, with the understanding that the codefendant would have to represent himself in the trial. The court then directed both counsel to attend the trial and every proceeding as adviser to his respective defendant. Defendants' oral motions for continuances were granted, and the case set for trial on September 13, 1982.

On September 8, 1982, defendant Clark and his codefendant filed identical written motions for further continuance. These motions were denied. The trial began on September 13, 1982, and went to conclusion, with Mr. Cohen acting throughout as adviser to defendant.

The facts recited above are set out at some length only to show how these facts fit in with decided cases on this issue. As stated in *State v. Jones*, 213 Neb. 1, 9, 328 N.W.2d 166, 172 (1982): "The record reflects a breakdown of communication between defendant and his counsel and raises a strong inference that defendant's requests for new counsel were based on mistrust of all lawyers and an attempt to delay the proceedings.

"The law in this state is well settled that the right of an indigent defendant to have counsel does not

give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. *State v. Fallis*, 205 Neb. 465, 288 N.W.2d 281 (1980). The standard for determining whether or not counsel for defendant in a criminal prosecution has provided adequate representation requires that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area and that he conscientiously protect the interests of his client. *State v. Shepard*, 208 Neb. 188, 302 N.W.2d 703 (1981)."

There is no evidence presented in this case that the counsel appointed and refused was not competent. The record raises an inference in this case that defendant had not really wanted counsel, but, rather, wanted to so conduct himself as to be able to complain that he was not afforded counsel. As well said by the trial court in this case, "Defendants are not permitted to utilize the constitutional right to counsel to manipulate or obstruct the orderly procedure in the courts or to interfere with the fair administration of justice." In this case there has been no deprival of counsel. As stated in *State v. Blunt*, 197 Neb. 82, 89, 246 N.W.2d 727, 732 (1976), "An indigent defendant who refuses to accept offered counsel without justifiable reason and elects to proceed pro se has not been deprived of his constitutional right to counsel." Defendant has not shown any justifiable cause for refusing to accept counsel offered to him. The trial court did not err in refusing to appoint new and different counsel for defendant.

It should be noted that during the trial, Mr. Cohen acted as technical adviser, and after the trial was permitted to withdraw and present counsel was appointed by the court to perfect this appeal.

With regard to the alleged error of the trial court in refusing to grant defendant a further continuance

of trial, the law is settled that " '[a] motion for a continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.' " *State v. Davis*, 199 Neb. 165, 167, 256 N.W.2d 678, 680 (1977). The incidents resulting in the case happened on June 25, 1981. A preliminary hearing was held. A plea in abatement was filed and ruled upon. There were specific waivers by defendant on two occasions to the application of the speedy trial rule. On July 8, 1982, defendant's motion for a continuance was granted, and the trial date was set, at that time, for a date more than 2 months in the future. Contrary to the general contentions of counsel on appeal, the case was not really involved, and further time was not needed to defend the case even when that defense was conducted pro se. There were no difficult questions of law. The attacks in question, beyond any doubt, constituted the intentional inflicting of wounds causing "serious bodily injury"; there is no hint in the testimony at the trial, or in the brief on appeal, that any person other than Zalme inflicted the knife wounds and that defendant herein was Zalme's willing partner in these crimes. The case presents, as so many such cases do, facts which the ablest counsel in the world cannot change, and those facts render defendant guilty. The trial court did not abuse its discretion in denying any further continuance of the trial.

Defendant's last assignment of error is that the trial court erred in failing to allow defendant the use of an investigative report prepared by the state ombudsman. This report came to light when James Foster, then acting as counsel for Zalme, filed a motion to take the deposition of the state ombudsman, which motion was joined in by Mr. Cohen, counsel for defendant Clark, at a hearing on February 1, 1982. This motion was denied, but the court authorized both prosecution and defense counsel to

examine the 237-page report. The court later ordered counsel not to reveal to defendants Robert Clark and John Zalme matters set out in the report.

The report itself was entitled "The Assault of an Inmate and the Near-Fatal Stabbing of Four Prison Guards on June 25, 1981, Could Have Been Prevented." The trial court, in an excess of caution, authorized counsel to examine the report. As its title would indicate, the main objective of the report was an effort to determine if the assaults could have been avoided by prison authorities. In the report, named inmates told of threats on their lives and sexual pressures by other inmates planning on taking over a cell block by killing guards. The inmates stated that the assaults could have been avoided if the authorities had heeded the inmates. The trial court concluded that to release the report beyond the attorneys in the case "could pose an unreasonable risk of serious bodily harm or even worse to individuals at the penitentiary or who have been at the penitentiary . . . ."

On appeal defendant contends that since he was representing himself after Mr. Cohen was discharged, defendant had the right to have any information which an attorney representing him would have had. We are cited to no cases so holding.

The trial court examined the report, trial counsel (before his discharge) examined the report, present counsel has had the opportunity to examine the report, and this court has examined the report. There has been no showing to this court that there is any specific information in the report that would work to defendant's benefit—either in the determination of his guilt or innocence or in his sentence. We do not find any such evidence on our examination. The effect of the report, had it had any effect in this case (which it did not), should have been to defendant's further detriment. The trial court, in the exercise of its discretion, properly refused to permit defendant to examine the report. The probability of harm to

inmates and further trouble in the prison far outweigh any possible benefit to defendant.

None of the points raised by defendant on this appeal has merit. There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN C. ZALME, APPELLANT.
342 N.W.2d 373

Filed December 23, 1983. No. 82-840.

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

Rodney J. Rehm of Cobb & Rehm, P.C., for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

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

PER CURIAM.

Defendant, John C. Zalme, was charged in an eight-count information setting out the same eight charges made against defendant Robert P. Clark in the case of *State v. Clark*, *ante* p. 49, 342 N.W.2d 366 (1983). The cases against defendant Zalme and Robert Clark were joined for jury trial. Defendant was found guilty and sentenced to the same term of years as defendant Robert Clark, as set out in *State v. Clark*, *supra*. The facts are fully set out in the earlier case of *State v. Clark*, and will not be repeated.

On this appeal defendant assigns basically three errors: (1) Denial of assistance of counsel in that the court refused to appoint different counsel after a breakdown of communication between defendant

and his court-appointed counsel; (2) Error in the refusal of the trial court to permit defendant to see the ombudsman's report referred to in *State v. Clark*; and (3) Error in the trial court's refusal to grant a continuance of the date of trial.

Each of these points is raised and disposed of in *State v. Clark*. Defendant Zalme presents no different or more persuasive arguments or facts on this appeal than those presented in the *Clark* case.

Each point was disposed of adversely to defendant in the *Clark* case, and the *Clark* opinion controls the disposition of this case.

There is no error. The judgment is affirmed.

AFFIRMED.

IVA CUMMINGS, APPELLANT, V. H. STERLING MORTON, APPELLEE.

341 N.W.2d 599

Filed December 23, 1983. No. 83-110.

Appeal from the District Court for Pierce County: MERRITT C. WARREN, Judge. Affirmed.

Iva Cummings, pro se.

Jewell, Otte, Gatz & Collins, for appellee.

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

PER CURIAM.

The appellant, Iva Cummings, plaintiff in the trial court, appeals from an adverse decision rendered by a jury convened in the district court of Pierce County, Nebraska, involving an automobile accident in which Cummings was injured. Although Cummings was represented by counsel in the trial court, she appears here pro se. Little purpose would be served in attempting to detail the facts of this case in view of the fact that the versions offered by each

of the parties are in complete and absolute conflict. Suffice it to say that this conflict was resolved by the jury, which apparently believed the appellee, Morton, and disbelieved the appellant, Cummings.

Our review of the record satisfies us that the evidence was sufficient to support the jury's action, and the decision is not clearly wrong; therefore, the verdict will not be set aside. *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983); *Holly v. Mitchell*, 213 Neb. 203, 328 N.W.2d 750 (1982).

We have reviewed all 18 errors assigned by Cummings and find none to have merit. The judgment of the district court is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD E. LEE, APPELLANT.

341 N.W.2d 600

Filed December 23, 1983. Nos. 83-118, 83-119.

1. **Motions to Strike: Juries.** Ordinarily, when a motion to strike inadmissible evidence is sustained and the jury is instructed to disregard it, such action by the court is deemed sufficient to prevent prejudice, and therefore the defendant is not entitled to a mistrial.
2. **Trial: Evidence.** Error in the admission of evidence is not grounds for reversal if no substantial miscarriage of justice occurred.
3. **Trial: Evidence: Hearsay.** To qualify as an excited utterance the following conditions must exist: (1) There must have been a startling event. (2) The statement must relate to the event. (3) The statement must have been made by the declarant while under the stress of the exciting event.
4. _____: _____: _____. A determination as to the admissibility of an excited utterance generally rests within the sound discretion of the trial court.
5. **Criminal Law: Evidence.** The refusal by the trial court to permit the introduction of cumulative evidence is not error and does not entitle a defendant to a new trial, absent a showing of an abuse of discretion.

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

Thomas M. Kenney, Douglas County Public Defender, and Stanley A. Krieger, for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr, for appellee.

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

KRIVOSHA, C.J.

The appellant, Edward E. Lee, was charged and convicted of first degree murder by a jury, in violation of Neb. Rev. Stat. § 28-303 (Reissue 1979), a Class I felony, and of being a felon in possession of a firearm in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1979), a Class IV felony. We have examined the record, and although Lee's counsel makes an effective argument to this court, we believe that the assignments of error do not justify a reversal in this case. We therefore affirm both the convictions and the sentences.

The evidence discloses that in the early morning hours of Saturday, August 7, 1982, Lee was a passenger in an automobile being driven by Bonnie Welker. As they approached the intersection of 84th and L Streets in Omaha, Nebraska, they were met by another vehicle driven by Gregory Powell, in which the victim, Wilbert Swick, the owner of the vehicle, was a passenger. Welker testified that she had noticed the two males in the accompanying automobile yelling at her, although she was not able to understand what they were saying. She further testified in substance that the driver of the other car "came over in her lane" and, when she looked over at the automobile, the passenger blew her a kiss. This apparently irritated Lee. Both cars then arrived at the intersection of 84th and L Streets, where Welker negotiated her automobile into the right-hand turn lane, and she was about halfway into the turn when Lee made her stop the car by threatening to jump out. When Welker stopped the vehicle, Lee left the ve-

hicle and went over to the Swick automobile. According to Powell, he saw Lee get out of the car and walk over to their car. Powell then heard Lee say, "Don't be flirting with my girl." Lee then exhibited a gun, swung it around, and fired a shot. After Lee left the vehicle and returned to the Welker automobile, Swick said, "Oh, my God, I have been shot, get me to a hospital." Powell rushed Swick to the Midlands Hospital, where he later died from the wounds.

According to Welker, when Lee returned to the Welker car he said, "I shot the gun." He further said, "I had the gun up to his head. I didn't even know I had the gun in my hand until it was up against his head. I was bringing it down when it went off." Welker further testified that Lee said he did not even remember pulling the trigger. Welker was permitted to testify that Lee was pretty upset and said he did not know why it had happened and that he did not know why God had picked on him for that to happen to. Both Welker and Lee drove around Omaha until approximately 6:30 a.m.

Lee was later arrested and charged with the crimes which resulted in his convictions. He was sentenced to life imprisonment on the charge of murder and to a term of 20 months' to 5 years' imprisonment on the charge of possession of a firearm by a felon. He now maintains that the convictions must be set aside because (1) it was error for the trial court to admit testimony concerning his sale or attempted sale of marijuana and (2) it was error to refuse to grant Lee a mistrial upon defense motion.

First, as to the assignment concerning the sale or attempted sale of marijuana, the record discloses that during the examination of Bonnie Welker, she testified that she and Lee had left Kansas City for Omaha about 11 a.m. on the morning of August 6, 1982. She testified that they were drinking in the car and were also smoking "pot." During her direct examination concerning this trip, the following exchange occurred between her and the prosecutor:

"Q. When you drove back that day, were you guys doing any drinking on the way back? A. Yes, we were. Q. What were you drinking? A. We had a 12-pack of beer. Q. When you drove back from Kansas City that day, were you doing any drugs of any kind? A. Yes. Q. What? A. We were smoking pot. Q. Smoking pot? A. Yes. Q. All three of you? A. Yes. Q. Where had the pot come from? A. It was Stephanie's. Q. This girl that you mentioned earlier? A. Yes. Q. She wasn't with you, was she? A. No. Q. How did you end up with it? A. Because Ed [Lee] said if he had a bunch of pot, he could make some money. She took it down there to him. Q. Originally on Wednesday when he went down? MR. CORRIGAN [defense counsel]: Your Honor, I am going to object." Following the objection, the court ordered a short recess and heard argument of counsel in chambers.

Lee's counsel moved for a mistrial on the ground that the prosecution had introduced evidence of other crimes, i.e., the selling of drugs, which was inadmissible. The court refused to grant the mistrial but did offer to instruct the jury to disregard the evidence. Defense counsel objected to that suggestion and, therefore, no instruction was given. It is the denial of the motion for mistrial which Lee contends was error.

Ordinarily, when a motion to strike inadmissible evidence is sustained and the jury is instructed to disregard it, such action by the court is deemed sufficient to prevent prejudice, and therefore the defendant is not entitled to a mistrial. See *State v. Eberson*, 209 Neb. 41, 305 N.W.2d 904 (1981). As an example, in *State v. Kirby*, 185 Neb. 240, 175 N.W.2d 87 (1970), a witness was asked how long he had known the defendant. He replied, " 'I have met him a couple times. When he is—before he went to prison . . . .' " *Id.* at 253, 175 N.W.2d at 95. Defense counsel moved for a mistrial, which was overruled. On appeal to this court we affirmed the action of the

trial court in denying the motion for a mistrial, saying at 253, 175 N.W.2d at 95-96: "The answer was unexpected, and the court immediately instructed the jury to disregard it. It is a rule in this jurisdiction that if an objection or motion to strike is made and the jury is admonished to disregard it, the alleged tainted evidence is not error."

In the instant case defense counsel did not move to strike the testimony, although he did object to the question after the answer had been given. He also refused to permit the trial court to admonish the jury to disregard the testimony. It would appear to us that if, by properly objecting or moving to strike and requesting the trial court to instruct the jury, the error is cured and precludes a defendant from obtaining a new trial, then failing to move to strike and refusing to permit the trial court to admonish the jury must likewise preclude a defendant from being entitled to a new trial.

Furthermore, even if inadmissible evidence finds its way to the jury, the defendant is not generally entitled to a new trial unless the evidence improperly admitted results in a substantial miscarriage of justice. Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1982) provides in pertinent part: "No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred." See, also, *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Van Ackeren*, 194 Neb. 650, 235 N.W.2d 210 (1975).

Not every error entitles a defendant to a reversal of his conviction. For example, in *State v. Russ*, 191 Neb. 300, 214 N.W.2d 924 (1974), the jury, during its deliberations, accidentally discovered that the de-

fendant was on parole at the time he allegedly committed the crime in question. The trial court denied defendant's motion for mistrial, and on appeal we affirmed, saying at 302, 214 N.W.2d at 925: "Error in the admission of evidence is not grounds for reversal if no substantial miscarriage of justice occurred. [Citation omitted.] The evidence of guilt in this case is conclusive. Under these circumstances we conclude no substantial miscarriage of justice occurred." See, also, *State v. Dittrich*, 191 Neb. 475, 215 N.W.2d 637 (1974); *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974).

The evidence in this case was simply overwhelming that Lee fired the weapon which resulted in Swick's death and that he was a felon in possession of a weapon. The only defense raised by Lee was that the evidence was insufficient to prove premeditation and that, therefore, the crime committed was not murder in the first degree but murder in the second degree. We do not believe the statement by Lee's companion, to the effect that someone brought Lee "pot" because Lee thought he could make some money, under the evidence in this case, was sufficient to entitle Lee to a new trial under the circumstances in this case.

If the evidence presented established that the State had knowingly and deliberately adduced inadmissible evidence, the harmless error rule might not apply. See, *State v. Atwater*, 193 Neb. 563, 228 N.W.2d 274 (1975); *State v. Brooks*, 189 Neb. 592, 204 N.W.2d 86 (1973); *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975). In the present case, however, there is no indication that the State deliberately and intentionally sought to introduce to the jury evidence that Lee was engaged in the sale of illegal drugs. Furthermore, defendant, without objection, permitted the introduction of evidence to the effect that the parties were, at a minimum, violating the law by both drinking on a public highway and smoking "pot." Neb. Rev. Stat. §§ 53-186 (Reissue 1978) and

28-416 (Cum. Supp. 1982). Defendant argues that those crimes were minor in comparison to the crime of selling marijuana, and therefore the testimony regarding the sale should be viewed in a different light. We find no basis in the record, however, to assume this to be true. As a matter of fact, one might conclude from examining the record that in fact defense counsel wanted the jury to believe that Lee had been smoking pot and drinking to excess so that it might believe that Lee could not have the requisite intent to commit murder in the first degree. To therefore suggest that some of the evidence was admissible, or at least harmless, and the balance inadmissible and harmful is an attempt to draw a line too fine. Where the statement here is so minor as compared to either the crime charged or the other evidence introduced, we can say that a substantial miscarriage of justice did not occur.

Lee's second assignment of error concerns the trial court's refusal to permit Welker to testify concerning certain allegedly exculpatory statements made by Lee following the incident. The trial court did permit Welker to testify concerning statements made by Lee during the first 10 minutes following the incident. Lee sought to introduce other allegedly exculpatory statements made by him to Welker during the remaining 4 hours while they drove around Omaha. These statements, the trial court concluded, were too remote in time and did not fall into the "excited utterance exception" to the hearsay rule. We believe the trial court was correct.

Neb. Rev. Stat. § 27-803(1) (Reissue 1979) does indeed exclude from the hearsay rule statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." To qualify as an excited utterance the following conditions must exist: "(1) There must have been a startling event. [Citation omitted.] (2) The statement must relate to the event. [Citation omitted.] (3) The statement

must have been made by the declarant while under the stress of the exciting event. [Citations omitted.]" *State v. Reed*, 201 Neb. 800, 806, 272 N.W.2d 759, 762 (1978). A determination as to the admissibility of the statement generally rests within the sound discretion of the trial court. See, *State v. Juarez*, 187 Neb. 354, 190 N.W.2d 858 (1971); *State v. Brown*, 190 Neb. 96, 206 N.W.2d 331 (1973). Our review of the entire record leads us to the conclusion that one cannot say that the trial court abused its discretion when it determined that after 10 minutes all further statements were outside of the excited utterance rule.

Moreover, it appears that the statements which were excluded were simply more of the same type of statements which were permitted and would therefore, at best, have been cumulative in nature. The refusal by the trial court to permit the introduction of cumulative evidence is not error and does not entitle a defendant to a new trial, absent a showing of an abuse of discretion. *State v. Newman*, 179 Neb. 746, 140 N.W.2d 406 (1966); *Edmonds v. State*, 163 Neb. 323, 79 N.W.2d 453 (1956). We believe the evidence fails to show any abuse of discretion.

Having therefore concluded that there was no error committed by the trial court, we affirm both the convictions and the sentences.

AFFIRMED.

IN RE INTEREST OF C., E., A., AND H., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. H.N., APPELLANT.

341 N.W.2d 605

Filed December 23, 1983. No. 83-164.

Parental Rights. An order of the juvenile court terminating parental rights must be supported by clear and convincing evidence.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

Kent E. Florom, Lincoln County Public Defender, for appellant.

James Mueller, Deputy Lincoln County Attorney, for appellee.

Richard A. Birch, guardian ad litem.

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

WHITE, J.

This is an appeal from the order of the district court for Lincoln County, Nebraska, which affirmed the county court order terminating the parental rights of Harold to C., E., A., and H., children under the age of 18 years. Harold appeals. We review the matter de novo upon the record. *In re Interest of Goodon*, 208 Neb. 256, 303 N.W.2d 278 (1981).

An order of the juvenile court terminating parental rights must be supported by clear and convincing evidence. *In re Interest of R.D.J. and K.S.J.*, 215 Neb. 724, 340 N.W.2d 415 (1983).

In an amended petition filed in the county court, appellant was alleged to be an unfit parent by reason of debauchery, use of intoxicating liquor, and lascivious behavior, which conduct is seriously detrimental to the health, morals, or well-being of the children. Neb. Rev. Stat. § 43-209(4) (Reissue 1978). Both lower courts agreed with this allegation, thereby terminating appellant's parental rights.

While there are several alleged errors assigned and argued, including the reception of certain evidence, they need not be discussed, since the evidence about which there is no substantial dispute establishes conclusively the absolute unfitness of the appellant.

We will not detail the evidence except to note that appellant on a number of occasions engaged in

sexual acts with his children and the neighbors' children. He was convicted and is presently incarcerated for the offenses of first degree sexual assault.

The clear import of the evidence establishes that the appellant suffers from a psychotic disorder known as pedophilia, an adult individual's sexual preference for children. No reasonable prospect exists that the appellant can ever be cured of this disorder and, certainly, none exists that he can be cured within any reasonable time.

The district court was correct in affirming the decision of the county court terminating the parental rights of Harold.

The natural mother was shown by the evidence to have abandoned the children 5 years prior to the filing of the petition. She was served by published notice, after attempted service at the last and second last known addresses was unsuccessful. She did not appear at these proceedings and her parental rights were also terminated by the county court.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANA MILLER, APPELLANT.

341 N.W.2d 915

Filed December 23, 1983. No. 83-225.

1. **Criminal Law: Kidnapping: False Imprisonment.** The kidnapping statute, Neb. Rev. Stat. § 28-313 (Reissue 1979), and the false imprisonment in the first degree statute, Neb. Rev. Stat. § 28-314 (Reissue 1979), define separate offenses.
2. **Criminal Law.** When an act violates more than one criminal statute, the State may prosecute under either criminal statute so long as it does not discriminate against any class of defendants.

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

Thomas M. Kenney, Douglas County Public Defender, and Victor Gutman, for appellant.

Paul L. Douglas, Attorney General, and Lynne R. Fritz, for appellee.

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

BOSLAUGH, J.

After trial to the court the defendant was convicted of kidnapping and use of a firearm in the commission of a felony. He was sentenced to imprisonment for 5 years on count I and imprisonment for 1 year on count II. He has appealed, and contends that the trial court should have dismissed the information or found him guilty of false imprisonment in the first degree.

The offense occurred on October 6, 1982, when the defendant entered the office of the superintendent of shops of the Union Pacific Railroad in Omaha, Nebraska, and held the superintendent prisoner at gunpoint for approximately 40 minutes. The defendant had been refused employment because of a physical disability. During the time that the defendant held the superintendent prisoner, the defendant stated that he intended to kill the superintendent. After about 40 minutes the defendant left the superintendent's office without harming him, but the defendant threatened to "get" the superintendent's family if the authorities were sent after the defendant.

Under Neb. Rev. Stat. § 28-313(1)(c) (Reissue 1979), "A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following: . . . (c) Terrorize him or a third person." Neb. Rev. Stat. § 28-312 (Reissue 1979) defines "restrain" and "abduct" in pertinent part as follows: "(1) Restrain shall mean to restrict a person's movement in such a manner as to interfere substantially with his liberty: (a) By means of force, threat, or deception . . . (2) Abduct shall mean to restrain a person with intent to prevent his liberation by: . . . (b) Endan-

gering or threatening to endanger the safety of any human being."

The evidence of the State was clearly sufficient, if believed, to support a finding of guilty on both counts, beyond a reasonable doubt.

The defendant contends that the evidence would also have sustained a finding of guilty of false imprisonment in the first degree. Neb. Rev. Stat. § 28-314(1)(a) (Reissue 1979) provides: "A person commits false imprisonment in the first degree if he knowingly restrains or abducts another person (a) under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury."

The defendant argues that the offenses are identical if a person is abducted with the intent to terrorize the victim or the abduction occurs under terrorizing circumstances. The defendant then argues that the prosecution for kidnapping violated the defendant's right to due process and equal protection because the prosecutor could arbitrarily choose which crime to charge.

The defendant's contention that the crimes are identical is without merit. Kidnapping requires proof of a specific intention which is not an element of false imprisonment. An abduction might occur under terrorizing circumstances even though there was no intention on the part of the abductor to terrorize the victim.

The defendant's second contention is equally without merit. The discretion which a prosecutor exercises in deciding which crime to charge is no different in this case than that which a prosecutor exercises in any case where a single act may violate more than one statute. In *United States v. Batchelder*, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979), the U.S. Supreme Court held that when an act violates more than one criminal statute, the government may prosecute under either criminal statute so long as it does not discriminate against any

class of defendants. The Court stated: "[T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause." *Id.* at 125.

In *State v. White*, 209 Neb. 218, 228, 306 N.W.2d 906, 913 (1981), this court quoted with approval from *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978), as follows: " 'In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." ' "

See, also, *State v. Karpinski*, 92 Wis. 2d 599, 285 N.W.2d 729 (1979).

There being no error, the judgment is affirmed.

AFFIRMED.

PAMELA J. SHAW, APPELLEE, V. WAYNE R. SHAW, APPELLANT.
341 N.W.2d 348

Filed December 23, 1983. No. 83-228.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Harry H. Foulks, for appellant.

Patricia J. Jacobs, for appellee.

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

PER CURIAM.

The court, having reviewed the record in this case, finds that the judgment of the trial court should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ALFRED D. COCA, APPELLANT.
341 N.W.2d 606

Filed December 23, 1983. No. 83-296.

1. **Criminal Law: Rules of Evidence.** The "evidence of other crimes" rule is one of relevance.
2. **Rules of Evidence.** Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.
3. **Criminal Law: Evidence: Prior Acts.** As a general proposition, evidence of crimes committed by the accused other than that with which he is charged is not admissible.
4. _____: _____: _____. It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that he committed other crimes.
5. _____: _____: _____. Evidence of other crimes is admissible where there are unique, almost "signature-like" similarities between them and the offense charged or the evidence is otherwise so

related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the guilt of the accused.

6. _____: _____: _____. Balancing the need for "other-crimes" evidence against the possible prejudice to the accused is within the discretion of the trial court.
7. **Criminal Law: Evidence: Proof.** Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found.
8. **Words and Phrases.** Intentionally means "willfully" or "purposely," and not accidentally or involuntarily.
9. **Criminal Law: Words and Phrases.** To possess a narcotic drug means to have actual control, care, and management of, and not a passing control, fleeting and shadowy in its nature.
10. _____: _____. In criminal law, motive is that which leads or tempts the mind to indulge in a criminal act.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded for a new trial.

Deborah K. Long, and Toney J. Redman, for appellant.

Paul L. Douglas, Attorney General, and Sharon M. Lindgren, for appellee.

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

CAPORALE, J.

A jury determined, and the trial court adjudged, that defendant-appellant, Alfred D. Coca, was guilty of knowingly and intentionally possessing more than 1 pound of marijuana. Following an enhancement proceeding, Coca was also adjudged to be an habitual criminal. He was thereafter sentenced to imprisonment for a term of 10 years. In this appeal Coca argues, among other things, that the trial court improperly received certain evidence. We agree with that argument, reverse the trial court's judgments, and remand for a new trial.

On November 8, 1981, Lincoln police detective

Mark Lantis observed a green 1979 Mercury automobile, bearing Colorado license plates, parked on the side of a gravel road near 1st and Old Cheney Road, a rural area outside the city of Lincoln but within Lancaster County. He approached the automobile and asked the lone occupant, who was seated in the front passenger seat, to identify herself. She produced a Kansas driver's license identifying her as Jeannine Hupe. After being unable to check the automobile's registration certificate and license plates with the Lincoln Police Department, Lantis searched the surrounding area. Finding no one, he left, parked about a half mile away, and kept the automobile under observation. After a few minutes Lantis observed a man approach the automobile and enter it by the driver's side door. The automobile was then driven away.

Lantis followed the Mercury and eventually stopped it. He asked the driver for identification and a driver's license. The driver identified himself as Coca and admitted he had no license to drive, as it had been suspended in Colorado. Lantis issued Coca a citation and asked his permission to search the automobile. Coca allowed Lantis to search the trunk but refused to allow a search of the passenger compartment without a warrant. In the trunk Lantis found a paper bag containing several syringes, a spoon with a sooty bottom and a powdery residue in the bowl, several foil-wrapped cubes, a bag containing a single hand-rolled cigarette, and a Polaroid photograph of a marijuana plant. Coca denied that the items were his and claimed that his girl friend was a diabetic. Coca was then taken to the police station, where Lantis determined that there were needle marks on Coca's arms. He was then placed in jail.

Thereafter, a warrant was issued to search the vehicle. A quantity of marijuana was found in a plastic garbage bag on the floor behind the driver's seat. A smaller bag of marijuana was found on the floor

behind the front passenger seat. Lantis also found a box of plastic sandwich bags; another photograph; two spoons, both of which were burnt on the bottom and one of which contained a powdery residue; a bag of cellophane-wrapped cubes; some foil-wrapped cubes; some small white packets; and some white tablets.

A state-employed chemist later determined that the cubes, the tablets, and the white packets contained no controlled substances. The spoons had traces of phenmetrazine, a controlled substance prescribed as a weight reduction aid. The chemist determined that the total weight of marijuana seized from the automobile weighed 1 pound 15 ounces.

As a result of the November 8, 1981, arrest, Coca was charged with knowingly and intentionally possessing more than 1 pound of marijuana in violation of Neb. Rev. Stat. § 28-416(5) (Cum. Supp. 1982). He was also charged with being an habitual criminal under the provisions of Neb. Rev. Stat. § 29-2221 (Reissue 1979).

On September 16, 1981, about 2 months prior to his November 1981 arrest, Coca and Hupe had been discovered harvesting marijuana at another Lincoln location. Coca fled upon police discovery of this activity; however, he was apprehended the next day. Hupe was arrested at the scene, at which time the same 1979 Mercury automobile which was observed by Lantis on November 8, 1981, was seized and searched. That search resulted in the confiscation of a quantity of marijuana. Coca pled guilty to charges arising from the September harvesting.

At Coca's trial concerning the November 1981 incident, the State elicited testimony and introduced other evidence concerning the September crime. The State also introduced the nonmarijuana-related physical evidence seized from the automobile pursuant to the November arrest of the defendant. Coca argues, inter alia, that the trial court should have excluded all the foregoing evidence.

The applicable "evidence of other crimes" statute is Neb. Rev. Stat. § 27-404(2) (Reissue 1979), which provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he 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 rule is one of relevance. *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Neb. Rev. Stat. § 27-401 (Reissue 1979); *State v. Bromwich*, 213 Neb. 827, 331 N.W.2d 537 (1983).

As a general proposition, evidence of crimes committed by the accused other than that with which he is charged is not admissible. *State v. Evans*, 212 Neb. 476, 323 N.W.2d 106 (1982); *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975). However, it is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged, even though such facts and circumstances may prove or tend to prove that he committed other crimes. *State v. Evans*, *supra*; *State v. Scott*, 211 Neb. 237, 318 N.W.2d 94 (1982); *State v. Dandridge*, 209 Neb. 885, 312 N.W.2d 286 (1981); *State v. Ellis*, *supra*. Evidence of other crimes is admissible where there are unique, almost "signature-like" similarities between them and the offense charged, or the evidence is otherwise so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the guilt of the accused. *State v. Scott*, *supra*; *State v. Dandridge*, *supra*.

Balancing the need for "other-crimes" evidence against the possible prejudice to the accused is

within the discretion of the trial court. *State v. Scott, supra.*

In order to determine whether the trial court abused its discretion, we must keep in mind the constituent elements of the crime with which Coca was charged. They are set forth in § 28-416(5) as (1) knowingly or intentionally, (2) possessing, (3) marijuana, (4) which weighed more than 1 pound.

There is no doubt that marijuana weighing more than 1 pound was found in the automobile driven by Coca. The inquiry, therefore, becomes whether the evidence in controversy so bears upon the remaining elements as to justify its admission under the rules discussed earlier in this opinion.

As to the element of knowledge, this court has said: "Proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. People v. Mack, 12 Ill. 2d 151, 145 N.E.2d 609. But mere presence at a place where a narcotic drug is found is not sufficient. State v. Hunt, 91 Ariz. 149, 370 P.2d 642; Carrell v. State, 90 Ariz. 411, 368 P.2d 649. As stated by the Arizona court in State v. Hunt, *supra*, joint possession cannot be established by the fact that the defendant is or has been in the company of one who has a narcotic drug on his person. An additional independent factor linking the defendant with the narcotic must be shown. See, also, Spataro v. State (Fla. App.), 179 So.2d 873; Evans v. United States, 257 F.2d 121." *State v. Faircloth*, 181 Neb. 333, 337, 148 N.W.2d 187, 190 (1967).

Intentionally means "willfully" or "purposely," and not accidentally or involuntarily. *Sall v. State*, 157 Neb. 688, 61 N.W.2d 256 (1953).

To possess a narcotic drug means to have actual control, care, and management of, and not a passing control, fleeting and shadowy in its nature. *State v. Williams*, 211 Neb. 650, 319 N.W.2d 748 (1982).

The task further resolves itself into an analysis of whether the evidence was properly received as tending to establish any one or more of those remaining elements by proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. § 27-404(2).

In criminal law, motive is that which leads or tempts the mind to indulge in a criminal act. *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). It does not seem to us it can be said that Coca's involvement in a September marijuana harvesting scheme tends to establish his motive to possess marijuana in November.

Likewise, the evidence is irrelevant to show Coca's opportunity to possess marijuana at the later date, since all the marijuana found in the car in September was confiscated by the police at that time.

We cannot infer that because Coca intended to harvest different marijuana in September, he intended to possess the marijuana which was found in the automobile in November.

Neither can it be said the September crime tends to show how Coca prepared to possess marijuana in November. In fact, if the prior harvesting were in preparation for the later possession, the prior act proved fruitless. Nor is there any apparent plan or scheme common to the September and November acts. The harvesting incident does not show that the November possession was the end result of a scheme which included the September harvesting.

Does the fact that he was involved in a prior harvesting scheme make it more likely he knew that the marijuana was behind the seat of the vehicle in November? It does not; the important question as to knowledge in the November incident is whether Coca knew the marijuana was in the car, not whether he knew what marijuana was.

There is no problem with Coca's identity in this case. Neither are there any issues as to whether there was any mistake or accident.

We must therefore conclude that the evidence of the September crime has no relevancy to the question of whether Coca knowingly or intentionally possessed more than 1 pound of marijuana in November. The jury was asked to infer from the evidence that since Coca was involved with marijuana previously, he criminally possessed it at a later time. Evidence of a prior crime cannot be used for such a purpose. Coca's conviction must therefore be reversed and a new trial granted to him.

Having reached that conclusion, it is not necessary to consider Coca's other arguments, except to observe that the nonmarijuana-related physical evidence seized from the automobile was also irrelevant to the offense with which the defendant was charged and should not have been received.

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, J., concurs in the result.

MAUDE CLEVENGER SIM, APPELLANT, V. OPAL C. COMISKEY AND EDITH R. WRIGHT, APPELLEES.

341 N.W.2d 611

Filed December 23, 1983. No. 83-324.

1. **Declaratory Judgments.** The granting of declaratory relief is discretionary.
2. _____. Declaratory relief will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

William L. Walker of Walker & Ludlam, and Harvey A. Neumeister and Kent J. Neumeister, for appellant.

Hoch & Steinheider, for appellees.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for State.

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

PER CURIAM.

This is an appeal from an order of the district court dismissing plaintiff-appellant's petition for declaratory judgment on the ground that at the time of its filing there was pending in the county court a proceeding involving the same parties and issues. We affirm.

The record establishes that sometime prior to September 3, 1982, the defendants-appellees, Opal C. Comiskey and Edith R. Wright, filed a petition in the county court for Otoe County, seeking an appointment of a conservator and guardian for their half sister, Maude Sim, the plaintiff-appellant, then 82 years of age. In Sim's amended answer filed in the county court, she questioned the constitutionality of 1982 Neb. Laws, L.B. 428, which amended Neb. Rev. Stat. §§ 30-2619, 30-2620, 30-2624, 30-2625, 30-2627, 30-2628, 30-2630, and 30-2633 (Reissue 1979), concerning the appointment of guardians for incapacitated persons.

On September 17, 1982, Sim instituted this action in the district court for Otoe County, seeking a declaration that L.B. 428 is unconstitutional, and seeking to enjoin the prosecution of the county court proceeding.

This court has said on numerous previous occasions that the granting of declaratory relief is discretionary. *Millard School Dist. v. State Department of Education*, 202 Neb. 707, 277 N.W.2d 71 (1979); *Stahmer v. Marsh*, 202 Neb. 281, 275 N.W.2d 64 (1979); *Blanco v. General Motors Acceptance Corp.*, 180 Neb. 365, 143 N.W.2d 257 (1966); *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 75 N.W.2d 619 (1956).

The sole question presented, therefore, is whether

the district court abused its discretion in dismissing Sim's quest for declaratory relief. It did not.

In *Strawn v. County of Sarpy*, 146 Neb. 783, 21 N.W.2d 597 (1946), a case seeking a declaration of contract rights in the face of other pending actions involving the same contract, we denied declaratory relief and adopted the rule that such relief will not be entertained if there is pending, at the commencement of the declaratory action, another action or proceeding to which the same persons are parties and in which are involved, and may be adjudicated, the same issues involved in the declaratory action.

We have reiterated that rule on at least three occasions since *Strawn*. It appears we last did so in *Slosburg v. City of Omaha*, 183 Neb. 839, 165 N.W.2d 90 (1969). Therein, we directed entry of a declaratory judgment because, inter alia, there was no other case pending at the time the declaratory action was filed. We also recognized the rule in *Berigan Bros. v. Growers Cattle Credit Corp.*, 182 Neb. 656, 156 N.W.2d 794 (1968), but held it did not apply because the issue in the previously pending case was not the same as the multiple issues presented in the declaratory action. The rule was acknowledged in *State ex rel. Meyer v. Sorrell*, 174 Neb. 340, 117 N.W.2d 872 (1962), wherein we refused to permit a declaratory action, filed prior to the holding of a hearing by the Governor to remove a public official from office, to operate so as to oust this court's original jurisdiction in a quo warranto action.

We also noted in *Strawn v. County of Sarpy, supra*, quoting with approval from *Woollard v. Schaffer Stores Co.*, 272 N.Y. 304, 5 N.E.2d 829 (1936), that when " 'another action between the same parties, in which all issues could be determined, is actually pending at the time of the commencement of an action for a declaratory judgment, the court abuses its discretion when it entertains jurisdiction.' " *Strawn* at 788, 21 N.W.2d at 600.

It is clear that the district court did not abuse its discretion by dismissing Sim's petition for a declaratory judgment.

AFFIRMED.

STATE OF NEBRASKA EX REL. LINDA M. BIRDINE, APPELLEE, V. JOHN FULLER, APPELLANT.

341 N.W.2d 613

Filed December 23, 1983. No. 83-506.

1. **Courts: Judgments.** A district court has no authority or power to vacate a judgment after term except for the reasons and within the time limited in Neb. Rev. Stat. § 25-2001 (Reissue 1979).
2. **Equity: Judgments.** Equity will not vacate a judgment after term where there is an adequate remedy at law.
3. _____: _____: To be entitled to vacate a judgment after term by an action in equity, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under Neb. Rev. Stat. § 25-2001 (Reissue 1979).

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Jerry L. Pettit, for appellant.

Patricia J. Jacobs, for appellee.

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

BOSLAUGH, J.

The respondent, John Fuller, appeals from the order of the district court dismissing his petition to vacate a judgment in a paternity action. The trial court found that any right to relief was barred by Neb. Rev. Stat. § 25-2008 (Reissue 1979).

On February 8, 1978, a petition was filed in the district court alleging that the respondent was the father of two children born to the petitioner, Linda M. Birdine. A summons and a copy of the petition were served on the respondent personally. The respondent failed to plead or appear, and a default

judgment was entered against the respondent on April 5, 1978. The trial court found that the respondent was the father of the children, and he was ordered to pay support in the amount of $100 per month for each child.

Thereafter, various proceedings were had in an effort to enforce the order for support. On January 25, 1980, the trial court ordered the respondent to show cause why he should not be proceeded against and punished for having failed and refused to make child support payments as provided in the order of April 5, 1978. A copy of that order was served personally on the respondent on January 30, 1980. During 1980 and 1981, the respondent made payments, but not in the amounts required by the judgment of April 5, 1978.

On February 4, 1983, the respondent filed an application to vacate the judgment, alleging that the judgment of April 5, 1978, was entered as the result of irregularity and fraud. A petition seeking the same relief was filed February 28, 1983.

Neb. Rev. Stat. § 25-2001 (Reissue 1979) provides that a judgment may be vacated or modified after term for irregularity in obtaining the judgment and for fraud practiced by the successful party. Section 25-2008 provides that proceedings to vacate or modify a judgment for irregularity must be commenced within 3 years after the defendant had notice of the judgment; proceedings to vacate or modify a judgment for fraud must be commenced within 2 years after the judgment is rendered, unless the party thereto is an infant or person of unsound mind, and then within 2 years after removal of such disability.

After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in § 25-2001. *Lienemann v. Lienemann*, 197 Neb. 449, 249 N.W.2d 902 (1977). See, also, *Meier*

v. Nelsen, 156 Neb. 666, 57 N.W.2d 273 (1953). The application of the respondent filed on February 4, 1983, was filed more than 3 years after January 30, 1980, the date on which an order to show cause was served upon the respondent, and more than 4 years after the judgment of April 5, 1978, was entered. The finding of the district court that the proceeding was barred by § 25-2008 is supported by the record.

The respondent argues that in addition to the statutory remedy the trial court may vacate the judgment under its equity powers. In *McNally v. McNally*, 152 Neb. 845, 851, 43 N.W.2d 170, 174 (1950), we said: "Defendants also contend that they are entitled to equitable relief independent of the statutory provisions. We have recently restated the applicable rule: ' "While in a proper case an action in equity to vacate a judgment and obtain a new trial will lie, such relief will not be granted when there is an adequate remedy at law. * * * To be entitled to equitable relief in such a case, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under section 25-2001, R. S. Supp., 1947." ' Nemetz v. Nemetz, *ante* p. 178, 40 N.W.2d 685. No such showing is made."

There is nothing in the record to show a legal reason why the defendant was prevented from defending the action in 1978 or attempting to vacate the judgment after he was served with the order to show cause in 1980.

The judgment is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

Cite as 216 Neb. 89

IN RE DISSOLUTION OF SCHOOL DISTRICT NO. 22. RANDALL D. ACKLIE, APPELLANT, V. DOUGLAS J. JENSEN, COUNTY SUPERINTENDENT, APPELLEE.

341 N.W.2d 918

Filed December 30, 1983. No. 82-601.

1. **Schools and School Districts: Statutes.** Under the provisions of Neb. Rev. Stat. §§ 79-603 and 79-420 (Reissue 1981), it is the mandatory duty of the county superintendent to dissolve a Class I school district which for 2 consecutive years contracts for instruction of all of its pupils with a Class II, III, IV, or V district, and to attach its territory to one or more neighboring school districts other than a Class I district.
2. **Schools and School Districts: Appeal and Error.** Appeals from action taken by the county superintendent in cases involving the dissolution and merging of Class I school districts are tried de novo in the district court and heard de novo on the record in this court.
3. **Schools and School Districts: Constitutional Law.** A litigant who invokes the provisions of a statute in appealing the action of a county superintendent in dissolving and merging a Class I school district may not challenge that statute's validity nor seek the benefit of such statute and in the same action and at the same time question its constitutionality.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

Richard Krepela, Madison County Attorney, for appellee.

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

HASTINGS, J.

This is an appeal from a judgment of the district court for Madison County which affirmed the order of the Madison County superintendent of schools dissolving school district No. 22 of Madison County and merging it with school district No. 5 of Battle Creek.

School district No. 22 was a Class I district composed of certain sections of land within Township 23, and was located immediately adjacent to the south-

easternmost corner of district No. 5, a Class III district. Randall D. Acklie, the plaintiff-appellant, was, until June 20, 1981, a resident and registered voter of school district No. 22. Thereafter, and at the time of the appeal hearing in district court on June 28, 1982, he had paid some leasehold improvement taxes on a grain bin located within the boundaries of district No. 22, although he no longer resided within the district.

Neb. Rev. Stat. § 79-603 (Reissue 1981) provides in part that "the county superintendent shall dissolve and attach to a neighboring district or districts any school district which, for two consecutive years, contracts for the instruction of all of its pupils with a Class II, III, IV, or V district. The dissolution . . . shall be effected in the manner prescribed in section 79-420."

Neb. Rev. Stat. § 79-420 (Reissue 1981) provides that before dissolving a district, the county superintendent shall fix a time for hearing, and shall notify each legal resident of the district 15 days before the hearing by mail or publication in a newspaper of general circulation in the area. If the county superintendent finds that the district is to be dissolved, an order shall be entered dissolving the district and attaching "*the territory of such district to one or more neighboring school districts.*" (Emphasis supplied.)

Section 79-420 also provides that appeals from orders of the county superintendent may be taken to the district court. These appeals are heard de novo in that court, and are reviewed in this court de novo on the record. Neb. Rev. Stat. § 25-1937 (Reissue 1979).

With exceptions not present here it is the mandatory duty of the county superintendent to dissolve the school district involved and attach its territory to another district or districts where such Class I district has contracted for the instruction of all of its pupils with a Class III district for 2 consecutive

years. *Chappell v. Carr*, 185 Neb. 158, 174 N.W.2d 208 (1970).

No question is presented by the record but that a proper hearing was held by the county superintendent on March 20, 1980, and that the conditions requiring dissolution and merger were present in this case. However, Acklie complains not of the dissolution of the district involved, but in the attachment of its territory to district No. 5 rather than to one of the other Class III districts within the county.

This contention was answered in *McDonald v. Rentfrow*, 171 Neb. 479, 106 N.W.2d 682 (1960), a case involving the identical issue. This court said: "What was done here was in the exercise of legislative power properly delegated by the Legislature to the county superintendent. . . . In pursuance of this delegated power the county superintendent could do what was done by the order in question without the consent and over the protests of residents or taxpayers in the district." *Id.* at 489, 106 N.W.2d at 689.

The appellant next contends that §§ 79-603 and 79-420 violate the provisions of article II, § 1, and article III, § 1, Constitution of Nebraska, in that no standards or limitations are prescribed for the direction and guidance of the county superintendent in deciding to what neighboring district or districts the territory of the dissolved district shall be attached. "This court has held many times that a litigant who invokes the provisions of a statute may not challenge its validity; nor seek the benefit and in the same action and at the same time question its constitutionality." *Alumni Control Board v. City of Lincoln*, 179 Neb. 194, 199, 137 N.W.2d 800, 804 (1965).

As stated in *Shields v. City of Kearney*, 179 Neb. 49, 51-52, 136 N.W.2d 174, 175 (1965): "The plaintiffs in this action have availed themselves of the remedy provided by the statute. They seek the benefit of the statute to obtain a determination that the action of the city was not authorized under the statute. They are, therefore, prevented in this action from ques-

tioning the constitutionality of the statute under which they have proceeded. We make no determination of the question concerning the constitutionality of the statute as amended."

From a de novo review we find that the action of the county superintendent was neither arbitrary, capricious, nor unreasonable, nor did his action violate any of the rights or privileges to which the appellant is entitled. The judgment of the district court is affirmed.

AFFIRMED.

RANDALL A. MCFARLAND, BY AND THROUGH HIS FATHER AND NEXT FRIEND, DONALD E. MCFARLAND, SR., APPELLANT, V. PATRICK O. KING ET AL., APPELLEES.

341 N.W.2d 920

Filed December 30, 1983. No. 82-661.

1. **Summary Judgment.** A party is entitled to summary judgment if (1) he can show there is no genuine issue of material fact, and (2) where, under the facts, he is entitled to judgment as a matter of law.
2. _____. In considering a motion for summary judgment, the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom.
3. **Motor Vehicles: Rules of the Road.** A driver emerging from a driveway has the duty to look for approaching traffic and to see what is in plain sight within the radius which denotes danger.
4. _____: _____. A driver of a vehicle must maintain such lookout and control as will avoid collision with others exercising due care. He has a right to assume that others, children and adults, will do likewise.
5. _____: _____. A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way.
6. **Motor Vehicles: Proximate Cause: Negligence.** Where the evidence shows without dispute that the proximate cause of a collision is the failure of the driver of a vehicle entering a highway from a

private road to look for approaching vehicles, the failure to look constitutes such negligence as will bar recovery as a matter of law.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Dale Romatzke of Kelley, Wallace, Scritsmier, Moore, Romatzke & Byrne, P.C., for appellant.

Stephen W. Kay of Kay & Kay, for appellees.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and NORTON, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This was a suit against Patrick O. King (King) and his employer, Missouri Valley Construction Company, to recover for personal injuries sustained when Randall A. McFarland (Randall), age 15 years, collided with King's pickup truck while riding his bicycle. Defendants' separate motions for summary judgment were sustained. Plaintiff appeals. We affirm.

We first discuss the issues of King's liability, Randall's contributory negligence, and causation. King, Randall, two eyewitnesses, and two accident investigating officers testified by deposition.

There is no substantial dispute of these facts. The accident occurred about 5:45 p.m. on August 14, 1979, on Rodeo Road, North Platte, Nebraska, in the business district at a point west of the Ash Street intersection. Rodeo Road runs east and west, with two lanes of traffic each way; there are stop signs on Ash Street at the intersection. There is a private driveway on the north side of Rodeo Road; its west edge is about 68 feet west of the center of the intersection. Leland Emken had stopped his 12-foot-long pickup truck in that driveway, heading south and preparing to exit into the street; his pickup was across the sidewalk, with the front of the pickup about 7 feet from the edge of Rodeo Road. Emken and his wife, Jennie, a passenger, both observed Randall pedaling his 10-speed bicycle eastward on

the sidewalk west of their pickup; he looped around the rear of the pickup, came along the left side of the truck and exited southeasterly onto Rodeo Road without slowing, stopping, or looking for traffic; the view to the east was unobstructed; they described Randall's speed as fast. Randall looked west at all times; he continued to look west and pedaled his bicycle up to the time of impact with King's truck. The point of impact was about 25 feet from the front of Emken's truck. Randall never looked in the direction of King.

King was driving his pickup truck west on Rodeo Road in the inside lane at about 30 to 32 m.p.h.; he was observing traffic ahead, and he saw Emken's truck about the time that he left the intersection; he never saw Randall until the bicycle was 4 feet from his truck. The impact was on the front side of the right front fender; the headlight and windshield were broken. Randall received severe head injuries; he has no recollection of the events.

A party is entitled to summary judgment if (1) he can show there is no genuine issue of material fact, and (2) where, under the facts, he is entitled to judgment as a matter of law. *Green v. Village of Terrytown*, 189 Neb. 615, 204 N.W.2d 152 (1973). See Neb. Rev. Stat. § 25-1332 (Reissue 1979).

"In considering a motion for summary judgment, the court views the evidence in the light most favorable to the party against whom it is directed giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom." *Pfeifer v. Pfeifer*, 195 Neb. 369, 371, 238 N.W.2d 451, 453 (1976).

These rules apply to the duties of Randall and King.

"The driver of a vehicle emerging from . . . [a] driveway . . . shall stop such vehicle immediately before driving onto a sidewalk . . . extending across such . . . driveway . . . . Before entering the highway, he shall yield the right-of-way to all vehicles

approaching on such highway." Neb. Rev. Stat. § 39-638 (Reissue 1978). This statute applies to bicycle riders (Neb. Rev. Stat. § 39-686 (Reissue 1978)); and in *Sacca v. Marshall*, 180 Neb. 855, 146 N.W.2d 375 (1966), its provisions were held to apply to a 14-year-old boy.

A driver emerging from a driveway has the duty to look for approaching traffic and to see what is in plain sight within the radius which denotes danger. *Laux v. Robinson*, 195 Neb. 601, 239 N.W.2d 786 (1976).

"A driver [of a vehicle] . . . must maintain such lookout and control as will avoid collision with others exercising due care. He has a right to assume that others, children and adults, will do likewise." *Zoucha v. Northwestern Bell Tel. Co.*, 176 Neb. 408, 414, 126 N.W.2d 220, 224 (1964); *Bear v. Auguy*, 164 Neb. 756, 83 N.W.2d 559 (1957).

" 'A vehicle traveling on a highway at a reasonable and lawful rate of speed is not required to slow down or stop upon the appearance of a vehicle about to enter the highway from a private road until it reasonably appears that its driver is not going to yield the right-of-way.' " *Laux v. Robinson*, *supra* at 604, 239 N.W.2d at 788; *Kubo v. Fish*, 152 Neb. 74, 40 N.W.2d 270 (1949).

Appellant contends that since Randall looked to the west, there was an inference that he also looked east. This is not reasonable, considering the uncontradicted evidence of the two eyewitnesses to the contrary and the impact circumstance that Randall continued to pedal his bicycle up to the time of impact. Further, appellant is confronted with the rule that Randall had the duty to look for approaching traffic and to see what was in plain sight. *Laux v. Robinson*, *supra*.

As general propositions, we have held that summary judgment is difficult to use in many tort cases, *Pfeifer v. Pfeifer*, *supra*, including the issues of contributory negligence and the comparative measure-

ment of negligence, Neb. Rev. Stat. § 25-1151 (Reissue 1979); *C. C. Natvig's Sons, Inc. v. Summers*, 198 Neb. 741, 255 N.W.2d 272 (1977).

Appellant contends that *Camerlinck v. Thomas*, 209 Neb. 843, 312 N.W.2d 260 (1981), is applicable: "Where reasonable minds might draw different conclusions from the evidence, the question as to the child's negligence or contributory negligence under the circumstances is a matter for determination by the jury." (Syllabus of the court.) The issue there was whether a 6-year-old child who struck another child with a stick could be charged with negligence as a matter of law. It also recognized that in some cases, " 'Even if a child is not capable of contributory negligence, if such child's conduct can be considered the sole proximate cause of his injury there can be no recovery,' " *id.* at 855, 312 N.W.2d at 266, citing *Korbelik v. Johnson*, 193 Neb. 356, 227 N.W.2d 21 (1975). Appellants also cite *Sacca v. Marshall*, *supra*, and *Bear v. Auguy*, *supra*. Both are distinguishable. In *Sacca* there was a genuine issue of material fact as to whether or not the minor had steered his bicycle into the path of the car. There was a direct conflict in the evidence. In *Bear* there was a genuine question as to whether or not it was reasonable for a 14½-year-old boy to run a stop sign at an intersection when he was being pursued by a large dog.

Appellant's main argument is that there was a material fact question concerning King's failure to maintain proper control and lookout, as shown by his speed in excess of 20 m.p.h., Neb. Rev. Stat. § 39-662 (Reissue 1978), and his failure to see Randall until the bicycle was 4 feet from his truck.

There are exceptions to *Camerlinck*, as discussed in *Armer v. Omaha and Council Bluffs St. Ry. Co.*, 151 Neb. 431, 440-41, 37 N.W.2d 607, 612 (1949): "Appellee refers to cases of this and other jurisdictions where the complainant suddenly and without means of notice to the motorist placed himself in a position

of peril in the course of travel of a motor vehicle, and recovery was denied. These presented happenings where there was no opportunity for the operator of the vehicle to act and prevent a collision; and these were inevitable because of the suddenness of the appearance of the victim and the proximity to the moving machine. Unavoidable accident, at least so far as the driver was concerned, describe [sic] these happenings. *In these cases speed, absence of signal of approach, failure of lookout, or lack of control was not the cause, proximate or remote, of the accident.* . . . If the situation is created so quickly that the motorist has no opportunity to avoid doing injury, there is no liability, but if he has time within which an ordinarily careful and prudent person could and would avoid inflicting damage, the problem of whether or not his acts or omissions were negligent, or the proximate cause of the damage, is for a jury." (Emphasis supplied.)

Although the exact point of impact is not known, these facts appear: The west edge of the driveway was about 68 feet west of the center of Ash Street. Emken said his truck was in the driveway, with the front 7 feet north of the edge of Rodeo Road, and that the impact was about 10 feet east of his truck and 25 feet southeast diagonally from the truck, which would be about 18 feet southeast from the edge of the street.

Concerning the reasonableness of King's speed at 30 to 32 m.p.h., and disregarding the width of the Emken truck, the maximum distance that King traveled from the center of the intersection was 58 feet. It would take him 1.2 seconds to drive that distance at that speed. At 20 m.p.h. it would take him 1.9 seconds. His speed was not a material fact question, and it did not contribute to Randall's injury. *Hersh v. Miller*, 169 Neb. 517, 99 N.W.2d 878 (1959). At most, a slower speed would have placed the point of impact nearer the front of the truck.

When King left the intersection, he saw the Emken

pickup stopped in the driveway; he did not see Randall. King did not look in the direction of the pickup in the driveway again. King's pickup was in plain sight all of the time as Randall approached the edge of Rodeo Road. Randall did not either stop, look in the direction of King, or yield the right-of-way; he continuously propelled his bicycle into the street and against King's truck. Randall's own conduct placed him in a position of peril, and King had no opportunity to slow, stop, or turn aside to prevent the collision. Had King seen Randall pedaling along the east side of the Emken pickup, his first notice that Randall was not going to stop would have been when Randall passed the front of the pickup, which was 25 feet from impact, and his first notice that Randall would not yield the right-of-way was when Randall entered Rodeo Road, which was 18 feet from impact. At that time Randall could have safely turned east in the outside lane of the street. King could not have avoided the collision. There was no genuine issue of material fact concerning either control or lookout.

"Where the evidence shows without dispute that the proximate cause of a collision is the failure of the driver of a vehicle entering a highway from a private road to look for approaching vehicles, the failure to look constitutes such negligence as will bar recovery as a matter of law." (Syllabus of the court.) *Kubo v. Fish*, 152 Neb. 74, 40 N.W.2d 270 (1949).

On the record made by defendants, Randall's conduct was shown to be the proximate cause of his injury, and he cannot recover. *Kubo v. Fish, supra.*

Movants having made a prima facie showing for summary judgment, plaintiff was required to overcome it. *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982). Plaintiff produced an attorney's affidavit that at trial an expert would reconstruct the accident scene. Neb. Rev. Stat. § 25-1334 (Reissue 1979) requires that the "affidavits shall be made on personal knowledge, [and] shall set forth such

facts as would be admissible in evidence. . . ." Further, the affidavit did not controvert any of movants' competent evidence, and it did not establish the existence of a question of material fact. *Eden v. Klaas*, 165 Neb. 323, 85 N.W.2d 643 (1957).

Movants were entitled to summary judgment as a matter of law.

It is not necessary to discuss the other assigned errors.

AFFIRMED.

KUSTOM KREATIONS, LTD., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. RICHARD M. DUXBURY ET AL., APPELLANTS AND CROSS-APPELLEES.
342 N.W.2d 656

Filed December 30, 1983. No. 82-702.

1. **Mechanics' Liens: Foreclosure: Appeal and Error.** A foreclosure of a mechanic's lien is an action in equity which is heard on appeal in this court de novo on the record, with weight being given to the findings of the trial court when credible evidence is in conflict on material questions of fact.
2. **Pleadings: Trial.** Normally, a petition seeking to recover upon an express contract may be amended before trial to permit recovery on quantum meruit, in the absence of a showing of prejudice to the defendant.
3. **Pretrial Conferences: Pleadings: Trial.** If at a pretrial conference it appears there are issues not then within the pleadings, they should be stated plainly in the pretrial order, and, absent objections to the order by the parties, such order should thereafter govern the proceeding in that respect, and evidence may properly be received in support of proof as to such issues.

Appeal from the District Court for Lancaster County: JOHN M. BROWER, Judge. Affirmed.

James W. Hewitt, for appellants.

William E. Langdon of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and BRODKEY, J. Retired, and MURPHY, JOHN, D.J.

PER CURIAM.

This was an action brought prior to November 21, 1980, by the plaintiff, Kustom Kreations, Ltd., to foreclose a mechanic's lien which it had filed as a result of the construction of the home of the defendants Richard M. and Ardythe M. Duxbury. The defendant Universal Surety Company is the surety on a bond filed under the provisions of Neb. Rev. Stat. § 52-121 (Reissue 1978), effective at the time, to effect a transfer of the lien from the real estate. Judgment was entered by the district court in favor of the plaintiff in the amount of $7,207.93 on the basis of quantum meruit, and in favor of the Duxburys on their cross-petition for damages in the amount of $4,381.42. Both parties have appealed.

The foreclosure of a mechanic's lien is an action in equity which is heard on appeal in this court de novo on the record, with weight being given to the findings of the trial court when credible evidence is in conflict on material questions of fact. *Nebraska Engineering Co. v. Gerstner*, 212 Neb. 440, 323 N.W.2d 84 (1982); *Ringland-Johnson-Crowley v. First Cent. Serv.*, 255 N.W.2d 149 (Iowa 1977).

In early 1979 Charles Aron, the owner and operator of Kustom Kreations, Ltd. (Kustom), was contacted by the Duxburys regarding the purchase of a lot in the Ridgewood subdivision in Lancaster County. The Duxburys subsequently purchased a lot, and in May 1979 met with the plaintiff to discuss the construction of a residence. After several meetings the Duxburys decided to construct the residence and requested Kustom to be the general contractor. In June of 1979 Kustom began construction on the house.

Shortly thereafter, final plans were submitted by Robert Dawson, a Lincoln architect. Construction of the residence in accordance with the plans became difficult, if not impossible, according to the plaintiff, because the Duxburys requested numerous

major changes from July to the end of January 1980, when Kustom refused to work.

In January 1980 Kustom and the Duxburys met to discuss the number of changes requested by the defendants, the increased cost of the changes, and the financial problems involved with the construction of the residence. After two subsequent meetings during January, Kustom advised Mr. Duxbury of the intended termination at the end of the month. Upon termination Kustom gave Duxbury a list of the work to be completed and a final bill for labor performed, materials supplied to the residence, and a 10-percent fee based upon work completed through January 31, 1980.

The Duxburys assign as error: (1) The trial court was incorrect to allow recovery in quantum meruit when an express contract theory was pleaded; (2) There was error in allowing Kustom to recover when substantial performance was not completed on the contract; (3) The trial court erred in failing to find a contract price limitation of $100,000; and (4) The trial court erred in assessing the amount of damages on the cross-petition. Kustom assigns as error the award of an 8-percent contractor's fee instead of 10 percent, and the award of damages on the defendants' cross-petition.

By its amended petition Kustom alleged the following: "3. Beginning June 28, 1979, and at various times thereafter and extending to and including February 1, 1980, the plaintiff, pursuant to an oral contract between the plaintiff and the defendants, Richard M. Duxbury and Ardythe M. Duxbury, delivered two hundred concrete blocks and four round bales of hay to the above described real estate, performed thirty-three hours of foreman's work and supervised the construction of the residence on the above-described real estate. That said two hundred concrete blocks were incorporated into the residence on said real estate and the four bales of hay were incorporated into said real estate.

"4. That the reasonable value of the above-described materials and labor is as follows:

200 concrete blocks	$ 102.40
4 bales of hay	$ 100.00
33 hours of foreman time	$ 330.00
Supervision of construction	$ 8,344.41

and that said values were agreed upon in the terms of the oral agreement of the parties.

"5. That the plaintiff, Kustom Kreations, Ltd., duly performed all the conditions of said oral agreement on its part to be performed. The defendants, Richard M. Duxbury and Ardythe M. Duxbury, have failed to pay the plaintiff any part of the above-described amount due and there is now due and owing to the plaintiff from the defendants the sum of $8,785.84, with interest thereon from and after February 1, 1980."

In the pretrial order one of the specified issues for trial was whether the plaintiff is entitled to recover for work performed under quantum meruit. No objections were made by the defendants to this order. Subsequent to the pretrial conference, Kustom filed a motion before trial to strike from paragraph 4 of the amended petition the language "and that said values were agreed upon in the terms of the oral agreement of the parties," and from paragraph 5, "That the plaintiff, Kustom Kreations, Ltd., duly performed all the conditions of said oral agreement on its part to be performed." According to the defendants' brief, the overruling of the motion to strike is not in the transcript, and the parties have stipulated in this court that the motion was overruled. At trial the defendants objected to the plaintiff's attempt to introduce evidence of reasonable value, but the objections were overruled. In its opinion the trial court held quantum meruit was sufficiently pleaded.

We would agree that, at the very least, the amended petition is unclear as to the plaintiff's theory of recovery. It is difficult to understand why the

plaintiff's motion to amend its pleadings was overruled. Normally, a petition seeking to recover upon an express contract may be amended before trial to permit recovery on quantum meruit, in the absence of a showing of prejudice to the defendant. See *Knoell Constr. Co., Inc. v. Hanson*, 210 Neb. 628, 316 N.W.2d 321 (1982).

However, we need not reach any question as to a deficiency in the pleadings. As previously stated, the pretrial order specified that one of the issues was whether the plaintiff was entitled to recover for work performed under quantum meruit. In *Tober v. Hampton*, 178 Neb. 858, 864, 136 N.W.2d 194, 199 (1965), this court said: "If at a pre-trial conference it appears there are issues which might be determinative of the cause although not then within the pleadings, they should be stated in the pretrial order which should thereafter govern the proceeding in that respect. . . . In the pre-trial order before us the issues involved and later considered were plainly stated. No exceptions were taken by the parties. The contention of the plaintiffs [that the trial court erred in receiving evidence on issues not set forth in the pleadings] cannot be sustained." Accordingly, the trial court did not err in receiving evidence of the fair and reasonable value of goods and services furnished to the defendants.

From a de novo review of the record, we find that the evidence supports the conclusion that the plaintiff agreed with the defendants to construct a house in accordance with the plans and specifications furnished by the architect, Robert Dawson. We further determine that, due to specific requests of the defendants, significant changes were made in the plans, causing additional expenses, and that the expenditures actually made, including those for the concrete blocks, hay, and labor, were fair and reasonable, as was a charge of 8 percent of the total cost for supervision by the plaintiff of the overall

construction. The total of these sums amounted to $7,207.93, to which the plaintiff is entitled.

From a similar review we conclude that the defendants incurred additional expenses because of the fault of the plaintiff in failing to complete the flashing around the chimney, in failing to complete certain insulation work, and in faulty construction of the roof rafters, necessitating the addition of soffits and fascia boards, totaling $4,381.42, for which judgment should be entered for the defendants on their cross-petition.

The trial court having entered judgment in these same amounts, we determine that such judgment is correct, and it is affirmed.

AFFIRMED.

MURPHY, JOHN, D.J., dissenting.

For the reason that I feel the majority's reliance on *Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965), is inappropriate, I respectfully dissent.

At the outset it should be noted that the pretrial conference involved in this case was held on July 24, 1981. The pretrial conference order was not filed until July 29, 1981, the day trial began in the district court. Paragraph 3 of the pretrial order stated in part, "Controverted and unresolved issues - the issues remaining to be determined are: . . . c. Whether plaintiff is entitled to recover for work performed under quantum meruit." After the pretrial conference was held, and the day before trial began, the plaintiff filed a motion to amend its amended petition by striking any reference to an agreement as to values contained in the oral agreement of the parties, and by striking the reference that the plaintiff performed all the conditions of the oral agreement of the parties. This motion was overruled. The memorandum opinion of the court held that the amended petition of the plaintiff set out a theory of recovery based on quantum meruit, and allowed recovery on that basis.

Tober, *supra*, holds that a pretrial conference or-

der governs what issues will be decided at trial, despite the absence of those issues from the pleadings. However, in the instant case, due to the possible confusion surrounding the question of whether or not quantum meruit could properly be adduced at trial, it would seem to be inappropriate to strictly apply *Tober*. It is certainly logical to assume that the failure by the court to allow the amendment requested by the plaintiff would induce the defendants to believe that the plaintiff would be held to proof under a theory of contract. It should be the purpose of a pretrial conference to make clear the issues, not confuse them. Due to the late date of the pretrial conference, and due to a seemingly inconsistent ruling after the pretrial conference, the defendants were placed at a distinct disadvantage.

Because of the prejudice to the defendants, I believe that *Tober* should not be applied in this case; that the amended petition, although not clear, sets out a theory of recovery based on contract, not quantum meruit; that the lower court erred in determining that the plaintiff was entitled to recover under a theory of quantum meruit; that the court erred in allowing evidence of the reasonable value of materials, supplies, and work performed by the plaintiff; and that the judgment should be reversed and the cause remanded for a new trial. I would have so held.

LEROY BLITZKIE, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

342 N.W.2d 5

Filed December 30, 1983. No. 82-747.

1. **Pleadings: Motions to Dismiss.** A motion to dismiss is not allowable as a pretrial pleading.
2. **Pleadings.** An irregular pleading such as a motion to dismiss may sometimes be recognized as a demurrer if the parties by stipulation, or the court by rule of court, permits the same.

3. **Jurisdiction.** The absence of subject matter jurisdiction may be raised by demurrer, or may be decided on a motion for summary judgment, or by trial on the merits.
4. **Summary Judgment.** One against whom a motion for summary judgment is invoked must be given at least 10 days from filing the same to respond with counteraffidavits or depositions.

Appeal from the District Court for Boyd County: HENRY F. REIMER, Judge. Reversed and remanded.

Germer, Koenig, Murray, Johnson & Daley, and Jewell, Otte, Gatz & Collins, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

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

HASTINGS, J.

The plaintiff, LeRoy Blitzkie, brought this action under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), claiming damages to his herd of swine because of the alleged failure of the State of Nebraska to disseminate information regarding the outbreak of pseudorabies in the vicinity of plaintiff's farm.

After filing an answer in which it denied any negligence on its part, the defendant filed a motion to dismiss, claiming generally that the actions complained of by the plaintiff were discretionary functions performed by the State, and were therefore excluded from the waiver of immunity as provided for in § 81-8,219(1)(a). The court overruled the motion to dismiss, but treated it as a motion for summary judgment and ordered the plaintiff's petition dismissed.

The district court was correct in concluding that a motion to dismiss is not allowable as a pretrial pleading. Neb. Rev. Stat. § 25-803 (Reissue 1979). It was also correct in stating that an irregular pleading such as a motion to dismiss may sometimes be recognized as a demurrer if the parties by stipulation,

or the court by rule of court, permits the same. *State, ex rel. Johnson, v. Consumers Public Power District*, 142 Neb. 114, 5 N.W.2d 202 (1942). Such was not the case here.

The trial court based its ruling on the theory that subject matter jurisdiction was lacking. The defendant in its brief also argues absence of jurisdiction. This may be raised by demurrer, or may be decided on a motion for summary judgment, or by trial on the merits. Whether the plaintiff by amended petition can sufficiently allege jurisdiction, or on motion for summary judgment can elicit facts which may include this case within the waiver of immunity of the State Tort Claims Act, remains to be seen.

However, it is apparent that one against whom a motion for summary judgment is invoked must be given at least 10 days from filing the same to respond with counteraffidavits or depositions. Neb. Rev. Stat. § 25-1332 (Reissue 1979). This opportunity was not afforded the plaintiff.

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

REVERSED AND REMANDED.

BRYANT HEATING & AIR CONDITIONING COMPANY, INC., APPELLANT, V. THE UNITED STATES NATIONAL BANK OF OMAHA, A CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, GERALD M. GIDDINGS ET AL.,THIRD-PARTY DEFENDANTS, APPELLEES.

342 N.W.2d 191

Filed December 30, 1983. No. 82-815.

1. **Summary Judgment.** Summary judgment may be properly granted where there exists no genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and the movant is entitled to judgment as a matter of law.
2. **Election of Remedies.** A party cannot, either in the course of liti-

gation or in dealings in pais, occupy inconsistent positions or proceed on irreconcilable claims of right.

3. **Conversion.** Two parties can convert the same property if both wrongfully exercise dominion over it which is inconsistent with the rights of the true owner.
4. **Negotiable Instruments: Conversion.** A negotiable instrument can be the subject of conversion.
5. **Conversion.** One who takes possession of the personal property of another by purchase from a person having no authority from the true owner to dispose of it commits conversion.
6. **Actions: Judgments: Tort-feasors.** Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can be had.
7. _____: _____: _____. The partial payment of a judgment against one of several wrongdoers is not a satisfaction which will prevent the maintenance of an action against another.
8. **Stipulations.** One who is not a party to a stipulation is not bound by its terms.
9. **Summary Judgment: Final Orders: Appeal and Error.** The denial of a motion for summary judgment is not a final order and therefore is not appealable to the Supreme Court.

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

James B. Cavanagh of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellant.

Joseph Polack of Polack & Woolley, P.C., for appellees.

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

CAPORALE, J.

Bryant Heating & Air Conditioning Company, Inc., plaintiff-appellant, brought an action against The United States National Bank of Omaha, defendant-appellee, seeking to recover funds the bank credited to the account of one Gerald M. Giddings, who forged Bryant's endorsements on checks drawn payable to Bryant's order. The trial court granted the bank's motion for summary judgment and dismissed

Bryant's petition. We reverse and remand for further proceedings.

Giddings, while employed as a bookkeeper and credit manager by Bryant, carried out a scheme of embezzlement between the years 1973 and 1981 which resulted in a loss to Bryant in excess of $300,000. The central part of the scheme consisted of Giddings taking checks drawn payable to Bryant's order by its customers as payments on their accounts, placing upon the back of the checks a Bryant stamp consisting of Bryant's name and address, signing his own name below the stamp, and depositing the checks in his personal account at the bank.

Bryant discovered the scheme in March of 1981. Giddings then resigned and gave Bryant's president a $50,000 check and an assurance that the $50,000 represented the extent of his thievery. Such proved not to be the case. On March 26, 1981, Bryant filed suit against Giddings and, on that same day, obtained a writ of attachment against Giddings' property, including his personal accounts at the bank. On September 18, 1981, Giddings entered into a stipulation for judgment in favor of Bryant. The stipulation was approved and incorporated into the district court's judgment for $257,366.51 (total theft, $307,366.51 less the $50,000 payment), plus $89,528.70 in prejudgment interest. The judgment provided that all money or property obtained to satisfy it would be applied to the payment of the oldest outstanding obligation, plus interest. Bryant has collected $147,562.56 on this judgment.

The record does not reflect when Bryant filed this suit against the bank. The record does establish, however, that on May 22, 1981, Bryant filed an amended petition claiming that the bank had converted over $355,000 of Bryant's money. That petition was again amended to cover only the amount Giddings had embezzled from January 1, 1977, through March 9, 1981—nearly $207,000. Bryant then filed a motion for summary judgment or, in the al-

ternative, for partial summary judgment on the sole issue of the bank's liability to it, leaving open the question of the amount of damages which Bryant claims to be entitled to receive. The bank filed a pleading asserting that genuine issues of material fact existed and, thus, Bryant was not entitled to any type of summary judgment. The bank then moved for a summary judgment in its favor dismissing Bryant's petition on the ground that Bryant had elected its remedy by pursuing a judgment against Giddings, or, in the alternative, for a partial summary judgment reducing any liability the bank might have to Bryant by the $147,562.56 Bryant recovered from Giddings.

The trial court denied Bryant's motions for full or partial summary judgment and granted the bank's motion by dismissing Bryant's petition.

Bryant's 10 purported assignments of error merge, with one exception discussed later, into the single question of whether the trial court was correct in concluding that Bryant's suit against the bank was barred by its suit against Giddings.

To resolve that issue in the posture of this case, we are required to determine whether there here exists no genuine issue as to any material fact, whether the ultimate inferences to be drawn from those facts are clear, and whether the bank is entitled to judgment as a matter of law; for it is only under such circumstances that summary judgment may properly be granted. *McFarland v. King, ante* p. 92, 341 N.W.2d 920 (1983); *Butte State Bank v. Williamson*, 215 Neb. 296, 338 N.W.2d 598 (1983).

The bank cites us to *Jones v. First Nat. Bank of Lincoln*, 3 Neb. (Unoff.) 73, 90 N.W. 912 (1902), as dispositive of this appeal. Therein, Willard E. Stewart fraudulently obtained the signature of John T. Jones on a check drawn upon Jones' account at the defendant bank. After discovering the fraud Jones succeeded in obtaining a civil judgment against Stewart. He then sued the bank, alleging that the

funds had been wrongfully paid. The trial court directed a verdict for the bank. On appeal this court stated: "Having elected to treat the check as valid and the payment to Stewart as authorized thereby, he can not afterwards assert the contrary position. Either Stewart had his money or the bank had it. Both could not have it. If the bank had the money, Stewart had the bank's money; and he was not liable to Jones, but to the bank. If Stewart had Jones' money, it was because the bank had paid it out on Jones' check, and the bank was no longer holden for the deposit. . . . Looking at this suit as one based upon payment of the altered check, the two are entirely inconsistent." *Jones* at 79, 90 N.W. at 914.

The bank characterizes the *Jones* rule as a facet of the election of remedies doctrine and contends that it is the majority rule. It cites us to cases from several jurisdictions which embrace it, *Winn v. National Bank of Athens*, 110 Ga. App. 133, 138 S.E.2d 89 (1964), and *V. H. Juerling & Sons, Inc. v. First Nat'l Bank*, 143 Ind. App. 671, 242 N.E.2d 111 (1968), and urges us to apply it to the present situation. On the other hand, Bryant asks us to overrule *Jones* and accept the reasoning of those jurisdictions which have rejected the automatic application of the doctrine of election of remedies to bar a subsequent suit against a bank by its depositor. *Hennesy Equipment Sales Co. v. Valley Nat. Bank*, 25 Ariz. App. 285, 543 P.2d 123 (1975); *First National Bank of McAlester v. Mann*, 410 P.2d 74 (Okla. 1965).

We reject both invitations. The bank asks us to transplant the *Jones* rule from the ground in which it is rooted to virgin soil; it cites no case wherein the *Jones* rule has been applied to bar recovery by the true owner of a negotiable instrument from a nonpayor depositary bank which dealt with the thief. In *Jones* the bank was sued by its own depositor. The rationale adopted in the *Jones* opinion is not applicable to the situation in the instant case, for Bryant had no account with the bank. Therefore, Bryant's

suit against Giddings could not carry with it the concept that the bank had rightfully paid out Bryant's funds. Here, Bryant is the victim of an embezzlement, which, after seeking satisfaction from the embezzler and not finding enough assets to satisfy its judgment, seeks to go after the embezzler's bank for cashing its checks on forged endorsements.

Jones does not hold that one who pursues one wrongdoer to judgment may not thereafter pursue a second wrongdoer. It rests, rather, on the ground that Jones, as the bank's depositor, obtained his judgment against the wrongdoer Stewart on the basis that the check was valid and authorized the bank to pay, but which was fraudulently obtained from Jones by Stewart. Jones could not thereafter maintain the inconsistent position against the bank that the check was invalid and therefore did not authorize payment.

The doctrine of election of remedies appears to be a somewhat vague notion lying somewhere between the areas occupied by the doctrines of equitable estoppel and res judicata. "The doctrine of election of remedies is largely a rule of policy to prevent vexatious litigation, and is widely recognized both in the federal and state courts. It is based on the rule that a party cannot, either in the course of litigation or in dealings in pais, occupy inconsistent positions, or proceed on irreconcilable claims of right; in other words, that a man shall not be allowed to approbate and reprobate. It has been said that the doctrine is a harsh rule which is not to be extended, and that it is to be applied by the courts with a wide discretion in order that it may not be made an instrument of oppression." 28 C.J.S. *Election of Remedies* § 1 at 1058-59 (1941).

We have dealt with the election of remedies doctrine on a number of prior occasions. In *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961), a case involving a suit against a soft drink bottler after a consumer discovered a dead mouse in

the bottle he had just drunk from, we stated: " 'Before a case can arise for the application of the principle of election there must be (1) two co-existing remedies; and (2) those remedies must be so inconsistent that a party can not logically choose one without renouncing the other.' " *Id.* at 861, 112 N.W.2d at 256. This rule was restated in *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980). The doctrine is frequently applied in cases in which the existence of a contract is alleged, damages for its breach are sought, and in a subsequent action rescission of the contract is sought. *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955); *Majerus v. Santo*, 143 Neb. 774, 10 N.W.2d 608 (1943); *Pollock v. Smith*, 49 Neb. 864, 69 N.W. 312 (1896). The bases of these decisions are that the relief and facts necessary to prove the right to the relief are inconsistent.

The bank argues that the relief sought by Bryant and the facts alleged in Bryant's suit against Giddings are inconsistent with the relief requested and the facts alleged in Bryant's suit in the case at hand. This is not so. In its petition against Giddings, Bryant alleged that Giddings had converted checks belonging to Bryant and applied the proceeds to his own use. In the present case Bryant alleges that the bank converted checks belonging to Bryant. These are not inconsistent allegations. Two parties can convert the same property if both wrongfully exercise dominion over it which is inconsistent with the rights of the true owner. *Allen v. Dealer Assistance, Inc.*, 207 Neb. 455, 299 N.W.2d 744 (1980); Restatement (Second) of Torts §§ 222 A, 229 (1965). A negotiable instrument can be the subject of conversion. *State v. Omaha Nat. Bank*, 59 Neb. 483, 81 N.W. 319 (1899). See, also, Neb. U.C.C. § 3-419 (Reissue 1980).

Furthermore, the bank seems to propose that either Giddings or itself must have converted the checks, not both of them. This also is an erroneous proposition. One who takes possession of the per-

sonal property of another by purchase from a person having no authority from the true owner to dispose of it commits conversion. *Burns v. Commonwealth Trailer Sales*, 163 Neb. 308, 79 N.W.2d 563 (1956). In *Paxton v. State*, 59 Neb. 460, 81 N.W. 383 (1899), a case involving a suit by the State against the surety of the State Treasurer who had wrongfully paid state funds to a bank holding void state warrants, this court stated that both the State Treasurer and the bank were tort-feasors, and the State could sue both or either of them.

The bank further contends that unless Bryant's suit is barred, it will recover its damages twice. Such a claim has no basis. Several actions may be brought and several judgments recovered against several wrongdoers, although but one satisfaction can be had. *Tober v. Hampton*, 178 Neb. 858, 136 N.W.2d 194 (1965). The partial payment of a judgment against one of several wrongdoers is not a satisfaction which will prevent the maintenance of an action against another. *Lovejoy v. Murray*, 70 U.S. (3 Wall.) 1, 18 L. Ed. 129 (1865); Restatement (Second) of Judgments § 50 (1982); 74 Am. Jur. 2d *Torts* § 86 (1974). Should Bryant recover a judgment against the bank, all that is necessary is that the trial court credit the bank with the appropriate amount, if any, of the recovery made by Bryant on its judgment against Giddings.

Additionally, the bank urges that it is prejudiced by the stipulation of judgment entered into by Giddings and Bryant whereby any amounts recovered by Bryant in enforcing its judgment were applied to the oldest checks embezzled. This claim is also without merit. It is true that the parties to an action are ordinarily bound by the terms of certain types of stipulations they voluntarily make. *State v. Wells*, 197 Neb. 584, 249 N.W.2d 904 (1977). The bank, however, was not a party to the stipulation in question and therefore cannot be bound by it. The trial court would be obligated to make its own determination on

all questions of law involved in the instant case. *Elrod v. Prairie Valley*, 214 Neb. 697, 335 N.W.2d 317 (1983); *Staley v. City of Blair*, 206 Neb. 292, 292 N.W.2d 570 (1980).

Bryant also urges as error the overruling of its alternative motions for full or partial summary judgments. On the other hand, the bank asks us to rule on its alternative partial summary judgment motion for limitation of damages, should we disturb the district court's ruling on its full summary judgment motion. With respect to the bank's request the granting of one alternative summary judgment includes the implicit denial of another alternative motion. The denial of a motion for summary judgment is not a final order and therefore is not appealable to this court. *Cockle v. Cockle*, 215 Neb. 329, 339 N.W.2d 63 (1983); *Randall v. Erdman*, 194 Neb. 390, 231 N.W.2d 689 (1975). That being so, we have no jurisdiction to consider the overruling of any of the motions for either full or partial summary judgments.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

THOMAS D. LUXFORD, APPELLANT, V. CHARLES L. BENSON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, ET AL., APPELLEES.

341 N.W.2d 925

Filed December 30, 1983. No. 83-193.

1. **Sentences.** An offender's sentence, for the purpose of good time computations, is the sum of all sentences he receives regardless of when incurred.
2. _____. The date of an offender's initial incarceration is the date on which service of such consolidated sentence is deemed to begin.
3. _____. Absent approval of the Board of Pardons, the good time sentence reduction provisions of 1975 Neb. Laws, L.B. 567, are not applicable to an offender who started to serve his sentence prior to the effective date of L.B. 567.

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

Vincent M. Powers, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellees.

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

PER CURIAM.

Thomas D. Luxford brought an action for declaratory judgment to determine whether his "good time" was properly computed by the Nebraska Department of Correctional Services. The district court adjudged that the Department of Corrections had properly consolidated Luxford's sentences and calculated his "good time" under L.B. 1307, 1969 Neb. Laws, ch. 817, p. 3071. Luxford appeals and we affirm.

On September 15, 1972, Luxford was sentenced to 7 years' imprisonment. He escaped from custody on June 10, 1974, and remained a fugitive until July 5, 1979. On December 17, 1979, after his return to prison, Luxford was sentenced to a term not less than 5 nor more than 6 years for his escape from prison. The sentence for escape was consecutive to Luxford's sentence imposed in 1972. Luxford's sentences were consolidated to a term of 12 to 13 years, commencing on September 15, 1972, plus 5 years and 25 days attributable to Luxford's absence from prison during his escape.

The district court, by utilizing L.B. 1307, determined that Luxford's mandatory parole date was July 30, 1985, and that his mandatory discharge date was October 9, 1990. Calculation under 1975 Neb. Laws, L.B. 567, indicates that a mandatory discharge date for Luxford would be September 9, 1984. The district court found approval of the Board of Pardons had not been sought or received for the retroactive application of L.B. 567 regarding the

consolidated sentences. The trial court concluded that the provisions of L.B. 1307 effective at Luxford's initial sentencing applied to the consolidated term of imprisonment.

This court recently explained the computation of "good time" and the respective relationships of L.B. 567 and L.B. 1307 to "good time." See *Boston v. Black*, 215 Neb. 701, 340 N.W.2d 401 (1983). Luxford's assignments of error coincide with the errors assigned in and disposed by *Boston v. Black, supra.*

Luxford claims that the district court erred in failing to apply retroactive application of L.B. 567, notwithstanding the absence of approval of the Board of Pardons for retroactivity. As noted in *Boston v. Black, supra* at 710, 340 N.W.2d at 407, application of L.B. 567 to shorten the imprisonment of an offender who was initially sentenced prior to the effective date of L.B. 567 without approval by the Board of Pardons "would result in the commutation of a sentence by legislative action. This is a power denied to the Legislature by this state's Constitution." See, also, *Lytle v. Vitek*, 203 Neb. 825, 280 N.W.2d 654 (1979).

Luxford next claims the district court erred by not applying L.B. 1307 to the first sentence and L.B. 567 to the second sentence. Under the statutory structures of L.B. 567 and L.B. 1307, an offender's consecutive term imposed during incarceration is consolidated with the prisoner's previous sentence so that the minimum term of the consolidated sentence is the total or sum of the minimum terms of the subsequent offense and previous offense and the maximum term is the total or sum of the maximum terms of such subsequent offense and previous offense. See Neb. Rev. Stat. § 83-1,110 (Cum. Supp. 1974 and Reissue 1981). The consolidated sentence commences at the date of the initial incarceration. Absent approval of the Board of Pardons, "good time" is computed under the statutory provisions in effect at the date of initial incarceration. See,

Boston v. Black, supra; *Gochenour v. Bolin*, 208 Neb. 444, 303 N.W.2d 775 (1981).

As his final assignment of error, Luxford claims the judgment of the district court violated both ex post facto and due process clauses of the U.S. Constitution. In *Boston v. Black, supra*, an attack on the due process aspects of the questioned legislation was resolved against the prisoner. For the reasons given in *Boston v. Black, supra*, Luxford's claim of error pertaining to a due process question is rejected. Concerning the ex post facto claim made by Luxford, the U.S. Supreme Court in *Weaver v. Graham*, 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981), set forth a conjunctive test to determine whether a subsequently enacted "good time" law violates the ex post facto clause. "[A subsequently enacted good time law] violates the [ex post facto] Clause if it is *both* retrospective and more onerous than the law in effect on the date of the offense." (Emphasis supplied.) *Id.* at 30-31. "The fact of the matter is that application of the law embodied in L.B. 1307 to determine offenders' good time rights took place not at the time they were convicted of the subsequent offenses but at the time they began serving their initial sentences." *Boston v. Black, supra* at 710, 340 N.W.2d at 407-08. Luxford's claim does not fulfill the first requirement, namely, retrospection, in order to satisfy the test prescribed by *Weaver v. Graham, supra*. Absent such retrospection, we do not need to proceed any further on the question of whether the questioned legislation is ex post facto.

The judgment of the district court is affirmed.

AFFIRMED.

Cite as 216 Neb. 119

STATE OF NEBRASKA, APPELLEE, V. LARRY ALAN THIELEN, APPELLANT.

342 N.W.2d 186

Filed December 30, 1983. No. 83-235.

1. **Indictments and Informations.** The district court in its discretion may before trial permit the county attorney to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged.
2. _____. Correcting an erroneous statutory reference in an amended information does not amount to a change in the offense charged, where the body of the information in both the original and amended informations remains essentially the same.
3. **Plea in Abatement.** After trial and conviction any error in the district court's ruling on the plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt.
4. **Criminal Law: Evidence: Intent: Proof.** The intent with which an act is done is purely a mental process and difficult to establish by direct proof. It is generally a conclusion that must be drawn after a consideration of the actions of the defendant viewed in the light of the surrounding circumstances.
5. **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, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be affirmed if, taking the view most favorable to the State, there is sufficient evidence to support it.
6. **Evidence.** An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified, it is immaterial in how many or in whose hands it has been.
7. **Jury Instructions.** It is not error to refuse to give a requested instruction if the substance of the request is in the instructions actually given.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed.

Mark M. Rhodes of Rhodes and Webb, for appellant.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellee.

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

GRANT, J.

In an amended information defendant-appellant was charged with aiding or abetting the intentional delivery of cocaine. After jury trial defendant was convicted and sentenced. On appeal defendant alleges that the trial court erred (1) in granting the State leave to amend the information "without service upon the Appellant or allowing him sufficient time to answer or to prepare to answer the charges set for [sic] in the amended information" (Brief for Appellant at 2); (2) in overruling defendant's plea in abatement; (3) in the reception of certain evidence without proper foundation; (4) in failing to find there was insufficient evidence to support a finding of defendant's guilt; (5) in refusing defendant's proposed jury instructions. For the reasons hereinafter set out we determine that the trial court did not err, and defendant's conviction is affirmed.

The facts are these. After an evening of partying into the early morning hours of August 17, 1982, the defendant allowed a Bobby Pearson to sleep in a rec room in the basement of defendant's residence. Pearson brought a small wooden box containing cocaine into the basement and concealed it in a drawer of a stove. Later in the morning while defendant was still sleeping, Pearson left for work, leaving the cocaine in the stove.

Prior to August 17, 1982, Investigator Richard Wagner of the Nebraska State Patrol, acting as an undercover agent, had been negotiating with Pearson to purchase some cocaine. Wagner called Pearson at his place of business on the morning of the 17th, and subsequent to their discussion met Pearson and they proceeded to the defendant's residence.

Upon their arrival they met the defendant just outside the back door. Defendant was taking out some garbage. Pearson introduced defendant to Wagner.

Defendant continued on with his work and Wagner and Pearson went down to the basement. There Pearson retrieved the box from the stove and placed the box on the counter. Having emptied the trash, defendant also proceeded down to the basement and found Pearson and Wagner in the kitchenette area. Wagner then took the substance, later determined to be cocaine, out of the box and asked Pearson about "weighing material." Pearson then asked defendant where defendant's scale was. Defendant left the room and returned with a scale. Wagner then weighed the cocaine, and displayed the drug fund money he was using to make the purchase. Throughout this time, defendant was present, although Wagner's conversation was only with Pearson. Wagner and Pearson agreed to pay the money outside and they left the basement together. Defendant stayed behind. Wagner and Pearson drove away in Wagner's car. After driving a few blocks Wagner arrested Pearson. Defendant was arrested later at his residence.

After defendant was bound over to district court, an information was filed entitled "Aiding or Abetting Delivery of a Controlled Substance Neb. R.S. 28-205 Class III Felony," and stating the defendant did "aid or abet the unlawful, felonious, knowing and intentional delivery of a controlled substance, to wit: one ounce cocaine to Inv. R. Wagner, N.S.P."

Defendant filed a plea in abatement alleging there was insufficient evidence to bind him over on the charges of delivery of a controlled substance or aiding or abetting delivery of a controlled substance. This plea in abatement was overruled by the district court, and the appellant was arraigned and entered a plea of not guilty. Jury trial was set for December 14, 1982.

On December 13 the State filed a motion for leave to file an amended information. The amended information was entitled "Aiding or Abetting Delivery of a Controlled Substance Neb. R.S. 28-206 Class III

Felony," and charged that defendant did "aid or abet the unlawful, felonious, knowing or intentional delivery of a controlled substance, to wit: cocaine to Investigator Richard Wagner, N.S.P."

A hearing was held on this motion on December 14. Defendant objected to the motion, alleging that the amended information contained a different charge, in that Neb. Rev. Stat. § 28-206 (Reissue 1979) was set out in the title, where the original information referred to Neb. Rev. Stat. § 28-205 (Reissue 1979). The court granted the State leave to file the amended information. No further arraignment was held and the case proceeded immediately to trial.

No question is raised in this court as to the lack of an arraignment held on the amended information, and none would be warranted in view of the provisions of Neb. Rev. Stat. § 29-1816 (Reissue 1979), which state in pertinent part, "If the accused appears in person and by counsel and goes to trial before a jury regularly impaneled and sworn, he shall be deemed to have waived arraignment and a plea of not guilty shall be deemed to have been made." Defendant was present with his counsel on the morning of trial. He objected to the amended information only on the specific grounds that the amended information stated a new charge against defendant. Defendant did not object to the inconsequential changes in the amended information, to wit: changing "and" to "or," deleting the amount of cocaine allegedly delivered, and spelling out the name of the investigator. His objection is based on the reference in the amended information to "Neb. R.S. 28-206." The language of the original information and the amended information both set out a violation of § 28-206, not a violation of § 28-205. Section 28-205 provides that a person is guilty "of aiding consummation of felony if he intentionally aids another to secrete, disguise, or convert the proceeds of a felony or otherwise profit from a felony." Defend-

ant was never charged in such language. Both the original and amended informations charged that defendant did "aid or abet the unlawful . . . delivery of a controlled substance"—a clear allegation of a violation of § 28-206. Defendant was never misled as to the allegation against him, and the amended information did not state a new charge when it referred to § 28-206 rather than § 28-205. In that situation the incorrect reference to the statute is mere surplusage in the information, and not prejudicial to defendant's rights.

The district court in its discretion may before trial permit the State to amend a criminal information, provided the amendment does not change the nature or identity of the offense charged, and the information as amended does not charge a crime other than the one on which the accused has his preliminary hearing. *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977); *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982).

The amendments in the information did not change the offense charged, and defendant was never misled as to the charge against him. The actual language of the crime charged in the information controls over a reference to an incorrect statute number in a situation such as this, where the language clearly sets out the elements of the crime charged. The trial court did not err in permitting the filing of the amended information.

Defendant next assigns as error the overruling of his plea in abatement. After examination of the evidence adduced at the preliminary hearing, the district court overruled defendant's plea in abatement. At the subsequent trial the jury found the defendant guilty of aiding or abetting delivery of a controlled substance.

This court has held that "after trial and conviction in the District Court any error in the ruling of the District Court on the 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. Franklin*, 194 Neb. 630, 638, 234 N.W.2d 610, 615 (1975). See, also, *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983). There is no error shown in the overruling of the plea in abatement. As discussed below, the evidence in this case was sufficient for the jury to find defendant guilty. Therefore, there can be no error in the overruling of defendant's plea in abatement.

Defendant next assigns as error the admission into evidence of the cocaine itself, alleging that there was "an incomplete chain of custody." The evidence showed that Officer Wagner had the substance which had been delivered to him in his personal possession after the delivery until the officer placed the substance in a marked evidence bag and locked it in his desk. The officer then transported the substance to Lincoln and delivered it to the State's chemist. The chemist then tested the substance and found it to be cocaine.

The chemist's testimony as to his determination that the substance was cocaine was not objected to. The chemist testified that exhibit 2 at the trial was the bag of cocaine he had received from Wagner, and tested, and that the exhibit bore his lab number and initials. Officer Wagner testified that exhibit 2 was in the same condition as when he had it, except for "the bottom cut that was made by the laboratory."

The court said in *State v. Weible*, *supra* at 182, 317 N.W.2d at 924-25, that "an exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified, it is immaterial in how many or in whose hands it has been."

Here, the cocaine was identified clearly, and the

trial court properly determined that it could be received in evidence.

Defendant also contends that the evidence was insufficient as a matter of law to prove that defendant intentionally aided or abetted the delivery of the cocaine in question. In determining this question this court must sustain the verdict of the jury if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982). Further, in considering the posture of defendant in this case as an alleged aider or abettor, we are guided by *State v. True*, *supra* at 704, 316 N.W.2d at 625, where it is stated: "Aiding and abetting involves some participation in the criminal 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 crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient." The evidence in this case shows that defendant himself testified that Pearson asked him to get a scale and that defendant did go get the scale for Pearson. Further testimony from Pearson, who had been called as a witness by defendant, showed that defendant was in the room while the scale was used to weigh the cocaine. This same witness, to be sure, testified that defendant was not aware that cocaine was being weighed and sold. It is not the province of this court on review, however, to pass upon the credibility of witnesses or to weigh the evidence, because such matters are for the jury. *State v. True*, *supra*; *State v. Pena*, 208 Neb. 250, 302 N.W.2d 735 (1981).

Insofar as the question of defendant's criminal intent, the law is settled that independent evidence of specific intent is not required. The 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. Brown*, 174 Neb. 393, 118 N.W.2d

332 (1962); *State v. Jungclaus*, 176 Neb. 641, 126 N.W.2d 858 (1964)0

In this case the jury was properly instructed, and the evidence is clearly sufficient to support the jury's finding of defendant's guilt.

Defendant also objects to the refusal of his offered instruction. The instruction, as offered, provided definitions of various terms. All appropriate definitions were set out in the court's instructions, and as stated in *State v. Vicars*, 207 Neb. 325, 335, 299 N.W.2d 421, 428 (1980), "The court may properly refuse a requested instruction where the substance of the request is covered in those actually given." The court did not err in refusing to give defendant's requested instruction, and no error has been shown in the instructions as given.

Careful consideration of the entire record discloses no error in any manner prejudicing defendant's rights. The judgment is affirmed.

AFFIRMED.

MARGARET GESMAN, APPELLANT AND CROSS-APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLEES AND CROSS-APPELLANTS.

342 N.W.2d 196

Filed January 6, 1984. No. 82-710.

Administrative Law: Jurisdiction: Appeal Bonds. The requirement of Neb. Rev. Stat. § 77-2407 (Reissue 1981) to furnish a proper appeal bond in any appeal from an order of the Director of Administrative Services is mandatory and essential to confer jurisdiction of the proceedings on the district court, and the failure to do so may be objected to at any time during the course of the proceedings.

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

J. Patrick Green, John P. Miller, and Renne Edmunds and Larry W. Myers, for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter, and Kermit A. Brashear II, Special Assistant Attorney General, for appellees.

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

HASTINGS, J.

This was an appeal under the provisions of Neb. Rev. Stat. § 77-2407 (Reissue 1981), taken by the plaintiff to the district court from the decision of the Director of Administrative Services, who had denied the plaintiff's claim. The district court affirmed the action of the director and dismissed the petition. The plaintiff has appealed, and the defendants have cross-appealed alleging a failure of jurisdiction. We sustain the cross-appeal and order that the proceedings be dismissed.

Margaret Gesman, the plaintiff, had paid the motor vehicle inspection fee, mandated by Neb. Rev. Stat. §§ 60-1701 et seq. (Reissue 1978), for several years. Following the declaration of § 60-1701 (Cum. Supp. 1980) to be unconstitutional by a decision of the Douglas County District Court, the plaintiff filed a claim for refund with the Director of Administrative Services. This claim was denied by the director on May 14, 1981.

Plaintiff's petition appealing this decision was filed in the district court on May 29, 1981, together with a certified transcript from the Director of Administrative Services, and, according to the stipulation of facts of the parties, a $50 appeal bond. Sometime after this date, and before the hearing in the district court, the motor vehicle inspection law was declared unconstitutional by this court in the case of *State v. Edmunds*, 211 Neb. 380, 318 N.W.2d 859 (1982).

Because we decide this case on jurisdictional grounds, it is not necessary for us to set forth plaintiff's various assignments of error, nor to reach the merits of her claim.

The parties agree that appeals from the denial of claims by the director are governed by the provisions of § 77-2407. That section provides in part as follows: "[T]he party aggrieved by the decision of the director may appeal therefrom to the district court of the county where the capital is located within twenty days after receiving official notice. Such appeal may be taken in the manner provided by law in relation to appeals from county courts to such district courts, and shall be prosecuted to effect as in such cases. The party taking the appeal shall give bond to the State of Nebraska in the sum of *two hundred dollars*, with sufficient surety to be approved by the clerk of the court to which such appeal may be taken, conditioned to pay all costs which may accrue to the Director of Administrative Services by reason of taking such appeal." (Emphasis supplied.)

The defendants argue that under the doctrine laid down by this court in *School Dist. No. 17 and Westside Comm. Schools v. State*, 210 Neb. 762, 316 N.W.2d 767 (1982), § 77-2407 incorporates by reference the scheme of appellate procedure of Neb. Rev. Stat. §§ 27-1301 et seq. (Reissue 1964). As a result, the defendants contend, the plaintiff was required to file a $50 appeal bond within 10 days of the final order of the director entered on May 14, 1981, which was not done.

It is the plaintiff's position, on the other hand, that § 77-2407 specifically requires the giving of a bond to the State of Nebraska in the sum of $200; that this requirement controls over the generalized adoption of the requirements of Chapter 27; that § 77-2407 makes no provisions for a time limit on the filing of a bond, but only the 20-day provision as to a transcript; and that the bond was filed with the transcript and within the 20-day requirement, i.e., on May 29, 1981.

Even assuming for the sake of argument that plaintiff's interpretation is correct, she has still

failed to comply with the jurisdictional requirements. There is absolutely no evidence of the filing of a *$200* bond. There is a copy of a $50 money order payable to and tendered to the Department of Administrative Services within 4 days of the director's decision, which was returned to the plaintiff, and the stipulation relating to the filing of a $50 appeal bond on May 29.

The requirement as to the furnishing of a proper appeal bond is mandatory and essential to confer jurisdiction of the proceedings on the district court. Since such bond is a condition precedent to the jurisdiction of the district court, the objection may be raised at any time. *Security Mutual Life Ins. Co. v. Gilliam*, 143 Neb. 673, 10 N.W.2d 670 (1943). The defendants' motion to dismiss the appeal was filed on May 19, 1982, well before the entry of the order affirming the action of the director. The motion to dismiss should have been sustained.

Because the action of the district court ordering plaintiff's petition to be dismissed was correct, it is affirmed.

AFFIRMED.

SHANAHAN, J., concurs in the result.

IN RE ESTATE OF ROY MARSH, DECEASED.
WILLA JAYCOX BUCKLES ET AL., APPELLEES, V.
ESTHER APLEY ET AL., APPELLANTS,
BLUE VALLEY LUTHERAN HOMES SOCIETY, INC.,
A NEBRASKA NONPROFIT CORPORATION,
INTERVENOR-APPELLANT.
342 N.W.2d 373

Filed January 6, 1984. No. 82-800.

1. **Wills.** Generally, where a part of a will is invalid, the valid bequests should be sustained unless to do so would defeat the testator's intent and interfere with his general scheme of distribution, or work an injustice to other heirs.

2. **Wills: Judgments: Appeal and Error.** Findings that certain portions of a testamentary document are the products of undue influence are determinations of fact. As such, the standard of review is whether the findings are supported by sufficient evidence, which are not to be disturbed unless clearly wrong.
3. _____: _____: _____. The finding that a partially valid testamentary document is or is not to be given dispositive effect is equitable in nature and, on appeal, reviewed de novo on the record.

Appeal from the District Court for Thayer County: WILLIAM B. RIST, Judge. Reversed and remanded for further proceedings.

Michael L. Jeffrey of Jeffrey, Jeffrey, Hahn & Hemmerling, P.C., and William C. Waller, Jr., and Denis H. Mark of Wagner & Waller, P.C., for appellants.

David E. Cording, for intervenor.

Joseph Ginsburg of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellees Buckles.

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

CAPORALE, J.

This is an appeal taken by the contestants, the testator's heirs at law, and the intervenor, Blue Valley Lutheran Homes Society, Inc., from the judgment of the district court which, applying special jury findings, declared portions of a will of Roy Marsh, deceased, invalid as being the result of undue influence exercised by Peggy Sweetser, one of the proponents-appellees. That court held the remaining portions thereof valid. Another beneficiary under said will, Willa Buckles, is the remaining proponent-appellee. For the reasons discussed hereinafter we find the entire will invalid, and therefore reverse the trial court's judgment and remand the case for further proceedings not inconsistent with this opinion.

The facts, though somewhat complex, are not in serious dispute. In the early 1950s the decedent, a

lifelong bachelor and Thayer County farmer, estranged himself from his brother and sister due to a dispute, the details of which are unimportant to this case. That estrangement continued until Marsh's death on November 6, 1980, and is evidenced by the provisions in every testamentary document Marsh executed since the 1950s, each of which contains a specific statement that his family was to receive none of his estate.

In the early 1950s Marsh became acquainted with Willa Buckles, née Jaycox, then a high school student and waitress at a Hebron, Nebraska, cafe. In a 1953 will Marsh provided that she receive a $5,000 devise. After she married, Marsh provided the couple with the use of a quarter section of farmland. Codicils to Marsh's 1953 will, executed in 1966 and 1969, provided that the Buckleses receive over 1,000 acres of Marsh's farmland, and Willa's cash devise was increased to $10,000. This 1953 will devised the residue of the estate, after distribution of specific bequests, to the city of Hebron.

On January 7, 1970, Marsh entered into an agreement with Blue Valley, a nursing care home, whereby in return for devising to Blue Valley a quarter section of land, Blue Valley would provide Marsh with living accommodations for the rest of his life. Marsh was then 73 years old. The agreement also provided that if Marsh, during his lifetime or the estate after his death, transferred property to Blue Valley valued at more than $300,000, Blue Valley's new nursing facility would be designated as the "Roy Marsh Memorial Home."

On the same day, Marsh executed a new will. This 1970 will devised a quarter section of land to Blue Valley, as their agreement provided. The specific devises of money remained the same, including the $10,000 devise to Willa Buckles. The land devised to the Buckleses remained the same, but, in addition, they were also to receive all of Marsh's farming equipment and machinery. This will elimi-

nated the city of Hebron as a beneficiary and provided that the first $250,000 of the residue of Marsh's estate, after the payment of the specific devises and expenses, go to Blue Valley, and the remainder be divided equally between Blue Valley and the Buckleses.

In 1972 Marsh moved into the Blue Valley home and there met Peggy Sweetser, a nurse's aide and, later, a licensed practical nurse. Sweetser initially endeared herself to Marsh by preparing him a bowl of potato salad, and soon thereafter entered into the group of persons who were the objects of Marsh's generosity. Prior to his death, Marsh gave Sweetser a car, the free use of a house, a salary for minimal duties, and other gifts. After Marsh's death Sweetser became the owner of bank deposits and mutual funds in the amount of $130,000, upon which she had been named either joint owner or death beneficiary. Both the Buckleses and Blue Valley received substantial gifts from Marsh as well.

On January 28, 1974, Marsh and Blue Valley modified their 1970 agreement and provided that when Marsh transferred an additional $60,000 in cash and promissory notes to Blue Valley, Blue Valley would promptly affix a plaque to its new nursing facility, with the inscription "Roy Marsh Memorial Building."

By early 1975 Marsh had performed his obligation under this agreement. In August of 1975 Marsh executed a codicil to the 1970 will, leaving Sweetser his home and a quarter section of land. On August 10, 1977, while in the hospital, Marsh executed a new will. This will eliminated the 1970 cash devises, except for the $10,000 devise to Willa Buckles and one to a Hebron church. The rest of the specific noncash devises of the 1970 will and the 1975 codicil were left unchanged. Under the August 1977 will the residual devise to Blue Valley was reduced from $250,000 to $25,000, with the remainder of the residual estate to be divided between the Buckleses and

Sweetser. In November of 1977, after Marsh left the hospital, a new will was executed with nearly identical provisions as the August 1977 will, except that an automobile was given to Sweetser and the following statement was inserted: "In making this my Last Will and Testament, I have made Willa Jacox [sic] Buckles and Peggy Sweetser my principal beneficiaries. I do this after giving the matter careful consideration and in appreciation of the many many things they have done for me. I have never had a family and I think of these two young ladies as I would my own daughters had I been blessed with any."

In April of 1978 Marsh executed a codicil to the November 1977 will, naming Willa Buckles and Sweetser as his personal representatives. In April of 1980 Marsh executed a codicil providing for contingent beneficiaries should the primary beneficiaries predecease him.

While the record is not entirely clear on the matter, it appears that the November 1977 will, including its later codicils, was found by the county court for Thayer County to be Marsh's valid last will. That decision was appealed to the district court wherein Willa Buckles and Sweetser became the proponents of that will and Marsh's heirs at law became the contestants. Blue Valley filed a petition in intervention which took the same position as that taken by the heirs in attacking the 1977 will as being the product of undue influence.

Trial was had to a jury which, by special verdict, found that both codicils to the 1977 will, in their entirety, and the devises to Sweetser, both specific and residual, of that will were the products of Sweetser's undue influence upon Marsh. The trial judge reserved for himself the question of the validity of the remaining portions of that will. He ruled that the November 1977 will, less the tainted provisions, was the valid last will of Marsh, and certified that result to the county court.

The dispositive assignment of error made by Blue Valley and Marsh's heirs at law is the assertion that the district court erred in ruling that the 1977 will was only partially invalid.

We note that Sweetser has not filed a brief in this court and that none of the parties attack the jury's finding that certain portions of the 1977 will and each of its codicils were the product of Sweetser's undue influence on Marsh.

The parties are in disagreement as to the appropriate standard of review in this court of the trial court's determination that the 1977 will was only partially invalid. Blue Valley and the heirs contend that the finding is one of law and, thus, the district court's finding is no restraint on our inquiry into its propriety on appeal, as we must make our own determination of legal matters. See *Elrod v. Prairie Valley*, 214 Neb. 697, 335 N.W.2d 317 (1983). The Buckleses, on the other hand, contend that the ruling determined a question of fact and, thus, we are bound by the trial court's finding unless it is not supported by sufficient evidence. *Minor v. Bickford*, 195 Neb. 402, 238 N.W.2d 243 (1976). No one claims that the trial judge invaded the jury's province by taking upon himself the decision of whether the 1977 will, less the devises and codicils found by the jury to be the product of undue influence, was valid.

The procedure employed by the trial judge has been implicitly approved by us in *Spinar v. Wall*, 191 Neb. 395, 215 N.W.2d 98 (1974), and *In re Estate of George*, 144 Neb. 887, 15 N.W.2d 80 (1944). However, we have been directed to no case, and we find none, which specifically and directly holds that the issue of partial or total invalidity of a will containing void provisions is a question for the court. For the answer to this question we look at the rule of partial invalidity as adopted in Nebraska. *In re Estate of George* states at 898, 15 N.W.2d at 87: " 'The general rule that, where a part of a will is invalid, the valid bequests should be sustained, has its limita-

tions; and when the rule will defeat the testator's intent, and interfere with the general scheme of distribution, or work an injustice to other heirs, it should not be applied.' " We now hold that whether a will which is only partially valid should be given any dispositive effect presents a question which is equitable in nature, a matter for the court. The standard of review in such a case is thus a hybrid one. The findings that certain portions of a testamentary document are the products of undue influence are determinations of fact. As such, the standard of review is whether the findings are supported by sufficient evidence, which are not to be disturbed unless clearly wrong. *Jameson v. Giacalone*, 215 Neb. 33, 337 N.W.2d 120 (1983); *In re Estate of Bouma*, 206 Neb. 209, 292 N.W.2d 37 (1980). The finding that a partially valid testamentary document is or is not to be given dispositive effect is equitable in nature and, on appeal, reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Burton v. Annett*, 215 Neb. 788, 341 N.W.2d 318 (1983).

Our de novo review, conducted in accordance with the foregoing rule, leads us to the conclusion that the November 1977 will, less the provisions which are the product of Sweetser's undue influence, should not be upheld.

It is apparent that, since 1953, Marsh desired that the bulk of the residue of his estate be used for some public, charitable purpose. His 1953 will provided that the city of Hebron, after satisfaction of that will's specific devises, was to receive the residue of his estate. By his 1970 will a large portion of his estate was to go to Blue Valley. It is only after the influence of Sweetser began to work on Marsh that these charitable devises were reduced in Marsh's wills. In the November 1977 will, instead of Blue

Valley receiving the first $250,000 and half of the remainder of the residue of Marsh's estate, as provided under the 1970 will, Blue Valley was to receive only $25,000 of the residue, and the Buckleses and Sweetser were to receive the remainder. Since the residual provision for Sweetser was declared invalid, it appears, though we do not decide, that the Buckleses would receive the entire residue after the $25,000 devise to Blue Valley. See Neb. Rev. Stat. § 30-2344 (Reissue 1979), which provides that, with certain exceptions, if a devise other than a residuary one fails for any reason, it becomes part of the residue. If § 30-2344 would not apply, it appears that Marsh's estate would be subject to a partial intestacy and that portion would pass to his heirs, Marsh's manifestly adamant wishes to the contrary notwithstanding. See Neb. Rev. Stat. § 30-2301 (Reissue 1979), which provides that any part of an estate not effectively disposed of by will passes to the testator's heirs.

Neither alternative fulfills Marsh's intent, absent the undue influence, as either would violate the general scheme of distribution he has embraced since the early 1950s. As such, the November 1977 will fails completely and is of no force or effect. See *O'Brion, Appellant*, 120 Me. 434, 115 A. 169 (1921).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KENNETH D. LIEB ET AL., APPELLEES, V. RICHARD M. PITSCH ET AL., APPELLANTS.

342 N.W.2d 377

Filed January 6, 1984. No. 82-802.

Injunction: Property. Everyone has the right to any beneficial use of owned property if the benefit sought is not out of all reasonable proportion to the injury caused to another.

Appeal from the District Court for Seward County: WILLIAM H. NORTON, Judge. Reversed and remanded with directions.

Kent F. Jacobs of Blevens, Blevens & Jacobs, for appellants.

Frederick B. Allan, Jr., and Larry L. Brauer of Allan & Brauer, for appellees.

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

HASTINGS, J.

The plaintiffs, Kenneth D. Lieb and Nancy M. Lieb, and the defendants, Richard M. Pitsch and Betty R. Pitsch, are the owners of adjoining parcels of real estate located in Seward, Nebraska. The defendants have appealed from an order of the district court which granted the plaintiffs' petition for an order enjoining the defendants from constructing and maintaining a chain link fence on the defendants' property. This fence ran alongside a building located on the plaintiffs' property. We reverse.

This case was tried on a very brief stipulation of facts. According to that stipulation, the plaintiffs own a steel building which houses a retail liquor establishment and the plaintiffs' residence. That building is located on or within 10 inches of the common boundary line between the two properties.

Sometime in August of 1981, the defendants began to construct a 5-foot-high steel link fence, with the steel posts set in a concrete foundation. The fence and foundation are both located on the defendants' property, which in turn is approximately 10 inches from the base of plaintiff's building. Located on the side of plaintiffs' building, next to the defendants' fence, is one window. This window is the only opening, either door or window, on the north side of the structure.

As previously stated, the trial court found in favor of the plaintiffs, that the evidence indicates that the

fence as it is constructed will create a multiplicity of problems, and ordered that the fence be removed to a distance of at least 3 feet from the plaintiffs' building.

This is an equity case, and we review it de novo on the record. In *Bush v. Mockett*, 95 Neb. 552, 556, 145 N.W. 1001, 1002 (1914), this court said: "No doubt every one has the right to any beneficial use he may see fit to make of his own property, if the benefit he seeks is not out of all reasonable proportion to the injury caused to another. His neighbors have no legal cause to complain although it may interfere with some privileges formerly enjoyed."

From an examination of the record we conclude that the fence was not unsightly, nor was it constructed with malicious intention to injure the plaintiffs. Each property owner has a right to the reasonable use of his property, and the construction of the fence in this instance was not an unreasonable use.

The judgment of the district court is reversed, and the cause is remanded with directions to dismiss the plaintiffs' petition.

REVERSED AND REMANDED WITH DIRECTIONS.

KELLOGG COMPANY, A DELAWARE CORPORATION, APPELLEE, V. FRED A. HERRINGTON, NEBRASKA STATE TAX COMMISSIONER, AND THE STATE OF NEBRASKA, DEPARTMENT OF REVENUE, APPELLANTS.

343 N.W.2d 326

Filed January 6, 1984. No. 82-825.

1. **Statutes.** Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning.
2. **Taxation: Corporations.** Pursuant to the provisions of Neb. Rev. Stat. § 77-2734(2) (Reissue 1981), there is imposed a franchise tax

on each corporation doing business in this state, measured by its entire net income which, for purposes of this section, is determined by taking the taxpayer's federal taxable income derived from sources within the State of Nebraska as determined pursuant to statute, which is then apportioned in accordance with Neb. Rev. Stat. §§ 77-2735 to 77-2749 (Reissue 1981).

3. _____: _____. In computing a taxpayer's property values, payroll, and sales for purposes of computing its franchise tax under Neb. Rev. Stat. §§ 77-2735 to 77-2749 (Reissue 1981), the state must consider the values of the taxpayer's property worldwide, as well as its worldwide payroll and sales.

4. _____: _____. For purposes of Neb. Rev. Stat. § 77-2743 (Reissue 1981), the taxpayer's entire taxable income must be as defined by Neb. Rev. Stat. § 77-2734(2) (Reissue 1981), which limits it to the taxpayer's federal taxable income. This includes dividends and interest and fees paid to it by its foreign subsidiaries, but does not include the income of its foreign subsidiaries. The property factor, payroll factor, and sales factor must include the taxpayer's worldwide items.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed in part, and in part reversed and remanded.

Paul L. Douglas, Attorney General, and Ralph H. Gillan, for appellants.

Larry A. Holle and Scott D. Kelly of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

KRIVOSHA, C.J.

This appeal involves an interpretation of Nebraska's version of the Uniform Division of Income for Tax Purposes Act (Uniform Act), Neb. Rev. Stat. §§ 77-2735 to 77-2752 (Reissue 1981), as it applies to the Nebraska corporate franchise tax, Neb. Rev. Stat. § 77-2734(2) (Reissue 1981). The case comes to us on a stipulation of facts. We find that the appellee, the Kellogg Company, is a multistate corporation, incorporated in Delaware, headquartered in Battle Creek, Michigan, and engaged in the business of manufacturing and selling food products. The

company has American plant facilities located in Memphis, Tennessee; San Leandro, California; Omaha, Nebraska; and Battle Creek, Michigan. It also has 17 foreign subsidiaries located throughout the world. During the audit periods involved in this protest, 1968 through 1972, Kellogg stipulated that it received dividends as well as income in the form of "know-how fees" from its foreign subsidiaries. These fees are payments for the use of trade secrets, technical information, trademark rights, technical assistance, etc., developed by the Kellogg Company. We are not told as to the amount received or what percentage of the total information and know-how used by the foreign subsidiaries was obtained from the parent corporation.

The audit division of the Department of Revenue performed an audit of Kellogg's records. As a result of that audit, the department issued notices of deficiency determination on February 12, 1974. The notices were issued for the following years and amounts: 1968, $22,927.89; 1969, $26,563.85; 1970, $40,355.38; 1971, $37,581.19; and 1972, $35,768.63. For reasons which are not at all made clear to the court, this matter remained under consideration by the Nebraska Department of Revenue until October 25, 1979, when Tax Commissioner Fred A. Herrington issued his findings and order. The deficiency assessment was affirmed in the total amount of $203,001, which included interest updated through August 31, 1979. The Kellogg Company then appealed to the district court for Lancaster County, Nebraska, as provided by Neb. Rev. Stat. § 77-27,127 (Reissue 1981).

When the Kellogg Company was first advised of the deficiency by the Department of Revenue, it protested principally on the basis that it was error for the State to include in the definition of income for the Kellogg Company dividends, interest, and technical fees received by the Kellogg Company from its foreign subsidiaries. Before the matter was ulti-

mately decided by the Department of Revenue, Kellogg filed an addendum to its protest, maintaining that, when apportioning income between Nebraska and elsewhere, Nebraska was required to consider the property values, sales, and payroll of Kellogg on a worldwide basis.

After a hearing, based principally upon the stipulation of facts and certain documentary evidence not relevant to our discussion, the trial court concluded that worldwide apportionment, using worldwide income and property values, sales, and payroll, was required. The court reversed the deficiency determination against Kellogg and remanded the matter to the Tax Commissioner for further proceedings consistent with the court's order.

The Department of Revenue has now appealed to this court, assigning the following as error: (1) That the trial court erred in finding that combined reporting of the income of an affiliated group of corporations, including foreign corporations not subject to federal taxation, is permitted by Nebraska statutes; (2) That if such combined reporting is permissible under Nebraska law, then the trial court erred in finding that it was required; (3) That the trial court erred in failing to find that dividends and other payments made to a parent corporation by its foreign subsidiaries are business income of the parent corporation, subject to apportionment to states in which the parent does business; and, finally, (4) That the trial court erred in failing to find that Kellogg had failed to meet its burden of proof, and therefore erred in remanding the case to the Tax Commissioner for further proceedings. We believe that the trial court was correct with regard to the matter of property values, sales, and payroll, but wrong as to income, and for that reason we affirm in part and in part reverse and remand.

We turn first to an examination of the Uniform Act. It is noted by the Illinois court in the case of *Caterpillar Tractor Co. v. Lenckos*, 84 Ill. 2d 102, 108,

417 N.E.2d 1343, 1347 (1981): "A unitary business operation is one in which there is a high degree of interrelationship and interdependence between, typically, one corporation, which generally is a parent corporation, and its corporate subsidiaries or otherwise associated corporations, which group is usually engaged in multistate, and in some cases in international, business operations. Because of this integrated relationship, which is reflected in all phases of the business operations, it is extremely difficult, for purposes of taxation, to determine accurately the measure of taxable income generated within a State by an individual corporation of the unitary group which is conducting business in the State. Typically, the corporation's transactions and the income derived from them actually represent the business efforts of the individual corporation, plus efforts of other and possibly all members of the unitary business operation. As a result, the claimed income of each member of the group standing alone does not, in a real sense, reflect the conducting of a unitary business operation because the income is not attributable solely to the effort of the particular corporation."

As a result of this phenomenon, the National Conference of Commissioners on Uniform State Laws developed the "Uniform Division of Income for Tax Purposes Act." 7A U.L.A. 93 et seq. (1978). The purpose of the act is to assist states in attempting to allocate to a particular state a proportion of the unitary business income attributable to that particular state, and therefore subject to taxation.

The formula, designed and derived by the Uniform Act for purposes of taxing unitary business, has now gained wide acceptance and, at last count, has been substantially adopted by 23 states, including Nebraska. While the parties to this action raise no issue as to the application of this act, it is clear that Kellogg conducts a unitary business operation subject to the Uniform Act.

The U.S. Supreme Court has been called on a number of times to pass upon various aspects of the "unitary business" principle and formula apportionment. See, *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 102 S. Ct. 3103, 73 L. Ed. 2d 787 (1982); *F. W. Woolworth Co. v. Taxation & Revenue Dept.*, 458 U.S. 354, 102 S. Ct. 3128, 73 L. Ed. 2d 819 (1982); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 100 S. Ct. 2109, 65 L. Ed. 2d 66 (1980); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 100 S. Ct. 1223, 63 L. Ed. 2d 510 (1980); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 98 S. Ct. 2340, 57 L. Ed. 2d 197 (1978); *General Motors v. Washington*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 2d 430 (1964); *Butler Bros. v. McColgan*, 315 U.S. 501, 62 S. Ct. 701, 86 L. Ed. 991 (1942); *Bass, etc., Ltd., v. Tax Comm.*, 266 U.S. 271, 45 S. Ct. 82, 69 L. Ed. 282 (1924); *Underwood T'writer Co. v. Chamberlain*, 254 U.S. 113, 41 S. Ct. 45, 65 L. Ed. 165 (1920).

As we have noted, Kellogg initially argued that Nebraska could not apportion income between Nebraska and elsewhere and collect a tax in Nebraska on income which may not have been earned in Nebraska. They have now, of necessity, abandoned that view. In a recent decision involving the Uniform Act as applied to the California tax, the U.S. Supreme Court in *Container Corp. of America v. Franchise Tax Bd.*, ____ U.S. ____, 103 S. Ct. 2933, 77 L. Ed. 2d 545 (1983), approved the California method of imposing a unitary tax on a multinational corporation doing business in California. In approving the California formula the U.S. Supreme Court rejected the taxpayer's contention that it had a right to exclude income of its subsidiaries, including dividend income, nonbusiness interest income, and gains on sales of assets not related to the unitary business. In doing so the U.S. Supreme Court said at ____, 103 S. Ct. at 2950: "For the reasons we have just outlined, we conclude that California's application of the unitary business principle to appellant

and its foreign subsidiaries was proper, and that its use of the standard three-factor formula to apportion the income of that unitary business was fair. This proper and fair method of taxation happens, however, to be quite different from the method employed both by the Federal Government in taxing appellant's business, and by each of the relevant foreign jurisdictions in taxing the business of appellant's subsidiaries." The formula used by California, pursuant to statute, includes all of the income of the parent and its subsidiaries, including foreign subsidiaries, and uses to apportion this income the worldwide value of the taxpayer's property, payroll, and sales. That is the formula urged upon us by Kellogg.

With that brief background we then turn to an examination of the Nebraska act for purposes of attempting to determine what the proper application in Nebraska should be. In doing so, we are reminded that there are certain basic rules of construction which must be followed by the court. " 'A statute is not to be read as if open to construction as a matter of course.' " *County of Douglas v. Board of Regents*, 210 Neb. 573, 577, 316 N.W.2d 62, 65 (1982). "Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning." *Hill v. City of Lincoln*, 213 Neb. 517, 521, 330 N.W.2d 471, 474 (1983). Moreover, "[i]t is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute." *Gaughen v. Sloup*, 197 Neb. 762, 765, 250 N.W.2d 915, 917 (1977). In the construction of a statute which is clear and unambiguous, courts cannot supply missing language, and it is not within the court's power to read into a statute meaning which the clear language does not warrant.

See *Omaha Public Schools v. Hall*, 211 Neb. 618, 319 N.W.2d 730 (1982).

Before proceeding to examine Nebraska's version of the Uniform Act, we must first look at the section of the Nebraska statutes which imposes the tax. The Uniform Act merely apportions the tax, and it does not impose any tax obligation. The applicable taxing statute is § 77-2734. Subsection (1) of the statute has no application because it applies only to a corporation doing business within this state whose business consists exclusively of foreign commerce or interstate commerce, or both. The stipulation in this case is not to that effect, and presumably the Kellogg Company does business both within and without this state. For this reason the provisions of § 77-2734(2) have application. That subsection reads in part as follows: "[T]here is hereby imposed a franchise tax on each corporation or any other entity taxed as a corporation under the Internal Revenue Code according to or measured by its entire net income derived from all sources within this state for the taxable year at the rates imposed under subsection (1) of this section. *For the purposes of this subsection the taxpayer's entire net income shall be its federal taxable income derived from sources within this state* as determined pursuant to sections 77-2735 to 77-2749 without regard to the modification referred to in section 77-2741 . . . ." (Emphasis supplied.) For purposes of understanding this section it is important to note that a Nebraska taxpayer's "entire net income" is determined by the amount of income reported by the taxpayer on its federal tax report. For our purposes we need not concern ourselves with the modification referred to in § 77-2741.

In essence, there is imposed a franchise tax on a corporation at a prescribed rate times the corporation's *federal taxable income* apportioned in accordance with the Uniform Act. At this point we should note that this is a significant difference from the California code involved in *Container Corp. of*

America v. Franchise Tax Bd., ____ U.S. ____, 103 S. Ct. 2933, 77 L. Ed. 2d 545 (1983). The California law imposes the tax not upon the taxpayer's *federal* taxable income but, rather, upon its *gross* income, subject to certain modifications. Under the California code, therefore, the tax is imposed upon *all* of the income of the taxpayer, and may include income not required to be reported in the taxpayer's *federal* income tax return. Therefore, while it may be proper in California to use worldwide income as the tax base, the tax base in Nebraska is defined by statute to be "federal taxable income."

Having determined the tax base upon which the tax is imposed, we turn then to Nebraska's version of the Uniform Act to determine the proper method of apportionment. The pertinent section is § 77-2743. For reasons not entirely clear the Nebraska Legislature chose to deviate from the Uniform Act and divide the section into two parts. The first part is applicable if the taxable income derived from sources within the state is "separate and distinct." The record in this case does not reflect separate and distinct income, and therefore subsection (1) is inapplicable. Consequently, the provisions of § 77-2743(2) apply. That section reads as follows: "All business income shall be apportioned to this state as follows: . . . (2) If the portion of taxable income derived from sources within Nebraska cannot be readily separated from the portion derived from sources without Nebraska, it shall be determined by multiplying the taxpayer's entire taxable income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three." The act then goes on to define the three factors. Section 77-2744 defines the property factor as "a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of *all* the taxpayer's

real and tangible personal property owned or rented and used during the tax period." (Emphasis supplied.)

The State argues to us that, in using that factor, we should only take into account the taxpayer's real and tangible personal property owned, rented, or used during the tax period in the United States, and therefore we should not, as urged by Kellogg, consider all of the taxpayer's real and tangible property wherever found. We believe, however, that the language of the statute is clear and unambiguous. The statute says "all." Few words in the English language are as clear in meaning as is "all," unless it is the word "everywhere," which we shall discuss in a moment.

In *State v. Babcock*, 22 Neb. 33, 37, 33 N.W. 709, 710 (1887), we said: "[T]he word 'all' includes the whole." And in *Haverly v. Elliott*, 39 Neb. 201, 206, 57 N.W. 1010, 1011 (1894), we said: "The word 'all' does not mean some, nor a part, but means the whole . . . ." And, further, in *Consolidated Freightways Corp. v. Nicholas*, 258 Iowa 115, 121, 137 N.W.2d 900, 904 (1965), the Iowa Supreme Court noted: "The word 'all' is commonly understood and usually does not admit of an exception, addition or exclusion." See, also, 73 Am. Jur. 2d *Statutes* § 244 (1974).

The Legislature, if it says so, may be authorized to limit the factor in question to the United States, if by so doing the formula remains fair and equitable. See *Container Corp. of America v. Franchise Tax Bd.*, *supra*. But what the Legislature may do is not the same as what it has in fact done, and the language of § 77-2744 appears to be clear beyond question. *All* must mean everywhere.

This becomes even clearer when one looks at § 77-2747, the payroll factor. That section reads: "The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation, and the denominator of which is the total compensa-

tion paid *everywhere* during the tax period." (Emphasis supplied.) To suggest, as the State does, that everywhere means everywhere in the United States is to attempt to give a meaning to the word not generally recognized nor generally considered in its common meaning. The word "every" is synonymous with "all" and means all the separate individuals which constitute the whole. See, 15 Words and Phrases 792 (perm. ed. 1950); *Geary v. Parker*, 65 Ark. 521, 47 S.W. 238 (1898); *Knox Jewelry v. Cincinnati Ins. Co.*, 130 Ga. App. 519, 203 S.E.2d 739 (1974). *Everywhere* must therefore mean from all places.

Likewise, § 77-2749, in defining "sales factor," provides: "The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer *everywhere* during the tax period." (Emphasis supplied.) What we have said with regard to the payroll factor applies with regard to the sales factor. Therefore, reading the definitions of the three factors, one must come to the conclusion that if, indeed, the Uniform Act is applied, then the taxpayer is required to report, and the Department of Revenue is required to consider, the property factor, the payroll factor, and the sales factor of the taxpayer from all of its operations, both within and without the United States.

This results, of necessity, in a formula different than California's. This is due, however, to the difference in the Nebraska taxing statute and not due to the application of the Uniform Act. For purposes of § 77-2743 the taxpayer's entire taxable income must be as defined by § 77-2734(2), which limits it to the taxpayer's *federal* taxable income. This includes dividends and interest and fees paid to it by its foreign subsidiaries, but does not include the income of its foreign subsidiaries. The property factor, payroll factor, and sales factor must include the taxpayer's worldwide items. It may very well be,

and probably is true, that this does not provide the State with the result which it had hoped to obtain by adopting the Uniform Act. The difficulty, however, is that the Nebraska franchise tax "piggybacks" on the federal income tax in order to arrive at its principal base. By attempting to combine the "piggybacking" of the federal income tax with the provisions of the Uniform Act, it may be that the State realizes the smallest tax possible. This may be unfortunate, and not what the Legislature intended, but it is, in fact, what was accomplished. To the extent that the trial court included worldwide figures for property values, payroll, and sales, it was correct. To the extent that the trial court included worldwide income, it was in error.

The Department of Revenue argues that, regardless of the claims made by Kellogg, the taxpayer simply failed to meet its burden of proof, and therefore this appeal should be dismissed. In support of that position the State cites the provisions of Neb. Rev. Stat. § 77-2781 (Reissue 1981), which provide in part as follows: "In any proceeding before the Tax Commissioner the burden of proof shall be on the taxpayer . . . ." Admittedly, Kellogg failed to provide either the Tax Commissioner or the trial court with sufficient figures to compute the correct tax. However, this is not relevant in this particular appeal.

There are several other provisions of the Nebraska statutes which must be considered in arriving at a determination in this case. Section 77-27,127 reads in part as follows: "Any final action of the Tax Commissioner, if the person aggrieved thereby elects not to appeal first to the State Board of Equalization and Assessment, shall be subject to judicial review as provided in sections 84-917 to 84-919, as though it were a final decision of the State Board of Equalization and Assessment. The review provided by this section shall be the exclusive remedy available to any taxpayer and no other legal

or equitable proceedings shall issue to prevent or enjoin the assessment or collection of any tax imposed under the provisions of sections 77-2701 to 77-27,135." Further, Neb. Rev. Stat. § 77-27,128 (Reissue 1981) provides in part: "The review provided by sections 77-27,126 and 77-27,127 shall be the exclusive remedies available to any taxpayer for the review of the action in respect to the assessment of a proposed deficiency." Therefore, to determine what the authority of the district court is in this case in light of the limited evidence provided by stipulation, we must turn to Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1981). Subsection 84-917(6) reads in part as follows: "The 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: . . . (b) In excess of the statutory authority or jurisdiction of the agency; . . . (d) Affected by other error of law." In view of the fact that we have determined as a matter of law that the formula used by the Department of Revenue and approved by the Tax Commissioner was in excess of statutory authority and contrary to law, it appears to us that the clear language of § 84-917 required the trial court to remand this case to the Tax Commissioner for a determination in accordance with the proper formula. Likewise, on appeal under § 84-918, we must direct the district court to take such action. That is not to say that the burden of proof with regard to factual matters does not remain with the taxpayer. It is simply to recognize that in this case we do not reach the factual dispute because of the errors of law committed by the Tax Commissioner in interpreting the applicable statutes. When the case returns to the Tax Commissioner, Kellogg will bear the burden of producing evidence sufficient to establish that a determination made by the Tax Commissioner is not in accordance with law, if it disagrees with his determination.

For these reasons, therefore, the decision of the district court is in part affirmed and in part reversed, and the cause is remanded with directions to order the Tax Commissioner to recompute the taxes for the years in question in accordance with this decision.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

VIRGINIA PARIS, APPELLANT, V. J. A. BALDWIN MANUFACTURING COMPANY, A CORPORATION, AND MARYLAND CASUALTY COMPANY, APPELLEES.

342 N.W.2d 198

Filed January 6, 1984. No. 83-023.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside unless clearly wrong.
2. _____: _____. In testing the sufficiency of evidence to support findings of the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workmen's Compensation.** Whether a plaintiff in a Nebraska Workmen's Compensation Court case is totally and permanently disabled is a question of fact.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Jeffrey H. Jacobsen of Jacobsen, Orr & Nelson, for appellant.

William J. Ross of Ross, Schroeder & Fritzler, for appellees.

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

GRANT, J.

This is an appeal in a proceeding under the Nebraska Workmen's Compensation Act. Plaintiff-

appellant, Virginia Paris, was an employee of defendant J. A. Baldwin Manufacturing Company. Defendant Maryland Casualty Company was Baldwin's compensation insurance carrier. The two defendants are hereinafter referred to collectively as Baldwin.

Plaintiff was injured on June 13, 1979, when she tripped and fell forward as she entered Baldwin's place of business. She landed on her hands and injured her cervical spine and shoulder, and her hands. It is not disputed that these injuries arose out of, and in the course of, her employment.

After continuing to work for approximately 2 months, plaintiff sought medical assistance. Sometime before December 10, 1979, an electromyelogram confirmed the presence of bilateral carpal tunnel syndrome. On January 25, 1980, bilateral carpal tunnel releases were carried out. This operation apparently was wholly satisfactory, but plaintiff continued to have pain in her neck and shoulder area. In May 1980 plaintiff's doctor prescribed a transcutaneous nerve stimulator (TENS), a device used to relieve pain. The record is not clear, but it appears that the TENS unit was required only because of the pain in the plaintiff's neck and shoulder area.

In January of 1981 plaintiff filed her petition in the Workmen's Compensation Court. On May 19, 1981, plaintiff obtained an award giving her temporary total disability benefits from August 29, 1979, to April 29, 1981, and for an indefinite time in the future. Plaintiff was also awarded medical, hospital, and physical therapy expenses, and "such vocational rehabilitation services, including retraining and job placement as may be reasonably necessary to restore her to suitable employment." The award as to rehabilitation was made subject to the specific condition that "[i]f the plaintiff, without reasonable cause . . . fails . . . to cooperate in a reasonable program of rehabilitation, the Court may upon application of the defendant, suspend, reduce or limit the

compensation otherwise payable under the Nebraska Workmen's Compensation Law."

No appeal was taken from this award, and, in fact, in February of 1981, before the award, Baldwin had hired a rehabilitation expert to work with plaintiff. Baldwin complied fully with the May 19, 1981, award. Plaintiff underwent testing, and as part of her rehabilitation, obtained her general equivalency degree from high school and satisfactorily completed one trimester of an accounting course. The second trimester of that accounting course began in January of 1982. Plaintiff did not register for the second trimester, and dropped the course.

On May 13, 1982, Baldwin filed its application asking for a modification of the May 19, 1981, award, seeking to reduce or limit compensation payable to plaintiff because of plaintiff's refusal to cooperate in a reasonable program of rehabilitation. On August 19, 1982, a single judge of the compensation court granted Baldwin's application; found that plaintiff had "failed to cooperate in a reasonable program of rehabilitation"; terminated plaintiff's temporary total disability as of January 4, 1982; and awarded plaintiff a permanent partial disability of 10 percent of the body as a whole. Plaintiff applied for rehearing of this award. On rehearing before a three-judge panel, with one judge dissenting, the award was generally affirmed but modified to reduce the permanent partial disability to 5 percent. This appeal by plaintiff followed. For the reasons hereinafter stated we affirm the award on rehearing.

Plaintiff's assignments of error may be grouped into two main points. First, plaintiff alleges that the compensation court erred in finding that plaintiff failed to cooperate in a reasonable program of rehabilitation, and, second, that the compensation court erred in finding that plaintiff had a 5-percent permanent partial disability rather than finding that plaintiff was totally disabled.

Basic to our review of such questions is Neb. Rev.

Stat. § 48-185 (Reissue 1978), which provides in pertinent part: "The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case. A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award."

Cases decided under this statute have clearly established the guidelines for our review. As stated in *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 823, 272 N.W.2d 372, 376 (1978), "Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party." See, also, *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981).

With regard to plaintiff's first assignment of error that the compensation court erred in finding that plaintiff failed to cooperate in a reasonable program of rehabilitation, the record, viewed in the light most favorable to Baldwin, discloses the following: Baldwin had initiated a program of rehabilitation in February of 1981, some 3 months before the initial award. Plaintiff was extensively tested and assessed at Baldwin's expense. Plaintiff was then 51 years old and had gone through ninth grade in high school. Testing showed that she had an aptitude for clerical office work and that she had a background

in office work in that she had helped her husband at one time in running a small store and gasoline station. Plaintiff's program was then directed toward that kind of work. Arrangements were made and plaintiff obtained her general equivalency high school degree. Baldwin then arranged for plaintiff to take bookkeeping and accounting courses, offered by the Central Technical Community College, at Lexington High School. The courses were offered over a 9-month period, divided into 3-month trimesters.

Plaintiff took the first trimester, beginning in September of 1981 and concluding in December. She did what was described as excellent work and grasped the material well, and passed the course. She then told the rehabilitation counselor that she was not going to start the second trimester because her shoulder and back were bothering her.

Prior to this time, plaintiff's counselor had written to plaintiff's doctor asking for an update on plaintiff's condition, and specifically asking how the daily school routine was affecting her medical condition. The response to this inquiry was a one-line letter, dated December 1, 1981: "I can not give a permanent partial disability rating at this time."

In connection with plaintiff not continuing on with her rehabilitation program, the plaintiff's medical condition, and how it was affected by the schooling, is all-important. We search the record in vain for any medical opinion in this area. It is true that plaintiff herself testified, at the rehearing and on cross-examination, that she went to her doctor in December and her doctor told her that he thought she needed to drop schooling and get away from whatever "is tensing you up." The doctor testified by deposition and no such testimony was developed. Indeed, there is little questioning at all on that vital point. With regard to plaintiff's ability to continue her schooling, the following exchange is the total of plaintiff's own doctor's testimony on that issue:

"Q [By plaintiff's counsel] . . . Now, Virginia was taking some courses, I believe, in accounting through the rehabilitation department, and I believe her testimony will indicate that she had considerable problem with aching and so forth and did not feel at least in her mind that she could continue. Do you find any support medically for her complaints in that regard? That might not be phrased the best way in the world. Do you want me to rephrase it? A [By plaintiff's doctor] Well, all I have is her testimony that when she tried to go to school and do the studying, her back pain and her neck pain became so severe that she just wasn't able to handle it. I don't have any physical evidence to substantiate that. Q As a physician, do you have an opinion as to whether that makes any sense? A That is what I would expect based upon what I already knew about Virginia."

Further testimony of plaintiff's orthopedic doctor states that, as of August of 1982, plaintiff's complaints were entirely subjective; there was no muscle atrophy, no neurological deficits, no tenderness on examination, and no impairment or limitation of motion in the shoulder.

The examination of Baldwin's orthopedic specialist disclosed generally the same physical findings. This doctor, in his examination of April 9, 1982, evaluated plaintiff as follows: "It is my feeling that this woman's symptoms and signs were about the same as they were when I previously examined her [18 months before]. Her subjective complaints far outweigh any objective findings. I think that she has a trapezius sprain. I think that with an exercise program, her symptoms should be minimal. I feel that she is a very nervous woman and that this no doubt contributes to the symptoms that she complains of."

Additionally, the rehabilitation counselor, on July 14, 1981, and September 30, 1981, arranged for plaintiff to apply for a job for the last part of 1981.

Plaintiff refused to fill out and mail such applications for such work, which was of the type she was preparing herself for in school. Plaintiff's counselor concluded his report terminating his efforts at rehabilitation by writing to defendants, "At this time, I feel there is nothing more we can do vocationally for this client." His frustration is evident in the "MEDICAL Discussion" in that final report, when he states: "We have made attempts to obtain information from Dr. Ellis about the client's condition, but have only received copies of his progress rate indicating she has not improved and his opinion has not changed. Our request and his answers are totally unrelated. We have received nothing indicating she can't handle the courses and any sitting, either from the client or her physician."

Outside of plaintiff's own testimony on rehearing, the record is devoid of any other evidence that plaintiff could not handle the rehabilitation schooling. The compensation court apparently did not believe plaintiff's testimony. Since there is evidence showing that plaintiff was handling the schooling adequately, and no medical evidence is presented that she could not continue to do so, there is no reason to disturb the compensation court's findings and determination that plaintiff did fail to cooperate in a reasonable course of rehabilitation and that such failure was willful.

With regard to plaintiff's contention that the court erred in not finding her totally disabled and in finding her permanent partial disability at 5 percent of the body as a whole, we need only note that, as stated in *Boults v. Church*, 200 Neb. 319, 321, 263 N.W.2d 478, 480 (1978), "[w]hether or not the plaintiff is totally and permanently disabled, and is entitled to receive the maximum allowable benefits, is a question of fact." In this case plaintiff's doctor determined plaintiff was totally disabled. This determination was based entirely on plaintiff's complaints of pain and on no objective medical findings.

Baldwin's orthopedic doctor evaluated plaintiff's permanent partial disability at 5 percent of the body as a whole. The compensation court determined this question by adopting the evidence of the 5-percent disability rating. As stated in *Cain v. La Grange Steel Erectors, Inc.*, 195 Neb. 272, 277, 237 N.W.2d 640, 643 (1976), quoting from *Marion v. American Smelting & Refining Co.*, 192 Neb. 457, 222 N.W.2d 366 (1974), " 'Where the record in a case reflects nothing more than a resolution of conflicting medical testimony, there appears no purpose in this court substituting its judgment of facts for the judgment of the compensation court.' "

There was sufficient evidence to support the compensation court's findings and determination in all respects.

The order on rehearing is affirmed.

AFFIRMED.

THOMAS W. GREIN, APPELLEE, V. BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF FREMONT, IN THE COUNTY OF DODGE, STATE OF NEBRASKA, ET AL., APPELLANTS.

343 N.W.2d 718

Filed January 13, 1984. No. 82-576.

1. **Public Meetings: Statutes.** The Nebraska Public Meetings Laws are a statutory commitment to openness in government.
2. _____: _____. Public meetings laws are broadly interpreted and liberally construed to obtain the objective of openness in favor of the public. Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed.
3. **Public Meetings: Statutes: Words and Phrases.** The public interest mentioned in Neb. Rev. Stat. § 84-1410 (Reissue 1981) is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities.
4. **Public Meetings: Statutes.** In civil actions good faith or good intention on the part of the public body is irrelevant to the question of compliance with the provisions of the Public Meetings Laws authorizing a closed session.

5. _____: _____. The prohibition against decisions or formal action in a closed session also proscribes crystallization of secret decisions to a point just short of ceremonial acceptance, and rubber-stamping or reenacting by a pro forma vote any decision reached during a closed session.
6. **Injunction.** An injunction is an extraordinary remedy available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury. The threatened action must be based upon a real apprehension that the acts for which the injunction is sought are not only threatened but will in all probability be committed.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed in part, and in part reversed with directions.

Sidner, Svoboda, Schilke, Wiseman, Thomsen & Holtorf, for appellants.

John F. Kerrigan and William G. Line of Kerrigan, Line & Martin, for appellee.

Neal E. Stenberg, for amicus curiae Nebraska Association of School Boards.

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

SHANAHAN, J.

Thomas W. Grein sued the Board of Education of the School District of Fremont to declare void a contract between the school district and a contractor submitting the second-lowest bid. Grein claimed the contract resulted from a closed session of the board in violation of the "Public Meetings Laws," Neb. Rev. Stat. §§ 84-1408 et seq. (Reissue 1981). The district court, sustaining Grein's motion for summary judgment, held that the closed session violated the Public Meetings Laws and that the resulting contract was void. The district court then enjoined the board from further violation of the Public Meetings Laws. We affirm in part and reverse in part with directions.

The questioned meeting of the board took place on January 4, 1982. At an unspecified date before the

meeting, a representative of Risor & Barney, Inc. (contractor), the low bidder on the school boiler project, met with one of the engineers of Clark Enersen Partners, the architectural firm employed by the school district. (Clark Enersen, its architects, engineers, and representatives, irrespective of professional nomenclature, will hereinafter be called the "architect.") The contractor informed the architect about the contractor's error in computing its bid, which resulted in underbidding the project by an amount up to $3,000. It was the impression of the architect that the contractor was soliciting support for a request to increase the amount of the bid in view of the error.

As a result of the meeting with the contractor, the architect met with the board president and other representatives of the school district during the evening shortly before the regular meeting of the board on January 4, 1982. At this preliminary meeting the architect mentioned a possible problem in view of the low bid. The architect requested a closed session of the board to disclose reasons for recommending the second-lowest bid, and declined to elaborate on these reasons in an open session. The architect's reasons for requesting the closed session and for rejecting the contractor's low bid can be summarized as follows: (1) An absence of facts to substantiate the low bidder's inability to perform the contract; (2) A conclusion by the architect that there had been "suggestion and inference" that the low bidder was soliciting assistance from the architect to increase the amount of the bid; (3) An award of the contract to the contractor contrary to recommendations of the architect expressed in an open meeting would cause "difficulties in the [architect]-contractor relationship"; (4) Public disclosure of the error by the contractor would needlessly injure the reputation of the contractor, notwithstanding that the error in bidding may have been an honest mistake misinterpreted by the pub-

lic; (5) On account of a deadline for federal funding, the architect did not delay bidding to investigate the experience and ability of the contractor; (6) The architect's opinion that the contractor would suffer injury to its reputation if there was public disclosure of the possible problem regarding the bidding; (7) It was unusual for an architectural firm to recommend a bid from other than the low bidder; (8) "[A] potential claim would exist by the low bidder" if the low bidder were not awarded the contract; and (9) There was "increased possibility of success" in the pursuit of a claim by the low bidder if "all facts on which [the architect] based [its] recommendation were not made known to the board . . . [in] a closed session."

After the preliminary meeting between representatives of the school district and the architect, the regular meeting of the board of education was convened. In the course of the regular meeting the architect addressed the board and stated: "I believe we will address the boiler bids with a recommendation which is the first order of our business. We would bring a recommendation to this Board to accept the bid of [the second-lowest bidder]." In response, the president of the school board asked: "Is there a reason why you go with the second low bidder?" The architect answered: "Yes sir, there is, and in order to protect our clients [sic] concern we would request a closed meeting to address these claims." At that point the school attorney expressed: "I would suggest, Mr. Chairman, that this would be appropriate both for the purpose of protecting the persons involved and in the interest of the school district, generally, that this be discussed privately." The school board then affirmatively voted to withdraw to the "closed session for these reasons." The exact contents of the closed session are not shown, but the architect's reasons for rejecting the low bid, as previously summarized, were disclosed to the board in the closed session. After the

closed session and upon reconvening the open session, the board, without further discussion or deliberations about bids on the boiler project, immediately voted to accept the bid of the second-lowest bidder.

There is no indication that any representative of the low-bidding contractor attended the meeting on January 4, 1982. When asked for whose protection the meeting was closed, the president of the board of education responded: "Probably the School Board. I don't know."

Grein sued to nullify the action of the board in awarding the boiler contract to the second-lowest bidder. See § 84-1414. Grein claimed that the closed session of the board was not authorized by § 84-1410. The answer filed by the board alleges that a closed session was necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual.

The district court held that the closed session of the board and the contract to the second-lowest bidder were void on account of violation of the "Open Meetings Laws." The district court also enjoined the board from further violations of the Public Meetings Laws and ruled that the plaintiff was entitled to recover an attorney fee, but the record does not disclose any order awarding a specific attorney fee.

The board claims: (1) The closed session did not violate the Nebraska Public Meetings Laws, §§ 84-1408 to 84-1414; (2) The vote of the board, namely, accepting the second-lowest bid during the open meeting immediately after the closed session, was permissible and not contrary to the Public Meetings Laws; and (3) The injunction prohibiting the board's further violation of the Public Meetings Laws was not proper.

A declaration of the intent behind the Public Meetings Laws is found in § 84-1408: "It is hereby declared to be the policy of this state that the forma-

tion of public policy is public business and may not be conducted in secret.

"Every meeting of a public body shall be open to the public in order that citizens may exercise their democratic privilege of attending and speaking at meetings of public bodies . . . ."

A closed session of a public body is authorized by § 84-1410: "(1) Any public body may hold a closed session by the affirmative vote of a majority of its voting members *if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual* and if such individual has not requested a public meeting. . . . (2) The vote to hold a closed session shall be taken in open session. The vote of each member on the question of holding a closed session, the reason for the closed session, and the time when the closed session commenced and concluded shall be recorded in the minutes. . . ." (Emphasis supplied.)

The Nebraska Public Meetings Laws are a statutory commitment to openness in government. As a result of open meetings, there will be development and maintenance of confidence, as well as participation, in our form of government as a democracy. The public can observe and within proper limits participate in discussions and deliberations of a public body. "Deliberation" means the act of weighing or examining reasons for and against a choice or measure, and connotes not only collective discussion but collective acquisition and exchange of facts preliminary to the ultimate decision. Cf., *People ex rel. Hopf v. Barger*, 30 Ill. App. 3d 525, 332 N.E.2d 649 (1975); *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.*, 263 Cal. App. 2d 41, 69 Cal. Rptr. 480 (1968). Government's decision-making process, whether observed personally by the public or publicized by the media, can be examined and analyzed in terms of the effect on the lives of people. In this manner government may be ac-

countable to the governed. Cf., *Hudson v. School Dist. of Kansas City*, 578 S.W.2d 301 (Mo. App. 1979); *Krause v. Reno*, 366 So. 2d 1244 (Fla. App. 1979); *Miglionico v. Birmingham News Co.*, 378 So. 2d 677 (Ala. 1979); *Ridenour v Dearborn Bd of Ed*, 111 Mich. App. 798, 314 N.W.2d 760 (1981).

"The basic argument for open meetings is that public knowledge of the considerations upon which governmental action is based is essential to the democratic process. The people must be able to 'go beyond and behind' the decisions reached and be apprised of the 'pros and cons' involved if they are to make sound judgments on questions of policy and to select their representatives intelligently. The presence of outside observers is an invaluable aid in making such information available, for official reports, even if issued, will seldom furnish a complete summary of the discussion leading to a particular course of action. . . . [T]he benefit of granting access to governmental meetings will inure to a far larger segment of the population, because those who do attend will pass on the information obtained. It is further argued that decisions which result in the expenditure of public funds ought to be made openly so that the people can see how their money is being spent; publicity of expenditures further serves to deter misappropriations, conflicts of interest, and all other forms of official misbehavior. . . . [O]pen meetings foster more accurate reporting of governmental activities. Even when meetings are closed, some hint of what occurs generally reaches [the media]; but such reports are often incomplete and slanted according to the views of the informant. To restrict [the media] to such sources of information is a disservice both to the public, which is misled, and to the officials, who may be judged on the basis of these distorted reports." Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 Harv. L. Rev. 1199, 1200-01 (1962).

Public meetings laws are broadly interpreted and

liberally construed to obtain the objective of openness in favor of the public. *Rice v. Union Cty. Reg. High School Bd. of Ed.*, 155 N.J. Super. 64, 382 A.2d 386 (1977); *Wexford Prosecutor v Pranger*, 83 Mich. App. 197, 268 N.W.2d 344 (1978); *Laman v. McCord*, 245 Ark. 401, 432 S.W.2d 753 (1968). Provisions permitting closed sessions and exemption from openness of a meeting must be narrowly and strictly construed. *Rice v. Union Cty. Reg. High School Bd. of Ed.*, *supra*; *Ill. News Broadcasters v. City of Springfield*, 22 Ill. App. 3d 226, 317 N.E.2d 288 (1974); *Daily Gazette v. Town Bd., etc.*, 111 Misc. 2d 303, 444 N.Y.S.2d 44 (1981); *Ridenour v Dearborn Bd of Ed*, *supra*.

Although the board's motion to adjourn to a closed session contained the phrase "protecting the persons involved and in the interest of the school district, generally," for our purposes we will assume that the motion had properly utilized the specific statutory language "for protection of the public interest." See § 84-1410.

The "public interest" mentioned in § 84-1410 is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities. Cf., *Russell, Jr. v. Wheeler*, 165 Colo. 296, 439 P.2d 43 (1968); *Goldberg v. Barger*, 37 Cal. App. 3d 987, 112 Cal. Rptr. 827 (1974).

It is axiomatic that concerns of citizens and taxpayers of a school district include the fiscal policy and cost of operating the district. The district's expenses will ultimately be reflected in taxes borne by the taxpayers. Here, there was a decision to be made: Should the low bid be accepted? Any answer to the question would have an impact on the pocketbooks and wallets of the public. The question and answer did indeed involve the public interest, but protection of that public interest in this case demanded deliberations in a public meeting rather than resolution in the recesses of a closed session. Cf., *Miglionico v. Birmingham News Co.*, 378 So. 2d

677 (Ala. 1979); *Ridenour v Dearborn Bd of Ed*, 111 Mich. App. 798, 314 N.W.2d 760 (1981); *Blackford, etc. v. School Bd. of Orange Cty.*, 375 So. 2d 578 (Fla. App. 1979). The board was not entitled to adjourn to a closed session based upon "protection of the public interest" contemplated by § 84-1410, in view of the circumstances presented in this case.

Going to the second claim for exemption from a public meeting, namely, "prevention of needless injury to the reputation of an individual," § 84-1410, one has to ask: Whose reputation was being protected? The reputation of the architect or of the board? There is no allegation or intimation critical of the integrity, loyalty, reliability, or honesty of the board or its representatives, individually or collectively. The lowest bidder's reputation seems to have become obscured in the shadow of the protective umbrella opened at the meeting. Nothing indicates that the low bid was other than the result of an honest but erroneous computation. Yet, the board elected to adjourn to a closed session where the architect related the honest mistake of the low bidder and expressed some rather suspect, speculative conclusions. Steeped in the secrecy of the closed session, the board reconvened the open meeting and immediately voted to accept the second-lowest bid, thereby rejecting the low bid without any discussion or explanation. Anyone believing that it was more salutary to spare the low bidder embarrassment over an honest mistake ignores that some people often draw the most cruel conclusions from sinister silence. We believe the slight discomfort, if any, experienced by a low bidder in the arena of public lettings is far outweighed by the policy favoring openness in the meetings of a public body. Cf. *Brown v. East Baton Rouge Parish School Bd.*, 405 So. 2d 1148 (La. App. 1981). Prevention of needless injury to an individual's reputation as a basis for a closed session was not established under the cir-

cumstances, and this exemption from an open session was not available to the board.

The board suggests a good faith motivation for a closed session is a cure for noncompliance with the Public Meetings Laws. The Public Meetings Laws contain no such rehabilitative or curative provision. If we were to permit the board's action to stand on the basis of good intention, such a rule would become an invitation, perhaps a license, for a public body to circumvent the Public Meetings Laws' limited exemptions by an additional criterion of good faith or good intention in adjournment to a closed session. We hold that in civil actions good faith or good intention on the part of the public body is irrelevant to the question of compliance with the provisions of the Public Meetings Laws authorizing a closed session. See, *Wolf v. Zoning Bd. of Adjust. of Park Ridge*, 79 N.J. Super. 546, 192 A.2d 305 (1963); *Times Publishing Company v. Williams*, 222 So. 2d 470 (Fla. App. 1969); *Blackford, etc. v. School Bd. of Orange Cty., supra*; *Kramer v. Bd. of Adjust., Sea Girt*, 80 N.J. Super. 454, 194 A.2d 26 (1963). Cf. *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974). The only question of fidelity involved is adherence to the requirements of the Public Meetings Laws.

The board believes its vote in the reconvened open session immediately after the closed session is valid. The minutes of the meeting reflect the board's vote to reconvene the open session and the immediate transaction of business: "[President of board]: All right, item A boiler bids, is there a motion? [Response]: I move that we accept the bid of [second-lowest bidder] for the boilers. [President]: Is there a second? [Response]: Second. [President]: Any discussion? Call the roll please." At that point there occurred five affirmative votes by which the motion carried. The necessary inference is that the vote during the reconvened open session was the extension, culmination, and product of the

closed session. To deny that deduction would not be a tax but a surtax on credibility, and naivete to the *n*th degree.

The prohibition against decisions or formal action in a closed session also proscribes "crystallization of secret decisions to a point just short of ceremonial acceptance," and rubberstamping or reenacting by a pro forma vote any decision reached during a closed session. *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.*, 263 Cal. App. 2d 41, 50, 69 Cal. Rptr. 480, 487 (1968). See, *Littleton Educ. Ass'n v. Arapahoe Sch. Dist.*, 191 Colo. 411, 553 P.2d 793 (1976); *Brown v. East Baton Rouge Parish School Bd.*, *supra*; *Peters v. Bowman Pub. Sch. Dist. No. 1*, 231 N.W.2d 817 (N.D. 1975); *Kramer v. Bd. of Adjust., Sea Girt*, *supra*. Cf. *Town of Palm Beach v. Gradison*, *supra*. Consequently, the vote of the board in accepting the second-lowest bid violated the Nebraska Public Meetings Laws and subjected the action to nullification, namely, being declared void by a court as provided in § 84-1414.

We find the judgment of the district court is correct in declaring void the board's accepting the second-lowest bid.

From all this there evolves a guiding principle relatively simple and fundamental: If a public body is uncertain about the type of session to be conducted, open or closed, bear in mind the policy of openness promoted by the Public Meetings Laws and opt for a meeting in the presence of the public.

The injunction ordered by the district court enjoined "further violations of" the Public Meetings Laws. Such injunction cannot stand. An injunction is an extraordinary remedy available in the absence of an adequate remedy at law and where there is a real and imminent danger of irreparable injury. See *Wexford Prosecutor v Pranger*, 83 Mich. App. 197, 268 N.W.2d 344 (1978). "[T]he mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an in-

junction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." *Labor Board v. Express Pub. Co.*, 312 U.S. 426, 435-36, 61 S. Ct. 693, 85 L. Ed. 930 (1941). "[T]he threatened action must be based upon a real apprehension that the acts for which the injunction are [sic] sought are not only threatened but will in all probability be committed. Unless it can be shown that reasonable grounds exist for apprehending that absent the injunction the actions will be done, the injunction will be denied." *Hudson v. School Dist. of Kansas City*, 578 S.W.2d 301, 312 (Mo. App. 1979). The facts of this case do not warrant the extraordinary remedy of injunctive relief. Therefore, the judgment of the district court granting the injunction is reversed, and the district court is directed to dissolve the injunction entered in the proceedings.

The matter of the attorney fee for proceedings in district court is apparently still pending before the trial court. Therefore, we make no ruling in view of the absence of a final order in the district court. For services in this court Grein is awarded an attorney fee of $500, which is taxed to the appellants as a part of the costs of the proceedings on appeal.

For the reasons given the judgment of the district court regarding the board's action in accepting the second-lowest bid is affirmed, but the order of the district court entering the injunction is reversed with directions as indicated herein.

AFFIRMED IN PART, AND IN PART REVERSED WITH DIRECTIONS.

FRANCES METHOD STRONG, APPELLANT, V. MORRIS SWEDBERG AND GAROLD METHOD, JR., APPELLEES.

342 N.W.2d 202

Filed January 13, 1984. No. 82-831.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Affirmed.

Don J. Sixta of Krafka & Sixta, P.C., for appellant.

Leo J. Eskey, for appellee Method.

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

PER CURIAM.

Reviewing this matter de novo on the record as an appeal in equity, we find no error in the judgment of the district court. The judgment of the district court is affirmed.

AFFIRMED.

O'KEEFE ELEVATOR COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT, V. SECOND AVENUE PROPERTIES, LTD., A NEBRASKA LIMITED PARTNERSHIP, ET AL., APPELLEES.

343 N.W.2d 54

Filed January 13, 1984. No. 82-833.

1. **Mechanics' Liens: Foreclosure.** An action to foreclose a mechanic's lien is one grounded in equity.
2. **Equity: Appeal and Error.** On appeal to this court an action in equity is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another, as well as the fact that the trial court viewed the premises.
3. **Uniform Commercial Code: Breach of Warranty: Proof.** To establish a breach of the implied warranty of merchantability arising under Neb. U.C.C. § 2-314 (Reissue 1980), there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury both proximately and in fact.

4. _____: _____: _____. To establish a breach of the implied warranty of fitness for a particular purpose arising under Neb. U.C.C. § 2-315 (Reissue 1980), there must be proof that the seller had reason to know of the buyer's particular purpose; that the seller had reason to know the buyer was relying on the seller's skill or judgment to furnish appropriate goods; and that the buyer did, in fact, rely upon the seller's skill or judgment.
5. **Mechanics' Liens: Foreclosure: Prejudgment Interest: Claims.** Prejudgment interest is recoverable upon the foreclosure of a mechanic's lien if the claim is liquidated.
6. **Claims.** A claim is liquidated when there is no reasonable controversy as to either the right to recover or as to the amount of such recovery.

Appeal from the District Court for Buffalo County: DeWayne Wolf, Judge. Reversed and remanded with directions.

James L. Quinlan of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

Kent A. Schroeder of Ross, Schroeder & Fritzler, for appellees.

Krivosha, C.J., Boslaugh, White, Hastings, Caporale, Shanahan, and Grant, JJ.

Caporale, J.

The defendant-appellee Second Avenue Properties, Ltd., refused to pay for a wheelchair lift sold to it and installed by plaintiff-appellant, O'Keefe Elevator Company, Inc. As a consequence, O'Keefe brought this action to foreclose its mechanic's lien. The trial court found in favor of Second Avenue and dismissed O'Keefe's petition. We reverse and remand for entry of a judgment in favor of O'Keefe.

The issues presented by O'Keefe's assignments of error are whether the trial court erred in finding that it breached its implied warranty of merchantability and that it did not substantially perform its contract.

An action to foreclose a mechanic's lien is one grounded in equity and, on appeal to this court, is reviewed de novo on the record, subject to the rule

that where credible evidence is in conflict on material issues of fact, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another, as well as the fact that the trial court viewed the premises. *Burton v. Annett*, 215 Neb. 788, 341 N.W.2d 318 (1983); *Chicago Lumber Co. v. Horner*, 210 Neb. 833, 317 N.W.2d 87 (1982); *Webb v. Lambley*, 181 Neb. 385, 148 N.W.2d 835 (1967).

From such a review of the record we find that Second Avenue entered into a contract with O'Keefe whereby the latter was required to sell to Second Avenue a Cheney wheelchair lift and install it in a back stairway of an office building which Second Avenue was constructing. Prior to entering into its contract with O'Keefe, Second Avenue had obtained the approval of the state public safety advisory committee for the use of such a lift to satisfy certain building requirements.

Second Avenue was advised by both the manufacturer and O'Keefe that the lift required a stairwell landing length of 5 feet 6 inches, not the 4 feet 7 inches provided. Second Avenue was further advised that either a wall would have to be moved or the landing floor level built up 3½ inches. Second Avenue decided to raise the landing floor level. Although Second Avenue undertook that responsibility, it had not raised the landing by the time O'Keefe arrived to install the lift. At that time Second Avenue, rather than building up the entire landing, built instead a 3½-inch platform to fit under the lift. As a consequence, there is a 5¾-inch drop from the lift to the landing. This condition creates more of a slope than an unassisted wheelchair-bound person is able to navigate. Because of this fact, the State Fire Marshal's office has required that "the building be altered to accomodate [sic] the existing lift, so that the lift can stop flush with the floor and the lift can be left in the down position, or another type of lift used." Second Avenue, although it has been using

the lift, refuses to pay any part of the $9,600 contract price to O'Keefe.

We observe that although the contract involved is a mixed one, both for the sale of goods as defined by Neb. U.C.C. § 2-105(2) (Reissue 1980) and for services, the parties tried this case on the theory that the sales article of the Uniform Commercial Code (article 2) applies. That being the case, we make no independent analysis of the issue, and assume for the purposes of this case, without deciding, that the contract does in fact come within the purview of the sales article of the Uniform Commercial Code, which encompasses transactions in goods. Neb. U.C.C. § 2-102 (Reissue 1980). See *Kearney Clinic Bldg. Corp. v. Weaver*, 211 Neb. 499, 319 N.W.2d 95 (1982), stating that this court will dispose of a case on appeal on the theory on which it was presented to the trial court.

The trial court concluded that because the "chairlift . . . cannot be safely operated by a handicapped person in a wheelchair," it is unfit for the ordinary purposes for which such goods are used. It therefore found that O'Keefe breached the implied warranty of merchantability arising by virtue of Neb. U.C.C. § 2-314 (Reissue 1980) and that, consequently, O'Keefe had not substantially performed its contract.

Section 2-314 provides in pertinent part: "(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .

"(2) Goods to be merchantable must be at least such as

"(a) pass without objection in the trade under the contract description; and

. . . .

"(c) are fit for the ordinary purposes for which such goods are used."

The difficulty with the trial court's conclusion is

that the failure of the lift to perform adequately results not from something inherent within the lift itself at the time of sale but, rather, because of the inadequacy of the landing which Second Avenue was required to provide. As stated in *Geiger v. Sweeney*, 201 Neb. 175, 266 N.W.2d 895 (1978), to establish a breach of the implied warranty of merchantability, there must be proof that there was a deviation from the standard of merchantability at the time of sale and that such deviation caused the plaintiff's injury both proximately and in fact. Thus, a breach of the warranty has been found to exist where the item sold failed to perform adequately because of a lack of quality inherent within the item itself. *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983); *Christensen v. Eastern Nebraska Equipment Co., Inc.*, 199 Neb. 741, 261 N.W.2d 367 (1978). The instant case does not present such a situation.

Second Avenue argues that, in any event, O'Keefe breached its implied warranty of fitness for a particular purpose arising under the language of Neb. U.C.C. § 2-315 (Reissue 1980). That section provides: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

Obviously, the implied warranty of fitness for a particular purpose is different than the implied warranty of merchantability. The following conditions, not required by the implied warranty of merchantability, must be present if a plaintiff is to recover on the implied warranty of fitness for a particular purpose: (1) The seller must have reason to know of the buyer's particular purpose; (2) The seller must have reason to know that the buyer is relying on the seller's skill or judgment to furnish appropriate

goods; and (3) The buyer must, in fact, rely upon the seller's skill or judgment. *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978); *Ruskamp v. Hog Builders, Inc.*, 192 Neb. 168, 219 N.W.2d 750 (1974); *Larutan Corp. v. Magnolia Homes Manuf. Co.*, 190 Neb. 425, 209 N.W.2d 177 (1973); J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 9-9 (2d ed. 1980).

Even if we assume that the first two requirements have been met by Second Avenue, the evidence simply does not establish that it in fact relied upon O'Keefe's skill or judgment in selecting the lift. To the contrary, Second Avenue obtained its own state approval and relied on its own knowledge. It ordered what it wanted and was provided what it ordered. Thus, no implied warranty of fitness for a particular purpose arose.

Neither does the evidence establish that O'Keefe's installation of the lift was faulty in any material respect. The evidence is that the lift itself operates properly; it cannot be used satisfactorily because Second Avenue failed to provide a proper landing.

Therefore, O'Keefe, contrary to the trial court's finding, did substantially perform its contract and is entitled to be paid in accordance with the terms of the contract.

The only question remaining is whether O'Keefe is entitled to the prejudgment interest it asks. Neb. Rev. Stat. § 45-104 (Cum. Supp. 1982), in effect at the time O'Keefe filed its lien, provides in pertinent part: "Unless otherwise agreed, interest shall be allowed . . . on money . . . due and withheld by unreasonable delay of payment." *Walker v. Collins Construction Co.*, 121 Neb. 157, 236 N.W. 334 (1931), permits the recovery of prejudgment interest upon the foreclosure of a mechanic's lien under the authority of § 45-104. However, such interest is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to either

plaintiff's right to recover or as to the amount of such recovery. *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983); *Classen v. Becton, Dickinson & Co.*, 214 Neb. 543, 334 N.W.2d 644 (1983). Here, there is no controversy as to the amount; it is fixed by contract at $9,600. Neither do we, under the circumstances presented by the record, find any reasonable controversy as to O'Keefe's right to recover. Consequently, O'Keefe is entitled to prejudgment interest.

The cause is remanded to the trial court with directions to enter judgment in favor of O'Keefe against Second Avenue in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

AMY MACKU, BY AND THROUGH HER MOTHER AND NEXT FRIEND, ALMA LORRAINE MACKU, RANDALL FAY MACKU, and ALMA LORRAINE MACKU, APPELLANTS, V. DRACKETT PRODUCTS CO., APPELLEE.

343 N.W.2d 58

Filed January 13, 1984. No. 83-212.

1. **Actions: Torts: Minors.** Generally, injury to a minor results in two causes of action—one on behalf of the minor and the other on behalf of the minor's parent.
2. **Actions: Minors.** At common law an infant could sue only by a guardian or next friend, because an infant lacked legal capacity to act for oneself. Neb. Rev. Stat. § 25-307 (Reissue 1979) is Nebraska's recognition of the common law regarding prosecution of an infant's claim.
3. **Actions: Minors: Products Liability: Limitations of Actions.** Regarding an infant's cause of action for product liability, Neb. Rev. Stat. § 25-213 (Reissue 1979) tolls the statute of limitations contained in Neb. Rev. Stat. § 25-224(4) (Reissue 1979).
4. **Actions: Legislature: Limitations of Actions.** The Legislature can shorten the period of limitation for commencement of a cause of action so long as a reasonable time is allowed to bring such action.
5. **Minors: Limitations of Actions.** Suspension of the statute of limitations in accordance with Neb. Rev. Stat. § 25-213 (Reissue 1979)

inures to the exclusive and personal benefit of an infant and not to the benefit of the infant's parent.

Certified Question from the U.S. Court of Appeals for the Eighth Circuit. Judgment entered.

Clay B. Statmore, for appellants.

Bert L. Overcash and Richard L. Spangler, Jr., of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellee.

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

SHANAHAN, J.

Pursuant to Neb. Rev. Stat. § 24-219 (Cum. Supp. 1982), the U.S. Court of Appeals for the Eighth Circuit has asked this court to answer a question regarding Nebraska law applicable to proceedings pending in federal court. The question from federal court is, Does Neb. Rev. Stat. § 25-213 (Reissue 1979) toll the running of the 2-year provision of Neb. Rev. Stat. § 25-224(4) (Reissue 1979) in product liability cases brought during a plaintiff's infancy?

Amy Macku, a minor, was injured on August 23, 1977, as a result of drinking liquid drain cleaner manufactured by Drackett Products Co. At the date of Amy's injury Neb. Rev. Stat. § 25-212 (Reissue 1975) specified a 4-year statute of limitations for a claim based on product liability, viz, such action "can only be brought within four years after the cause of action shall have accrued."

In 1978 the Nebraska Legislature enacted L.B. 665, which changed the statute of limitations concerning a claim based on product liability, namely: "Product liability actions; statute of limitations. (1) All product liability actions shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

"(2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by

section 2-725, Uniform Commercial Code, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

. . . .

"(4) Notwithstanding the provisions of subsections (1) and (2) of this section, *any cause of action or claim which any person may have on July 22, 1978 may be brought not later than two years following such date.*" (Emphasis supplied.) § 25-224. Section 25-224 became law on July 22, 1978.

On May 13, 1981, Alma Lorraine Macku, mother and next friend of Amy Macku, filed a complaint in federal district court seeking damages for the bodily injury of Amy. Also designated as plaintiffs in that complaint were Randall Fay Macku and Alma Lorraine Macku, Amy's parents, seeking damages resulting from the occurrence of August 23, 1977. Product liability is the basis of the Mackus' claims. See Neb. Rev. Stat. §§ 25-21,180 et seq. (Reissue 1979). The complaint alleged that Drackett marketed the drain cleaner in a dangerously defective condition, that is, Drackett's container of liquid drain cleaner was not equipped with a child-resistant cap as required by federal law.

At the date Amy sustained injury, and also when the complaint was filed in federal court, § 25-213 provided: "Except as provided in sections 76-288 to 76-298, if a person entitled to bring any action mentioned in this chapter, Chapter 23, article 24, and sections 81-8,209 to 81-8,239, except for a penalty or forfeiture, or for the recovery of the title or possession of lands, tenements or hereditaments, or for the foreclosure of mortgages thereon, be, at the time the cause of action accrued, within the age of twenty years, insane or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter after such disability shall be removed . . . ."

Drackett moved for a dismissal of the action on the ground that the complaint had been filed more than 2 years after July 22, 1978. The motion for dismissal was sustained. The Mackus have appealed.

Before an answer can be given to the question from federal court, we must review the respective causes of action of Amy and her parents.

Generally, injury to a minor results in two causes of action—one on behalf of the minor and the other on behalf of the minor's parent. The minor's claim is based on damages caused by the personal or bodily injury sustained by the minor, while the claim of a parent is based on the loss of services during minority and the necessary expenses of treatment for the injured child. See, 67A C.J.S. *Parent & Child* § 137 (1978); Restatement (Second) of Torts § 703 (1977). The cause or right of action of parents is distinct from the cause of action of their child. See 67A C.J.S., *supra* § 138. As a result of the occurrence on August 23, 1977, there were two separate causes of action—one in favor of Amy for bodily injury and the other in favor of Amy's parents for loss or damage sustained on account of Amy's injury. The causes of action or claims of the Mackus existed at the date § 25-224(4) became law in 1978.

What, then, is the effect of the 2-year limitation of § 25-224(4) on Amy's personal claim and upon any claim of Amy's parents?

To answer this question in reference to Amy's claim, we must first examine prosecution of a minor's cause of action based on tort. Neb. Rev. Stat. § 49-101 (Reissue 1978) provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska."

By the statutes of Westminster, West. 1, 3 Edw. I, ch. 49 (1275), and West. 2, 13 Edw. I, ch. 15 (1285), an

infant's action could be prosecuted by a guardian or a next friend. See, *Miles v. Boyden*, 20 Mass. (3 Pick.) 213 (1825); *Chudleigh v. C., R. I. & P. Ry. Co.*, 51 Ill. App. 491 (1893); *Cavender v. The Heirs of Smith*, 5 Iowa 157 (1857). Originally, at common law an infant could sue only by a guardian, because an infant was not sui juris—a person with legal capacity to act for oneself. See, *Whittem v. The State*, 36 Ind. 196 (1871); *Ortega v. Salt Lake Wet Wash Laundry*, 108 Utah 1, 156 P.2d 885 (1945); *In re Estate of Beghtel*, 236 Iowa 953, 20 N.W.2d 421 (1945); *Pintek v. Superior Court*, 78 Ariz. 179, 277 P.2d 265 (1954); *Davis v. Bankston*, 192 So. 2d 614 (La. App. 1966); cf. *Bose v. Wehrli*, 186 Misc. 325, 60 N.Y.S.2d 213 (1945). Absent prosecution by a guardian or next friend, an infant's action was subject to a demurrer as a result of the plaintiff's lack of capacity to sue. *Dalsgaard v. Meierding*, 140 Minn. 388, 168 N.W. 584 (1918); *Meyer v. Lane*, 40 Kan. 491, 20 P. 258 (1889).

Since 1867, Nebraska has recognized the common law regarding an infant's lack of legal capacity to sue. Such recognition is contained in our present statute, Neb. Rev. Stat. § 25-307 (Reissue 1979): "Suit by infant, guardian, next friend . . . . Except as provided by the Nebraska Probate Code, the action of an infant shall be commenced, maintained, and prosecuted by his guardian or next friend. . . ." Preservation of a cause of action of one under legal disability, e.g., an infant, has also existed in Nebraska law since 1867. See § 25-213.

In determining the effect of § 25-224(4) we bear in mind that statutes which change or take away a common-law right must be strictly construed. Any statutory construction restricting or abolishing common-law rights should not be adopted, unless the plain words of the statute compel such result. See, *Paulsen v. Courtney*, 202 Neb. 791, 277 N.W.2d 233 (1979); *Kenney v. Barna*, 215 Neb. 863, 341 N.W.2d 901 (1983). Consequently, any statute restricting a

cause of action for product liability is subject to scrutiny by the courts.

There is nothing in the language of § 25-224(4) indicating its 2-year limitation is given significance greater than, or effect different from, any other statute of limitations mentioned in chapter 25 of the Nebraska statutes. Must an infant commence an action "not later than two years following" July 22, 1978? Requiring an action to be prosecuted by one lacking legal capacity to sue is a consummate self-contradiction in law. Does § 25-213 toll the time limit of § 25-224(4) for prosecution of an infant's cause of action? Our answer is in the affirmative. Existence for a century has made preservation of an infant's cause of action an integral part of Nebraska's policy and law not casually overlooked or discarded. There must be more than silence in the legislation before we can infer an intent in § 25-224(4) to extinguish preservation of an infant's cause of action protected by § 25-213. To fashion an abolitionary intent from the verbal void of § 25-224(4) would be truly creative. However, creation is a subject for *Genesis* and not for the Nebraska Reports.

Courts are obligated to carefully watch over the interests of those persons legally incapable of asserting their rights. In *Sacchi v. Blodig*, 215 Neb. 817, 341 N.W.2d 326 (1983), we explained application of the discovery rule relative to prosecution of a malpractice claim of one under a legal disability. In the present situation, and in accordance with § 25-213, we hold that infancy tolls the 2-year statute of limitations of § 25-224(4). In answer to the question from federal court, Amy Macku's claim for product liability has not been barred under Nebraska law.

Concerning any claims of Amy's parents, § 25-224(4) shortened the statute of limitations for an adult's commencement of an action existing on July 22, 1978. The general rule is, "Unless forbidden by the state constitution, a state legislature may consti-

tutionally shorten the periods of limitation fixed by previously existing statutes. Moreover, such a change shortening the limitation period can validly be made applicable to existing causes of action, subject to the important qualification that there must be a reasonable time permitted for a party who has an existing cause of action to avail himself of his remedy before the bar of the statute as thus changed becomes effective. There is no vested right in the statute of limitations in force when a cause of action accrues, and the period allowed for suit may be shortened provided a reasonable time is permitted to bring the action." 51 Am. Jur. 2d *Limitation of Actions* § 38 at 620-21 (1970). The Legislature may reduce a period of limitations and apply a new and shorter period to previously accrued causes of action so long as a reasonable time is allowed to bring such action. See, *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974); *Greenhalgh v. Payson City*, 530 P.2d 799 (Utah 1975); *Bauld v. J. A. Jones Const. Co.*, 357 So. 2d 401 (Fla. 1978); *Collier v. Smaltz*, 149 Iowa 230, 128 N.W. 396 (1910); *McCloskey & Co. v. Eckart*, 164 F.2d 257 (5th Cir. 1947); *Davis & McMillan v. Industrial Acc. Com.*, 198 Cal. 631, 246 P. 1046 (1926). Alma Lorraine Macku and Randall Fay Macku, as persons with capacity to sue, could have prosecuted their causes of action during the shortened time, i.e., the 2-year period following July 22, 1978, prescribed by § 25-224(4).

Regarding a shortened time for commencement of an action, a "reasonable time" for prosecution of a claim must be of sufficient duration to afford full opportunity to resort to the courts for enforcement of the rights on which the statute of limitations operates. See, *Kozisek v. Brigham*, 169 Minn. 57, 210 N.W. 622 (1926); *Lamb v. Powder River Live Stock Co.*, 132 F. 434 (8th Cir. 1904). The 2-year period following July 22, 1978, was a reasonable time under the

circumstances for commencement of an action by Randall Fay Macku and Alma Lorraine Macku.

Section 25-213, suspending the statute of limitations during Amy's infancy, exists for the exclusive and personal benefit of Amy Macku and does not toll the time limit restricting prosecution of any parental claim associated with Amy's separate and personal claim. See, 54 C.J.S. *Limitation of Actions* § 235 (1948); *Osburn v. Savage Arms*, 66 Ohio Misc. 1, 419 N.E.2d 1138 (1980); *Ballantine v. Ahearn*, 170 Misc. 651, 10 N.Y.S.2d 937 (1939); *Walter v. City of Flint*, 40 Mich. App. 613, 199 N.W.2d 264 (1972); *Higgins v. Schneider*, 61 N.J. Super. 36, 160 A.2d 165 (1960).

For the reasons given our answer to the question from federal court is the claims of Alma Lorraine Macku and Randall Fay Macku are barred by the 2-year limitation dictated in § 25-224(4).

Although any claim of Amy's parents is barred by § 25-224(4), the claim of Amy, as previously indicated in this opinion, is not barred by § 25-224(4).

This opinion answering the certified question shall be sent to the U.S. Court of Appeals for the Eighth Circuit.

JUDGMENT ENTERED.

IN RE INTEREST OF J. AND R., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. IDA C., APPELLANT.

342 N.W.2d 660

Filed January 13, 1984. No. 83-246.

1. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence.
2. _____. A termination of parental rights should indeed be a last resort, and should be implemented only when no other reasonable alternative exists.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Timothy J. Cuddigan of Marks, Clare, Hopkins, Rauth & Cuddigan, for appellant.

Donald L. Knowles, Douglas County Attorney, and Christopher E. Kelly, for appellee.

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

WHITE, J.

This is an appeal from the decree of the separate juvenile court of Douglas County, Nebraska, which terminated the parental rights of Ida C. to her female children, J., age 10, and R., age 7. We affirm.

The natural father of J. and R. is deceased. Ida and her children became involved with the juvenile system in June 1978. A petition was filed alleging that J. and R. were homeless or destitute, or without proper support through no fault of a parent, guardian, or custodian. Neb. Rev. Stat. § 43-202(1) (Reissue 1978). Ida appeared and admitted the allegation. The court placed the children in a foster home and ordered Ida to embark on a course of conduct designed to rehabilitate her and to ensure a safe and adequate home for J. and R. The condition which gave rise to the initial action of the court is not described, except as a severe psychological depression which was treated with lithium, apparently a tranquilizer. The treating physician required that faithful ingestion of the tranquilizer be maintained so that a minimum, fixed level of the drug be present in the system at all times. Periodic blood screening was required to ensure that Ida was following directions.

At the time J. and R. were placed in a foster home, a male, Fred C., was living with Ida, and the two were eventually married. The record reflects nearly 5 years of Social Services reports and peri-

odic reviews, and ended in March 1983 when the juvenile court terminated the parental rights.

Although there were frequent setbacks, specifically, missed Positive Parenting sessions, failure to maintain required levels of lithium, sporadic employment by both Fred and Ida, threats and imprecations directed to caseworkers, insufficient housing, and missed visitation appointments, there was progress, generally to the point where there were extended home visitations by the children. The overnight visitations were suspended by the juvenile court when evidence of sexual contact by Fred toward J. was made known to the court. Ida steadfastly refused to believe J.'s assertion of the objectionable conduct. The juvenile court did not specifically find that such conduct actually took place, but was inclined to believe the assertions of J.

A further incident took place on January 26, 1980. Apparently in an attempt to punish J., Fred forced J., then age 6, to remain outside in below-freezing temperatures for an extended period. Ida was present during this totally inappropriate punishment and did not act to protect the child. J. was admitted to Immanuel Hospital in Omaha, unconscious, suffering from hypothermia. In addition, on examination both J. and R. had multiple bruises in various stages of healing. The children were replaced in foster care.

The children have been in foster care continuously since that time. A motion for termination of parental rights, alleging that J. and R. lacked proper parental care, was filed August 1, 1980. Neb. Rev. Stat. § 43-209(6) and (2) (Reissue 1978).

Psychological studies established that both J. and R. greatly fear Fred C. and have no confidence that Ida will protect them from him. All involved, psychologists, social workers, and court service personnel, agree that the interests of the children require a fixed and permanent home and that placement with Ida, with Fred in the home, would be

damaging to the children's mental health and possibly dangerous to their physical well-being as well.

Ida's appreciation of the court's dilemma can be demonstrated in the following exchange at the termination hearing: "Q. If, as a result of the counseling by the therapist of the children and of yourself, it's the conclusion that it would be best for the children and yourself, in order for you to be reunited, that Fred be removed from the picture, would your answer still be the same, you would not divorce Fred? A. No. Q. No matter what? Even if it states that Fred shall not be a part of the children's lives, you will never accept that? A. Huh-uh."

This case is tried de novo in this court. *In re Interest of Hill*, 207 Neb. 233, 298 N.W.2d 143 (1980).

An order terminating parental rights must be supported by clear and convincing evidence. *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983). A "termination of parental rights should indeed be a last resort, and should be implemented only when no other reasonable alternative exists." *Id.* at 389, 338 N.W.2d at 768.

As we view the matter, the juvenile court could not place the children with the natural mother, and indefinite foster care was unacceptable. The court clearly had no alternative but the termination. Ida clearly chose Fred over her children. She must live with that choice.

AFFIRMED.

GEORGE KRIJAN, APPELLANT, V. MAINELLI CONSTRUCTION COMPANY ET AL., APPELLEES.

342 N.W.2d 662

Filed January 13, 1984. No. 83-302.

1. **Workmen's Compensation: Words and Phrases.** For workmen's compensation purposes total disability does not mean a state of absolute helplessness, but means disablement of an employee to earn

wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do.

2. _____: _____. Total and permanent disability contemplates the inability of the workman to perform any work for which he has the experience or capacity to perform.

3. **Workmen's Compensation.** Whether a partial loss or loss of use of two members results in total and permanent disability is to be determined in accordance with the facts. Neb. Rev. Stat. § 48-121(3) (Reissue 1978).

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

Ronald E. Frank and Patrick J. Boylan of Sodoro, Daly & Sodoro, for appellant.

Richard L. Walentine of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellees.

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

BOSLAUGH, J.

This is an appeal in a proceeding under the Workmen's Compensation Act.

The plaintiff, George Krijan, was injured on April 26, 1979, while employed as a carpenter by the defendant Mainelli Construction Company. The injury occurred when the plaintiff fell about 20 feet from a scaffold and fractured his right leg and shoulder. The employer and its insurance carrier paid compensation for temporary total disability to the plaintiff from the date of the accident until January 21, 1982. The plaintiff commenced this action on August 23, 1982.

After a hearing before a single judge of the compensation court, the plaintiff recovered an award. The compensation court found that the plaintiff was temporarily totally disabled from the date of the accident until the date of the hearing, November 9, 1982, and that the plaintiff was totally and permanently disabled as a result of his two-member injury.

On rehearing, with one judge dissenting, the compensation court found that the plaintiff was temporarily totally disabled from the date of the accident to June 9, 1982, and thereafter sustained 11-percent permanent partial disability to his right arm and 13-percent permanent partial disability to his right leg, for which the plaintiff was entitled to receive compensation for 52.7 weeks from June 9, 1982. From that award the plaintiff has appealed.

The principal issue on the appeal is whether the plaintiff is in fact permanently totally disabled as a result of the injuries he sustained in the accident on April 26, 1979. The case is complicated by the fact that the plaintiff sustained a permanent partial disability to his left hand as the result of a fracture of his left wrist in an accidental fall from a scaffold on August 14, 1978, while employed by the defendant Mainelli. The compensation court, both in the original award and in the award on rehearing, found that the plaintiff has 17½-percent permanent partial disability to his left hand as a result of the injury sustained in the accident on August 14, 1978.

There is no dispute between the parties concerning the percent of disability to the two members injured in the accident on April 26, 1979. In their amended answer filed November 9, 1982, the defendants admit that the plaintiff sustained 12-percent permanent partial disability of the right arm and 16-percent permanent partial disability of the right leg, "and that defendants have been willing to compensate plaintiff for said disability in accordance with the Nebraska Workmen's Compensation Law." The issue is the compensation to which the plaintiff is entitled as a result of these injuries.

Neb. Rev. Stat. § 48-121(3) (Reissue 1978) provides in part as follows: "In any case in which there shall be a loss or loss of use of more than one member or parts of more than one member set forth in this subdivision, but not amounting to total and permanent disability, compensation benefits shall be paid for

the loss or loss of use of each such member or part thereof, with the periods of benefits to run consecutively. The total loss or permanent total loss of use of both hands, or both arms, or both feet, or both legs, or both eyes, or of any two thereof, in one accident, shall constitute total and permanent disability and be compensated for according to the provisions of subdivision (1) of this section. In all other cases involving a loss or loss of use of both hands, both arms, both feet, both legs, both eyes, or of any two thereof, total and permanent disability shall be determined in accordance with the facts."

Since the plaintiff has a permanent partial loss of use of one arm and one leg as a result of the injuries sustained in the accident on April 26, 1979, the issue is whether the plaintiff is in fact permanently totally disabled as a result of these injuries.

For workmen's compensation purposes total disability does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he was trained for, or accustomed to perform, or any other kind of work which a person of his mentality and attainments could do. *Franzen v. Blakley*, 155 Neb. 621, 52 N.W.2d 833 (1952). Total and permanent disability contemplates the inability of the workman to perform any work for which he has the experience or capacity to perform. *Shaw v. Gooch Feed Mill Corp.*, 210 Neb. 17, 312 N.W.2d 682 (1981).

The evidence is that the plaintiff is now 63 years of age. He was born in Yugoslavia and received the equivalent of an eighth grade education in that country. He was blinded in one eye during World War II while serving in the Yugoslav Army. He has worked most of his adult life as a carpenter. He has no other training or skills that are of importance, although he has worked as a cabinetmaker and operated his own small home-improvement contracting business for a while.

Three physicians testified as expert witnesses. Dr. James Scott-Miller, one of the treating physicians, testified that the plaintiff could do no heavy lifting, no squatting, no prolonged standing, and no ladder climbing. In Dr. Scott-Miller's opinion, the plaintiff was disabled from doing "union carpenter" work.

Dr. Joseph Gross testified that the plaintiff could do only moderate lifting and no routine or regular squatting. Dr. Gross believed the plaintiff was able to do prolonged standing, but acknowledged that the plaintiff said he was unable to do so. Dr. Gross stated that the plaintiff would have difficulty climbing ladders and scaffolds. Dr. Gross believed that the plaintiff could work as a carpenter only "in a limited manner."

Dr. Ronald A. Cooper, a neurologist, testified only in regard to the plaintiff's Parkinson's disease, which is unrelated to his other injuries.

The plaintiff testified in regard to the pain, stiffness, and weakness that he suffers as a result of his injuries. He related the difficulty he has in attempting to use carpenter's tools, and his inability to stand for periods of more than 30 minutes and to walk more than a few blocks at a time.

Kathleen Hesselink, a rehabilitation consultant called as a witness by the plaintiff, testified that the plaintiff was not a good candidate for vocational rehabilitation training because of his age, lack of education, and training and experience only as a carpenter. This witness believed the plaintiff might be able to work as a security guard in situations where his disabilities would not prevent him from doing the work.

From our review of the record we are convinced that the evidence does not sustain the findings and award of the compensation court on rehearing and that the evidence establishes as a matter of law that the plaintiff is in fact permanently totally disabled as a result of the injuries he sustained in the acci-

dent on April 26, 1979. The evidence further establishes that the plaintiff is entitled to recover additional medical expense in the amount of $110 for the services of Dr. Scott-Miller and reimbursement in the amount of $55.39 for medicines.

The award of the compensation court on rehearing is set aside and the cause remanded with directions to enter an award in conformity with this opinion.

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

SCHOOL DISTRICT NO. 21, MORRILL COUNTY, NEBRASKA, APPELLANT, V. PEGGY OCHOA AND COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLEES.

342 N.W.2d 665

Filed January 13, 1984. No. 83-330.

1. **Employment Security Law: Appeal and Error.** Appeals from the district court under the Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-668 (Reissue 1978), are reviewed by the Supreme Court de novo on the record made in the district court, with the duty to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof.
2. **Employment Security Law: Schools and School Districts: Words and Phrases.** "Regular terms" as used in the educational sense and as found in Neb. Rev. Stat. § 48-628(h)(2) (Cum. Supp. 1982) of the Employment Security Law refers to a definite period representing a regular division of an academic year during which instruction is regularly given to students of a particular school, college, or university.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed.

Donn C. Raymond of Raymond, Olsen, Ediger & Ballew, P.C., for appellant.

Paul D. Kratz, for appellee Commissioner of Labor.

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

PER CURIAM.

This is an appeal from an order of the district court for Morrill County involving a claim for unemployment benefits under the provisions of Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978). The order affirmed the decisions of the Nebraska Appeal Tribunal and claims deputy that concluded the claimant was entitled to benefits.

The claimant, Peggy Ochoa, certified to teach school in Nebraska, worked for three 6-week periods during the summers of 1980, 1981, and 1982 in the migrant program. The migrant program was set up by the U.S. Government under the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 2761 et seq. (Supp. II 1978), and is a special education program for children who come into the geographical area with migrant farm workers. This program is federally funded, but local school districts, such as School District No. 21, the appellant, are responsible for administering the program.

After completing her third term of summer employment, ending July 10, 1982, the claimant filed for unemployment benefits with the Nebraska Department of Labor on November 10, 1982. Following a review of the records, the claims deputy concluded that Ms. Ochoa had left the Bayard migrant program on July 10, 1982, when the most recent work assignment was completed, and that since the program was of a temporary nature, no more work was available and the separation was a "layoff" due to lack of work, entitling the claimant to benefits as of November 7, 1982. This is the determination from which School District No. 21 appeals.

On November 10, 1982, the claimant also filed a simultaneous claim for benefits with the Nebraska Department of Labor, based upon her previous 9-month employment contract with school district No. 127 of Valentine, Cherry County, Nebraska. This claim, not at issue here, was disallowed by the claims deputy on November 19, 1982, because she

had not made contacts for employment in her profession.

The record indicates the claimant voluntarily quit her employment in Valentine in order to relocate and that she was properly disqualified for the requisite period of time. The claimant notified school district No. 127 in March of 1982 that she did not intend to return, so that at the time she was employed in the migrant program in the summer of 1982, she was not between successive teaching assignments for school district No. 127. At the time the claimant filed for unemployment claims, she was working as a substitute teacher in the Bayard school district.

Normally, the claimant would not have been entitled to make a claim for summer school unemployment benefits because, due to her 9-month employment with school district No. 127 of Valentine, she would have had an expectation of returning to work in the fall and would not have genuinely been attached to the labor market. But the fact situation here is different and presents a more difficult question because we are concerned with the summer school period.

The issue before us is whether the trial court erred in not disqualifying the claimant for unemployment insurance benefits because the 6-week contract was a "term" or "academic year" which disqualified her for unemployment benefits as provided by § 48-628 (Cum. Supp. 1982). The applicable language of that statute reads as follows: "An individual shall be disqualified for benefits: . . . (h) For any week of unemployment if benefits claimed are based on services performed . . . (2) after December 31, 1977, in an instructional . . . capacity for an educational institution if such week of unemployment begins during the period between two successive years, or during a similar period between two regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, to any individual if such indi-

vidual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms."

Section 48-640 states that an appeal may be taken from the decision of the district court to the Supreme Court of Nebraska in the same manner as other appeals under the Employment Security Law, §§ 48-601 to 48-668. Section 48-639 provides in part: "In any judicial proceeding under sections 48-638 to 48-640 the court shall consider the matter de novo upon the record."

In *Heimsoth v. Kellwood Co.*, 211 Neb. 167, 169, 318 N.W.2d 1, 2 (1982), where this court reviewed a determination as to whether a claimant voluntarily left employment, we stated: "The scope of review is de novo on the record from the District Court and it is the duty of this court to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof." Since the question in the present case is one of statutory reading and analysis dependent upon determining legislative intent, § 48-639 applies, and this court should reach an independent conclusion, considering the matter de novo upon the record.

The school district's argument is basically twofold. First, it seems to contend that the claimant was engaged in seasonal employment and therefore was not entitled to unemployment benefits. Secondly, it is claimed that the 6-week period during which the claimant taught in the special program was a "regular term" of school, that she had a reasonable assurance she would perform services during that term in the summer of 1983, and, therefore, under § 48-628(h)(2) she was disqualified for benefits for unemployment between those "terms."

The school district's reliance on authorities it cites, excluding benefits on account of seasonal

employment, is misplaced. Those cases depended on statutory law to that effect. Efforts to include an exclusion for seasonal benefits in 1978 Neb. Laws, L.B. 128, failed. We have no such exclusion. Casual employment may be excluded if it occurs between two successive years or between two regular terms, whether or not successive. The problem in this case is that because the claimant had given notice in the spring of 1982 that she would not return to the teaching position in Valentine the next fall, her summer employment did not fall between two years or terms in which she had contracts or a reasonable assurance of employment.

The question remains as to whether the 6-week summer programs were "regular terms" so as to exclude unemployment during the 46 weeks falling between those two periods. We believe the question must be answered in the negative.

As defined in the record, the periods of instruction were special education programs catering to a limited group of people. They lasted but 6 weeks. Webster's Third New International Dictionary, Unabridged (1968), defines "term" as follows at 2358: "4 : one of several divisions of the year in a school, college, or university representing a continuous period during which instruction is regularly given to students." See *People ex rel. Powell v. Board of Education*, 343 Ill. App. 382, 385, 99 N.E.2d 592, 593 (1951), where, although interpreting a contract, the court nevertheless said: "The word term is defined in the educational sense in the same dictionary as 'a definite continuous period during which instruction is regularly given to students; as, a school year of three terms . . . .' It cannot be doubted that in common acceptation a semester is a school term."

We conclude that the period of unemployment did not begin during the period between two successive years, or during a similar period between two regular terms.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

BONNIE LOU DOBESH, APPELLANT, V. CHARLES EDWARD DOBESH, APPELLEE.

342 N.W.2d 669

Filed January 13, 1984. No. 83-478.

Divorce: Property Settlement Agreements. An agreement between husband and wife, if executed to control the disposition of the marital assets of the parties during a later dissolution action, is a written property settlement within the intendment of Neb. Rev. Stat. § 42-366 (Cum. Supp. 1982), and is binding on the court unless the agreement is found to be unconscionable.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Affirmed.

Gary G. Washburn of Stumpff & Washburn, for appellant.

Ronald Rosenberg of Rosenberg & Taute, for appellee.

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

GRANT, J.

This is a case involving the dissolution of a 35-year marriage. Appellant wife, Bonnie Lou Dobesh, sought a dissolution of the marriage and alimony from appellee husband, Charles Edward Dobesh. The parties were married in 1948. Two children were born to the marriage but were adults at the time of the decree herein.

During the marriage, the parties acquired more than 6,000 acres of land and were successful in a large cattle operation. The parties agree that this accumulation was the result of hard work by both.

Bonnie first filed for dissolution in November of

1980. At this time the parties' net worth was in excess of $1 million, but the ranching operation was beginning to experience financial difficulties stemming from a drop in cattle prices and escalating interest rates. The situation continued to deteriorate, until in late 1981 and early 1982 it became apparent that foreclosure actions by creditors would ensue unless the parties could get refinancing. The divorce action then pending was an impediment to any refinancing, and Charles requested Bonnie to dismiss that action. Two agreements were entered into between the parties in this connection—one to be effective in the event that refinancing was obtained, and one to be effective if refinancing could not be obtained. Both agreements provided generally for the disposition of the marital estate and for a minimum of $400 per month as alimony, with the further restriction that Bonnie could request more than $400 per month but Charles could not request less. These agreements were signed by both parties on February 11, 1982. On the same day, Bonnie dismissed her pending divorce action. Refinancing was not obtained, and the financial situation of the parties continued to deteriorate. In June 1982 Bonnie refiled for a dissolution of the marriage.

On August 26, 1982, two of the parties' major creditors entered into a "Trust Agreement" with the parties. Pursuant to this trust agreement, the parties transferred all their assets to a trustee, and, in return, the trustee paid off all unsecured creditors, released the parties from personal liability to the creditors, and agreed to give each of the parties $2,000 per month for 6 months. The agreement also allowed the parties additional time to attempt to find new financing.

No new financing was obtained, and on January 16, 1983, the property of the parties was sold by the trustee. Receipts from this sale were not sufficient to cover the parties' indebtedness, and neither party received any proceeds from the sale.

On May 24, 1983, trial was held on Bonnie's second dissolution petition. The trial court, by its decree, dissolved the marriage and decreed that Bonnie should receive $1 per year alimony until further order of the court.

There were no specific findings made by the trial court, but the necessary effect of the court's allowance of alimony in the amount of $1 per year was to refuse to accept the agreement of the parties as binding on the court.

Bonnie assigns two errors: (1) The failure of the trial court to find the agreement between the parties binding upon the parties; and (2) The abuse of discretion of the trial court in awarding only $1 per year as alimony.

With regard to the first assignment of error, it is clear that the agreement was a "written property settlement" within the intendment of Neb. Rev. Stat. § 42-366 (Cum. Supp. 1982). The agreement was entered into while one dissolution action was pending between the parties and, by its terms, was clearly written to control the disposition of the marital assets and alimony when the next dissolution action was filed. In that situation § 42-366(2) provides in part that "the terms of the agreement . . . shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties . . . that the agreement is unconscionable."

The general law is settled. If the agreement between the parties is not unconscionable, the agreement binds both the parties and the court. See *Paxton v. Paxton*, 201 Neb. 545, 270 N.W.2d 900 (1978). If the agreement is unconscionable, it is not binding, and the court may make orders for the disposition of the property and maintenance. See *Weber v. Weber*, 200 Neb. 659, 265 N.W.2d 436 (1978).

With regard to the meaning of "unconscionable," we have interpreted that word to mean "manifestly unfair or inequitable." *Weber v. Weber*, *supra* at

668, 265 N.W.2d at 442. In considering that term and § 42-366, as applied to a property settlement agreement, we held in *Prochazka v. Prochazka*, 198 Neb. 525, 529, 253 N.W.2d 407, 409 (1977), that the question is whether the evidence shows "any circumstance, economic or otherwise, which operates to render the effect of the agreement unjust to either party or obviously excessive in respect to benefits or burdens on either side." See, also, *Weber v. Weber*, *supra*.

Viewed in that light, there can be little doubt that the agreement in this case was unconscionable. At the time of the decree herein, all of the parties' property, with the exceptions noted below, had been sold. Bonnie remained in possession of a 1979 Lincoln Continental with a value of $7,000. She had furniture valued at between $5,000 and $7,500, and approximately $12,000 in cash which she had saved from the payments made to her under the trust agreement. Her debts totaled some $600. She was working in a hospital at minimum wages, grossing approximately $700 per month, and incurring monthly expenses of $868.50.

Charles had some furniture, his clothing, and other assets totaling $1,850, and a $50,000 future interest in certain real estate which was subject to a life estate in his mother. His debts, most of which were incurred after the parties' separation, totaled over $48,000. He was working as a cattle manager in Kansas at a salary of approximately $22,000 annually for very long hours. His monthly expenses are $1,665, an amount greater than his monthly take-home salary.

In these circumstances we review the matter de novo, but give weight to the fact that the trial court observed the witnesses. *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980). We find that the agreement between the parties is unconscionable insofar as it requires alimony payments of $400 per month.

We further find that, considering the economic circumstances of the parties, including specifically that

each is trying to rearrange his or her life after a serious financial comedown, the trial court did not abuse its discretion in awarding alimony of $1 annually until Bonnie dies or is remarried. Such an award was provided in *Jenks v. Jenks*, 200 Neb. 298, 263 N.W.2d 469 (1978), and it seems particularly applicable in a case such as this where the parties' finances are in such an unsettled state, with the possibility of further change.

The judgment of the trial court is affirmed.

AFFIRMED.

RUSSELL GERBERDING ET AL., APPELLEES, V. HARLAN G. SCHNAKENBERG ET AL., APPELLANTS.

343 N.W.2d 62

Filed January 13, 1984. No. 83-650.

1. **Easements: Equity.** A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court.
2. **Equity: Appeal and Error.** On appeal to this court, actions in equity are reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another.
3. **Easements: Proof.** The law treats with disfavor a claim of a prescriptive right, and, accordingly, such a claim requires that the elements of such adverse user be clearly, convincingly, and satisfactorily established.
4. _____: _____. A party claiming a prescriptive easement must show that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
5. **Easements: Presumptions.** As a general rule, a showing that the use has been open, visible, continuous, and unmolested for the prescriptive period raises a presumption that the use was under a claim of right and not permissive.
6. _____: _____. When the claimed use is over unenclosed lands, the presumption is that the use is permissive.
7. _____: _____. When the claimed right-of-way entails use over a way opened by the landowner for his own purposes, the presumption is that the use is permissive.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Reversed and remanded with directions.

George D. McArthur, for appellants.

David E. Cording, for appellees.

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

CAPORALE, J.

Harlan G. and Elvira V. Schnakenberg, husband and wife, and Merlen R. and Rosemary Schnakenberg, husband and wife, the defendants below, appeal from the establishment of a prescriptive easement granting the plaintiffs-appellees, Russell and Marla Gerberding, husband and wife, Michael D. and Nila J. Onnen, husband and wife, and Kenneth E. and Norma L. Schroeder, husband and wife, the right to cross in a north-south direction through the middle of the Schnakenbergs' land. We reverse and remand with directions to dismiss plaintiffs' petition.

All the parties to this action have an interest in Section 23, Township 3 North, Range 4 West, of the 6th P.M., in Thayer County, Nebraska. The Schnakenbergs are the land contract vendees of the northwest quarter of Section 23. Roy Getz, not a party to this action, is the titleholder of this quarter section and is the land contract vendor. Kenneth and Norma Schroeder are the managing directors of a trust which holds the fee title in and to the east half of the southwest quarter of Section 23. Schroeder and his wife owned the land from 1962 until it was placed in trust in 1980. The Gerberdings have an interest, the exact nature of which is unclear, in the west half of the southeast quarter of Section 23. The Onnens own the southeast quarter of the southeast quarter of Section 23. They acquired that interest in 1980 from Fred and Leonard Schmidt.

Each of the three parcels of land in which plain-

tiffs are interested is bisected by the Little Blue River. Access to each of these parcels may be had from a public road. However, in order to reach those portions of the parcels generally lying to the north of the river, one must either cross the river or the adjacent lands lying to the north of these parcels and occupied by the Schnakenbergs or others.

After a dispute arose between the Schnakenbergs and the plaintiffs concerning the latter's crossing over the former's land, this suit was filed.

The Schnakenbergs assign as error the trial court's finding that the plaintiffs have established the necessary elements of a prescriptive easement by evidence which is clear, convincing, and satisfactory.

A suit to confirm a prescriptive easement is one grounded in the equitable jurisdiction of the district court and, on appeal to this court, is reviewed de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another. *O'Keefe Elevator v. Second Ave. Properties*, *ante* p. 170, 343 N.W.2d 54 (1984); *Stricker v. Knaub*, 215 Neb. 372, 338 N.W.2d 757 (1983).

We also bear in mind that the law treats with disfavor a claim of a prescriptive right, and, accordingly, such a claim requires that the elements of such adverse user be clearly, convincingly, and satisfactorily established. *Stricker v. Knaub*, *supra*; *Hengen v. Hengen*, 211 Neb. 276, 318 N.W.2d 269 (1982). A party claiming a prescriptive easement must show that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period. *Stricker v. Knaub*, *supra*; Neb. Rev. Stat. § 25-202 (Reissue 1979).

With these two principles in mind our de novo review of the record reveals these facts. Sometime

prior to 1927 a house sat somewhere on the northwest quarter of Section 23; that is, on the land which the Schnakenbergs are purchasing. Naturally, a private roadway was built to this house. This roadway commenced on about the midpoint of the north boundary line of the northwest quarter, ran south to about the center of that quarter, and then angled in a southeasterly direction to the approximate midpoint of the north boundary line of the east half of the southwest quarter. This roadway, called route A by the parties, was used by the plaintiffs' predecessors in interest for access to the portions of their lands lying north of the river. The predecessors in interest to the Gerberdings and the Onnens had to cross other lands as well to reach those portions of their lands.

In the mid-1960s use of the southeasterly leg of route A was abandoned. Instead, the path which formerly constituted route A was changed by Roy Getz to run directly south from the midpoint of the north border of the northwest quarter to the intersection of the east half and the west half on the northern boundary of the southwest quarter. This change was made by Getz so that more of his northwest quarter could be placed under cultivation. This new pathway is referred to by the parties as route B. In 1976 the Schnakenbergs closed route B because it interfered with their plans to install a well and irrigate the northwest quarter. Thereafter, the Schnakenbergs built, and the plaintiffs used, a roadway which ran north and south along the eastern border of the northwest quarter. This roadway is referred to by the parties as route D.

It is apparent that the Schnakenbergs considered any use of route D to be permissive and that none of the plaintiffs had an easement of right-of-way to use it. That intention aside, it is apparent that none of the plaintiffs have used route D for the requisite period of time to establish a prescriptive easement by adverse use. Therefore, our inquiry is confined to a

determination of whether any of the plaintiffs have a prescriptive easement of right-of-way by route A or B.

The Gerberdings' predecessor in interest to the west half of the southeast quarter was George Heinrichs. The uncontradicted testimony is that Heinrichs asked for and received from Roy Getz permission to use either route A or route B. As such, it is clear that Heinrichs' use was permissive and that he considered it so. The general rule is that if a use begins as a permissive one, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate. *Bone v. James*, 82 Neb. 442, 118 N.W. 83 (1908); *Chalen v. Cialino*, 206 Neb. 106, 291 N.W.2d 256 (1980). This rule is not affected by the transfer of either the licensee's or licensor's title. *Miller v. Pellizzari*, 342 S.W.2d 48 (Tex. Civ. App. 1960); *Sturnick v. Watson*, 336 Mass. 139, 142 N.E.2d 896 (1957); *Johnson v. Hegland*, 175 Minn. 592, 222 N.W. 272 (1928). If the Gerberdings considered their use of route A or B to be under a claim of right, the record contains no indication that such intention was communicated to the holder of the servient estate prior to the filing of this suit. As such, the Gerberdings' claim must fail.

Another rule of law leads to the conclusion that the use of routes A and B by each of the plaintiffs was permissive in character rather than hostile and under a claim of right. While it is the general rule, as plaintiffs argue, that a showing the use has been open, visible, continuous, and unmolested for the prescriptive period raises a presumption that the use was under a claim of right and not permissive, *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983), the rule is not without exceptions. When the claimed use is over unenclosed lands, the presumption is that the use is permissive. *Scoville v. Fisher*, 181 Neb. 496, 149 N.W.2d 339 (1967). The same presumption arises when the claimed right-of-

way entails use over a way opened by the landowner for his own purposes. *Allen v. Bank*, 120 Colo. 275, 208 P.2d 935 (1949); *Dooling v. Dabel*, 82 Cal. App. 2d 417, 186 P.2d 183 (1947); *Jensen v. Gerrard et al.*, 85 Utah 481, 39 P.2d 1070 (1935). It is clear from the evidence that route A was used by the owners of the northwest quarter to reach their farm buildings. Route B was created and used by Roy Getz. As such, any use of that roadway by his neighbors is presumed permissive unless, by some act or otherwise, he or his transferee was given notice that the use was being claimed as a matter of right. No such notice was shown by any of the plaintiffs. Consequently, their claims must fail.

The plaintiffs make much of the fact that when Getz was dealing with the Schnakenbergs for the sale of the northwest quarter, he informed the Schnakenbergs that they should keep the drive, presumably route B, open. They assert that this is an indication of Getz's recognition of their right to use route B. In reality, the statement is ambiguous in that respect, since it could just as well indicate a mere wish to continue a permissive use as a neighborly gesture.

Accordingly, we find that the plaintiffs have failed to clearly, convincingly, and satisfactorily establish that their use of the Schnakenberg land to get to portions of their own land was under a claim of right. They are not entitled to a finding that they possess an easement of right-of-way by prescription over the Schnakenbergs' land, and plaintiffs' petition must therefore be dismissed.

The cause is remanded with directions to dismiss plaintiffs' petition.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RANDOLPH K. REEVES, APPELLANT.

344 N.W.2d 433

Filed January 20, 1984. No. 81-706.

1. **Prosecuting Attorneys.** As a general rule a prosecutor should withdraw from a case when he testifies at trial on behalf of the State. This general rule does not apply when the defense calls the prosecutor as a witness.
2. _____. A prosecutor need not be disqualified from trying a case absent a showing that he is or will become a necessary witness for the defense.
3. **Criminal Law: Evidence: Witnesses: Prosecuting Attorneys.** Where there are other viable methods available to the defendant for the introduction of evidence, the court should not allow defendant's counsel to raise the possibility of calling the prosecutor as a witness merely to disqualify the prosecutor from the trial of the case.
4. **Homicide: Intent.** No specific intention is required to constitute felony murder, other than the intent to do the act which constitutes the felony during which the killing occurred.
5. **Homicide: Lesser-Included Offenses: Jury Instructions.** Where an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in Neb. Rev. Stat. § 28-303(2) (Reissue 1979), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested.
6. **Jury Instructions.** It is the duty of the court upon request of the accused to instruct the jury upon any valid defense which the evidence supports. The court is not required to give instructions where there is not sufficient evidence to prove the facts claimed.
7. _____. All jury 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.
8. _____. It is not error to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity.
9. **Prosecutorial Misconduct.** Whether misconduct on the part of a prosecuting attorney is prejudicial to the defendant depends largely upon the facts of each particular case.
10. **Trial: Juries: Appeal and Error.** The trial judge is in the best position to measure the atmosphere at trial and gauge the probable impact an improper comment has on a jury. As such, the trial court's determination concerning the comment will not be overruled unless it is clearly erroneous.

11. **Prosecuting Attorneys: Juries: Motions for Mistrial.** Remarks of the prosecutor in final summation which do not mislead and unduly influence the jury do not rise to a level sufficient to require the granting of defendant's motion for mistrial.
12. **Juror Qualifications.** The trial court did not err in allowing the questioning of jurors as to whether their scruples against the death penalty would prevent them from returning a verdict of guilty regardless of the evidence, even though the jury was not to impose punishment and even though defendant contended that the questioning led to a conviction-prone jury.
13. _____. A juror who has indicated an inability to fairly and impartially determine guilt may be excused for cause.
14. **Sentences: Presentence Reports.** Pursuant to Neb. Rev. Stat. § 29-2521 (Reissue 1979), the sentencing court has broad discretion as to the source and type of evidence or information which may be used as assistance in determining the kind and extent of the punishment to be imposed. The sentencing court may consider a presentence investigation.
15. **Sentences: Presentence Reports: Constitutional Law.** By the very nature of a presentence investigation, it is necessary to rely to a great extent upon hearsay information, and it is not constitutionally required that the person convicted be allowed to confront all those who might give information to be used by the sentencing court.
16. **Statutes: Sentences.** Neb. Rev. Stat. § 29-2522(3) (Reissue 1979) does not impose the duty on the sentencing court to expressly distinguish every case cited by the defendant.
17. **Death Penalty: Sentences: Constitutional Law.** Jury sentencing in capital cases is not constitutionally required.
18. **Statutes: Aggravating and Mitigating Circumstances: Constitutional Law.** Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979), as interpreted by the decisions of this court, is not unconstitutionally vague.
19. **Statutes: Aggravating and Mitigating Circumstances.** Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1979) has been interpreted by this court to include murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering.
20. **Statutes: Aggravating and Mitigating Circumstances: Proof.** The facts relied upon to prove the aggravating circumstances of Neb. Rev. Stat. § 29-2523(1) (Reissue 1979) must be proven beyond a reasonable doubt.
21. **Statutes: Death Penalty: Supreme Court.** Under the provisions of Neb. Rev. Stat. §§ 29-2519 et seq. (Reissue 1979), the Nebraska Supreme Court is required, before imposing the death sentence, to not only consider the presence or absence of aggravating and mitigating circumstances but also to review death sentences and determine whether the sentence of death is excessive or dis-

proportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

22. **Homicide: Supreme Court.** The Supreme Court's review and analysis under Neb. Rev. Stat. § 29-2521.03 (Reissue 1979) shall include all first degree murder convictions for offenses committed on or after April 20, 1973, including cases presently pending in this court on appeal.
23. **Death Penalty: Supreme Court.** This court's review and analysis of death penalty cases is not confined to a mere counting process of aggravating and mitigating circumstances but, rather, to a reasoned judgment as to what factual situations require the imposition of death and which of those can be satisfied by life imprisonment in light of the totality of the circumstances present.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and J. Kirk Brown, for appellee.

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

PER CURIAM.

Randolph K. Reeves pled not guilty and not guilty by reason of insanity to each of two counts of felony murder in the commission or attempted commission of a first degree sexual assault. The jury found him guilty on both counts, and a three-judge panel sentenced him to death on each of the two murder counts. He appeals.

A statement of the facts is necessary. At 3:46 a.m. on March 29, 1980, Janet L. Mesner made a 911 emergency call and reported that she had been stabbed, that she thought a friend was dead from stab wounds, and that her address was 3319 South 46th Street, Lincoln, Nebraska. This address was a Religious Society of Friends meetinghouse, a place in which those of the Quaker religious faith meet. Since 1977, Janet Mesner had been a live-in caretaker of the premises. Victoria L. Lamm and her 2-year-old daughter were visitors.

Lincoln police officer Steven R. Imes responded to the call and, upon his arrival, found Janet Mesner lying on the floor in the rear of the house and attended by two or three firemen. She had seven stab wounds to her chest. When Officer Imes asked who had stabbed her, Janet replied, "Randy Reeves." The officer asked if there was anyone else still in the residence. Janet replied, "My friend, I think she's dead, and a little girl."

Officer Imes then went upstairs and found the partially clad body of Victoria Lamm lying face up in the south bedroom. There was a fatal stab wound in her chest, which penetrated the main pulmonary artery of the heart, and a stab wound in her midline, which pierced the liver.

The disordered condition of the room in which Victoria's body was found indicated that a violent struggle had taken place. The floor was covered with blood, and several articles of women's bedclothes, a piece of luggage, and papers were strewn about the room. A lamp and sewing machine were overturned, and the telephone was ripped from its wall socket. A billfold containing identification of the defendant was found near Victoria Lamm's foot. In the middle of the blood-soaked sheets on the bed, underwear, later identified as belonging to the defendant, was found. Later examination of the underwear revealed the presence of spermatozoal secretions of the defendant's blood type. Next to the bed was one of the defendant's socks. A serrated kitchen knife with Janet Mesner's blood on it was found near the bed.

When Officer Imes was investigating the bedroom, Victoria's 2-year-old daughter walked from the north upstairs bedroom. She was unharmed.

On the main floor the police found an open window in a small room adjoining the kitchen. On the outside of the house below the open window was a garbage can turned upside down. Next to the garbage can were two shoe prints in the mud; inside the

house was a shoe print in the downstairs den—all of which had the same characteristics as the shoes the defendant was wearing at the time of his arrest.

Janet Mesner was taken to Lincoln General Hospital in Lincoln where she was attended to by Drs. Chester Paul and Denise Capek. When Dr. Paul first saw Janet, she was in shock and emergency medical procedures were being undertaken.

Officer Richard J. Lutz, who had been dispatched to the emergency room, was present when Janet arrived. Janet told the officer that she had been "raped and stabbed" by Randy Reeves, and she gave his description. Janet did not know how Randy gained entrance to the residence, but she knew he was alone. She referred to the defendant as her cousin, and repeatedly stated, "I don't know why Randy would do such a thing to me or to my girl friend." Despite the efforts made on her behalf, Janet died at approximately 5:55 a.m.

The evidence at trial established that the defendant was adopted as a child by Donald and Barbara Reeves, who farmed near Central City, Nebraska. The Reeves family was related to the Mesner family. In addition to the interfamily relationship, several members of both families practiced the Quaker religious faith. The defendant and Janet were friends, and he had visited her house on prior occasions.

In the events leading up to the killings, the defendant and some of his friends were working a temporary construction job near Hastings, Nebraska. Inclement weather forced cancellation of the work scheduled for March 28, 1980, so the defendant and his coworkers, Ronald Barzydlow and Ray Schmidt, went to a bar in Hastings and began drinking at about 9 a.m. Defendant and his friends arrived at Ray Schmidt's house in Lincoln, Nebraska, at approximately 6 p.m. While at Schmidt's house, the defendant consumed more beer and informed Barzydlow and Schmidt about a party at the home of

another of the defendant's friends in Lincoln. Schmidt decided not to attend, but told the defendant that he could stay at his house after the party.

At the party the defendant consumed more alcohol and ingested two or three buttons of peyote, a hallucinatory drug. Mescaline is the main active ingredient of this drug. Several witnesses at the party noted that the defendant was having trouble concentrating and that he told a false story about beating up a friend of his. Mrs. Susan Blackwell, who was also present at the party, noticed that the defendant's eyes were red and glassy; at one point he pinched her and nudged her with his foot.

The defendant and Barzydlow were the last to leave the party at approximately 1:30 a.m. Barzydlow, who had consumed alcohol with the defendant on previous occasions, testified that the defendant was "drunker than I'd ever seen him . . . . He appeared to me to be in a stupor." On the ride home the defendant told Barzydlow that he wanted to visit a girl. After driving for a short time the defendant was unable to direct Barzydlow to his destination, so he requested to be let out of the car near 40th and Calvert Streets in Lincoln. Barzydlow complied with the request.

Based on the description Janet Mesner gave to the Lincoln police, Officer Bruce M. Bell arrested the defendant at 4:45 a.m. as he attempted to cross O Street between 39th and 40th Streets. The *Miranda* warnings were read, and the defendant answered in the affirmative to all of the questions.

At the time of his arrest the defendant's eyes were red, and he had blood on his hands and outer clothing. In addition, the fly of his trousers was open and his penis was exposed. Later tests determined the blood on defendant's body, including his penis and his clothes, was of the same type as Janet Mesner's blood.

The defendant was taken to the Lincoln police station and placed in an interview room. After again

being informed of his *Miranda* rights, the defendant was interviewed on three separate occasions. The third interview, which Assistant Chief of Police Roger LaPage and Lancaster County Attorney Ron Lahners conducted, was the most detailed. The defendant related the events that occurred before the murders. He also said that although he could not remember much about the murders, he could remember having stabbed and raped Janet Mesner.

Following the third interview, the defendant was administered a breath-alcohol test at 6:39 a.m. The results showed a blood alcohol content of .149 percent at that time.

At 10:30 a.m. the defendant was taken to Lincoln General Hospital in order to obtain urine, blood, saliva, and penile samples. The defendant's urine and blood samples tested by state chemists confirmed the presence of mescaline. A forensic serologist was unable to find the presence of semen from either the penile swabs of the defendant or the vaginal swabs of either of the two deceased women. However, the acid phosphate level of Janet Mesner's vaginal sample was consistent with intercourse having occurred.

The defendant at trial maintained that he was not guilty of the felony murder counts because of his inability to form the requisite intent needed for a first degree sexual assault or a first degree attempted sexual assault. Alternatively, in the event the jury found that he could entertain the intent to commit the sexual assault or attempted sexual assault, he pled not guilty by reason of insanity.

On the issue of defendant's mental capacity, the defense called several expert witnesses. A psychologist was not able to pinpoint the specific condition the defendant was suffering from, but did conclude that because of his amnesia concerning the stabbings, the closest category that would fit was a disassociative reaction. He concluded that, based upon the evidence presented, the defendant did not

have the capacity to know what he was doing or to understand the nature or quality of his acts. He also concluded that at the time of the stabbings the defendant did not know right from wrong. A psychopharmacologist also testified and reached the same conclusions as the psychologist regarding the defendant's sanity at the time of the incident. He testified that in combination with alcohol, mescaline produces a synergistic effect, or a result which is greater than the sum of the two parts. He stated that while alcohol tempers the hallucinatory effects of the mescaline, it further expands the feeling of being out of touch with reality. All but a slight portion of the testimony regarding the defendant's insanity or inability to form the requisite intent at the time of the crimes was based upon his consumption of peyote and alcohol. The defendant was diagnosed as not having any specific mental disease or defect. He had an above average IQ of 115 and had attended a year of college before dropping out.

The psychiatrists for the prosecution testified that the defendant did not suffer from a personality disorder or mental deficiency and was legally sane at the time of the stabbings and assault. The psychopharmacologist who testified for the State disagreed with the defendant's expert. He stated that alcohol would temper or depress any effects of mescaline when taken together. He further testified that the defendant, at the time he committed the crimes, had the mental capacity to know and understand the nature of his acts, had the mental capacity to know right from wrong, and knew such acts were wrong and would deserve punishment.

At the conclusion of the trial the jury found the defendant guilty on both counts. A three-judge panel sentenced him to death on each of the two murder counts, and this appeal followed.

The defendant contends that the trial court denied him a fair trial and due process of law by not disqualifying the prosecuting county attorney, Ron

Lahners, by virtue of the fact that he had interviewed the defendant shortly after the killings and was therefore a necessary witness for the defense on the issue of the defendant's sanity.

As a general rule, a prosecutor should withdraw from a case when he testifies for the prosecution. *People v. Superior Court, Cty. of San Bernardino*, 86 Cal. App. 3d 180, 150 Cal. Rptr. 156 (1978); *State v. King*, 256 N.W.2d 1 (Iowa 1977); *State v. Mercer*, ____ Mont. ____, 625 P.2d 44 (1981). However, the general rule does not apply when the defense calls the prosecutor as a witness. *People v. Arabadjis*, 93 Misc. 2d 826, 403 N.Y.S.2d 674 (1978); see, generally, Annot., 54 A.L.R.3d 100 (1974).

The record in this case supports the trial court's determination that it was not necessary to disqualify Mr. Lahners in order to assure the defendant a fair trial. The defense, not the State, called Mr. Lahners as a witness. Apparently, the defense believed this testimony would aid them in the insanity defense, in that during the interview which Mr. Lahners and Assistant Chief of Police Roger LaPage conducted, defendant was unable or unwilling to disclose many of the details surrounding the crimes. We find that there was nothing in the prosecutor's testimony that substantiated the defendant's contention that he was insane at the time of the killings. The prosecutor at all times prior to and during trial maintained that the defendant was in full possession of his mental capacity and not suffering from a mental disease or defect. The prosecutor's testimony directly refuted the defendant's claim that he was insane at the time of the killings.

Even if the events concerning the third interview were arguably relevant, there were other methods of introduction available to the defense. The assistant chief of police or Lt. Don L. Wilkins was present during the interview and there was no showing by the defense that they were unable to testify concerning this interview. In addition, the defend-

ant did not contest the accuracy of the transcript of the interview. The defendant made a previous motion to have any references to a polygraph statement stricken from the interview transcript and tape recording. The motion was sustained. When the trial judge offered to consider doing the same for the prosecutor's references on the transcript and tape recordings as to the defendant's untruthfulness, counsel for the defendant declined to make such a motion.

The defendant would have this court find prejudicial error because of a defense tactic that may have backfired. This we cannot do.

In *Riboni v. Dist. Ct.*, 196 Colo. 272, 586 P.2d 9 (1978), the defense intended to call the prosecutor because of his knowledge of a possible inconsistent statement of a prosecution witness and an on-scene vehicle accident inspection. The Colorado Supreme Court held that the defense could not disqualify the prosecutor and require the appointment of a special prosecutor absent a showing that the testimony was necessary and not merely cumulative. In so holding the Colorado court stated at 274-75, 586 P.2d at 11: "[T]here may be significant prejudice to the People if [the prosecutor] is precluded from participating in the prosecution. It appears that he has been specially trained to handle vehicular homicide cases and that it is a normal part of his case preparation routine to participate in an on-the-scene investigation of the accident whenever possible. Necessarily this would make him a witness to some aspect of every such case. Were it possible to disqualify him merely because he had obtained some factual knowledge of the case by first-hand investigation, he, and the People, would be penalized for having sought excellence in case preparation.

"Every prosecutor who participates directly in interviewing and otherwise investigating his cases subjects himself to the risk of being called as a witness. But to allow opposing counsel the unfettered

option of removing any prosecutor who has personal knowledge of any material fact in the case might well result in restricting the prosecution function of the ill-prepared. . . .

"Our justice system has encouraged trial lawyers to participate directly in case preparation, including interviewing witnesses. Obviously this system could not function efficiently if every prosecutor who has interviewed a witness could be disqualified from participating in the trial merely because there is a possibility he may be called as a witness."

We find the language of the *Riboni* case applicable here. There was evidence at trial that Mr. Lahners was the first to be called whenever any type of homicide occurred in which his office was involved. Upon notification of the homicide he would routinely go to the crime scene and make certain that the proper procedures were followed with the collection of evidence. He would then follow up on any details of the crime, which in this case involved a trip to the hospital to check on the victim and an interview with the defendant after his arrest. It is ludicrous to suggest that a defendant can disqualify a prosecutor every time he becomes personally familiar with the facts of a case. "[T]he Court will not allow defendant's counsel to raise the possibility of calling the prosecutor as a witness merely to disqualify him from the trial of the case." *People v. Arabadjis*, 93 Misc. 2d 826, 403 N.Y.S.2d 674, 676 (1978).

Due to the facts that the defendant had given statements to the police on at least two prior occasions, that other people were also present during the third interview and could have testified, that the trial court offered to consider a motion to delete the portions of the interview which defendant contends were prejudicial, that the defense, not the State, called Mr. Lahners as a witness, and that his testimony at trial was for the most part cumulative, we find no showing that the prosecutor as a witness infringed upon the defendant's right to a fair trial.

The defendant's tactics from the beginning appear to have been based upon a desire to either disqualify Mr. Lahners, the person most familiar with and competent to try the case, or to predicate error upon his remaining in the role of prosecutor.

The defendant contends that the trial court erred in refusing to submit jury instructions on lesser-included offenses of second degree murder and manslaughter.

The critical difference between a felony murder charge and a regular first degree murder charge with respect to intent has been addressed by this court on a number of previous occasions. The turpitude involved in the sexual assault takes the place of intent to kill or premeditated malice, and the purpose to kill is conclusively presumed from the criminal intention required for sexual assault. *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982); *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982); *State v. Montgomery*, 191 Neb. 470, 215 N.W.2d 881 (1974).

In *State v. Hubbard*, *supra* at 534, 319 N.W.2d at 118, we stated that "[w]here an information charges a defendant with a killing committed in the perpetration of or attempt to perpetrate one of the specific felonies set out in § 28-303(2), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested." In light of the holdings in the above-cited cases, defendant's contention is without merit.

The defendant next assigns as error the failure of the trial court to instruct the jury as follows: "You must also consider defendant's claimed mental diminished capicity [sic] and take all the evidence into consideration in determining whether defendant had the mental capacity to form any of the specific mental states that are essential elements of murder

in the first degree and sexual assault in the first degree.

"In this respect you must consider all the evidence, or lack of evidence, to determine whether the defendant had such reduced mental capacity (whether caused by mental illness, mental defect, intoxication, mental retardation, or a combination thereof,) that he could not form such mental state.

"If you have a reasonable doubt as to whether defendant was capable of forming such mental state, you must find the absence of such essential element."

In reviewing this assignment we note that it is the duty of the trial court upon request of the accused to instruct the jury upon his theory of the case, if there is evidence to support it. *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). We also note that the trial court retains discretion in the wording of jury instructions.

The overwhelming majority of the defendant's evidence contained in the vast record centered on defendant's lack of requisite intent due to voluntary drug and/or alcohol intoxication and defendant's insanity. Only a minute portion of the evidence touched on defendant's lack of intent due to other factors. The court is not required to give instructions where there is not sufficient evidence to prove the facts claimed. *State v. Scott*, 212 Neb. 625, 324 N.W.2d 670 (1982); *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978). The trial court did instruct the jury on defendant's theories of lack of intent due to intoxication and insanity. As stated in *State v. Bartholomew*, 212 Neb. 270, 275, 322 N.W.2d 432, 436 (1982): " '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.' " We find the jury was properly instructed.

The defendant assigns as error the trial court's refusal to instruct the jury with regard to the conse-

quences of an acquittal by reason of insanity. In *State v. Reitenbaugh*, 204 Neb. 583, 284 N.W.2d 19 (1979), and *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), we held that it was not error for the trial court to refuse to instruct a jury in a criminal case of the consequences of a verdict of not guilty by reason of insanity. Our reason for so holding was that, " 'in the absence of some specific statutory provision, a defendant's disposition is not a matter for the jury's concern.' " *Reitenbaugh*, *supra* at 585, 284 N.W.2d at 20.

Defendant next asserts that the trial court erred in not sustaining his motion for mistrial made at the close of final argument. The motion was based on a statement made by the prosecutor during closing argument. The statement is set forth as follows: "I would also point out to you that when you have listened to defense counsel during the arguments, they have asked you to do something. They have said, 'Couldn't it have happened? Isn't it possible? Isn't there a chance that —' in other words, what they're asking this jury to do is speculate on the evidence. And what I'd ask this jury to do would be to look at the evidence and then apply the evidence to the facts in this case to determine whether or not the elements have been proven. [If] the State doesn't prove this case beyond a reasonable doubt, then the State shouldn't win and this defendant should walk out of this courtroom a free man."

The defendant is correct in asserting that because of his insanity defense the statement made by the prosecutor was not an entirely correct statement of the law. A misstatement of the law, however, in and of itself does not automatically require a new trial. " 'Whether misconduct on the part of a prosecuting attorney is prejudicial to the defendant depends largely upon the facts of each particular case.' " *State v. Ellis*, 208 Neb. 379, 398, 303 N.W.2d 741, 753 (1981). In most instances the impact of a comment such as was made in the instant case de-

pends on the atmosphere at trial. The trial judge is in a much better position than we to measure the atmosphere at trial and gauge the probable impact an improper comment has on the jury. The trial judge expressly considered whether the comment could have been construed by the jury so as to apply to a not guilty by reason of insanity verdict. The trial judge held that, in context, the prosecutor's statement was specific to a verdict of not guilty and, as such, did not mislead the jury.

It has long been the law in this state that remarks of the prosecutor in final summation which do not mislead and unduly influence the jury do not rise to a level sufficient to require the granting of defendant's motion for mistrial. *Argabright v. State*, 62 Neb. 402, 87 N.W. 146 (1901).

Taken in context, the prosecutor's statement was not so prejudicial as to warrant a mistrial. Therefore, we find the trial court did not err in denying defendant's motion for mistrial based upon allegedly improper comments of the prosecutor during summation to the jury.

Defendant next argues that the trial court erred in permitting the prosecution to ask the prospective jurors, on voir dire, questions about their attitudes as to the death penalty. Defendant submits, without any proof, that because of this line of questioning, the jury was inclined to favor conviction.

This court recently addressed this issue in *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983), *State v. Scott*, 212 Neb. 625, 324 N.W.2d 670 (1982), and *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981). In those cases we held that a juror who has indicated an inability to fairly and impartially determine guilt by refusing to subordinate his personal views and obey the law of the state must be excused for cause. See, *State v. Kirby*, 185 Neb. 240, 175 N.W.2d 87 (1970); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978);

Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), *reh'g denied* 393 U.S. 898, 89 S. Ct. 67, 21 L. Ed. 2d 186. The questions asked during voir dire in the instant case did not exceed the bounds set forth in the above-cited cases, and, as such, we find no error.

In painting with broad strokes defendant contends that he was denied due process of the law by the sentencing panel because it introduced into evidence and considered defendant's presentence investigation.

Neb. Rev. Stat. § 29-2521 (Reissue 1979) authorizes the trial court to consider and receive any evidence which is deemed probative to sentencing in a capital case.

Neb. Rev. Stat. § 29-2261 (Reissue 1979) authorizes a presentence investigation in felony cases. This statute applies to all cases in which the trial court has discretion in sentencing, but does not make reference to any special procedure in cases of homicide.

Defendant asserts that Neb. Rev. Stat. §§ 29-2519 et seq. (Reissue 1979) set out the exclusive sentencing procedure in homicide cases and that because these statutes do not specifically mandate the use of a presentence investigation, the sentencing panel was in error in doing so. If defendant's interpretation was correct, a trial court could make use of a presentence investigation for a conviction of a Class IV felony such as pandering, but may not consider a presentence investigation after a first degree murder conviction. It is readily apparent that this assignment is without merit. As stated in *State v. Anderson and Hochstein*, *supra* at 72, 296 N.W.2d at 453: "[T]he traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence." See, also, *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981); *State v. Kramer*, 203 Neb. 658, 279 N.W.2d 634 (1979); *State*

v. Holzapfel, 192 Neb. 672, 223 N.W.2d 670 (1974).

Defendant's reliance on *Gardner v. Florida*, 430 U.S. 349, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977), is misplaced. In *Gardner* a plurality of the Court invalidated a death sentence in which the sentencing court had relied in part on a confidential portion of a presentence report that was not disclosed to the defendant or his counsel, nor included in the record on appeal. The Court did not formulate a "per se" rule of prohibition against the use of the presentence investigation in capital cases. On the contrary, if it appears that the content of the presentence investigation is fully disclosed to the defendant or his counsel so that he has a chance to explain or deny unfavorable information and it is included in the record on appeal, the presentence investigation remains an indispensable and valuable tool in a capital sentencing procedure.

In the instant case the defendant's counsel was questioned and he acknowledged that he had ample time to inspect the entire presentence report, and expressly stated that no additions or corrections were necessary. The panel specifically referred to the presentence investigation on the record whenever the substance of the report was considered material in regard to aggravating or mitigating factors. The accuracy of the statements made by the panel concerning the defendant's prior criminal activity was not contradicted by the defendant or his counsel, nor was the panel asked to provide the defendant an opportunity to challenge the accuracy or materiality of the information.

The defendant's sole objection on the record to the substance of the presentence report is as follows: "I would like to take this opportunity to object to the entire presentence investigation being received in evidence and particularly do I object to that portion of it which includes a polygraph examination. I object to that on the grounds that it's hearsay. The defendant is denied confrontation witnesses in an im-

portant area contrary to his constitutional rights." The polygraph examination results were contained within the police reports of the presentence investigation. The only conclusion made by the polygraph examiner was that he thought "that there are details concerning this case that Mr. Reeves . . . has not related to us at this time and that he does specifically recall these details and does specifically have mental recollection of these facts at this time." Although the opinion of the examiner was not favorable, we do not feel that this was the type of information that would be decisive in the sentencing panel's choice between a life and death sentence, and the polygraph information was not referred to anywhere in the decision of the panel.

As to the hearsay assignments made by the defendant regarding the presentence report: "By the very nature of a presentence investigation report, it is necessary to rely to a great extent upon hearsay information." *State v. Porter*, 209 Neb. 722, 723, 310 N.W.2d 926, 927 (1981).

As to the defendant's argument that use of the presentence report denied him the right of confrontation, we stated in *State v. Anderson and Hochstein*, 207 Neb. 51, 72, 296 N.W.2d 440, 453 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981): "We are unable to find any requirement in the law that a sentencing court may consider only information adduced at trial when exercising discretion in imposing sentence. Likewise, we find no constitutional requirement to permit one convicted the right to confront all who might give information to be used by the sentencing court. Such a requirement goes far beyond any constitutional mandate."

Defendant contends that the panel erred in permitting Dr. Harlan L. Papenfuss to testify to the fact that Victoria Lamm was pregnant at the time that she was killed. Again, we reiterate that § 29-2521 allows the introduction of any relevant evidence. We find it unnecessary to discuss this assign-

ment further because the panel specifically found that the defendant did not know that Victoria was pregnant at the time he stabbed her. In addition, the testimony was only offered to prove aggravating circumstance in § 29-2523(1)(d), that "[t]he murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence," and the panel found that (1)(d) existed for other reasons.

Defendant asserts that the sentencing panel had a duty to expressly distinguish every case cited by him. The defendant never requested that specific findings be made on each case; he merely requested that the panel consider the cases that he offered in making its decision. Further, § 29-2522(3) does not impose such a duty. The statute merely directs the sentencing court to consider factually similar cases to determine whether the sentence of death is excessive or disproportionate, considering both the crime and the defendant.

Defendant's assignments of error dealing with the constitutional issues, including denial of a trial by jury by virtue of the fact that a sentencing panel not a jury imposed the sentence, and his void for vagueness arguments, have been dealt with previously by this court. We find it unnecessary to review these principles again. *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *State v. Anderson and Hochstein*, *supra*.

The defendant argues that the death penalty statute, as construed in *State v. Anderson and Hochstein*, *supra*, to permit consideration of all aggravating circumstances and not just those set forth by statute, is unconstitutional and permits arbitrariness in the imposition of the death penalty, in violation of the eighth and fourteenth amendments to the U.S. Constitution.

We find it unnecessary to reach this assignment because the sentencing panel did not find that a nonstatutory aggravating circumstance existed in this case. However, we pause to note that the U.S. Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.), specifically approved the Georgia statutory scheme which authorized the jury to consider any other appropriate aggravating or mitigating circumstances, in addition to the 10 statutory aggravating circumstances, as long as the jury found at least one statutory aggravating circumstance before recommending a sentence of death. The Court did not require that all sentencing discretion be eliminated, but only that it be "directed and limited." *Gregg* at 189.

The remainder of defendant's assignments of error deal with factual findings of the sentencing panel in regard to aggravating and mitigating circumstances. We proceed to review the findings.

The defendant disagrees with the sentencing panel finding that aggravating circumstance (1)(b) of § 29-2523 existed in regard to the death of Victoria Lamm. The pertinent portion of the statute reads as follows: "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime."

In regard to this aggravating factor the sentencing panel found that "[t]he only conclusion that can logically be reached is that Victoria L. Lamm was murdered to conceal the identity of the defendant, the perpetrator of the sexual assault or attempted sexual assault upon Janet Mesner, and to, at least for a period of time, conceal the commission of that crime. The evidence establishes this beyond a reasonable doubt." We do not feel that the evidence was insufficient for the panel to make such a finding.

Apparently awakened by the noise in Janet Mes-

ner's adjacent bedroom, Victoria Lamm proceeded to investigate, when she was stabbed to death. This was corroborated by the fact that Victoria did not have the defense cuts on her hands that were present on Janet's hands. Victoria also had blood on the bottom of her feet from walking through the blood that was already present on the floor of Janet's bedroom. The telephone in the bedroom was made forcibly inoperative in an attempt to isolate Janet. Victoria did not know the defendant and posed no threat to him except as a witness to the crime he was in the process of committing.

Defendant contends that he could not have been attempting to conceal the crimes, because he left his billfold and several articles of his clothing at the scene of the crime. Defendant would have this court believe that these articles were intentionally left behind to cue in the police as to the perpetrator. After being taken into police custody, however, defendant, when questioned as to the location of his billfold and underwear, did not know of their whereabouts. We are of the opinion that defendant's billfold was dropped inadvertently. The other articles of clothing that were found at the scene of the crime are more indicative of an intoxicated state than a lack of concern of being apprehended.

Section 29-2523(1)(d) reads: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." This aggravating circumstance has been interpreted by this court in *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977), *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977), and *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982), to include murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering. Our reason for so doing was a recognition that while all murders are capable of being characterized by the use of one or more of the adjectives employed in (1)(d), the Legislature has required a much greater

degree of these characteristics than is usually present in a murder by use of the words "especially" and "exceptional." *State v. Rust, supra.* This interpretation is consistent with *Proffitt v. Florida*, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), where the U.S. Supreme Court approved a narrowed construction for a similar guideline.

In this case a violent struggle occurred in Janet's bedroom which culminated in her being stabbed seven times. The defense cuts on Janet's hands showed that she tried to defend herself from the defendant's brutal attack. During the time Janet was being stabbed, the defendant attempted to or did subject her to sexual penetration, as shown by the blood on the bed and the defendant's body, including his penis and his clothes. The elevated level of acid phosphate in Janet's vaginal tract was consistent with sexual intercourse having occurred. When defendant left the scene of the crime, Janet Mesner was still alive, but mortally wounded. She did not die quickly, but survived in her wounded condition for a substantial period of time. After she was stabbed Janet had to go downstairs to use the kitchen telephone in order to call for help because defendant had ripped out the upstairs telephone. Janet also made repeated statements that she was in a great deal of pain.

Janet Mesner's murder clearly involved a horrible sexual abuse and the imposition of extreme suffering.

The panel was correct in its findings that § 29-2523(1)(d) was applicable to the first felony murder count.

In regard to the second victim, Victoria Lamm, there were no defense cuts on her body nor any indication that she was able to resist the defendant's attack. Victoria's death appears to have occurred swiftly and suddenly when she walked in on the defendant's assault on Janet. There was also no evidence of any type of sexual assault upon Victoria.

Thus, we find that the sentencing panel was incorrect in finding that aggravating circumstance § 29-2523(1)(d) was present in the second felony murder count.

Section 29-2523(1)(e) reads: "At the time the murder was committed, the offender also committed another murder." We agree with the sentencing panel that the evidence establishes beyond a reasonable doubt that the defendant killed Janet Mesner and Victoria Lamm at about the same time.

As to the mitigating circumstances, § 29-2523(2)(a) reads: "The offender has no significant history of prior criminal activity." The defendant's criminal record is indeed substantial and significant. The defendant had been charged with several drug possessions, 23 bad-check incidents, theft, intoxication, assault, disturbing the peace, false accommodations, and failure to comply with a court order. Nearly all of the charges against the defendant resulted in convictions. We agree with the sentencing panel that "defendant's prior criminal activity is significant so as not to give him the benefit of this mitigating circumstance."

Section 29-2523(2)(b) reads: "The offender acted under unusual pressures or influences or under the domination of another person." "This mitigating circumstance refers only to external pressures, not those a defendant chooses to create for himself." *State v. Peery*, *supra* at 676, 261 N.W.2d at 105. We agree with the sentencing panel that "[t]here were no unusual pressures or influences nor was the defendant under the domination of another person when he killed both Janet L. Mesner and Victoria L. Lamm." This mitigating circumstance does not exist in either count I or count II.

Section 29-2523(2)(c) reads: "The crime was committed while the offender was under the influence of extreme mental or emotional disturbance." Only a small portion of medical testimony at trial suggested that the defendant had a mental or emo-

tional disturbance that was separate and apart from his drug and alcohol consumption on the night of the killings. We agree that "the defendant was not under the influence of extreme mental or emotional disturbance to a degree required by this statutory standard." This mitigating circumstance does not exist with either count.

Section 29-2523(2)(d) reads: "The age of the defendant at the time of the crime." The defendant was 24 years old at the time of the crime. This mitigating circumstance does not exist.

Section 29-2523(2)(e) reads: "The offender was an accomplice in the crime committed by another person and his participation was relatively minor." The defendant acted alone in both killings, and we agree with the sentencing panel that this mitigating circumstance does not exist.

Section 29-2523(2)(f) reads: "The victim was a participant in the defendant's conduct or consented to the act." The sentencing panel found that this circumstance does not exist, and we agree.

Section 29-2523(2)(g) reads: "At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication." We disagree with the sentencing panel's finding that this circumstance does not exist. Our reasons for finding this circumstance applicable are set out in some detail in the statement of facts. In addition, even the prosecuting attorney who tried the case in the trial court and in proceedings before the sentencing panel conceded on at least two occasions that (2)(g) existed. We therefore find as a matter of law that mitigating circumstance § 29-2523(2)(g) existed.

In sum, as to count I, we find beyond a reasonable doubt two aggravating circumstances, § 29-2523(1)(d) and (e), are present. In count II we also find that two aggravating circumstances exist, § 29-2523(1)(b)

and (e). We further find that mitigating circumstance § 29-2523(2)(g) applies to both counts.

Under the provisions of 1978 Neb. Laws, L.B. 711, codified as part of chapter 29, article 25 (Reissue 1978), this court must conduct its own review to determine whether the sentence of death in this case is excessive or disproportionate to the penalty imposed in cases with the same or similar circumstances. We now construe § 29-2521.03 to require an extensive review and analysis of all first degree murder convictions for offenses committed on or after April 20, 1973, including cases presently pending in this court on appeal. The 58 cases reviewed are set out in the addendum to this opinion.

State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979), is the most similar to the instant case in that they both involved the murder of two women and the sexual assault or the attempted sexual assault of one of them. More aggravating circumstances were found in *Williams*, but this alone does not eliminate the propriety of a death sentence in the instant case. As noted in *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977), our analysis is not confined to a mere counting process of aggravating and mitigating circumstances but, rather, to a reasoned judgment as to what factual situations require the imposition of death and which of those can be satisfied by life imprisonment in light of the totality of the circumstances present.

In conclusion, the cases which bear the most similarity to the acts committed by the defendant involved a death penalty. There are sufficient factual differences between the present case and those cases in which a life sentence was imposed, and therefore we find that the death sentence of Randolph K. Reeves is not disproportionate to the sentences in previous first degree murder cases, considering both the crime and the defendant.

We have reviewed the remainder of defendant's

assigned errors, find that they are without merit, and therefore they will not be discussed.

AFFIRMED.

McCOWN, J., not participating.

HASTINGS and CAPORALE, JJ., concur in the result.

ADDENDUM

FIRST DEGREE MURDER CASES ANALYZED AND REVIEWED AS OF NOVEMBER 15, 1983

CASES APPEALED AND REPORTED

State v. Casper, 192 Neb. 120, 219 N.W.2d 226.
State v. Wilson, 192 Neb. 435, 222 N.W.2d 128.
State v. Nokes, 192 Neb. 844, 224 N.W.2d 776.
State v. Russell, 194 Neb. 64, 230 N.W.2d 196.
State v. Harris, 194 Neb. 74, 230 N.W.2d 203.
State v. Lytle, 194 Neb. 353, 231 N.W.2d 681.
State v. McDonald, 195 Neb. 625, 240 N.W.2d 8.
State v. Ell, 196 Neb. 800, 246 N.W.2d 594.
State v. Sims, 197 Neb. 1, 246 N.W.2d 645.
State v. Stewart, 197 Neb. 497, 250 N.W.2d 849.
*State v. Rust, 197 Neb. 528, 250 N.W.2d 867.
*State v. Holtan, 197 Neb. 544, 250 N.W.2d 876.
State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (conviction reversed).
State v. Record, 198 Neb. 530, 253 N.W.2d 847.
*State v. Peery, 199 Neb. 656, 261 N.W.2d 95.
State v. Beans, 199 Neb. 807, 261 N.W.2d 749.
State v. Scott, 200 Neb. 265, 263 N.W.2d 659.
State v. Simpson, 200 Neb. 823, 265 N.W.2d 681.
State v. Prim, 201 Neb. 279, 267 N.W.2d 193.
State v. Beers, 201 Neb. 714, 271 N.W.2d 842.
State v. Fuller, 203 Neb. 233, 278 N.W.2d 756 (conviction reversed).
State v. Nielsen, 203 Neb. 847, 280 N.W.2d 904.
State v. Bennett, 204 Neb. 28, 281 N.W.2d 216.
*State v. Williams, 205 Neb. 56, 287 N.W.2d 18.
*State v. Otey, 205 Neb. 90, 287 N.W.2d 36.
*State v. Anderson and Hochstein, 207 Neb. 51, 296 N.W.2d 440.
*State v. Harper, 208 Neb. 568, 304 N.W.2d 663.
State v. Ditter, 209 Neb. 452, 308 N.W.2d 350.

*State v. Moore, 210 Neb. 457, 316 N.W.2d 33.
State v. Bradley, 210 Neb. 882, 317 N.W.2d 99.
State v. Boyer, 211 Neb. 139, 318 N.W.2d 60.
State v. Pope, 211 Neb. 425, 318 N.W.2d 883.
State v. Hubbard, 211 Neb. 531, 319 N.W.2d 116.
State v. Jones, 213 Neb. 1, 328 N.W.2d 166.
State v. Lamb, 213 Neb. 498, 330 N.W.2d 462.
State v. Searles, 214 Neb. 849, 336 N.W.2d 571.
State v. Palmer, 215 Neb. 273, 388 N.W.2d 281 (conviction reversed).
State v. Lynch, 215 Neb. 528, 340 N.W.2d 128.
State v. Tucker, 215 Neb. 636, 340 N.W.2d 376.

CASES NOT APPEALED TO SUPREME COURT

State v. Jimmie Ray Anderson Sentence 7/26/73	Dawson County - District Court Case No. 14391
State v. Kelvin Anderson Sentence 9/25/78	Douglas County - District Court Doc. 102, p. 85
State v. Blackbonette Sentence 8/23/82	Lancaster County - District Court Doc. 59, p. 108
State v. Brown Sentence 3/25/74	Douglas County - District Court Doc. 88, p. 625
State v. Bussard Sentence 2/22/80	Red Willow County - District Court Case No. 11,542
State v. Floyd Sentence 5/16/78	Hamilton County - District Court Doc. 24, p. 196
State v. Hatcher Sentence 4/14/78	Douglas County - District Court Doc. 101, p. 321
State v. Marshall Sentence 3/13/78	Lancaster County - District Court Doc. 48, p. 262
State v. McGee Sentence 4/14/80	Sarpy County - District Court Doc. 38, p. 170
State v. Nollen Sentence 1/24/83	Washington County - District Court Case No. 8982, Doc. BB, p. 82
State v. Rehbein Sentence 6/13/83	Douglas County - District Court Doc. 113, p. 475
State v. Rowert Sentence 12/8/77	Platte County - District Court Case No. 2805
State v. Schaeffer Sentence 9/30/77	Hall County - District Court Doc. 28, p. 279
State v. Dwayne Tucker Sentence 7/28/82	Douglas County - District Court Doc. 111, p. 465

CASES PENDING ON APPEAL IN SUPREME COURT NOVEMBER 15, 1983

No. 83-118 - State v. Lee Sentence 1/24/83	Douglas County - District Court Doc. 113, p. 308
No. 83-342 - State v. Krimmel Sentence 4/21/83	Douglas County - District Court Doc. 114, p. 26

No. 83-497 - State v. Elijah Jones — Douglas County - District Court
Sentence 6/13/83 — Doc. 114, p. 158
No. 83-576 - State v. Massey — Douglas County - District Court
Sentence 7/8/83 — Doc. 114, p. 368
*Death Sentence Pending

KRIVOSHA, C.J., concurring in part, and in part dissenting.

I find that I must concur in part and in part dissent from the majority opinion. I am in complete accord with the majority in nearly all of its conclusions, including its declaration that the court's review and analysis in death penalty cases must include all first degree murder convictions for offenses committed on or after April 20, 1973, including cases presently pending in this court on appeal. Having reached that conclusion, however, I believe that for reasons more particularly set out by me in my dissents in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979), *State v. Rust*, 208 Neb. 320, 303 N.W.2d 490 (1981), and *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981), the imposition of the death penalty in this case violates both the state and federal Constitutions as presently interpreted by the U.S. Supreme Court, as well as the provisions of Neb. Rev. Stat. §§ 29-2519 et seq. (Reissue 1979).

As I have previously indicated, my conclusion here is not based upon any notion that the crime involved herein was not heinous, as that term is normally understood, or that the appellant in this case should not receive the most severe sentence which the law may impose. Rather, it is because I believe the provisions of both the state and federal Constitutions, adopted by the people, and the provisions of §§ 29-2519 et seq., adopted by the people through their representatives, the Legislature, have ordered otherwise. In my view one cannot review all of the cases in which a life was intentionally and unlawfully taken and conclude that the imposition of the death penalty in this case is uniform and proportional to other cases. The legislative intent as expressed in § 29-2521.01 makes clear that the death

penalty is not to be imposed in an arbitrary fashion. See, also, *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). Absent the Legislature modifying or repealing §§ 25-2519 et seq., we are bound by their provisions. It is not for the courts to override the dictates of the people in that regard. It is for that reason that I would concur in all of the majority's opinion except that portion which affirms the imposition of the death penalty. Instead, I would impose a sentence of life and would hope that, by imposing a sentence of life, the board of pardons would not commute that sentence, so that the appellant in this case, having taken a life as an animal, would be required to spend the rest of his days living as an animal, within a cage. In my view that would indeed be a far greater punishment for the crime committed than even the one imposed by the majority.

BOSLAUGH, J., concurring.

I concur in the opinion and judgment of the court except as to the analysis and review of death penalty cases required by Neb. Rev. Stat. § 29-2521.03 (Reissue 1979).

I adhere to the construction of the statute adopted by the court in *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

DEBORA MORFELD AND JAMES WILLIAMS, APPELLEES, V. HENRY BERNSTRAUCH, DOING BUSINESS AS BERNSTRAUCH WRECKER SERVICE, APPELLANT.

343 N.W.2d 880

Filed January 20, 1984. No. 82-619.

1. **Replevin: Appeal and Error.** Where a jury is waived in a replevin action, the findings of the trial court will have the effect of a jury verdict.
2. **Judgments: Appeal and Error.** In considering the sufficiency of the evidence to sustain a judgment, an appellate court must view the evidence in the light most favorable to the successful party.

3. **Statutes: Rules of the Road.** The statutes comprising the Nebraska Rules of the Road (Neb. Rev. Stat. §§ 39-601 to 39-6,122 (Reissue 1978)) do not apply to private roads or private property.
4. **Constitutional Law: Motor Vehicles: Search Warrants.** A privately owned automobile may not be removed from private property without the consent of its owner by order of a police officer unless there are exigent circumstances requiring removal, or the officer has a search warrant.
5. **Agents.** An agent is personally liable to third persons for the agent's misfeasances or positive wrongs.
6. **Replevin: Damages.** Under Neb. Rev. Stat. § 25-10,105 (Reissue 1979), where a plaintiff in a replevin action recovers his property, the finder of fact must assess adequate damages to the plaintiff, including damages for loss of use of the wrongfully withheld property, if such property has value for use.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Brogan & Stafford, P. C., for appellant.

Richard L. Spittler, for appellees.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for amicus curiae State.

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

GRANT, J.

This is an action in replevin brought by plaintiffs, Debora Morfeld and James Williams (daughter and father and the legal owners of a 1968 Pontiac automobile), against defendant, Henry Bernstrauch, doing business as Bernstrauch Wrecker Service (the owner and operator of a towing service).

At the pretrial conference the parties waived their right to jury trial and the case was tried to the court. In that event, the findings of the trial court have the effect of a verdict of a jury; and on appeal, in considering the sufficiency of the evidence to sustain the judgment, the evidence will be considered in the light most favorable to the successful party, any controverted fact will be resolved in that party's favor, and the successful party will have the benefit

of every inference reasonably deducible from the evidence. *First State Bank of Scottsbluff v. Bear*, 172 Neb. 504, 110 N.W.2d 83 (1961).

After trial the court ordered the automobile returned to plaintiffs and assessed damages of $9,570, plus costs, against defendant. Defendant appeals, assigning as error that the trial court erred in determining that plaintiffs were entitled to a return of the car without paying towing and storage charges and that, in any event, the trial court erred in awarding excessive damages to plaintiffs. For the reasons hereinafter stated we affirm.

The evidence in the record before us, when viewed most favorably to plaintiffs, discloses the following. During the late evening of November 14, 1979, an on-duty Nebraska state patrolman received a call about a "drunk driver" in a car going south on U.S. Highway 81, south of Norfolk, Nebraska. He had also received calls concerning a hit-and-run parked car accident at a bar in Norfolk involving an older model blue car. The patrolman was informed over his radio that the car on Highway 81 had hit an abandoned concrete gas pump island at the Old Home Cafe. The patrolman examined the island and saw "a knick [sic] in the concrete and blue paint on it." The patrolman then followed a trail of liquid, which he believed to be from a car's radiator, from the Old Home Cafe to the Custer mobile home court, located 6 miles south of Norfolk and a quarter of a mile west of Highway 81. There the patrolman saw plaintiffs' blue 1968 Pontiac parked in front of a trailer house on Lot 6B. The trailer court consisted of 20 units. There was a private gravel road, maintained by the owner of the trailer court, through the court. Parking for automobiles was available in front of each trailer. The entire trailer court, including the road, was private property.

The patrolman proceeded to the trailer on the lot in front of which the car was parked. At the door to the trailer home he was met by the former husband

of plaintiff Debora Morfeld. Plaintiff and her former husband had been divorced for some 2 years, but were living together in the trailer with their two children. The patrolman inquired of Mr. Morfeld as to the ownership of the car in question. Mr. Morfeld was not cooperative in this conversation, and an altercation eventually ensued between the patrolman and Mr. Morfeld. Mr. Morfeld was arrested for assault, handcuffed, and ultimately taken to the Norfolk city jail.

Plaintiff Morfeld was asleep on the floor throughout. The patrolman checked her for injuries, but determined she was not injured, but probably intoxicated. There was no evidence at this time as to who was driving the 1968 Pontiac before it was parked. The patrolman then called for defendant to tow the car in question from its parking place to defendant's storage lot. Following the patrolman's directions, defendant entered the private property where the car was parked and towed the car to his lot, where the car was locked in.

Debora awakened about 4 a.m. on November 15, 1979, to find her former husband gone. Mr. Morfeld returned to the trailer later in the morning. Debora then called defendant and asked if she could have her car. Defendant advised her that the matter had to be cleared with the State Patrol. Debora then called the State Patrol and was told that it would take 3 days to "clear the car," because the patrol wanted to take paint samples from the car. Debora waited the 3 days and again called defendant, who informed her that the car had been released by the patrol and that Debora could have the car upon payment of the storage and towing fees. Debora refused to pay, and defendant refused to release the car without payment. The stalemate between the parties followed and ultimately resulted in this litigation. Although it might be noted that only approximately $35 separated the parties at this point, each party had rigidified its position based on prin-

ciple: plaintiff relying on her right to the use of her personal property without unlawful interference of others, and defendant relying on the workman's right to be paid for his toil. From such disputes over principle, extraordinary and expensive litigation often springs.

It should be noted that in connection with the events of November 14 and 15, 1979, Debora was never charged with any offense of any nature. By her testimony in this case, it is clear that Debora was driving the 1968 Pontiac south on Highway 81 on the night in question.

We turn, then, to the question of the propriety of the defendant's removal of plaintiffs' car from the private property where it was located. Admittedly, the removal was done by defendant at the direction of the state patrolman. Defendant's legal problem on this point is that the patrolman was without any authority to remove the privately owned car from the private property on which it was located. Defendant suggested to the trial court that Neb. Rev. Stat. § 39-671 (Reissue 1978) authorized the patrolman to order the car removed, and to require Debora to pay the appropriate storage and towing fees. In *Bassinger v. Agnew*, 206 Neb. 1, 290 N.W.2d 793 (1980), however, this court recognized that the Nebraska Rules of the Road, as set forth in Neb. Rev. Stat. §§ 39-601 to 39-6,122 (Reissue 1978) (which include § 39-671), do not apply to private roads or private property. The trial court so held. Once it is established that the officer had no statutory authority to remove the car from private property, Debora is entitled to her constitutional rights under article I, § 7, of the Constitution of the State of Nebraska to be secure in her person, house, papers, and effects against unreasonable searches and seizures, unless a proper warrant was issued. There was no warrant issued in this case, and there were no exigent circumstances brought to the attention of the trial court to justify a seizure without a warrant.

The trial court was correct in determining that the officer had "absolutely no authority to seize the automobile in question."

Once that point is established, we must determine defendant's personal responsibility for his unlawful act in seizing the car. Defendant has personal knowledge as to the answer to this question. In *Kuchar v. Bernstrauch*, 192 Neb. 225, 219 N.W.2d 764 (1974), this court considered a replevin action in which the plaintiff's car had been seized and impounded by the State Patrol on suspicion that the car was being used to transport marijuana. The car was seized by the State Patrol and placed in defendant's lot for storage. No showing was ever made that any controlled substance was ever found in the plaintiff's car. In the *Kuchar* case, *supra*, the county court had ordered the car released to plaintiff, but defendant (acting in exactly the manner in which he reacted to Debora in the instant case) demanded his storage fees before he would release the car. Kuchar then filed his replevin action, which was denied in the county court. On appeal the district court found for the plaintiff as to the right of possession and damages, and remanded the case to the county court to determine the damages. This court affirmed the action of the district court, stating at 227, 219 N.W.2d at 766, "The defendant's refusal to deliver the automobile to the plaintiff on order of the county court was wrongful and willful. He had no lien on the automobile although he had a claim against the State for his storage charges. An agent is personally liable to third persons for his own misfeasances and positive wrongs. Wilson v. Thayer County Agricultural Society, 115 Neb. 579, 213 N.W.2d [sic] 966.

"The plaintiff was entitled to possession of the automobile on March 1, 1973, and for damages for its wrongful detention thereafter."

This case is in exactly the same posture as *Kuchar v. Bernstrauch*, *supra*. Here, also, defendant's re-

fusal to deliver the car to Debora was wrongful and willful. He had no lien on plaintiffs' car, and defendant is personally liable to plaintiffs "for his own misfeasances and positive wrongs."

We turn, then, to the question of damages. The controlling statute is Neb. Rev. Stat. § 25-10,105 (Reissue 1979), which provides: "In all cases when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on an issue joined, or an inquiry of damages upon a judgment by default, they shall assess adequate damages to the plaintiff for the illegal detention of the property; for which with costs of suit, the court shall render judgment for plaintiff." It is at least of historical interest to note that this statute is worded exactly in the way in which it was adopted in 1867, except for the 1913 correction of the last word "defendant" to "plaintiff." The phrase "adequate damages to the plaintiff for the illegal detention of the property" has been the subject of much litigation since 1867. Defendant cites us to *Romberg v. Hughes*, 18 Neb. 579, 26 N.W. 351 (1886), and informs us that no part of that case has ever been overruled. Not so. In *Schrandt v. Young*, 62 Neb. 254, 86 N.W. 1085 (1901), Commissioner Roscoe Pound thoroughly analyzed the problems of damages in replevin actions. In *Schrandt*, *supra* at 259, 86 N.W. at 1087, Pound states, for the court, "What, then, is the measure of damage for detention? Ordinarily it is interest upon the value of the property. [Citations omitted.] But where the use of the property is valuable, the value of the use may and often does considerably exceed the lawful rate of interest. In such case interest does not afford adequate compensation, and, accordingly, it is well settled that the value of the use, where use has a special value above and in excess of interest, is recoverable as damages for detention, and is the measure thereof, instead of interest."

Commissioner Pound goes on to state in *Schrandt v. Young*, *supra* at 263, 86 N.W. at 1088, "Value of the

use of the property is a just and recognized element of such damages, and the right to it should not be made nugatory by limiting its recovery to the event of a return. Hence we think that *Romberg v. Hughes* should be limited, in its application, to damages for depreciation and deterioration, and that measure of the damages for detention recoverable by a defendant in replevin may be stated thus: He may recover, (1) if there is no special value attaching to use of the property, interest; (2) if the value of use of the property exceeds the interest, then such value, without regard to whether the property is returned, but, in such case, no interest; (3) if loss, deterioration or depreciation occur while the property is withheld, then the amount of such loss, damage or depreciation, to be conditioned, however, upon return of the property, the alternative judgment for the value being fixed as of the date of the taking. Moreover, the damages for detention must be such as grow out of the detention and are connected with or incident to the contest over possession."

It should be noted that *Schrandt* involved damages as computed for a defendant where the taking was wrongful, but as stated in *White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc.*, 197 Neb. 421, 427, 249 N.W.2d 489, 494 (1977), "Damages allowed for wrongful detention are succinctly stated in Schrandt v. Young (1901), 62 Neb. 254, 86 N.W. 1085. Although that case involved damages recoverable by a defendant under the predecessor statute to section 25-10,103, R.R.S. 1943, the language is equally applicable where judgment is for the plaintiff."

Recognition of the right to recover damages for wrongful detention has been recognized in Nebraska since 1867. The difficulty in the cases has been how to calculate the damage. In this case no such problem is present. The parties stipulated, "That the fair and reasonable rental value of the subject automobile at all times material hereto would be $10.00 per day." At the conclusion of plaintiffs' case,

plaintiffs submitted that stipulation, together with the calculation that 957 days had elapsed since the wrongful taking of the automobile. The trial court found that "the damage for the loss of use of the vehicle is $10.00 a day." No other evidence on the loss of use was submitted by either party.

The defendant raises the general question as to excessiveness of the verdict, and points out that plaintiff Debora Morfeld testified the automobile was only worth $1,200 before the impact at the Old Home Cafe, while defendant's witnesses testified that at the time of trial the car was only worth $50 or $60.

Plaintiffs' car has been ordered returned to them, and the value of the car is thus not in question, since plaintiffs have not sought or proven any damages for depreciation. The value of the use of a car may exceed the actual value of the car. It would seem that very few Rolls-Royce automobiles will be towed in and held for redemption and that the statute in question provided for loss-of-use recovery to provide for this very problem where an inexpensive chattel is wrongfully seized and, in effect, held for ransom. The 1968 Pontiac, whatever its value, was perfectly adequate to transport Debora to Norfolk and return her to her home. The value of that use has been stipulated to be $10 per day. The trial court was correct in assessing damages on that basis.

The whole case, with all its attendant problems, could always have been terminated by action of the defendant. After the state patrolman told defendant he had no further hold on the car, defendant could well have drawn on his knowledge of the decision in his own case of *Kuchar v. Bernstrauch*, 192 Neb. 225, 219 N.W.2d 764 (1974), returned the car, and then argued with the State Patrol and Debora about his relatively small towing fees. Defendant chose to stonewall the matter, and refused to return the car even upon filing of the lawsuit. He maintained the same attitude throughout the trial—contending that the car was worth only $50 or $60 and concluding his

evidence with a bill for $1,352 for storage and towing of this car. Defendant seems to believe that he is a law unto himself on replevin issues in Madison County. Short of physical solution of these problems, long lawsuits with commensurate high damages seem to be the only way to clear up the matter.

The judgment of the district court is correct, and it is affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting in part.

It seems to me that an award of $9,570 for the loss of use of a 1968 Pontiac automobile which was inoperable and valued at no more than $1,200 was clearly excessive.

A similar factual situation was presented in *Kroger Food Company v. Singletary*, 438 S.W.2d 621 (Tex. Civ. App. 1969). The trial court had awarded the plaintiff, whose car had been converted, $4 a day for loss of use. The car had a value of $175; the damages awarded for loss of use amounted to $1,760. In finding this award excessive the court said at 630: "While we have held that there is some evidence of the loss of use, we do not believe that the amount of this award should be permitted to stand.

"It has been said in one of the cases, Montgomery v. Gallas, 225 S.W. 557, 562 (Tex.Civ.App., 1920, no writ):

" '* * * It is a matter of common knowledge that there would have to be very exceptional circumstances to make the use of property for a year worth 50 per cent. more than its value. * * *'

"There being no 'exceptional circumstances' shown here, the award 'for a year' is more than eight times the value of the car. In the case from this court cited previously, Brown v. Spector, 70 S.W.2d 478, 480 (Tex.Civ.App., 1934, no writ), the court, after quoting from *Gallas*, supra, said:

" 'In this case for a period of only 497 days, representing the time the automobile was held by Sheriff Brown up to the filing of the first amended original

petition, judgment was rendered in Spector's favor for the use of his automobile a sum in excess of 5½ times the value of the automobile at the time it was seized. The judgment in the sum of $2,485 for the use of this automobile is so against the "common knowledge" of mankind as to be fundamentally erroneous.'

. . . .

"Here, the best that plaintiff can contend that he was deprived of the use of his car for approximately six months, that is, until he got a better one. Assuming that he was entitled to the $4.00 for every day as the rental value of his old car (an assumption upon which the evidence is not completely satisfactory), the award would not exceed approximately $900.00. This figure, in itself, is more than *five* times the market value of his car upon the date it was seized.

"The award of $1,760.00 is so grossly excessive that it shocks the judicial conscience. The amount of the award for loss of use of the car is considered by the court to be excessive by the sum of $860.00. In our opinion, under the circumstances of this case, damages for the loss of use of plaintiff's vehicle in the amount of $900.00 would be not only adequate but generous."

It has been held that any award of damages for loss of use must be limited to a certain time period. In *United States v. Hatahley*, 257 F.2d 920 (10th Cir. 1958), the court said at 923-24: "[T]he plaintiffs were entitled to the market value, or replacement cost . . . as of the time of taking, plus the use value . . . during the interim between the taking and the time they, acting prudently, could have replaced [the converted items].

. . . .

". . . But the right to such damages [loss of use] does not extend forever, and it is limited to the time in which a prudent person would replace [the items]."

In that case the court apparently based the limitation on damages for loss of use on reasoning similar to that found in the avoidable consequences rule. "The plaintiff who is injured by actionable conduct of the defendant, is ordinarily denied recovery for any item of special damages he could have avoided by reasonable acts, including reasonable expenditures, after the actionable conduct takes place.

. . . .

". . . One of the reasons for the avoidable consequences rule and the idea that damages should be minimized is that economic waste should be avoided. The problem usually arises where the cost of repair or replacement of damaged property exceeds its value . . . ." D. Dobbs, Handbook on the Law of Remedies § 3.7 at 186, 188-89 (1973).

In the present case there are no special circumstances to warrant an award for the loss of use of a used automobile greatly in excess of its value. Although the defendant did not plead that the plaintiffs could or should have minimized their damages, damage for the loss of use which they suffered should be limited to a period in which they, acting prudently, could have replaced the vehicle.

HASTINGS, J., joins in this dissent.

MARGARET CULLINANE, SPECIAL ADMINISTRATRIX OF THE ESTATE OF SHAWN CULLINANE, DECEASED, APPELLANT, V. INTERSTATE IRON & METAL, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

343 N.W.2d 725

Filed January 20, 1984. No. 82-729.

1. **Directed Verdict.** A motion for directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.

2. **Minors: Negligence.** If the actor is a child, the standard of care to which he must conform to avoid being contributorily negligent is that of a reasonable person of like age, intelligence, and experience under the same circumstances.
3. **Trial: Negligence.** Where reasonable minds might draw different conclusions from the evidence, the question as to negligence or contributory negligence under the circumstances is a matter for determination by the jury.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded.

Norman Denenberg, for appellant.

Thomas J. Walsh, Jr., of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellees.

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

WHITE, J.

This is a wrongful death action brought by the special administratrix of the estate of Shawn Cullinane, plaintiff-appellant, against Interstate Iron & Metal, Inc. (Interstate), and Sam Bittner, defendants-appellees. Plaintiff contends that Interstate, through its owner, Sam Bittner, was negligent in failing to properly maintain a building located at 2900 B Street, Omaha, Nebraska, and that this alleged negligence was the proximate cause of Shawn Cullinane's death. The district court for Douglas County, at the conclusion of plaintiff's case in chief, sustained the defendants' motion for a directed verdict. We reverse and remand.

We review the facts, noting that, in light of the directed verdict in favor of defendants, the plaintiff is entitled to have all competent evidence adduced on her behalf treated as true, to have every controverted fact resolved in her favor, and to have the benefit of every inference that can reasonably be drawn from the evidence. *Bank of Valley v. Mattson*, 215 Neb. 596, 339 N.W.2d 923 (1983).

In February 1981 Interstate, a Nebraska corporation, acquired a 6-acre tract of land located in the

vicinity of 2900 B Street, Omaha, Nebraska. This property was formerly the Allied Mills plant, and although not located in a highly populated area of the city, there is residential property in the immediate area.

The property contained a series of structures, including a grain elevator and approximately seven other buildings. Attached to the grain elevator, on the north end of the property, was a two-story building in which the accident in question occurred. On March 19, 1981, Sam Bittner, in his capacity as president of Interstate, contracted with Patrick Cox and Frank Bode for the sale of the scrap steel located in this building. This contract is set forth in pertinent part as follows:

"MARCH 19, 1981
INVOICE

TO: FRANK BODY [sic] and PAT COX d/b/a BODY [sic] CONSTRUCTION 105 Longview Route 4, Council Bluffs, Iowa 51501

SOLD: All scrap steel in Building 12, 2900 'B' Street Omaha, Nebraska, 68105.

TERMS: $5,000.00 payable as follows: $2,000.00 down $3,000.00 balance when starting lower floor of two story building. Waiver signed and made a part of this invoice."

Cox and Bode later entered into an agreement to sell Thomas Cullinane, the father of the deceased, a portion of the steel removed from the building. At approximately 6:30 a.m. on Saturday, May 2, 1981, Thomas Cullinane, accompanied by his 10-year-old son, Shawn, arrived on the premises. Thomas Cullinane was there to assist Cox and Bode with the removal of the steel beams, and intended to go to Des Moines, Iowa, later that day. Thomas Cullinane parked his pickup truck approximately 100 to 150 feet away from the building. At approximately 8:15 a.m. the crane arrived to be used for loading the steel beams onto trucks. Thomas Cullinane told his son to stay in his pickup while he assisted the other

workers on the top floor of the two-story building. At approximately 9 a.m. Shawn went up to the second floor of the building where the men were working. Thomas Cullinane instructed his son to return to the pickup truck, as it was dangerous for Shawn to be there. Shawn obeyed and returned to the truck. Later that morning, however, Shawn apparently reentered the building and fell through one of the open holes on the northwest portion of the second floor. At approximately 10:15 a.m. Sam Bittner and another employee of Interstate discovered Shawn's body on the lower level of the building directly under a 24-inch-square opening located on the second floor. Shawn was then taken to St. Joseph's Hospital, Omaha, Nebraska, where he died 26 hours later.

The facts that the building in question was not fenced or secured, that there were no warning signs present, and that the numerous holes on the second floor were for the most part uncovered are undisputed. It is also undisputed that prior to the accident both Sam Bittner and Thomas Cullinane knew of the unguarded holes and their potential hazard, especially if children were present.

At the close of plaintiff's case in chief, the trial court directed a verdict for the defendants, ostensibly on the theories that Interstate and Sam Bittner had relinquished possession and control of the building to Cox and Bode, and, consequently, whatever liability, if any, that existed would be their liability, not defendants' liability; that Shawn Cullinane was contributorily negligent as a matter of law; and that the "attractive nuisance" doctrine was not applicable to the facts of this case.

From our review of the record we conclude that it was error for the trial court to hold, as a matter of law, that defendants relinquished all possession and control of the building. The contract defendants entered into with Cox and Bode was not for the sale of the entire building but, rather, only for the scrap steel in the building. Cox and Bode had no right to

remove any other material from the premises. Of further interest is the fact that Cox and Bode never removed the steel from the first floor of the building. In fact, after the accident occurred, Sam Bittner would not allow Cox and Bode to remove that steel. Defendants later sold the first floor steel to another party. Although it is true, as defendants contend, that they had no control over the method in which the steel was removed, Sam Bittner and other Interstate employees entered the building at least once during the period in which the removal of the steel was taking place. This evidence adduced by plaintiff at trial would permit a jury to find that defendants had not relinquished *exclusive* possession and control of the building to Cox and Bode.

On the issue of Shawn Cullinane's contributory negligence, the standard of care to which a child must conform was set in *Huff v. Ames*, 16 Neb. 139, 141, 19 N.W. 623, 624 (1884): " '[T]he rule as to contributive negligence of a child is, that it is required to exercise only that degree of care which a person of the age of this plaintiff would naturally and ordinarily use in the same situation and under the same circumstances.' "

In 1917, and still applicable today, we held in *Rule v. Claar Transfer & Storage Co.*, 102 Neb. 4, 165 N.W. 883 (1917), that, as a general rule, whether a child 11 years of age is of sufficient knowledge, discretion, and appreciation of danger that he may be held guilty of contributory negligence is a question for the jury to determine. See, also, *Camerlinck v. Thomas*, 209 Neb. 843, 312 N.W.2d 260 (1981); *Sacca v. Marshall*, 180 Neb. 855, 146 N.W.2d 375 (1966).

The fact that the holes in the second floor presented a hazardous condition of which Sam Bittner was aware is uncontroverted. During direct examination Paul Behounek, an employee of Interstate, testified as follows: "Q. Was there — On these three occasions when you walked over to the building with Sam, was there ever anything said

about those holes? A. Yes, Sam said, 'Watch your step on the holes' everytime we'd go in, and he said, 'They really ought to be covered,' but they never did get covered."

Another witness who had been in the building on several occasions testified that he had almost walked into one of the holes himself. This issue of Shawn Cullinane's contributory negligence, or the degree thereof, should have been submitted to the jury.

Defendants argue, and the trial court found, that the "attractive nuisance" doctrine does not apply to this case. The Restatement (Second) of Torts § 339 (1965), which has been adopted in Nebraska, sets out the five elements necessary for a child to meet in order to recover from a possessor of land: "(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

"(b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

"(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

"(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

"(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children." *Id.* at 197. See, *Davis v. Cunningham*, 196 Neb. 8, 241 N.W.2d 343 (1976); *Gubalke v. Estate of Anthes*, 189 Neb. 385, 202 N.W.2d 836 (1972).

Defendants contend that because Shawn was brought to the premises by his father, he was not "attracted" to the dangerous condition. Defendants further contend that the proximate cause of Shawn's

death was not the condition of the building but, rather, the negligence of the father in failing to properly supervise his son.

Although the evidence is clear that Thomas Cullinane did indeed bring Shawn onto the premises where the building was located, it is just as clear that Mr. Cullinane did not bring Shawn onto the second floor of the building where the accident occurred. We need not speculate as to the possible reasons why Shawn reentered the building after he was warned to remain in the pickup truck; suffice it to say that Shawn's father did not bring him to the second floor of the building where the accident occurred.

Finally, on the issue of Thomas Cullinane's supervision of his son, we again find that this question should have been submitted to the jury. The law is well established in Nebraska that where there are issues as to the existence of negligence, contributory negligence, and proximate cause of an injury, those issues must be submitted to the jury. *City of Omaha v. Houlihan*, 72 Neb. 326, 100 N.W. 415 (1904); *Holly v. Mitchell*, 213 Neb. 203, 328 N.W.2d 750 (1982).

REVERSED AND REMANDED.

BOSLAUGH, J., dissenting.

The building in which Shawn Cullinane was fatally injured was located on a 6-acre industrial tract and was in the process of being demolished. A different standard of care is applicable to the owner of a building which is undergoing demolition.

An owner of a building being demolished owes no duty to keep the building in repair even to those properly within it. "It would be an absurdity to say that a building must be kept in repair while being demolished." *Matthews v. Southern Amusement Company*, 199 So. 2d 403, 404-05 (La. App. 1967). See, also, *Atkins v. Urban Redevelopment Auth., etc.*, 263 Pa. Super. 37, 396 A.2d 1364 (1979).

The rule is similar to that applicable to a street or highway under construction or repair. The duty to

keep the highway in reasonably safe condition for travel is remitted during the time when repairs or improvements are in progress. *Bruno v. Gunnison Contractors, Inc.*, 176 Neb. 462, 126 N.W.2d 477 (1964); *City of Lincoln v. Calvert*, 39 Neb. 305, 58 N.W. 115 (1894). The duty then is to warn the public that the highway is under construction or closed.

In *Neal, Admr. v. Home Builders, Inc.*, 232 Ind. 160, 111 N.E.2d 280 (1953), it was held not feasible to barricade a semiconstructed building so as to prevent trespasses by children. The court stated at 188-89, 111 N.E.2d at 294: "We believe it equally true in the case at bar that any barricade at the entrance to the semi-completed house, of sufficient size and strength to keep children out of the building, would destroy the very purpose for which the opening is maintained during the construction of the building. It is common knowledge that carpenters and other workmen use such openings as a means of ingress and egress into and out of the building in the performance of their duties in connection with the construction thereof, and to require them to remove and replace the barricade every time they went in or out of the building would delay its completion and place an undue burden on the owner of the property. *Chicago, etc. R. Co.* v. *Fox* (1906), 38 Ind. App. 268, 275, 70 N.E. 81.

"The owner or builder of a dwelling house is not an insurer of the safety of children who come upon or into the building while under construction either as trespassers or licensees, by permission or sufferance, for the purpose of play.

" 'The simple fact that a child *non sui juris* is injured will not import negligence to a defendant. It may be argued that a child of tender years is incapable of protecting itself and hence the law imposes the duty upon landowners. The primary duty of protecting children by nature and by law devolves upon their parents who have legal power to control their actions and whose moral duty it is to keep their

children from entering upon dangerous premises—an obligation equal at least to the moral obligation of the landowner to fence them out.' *Holstine* v. *Director, etc. Railroads* (1922), 77 Ind. App. 582, 594, 134 N.E. 303, *supra*."

Shawn did not enter the building with the express or implied consent of the owner. As such he was a trespasser or bare licensee, since he had been brought to the property by his father. Generally, the only duty owed to a trespasser is to refrain from willfully or wantonly injuring him. *Bosiljevac v. Ready Mixed Concrete Co.*, 182 Neb. 199, 153 N.W.2d 864 (1967).

This is not a case of a child attracted to a building under circumstances where the owner should have realized that children would be likely to trespass and not realize the seriousness of the risk, and in which the burden of eliminating the danger was slight as compared to the risk.

No question of warning is involved, since Shawn had been instructed by his father not to enter the building because of the danger involved.

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

MICHAEL EUGENE HOYLE, APPELLANT, V. HARRY "PETE" PETERSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, ET AL., APPELLEES.

343 N.W.2d 730

Filed January 27, 1984. No. 82-656.

Implied Consent Law: Blood, Breath, and Urine Tests. A motorist's subsequent offer to take the blood alcohol test previously refused does not nullify or cure such driver's initial refusal to take the test requested by the arresting officer.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Robert L. Anderson, for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter, for appellees.

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

SHANAHAN, J.

Michael Eugene Hoyle appeals the judgment of the district court for Lancaster County, Nebraska, affirming an order of Harry "Pete" Peterson, director of the Department of Motor Vehicles, State of Nebraska, namely, revocation of Hoyle's Nebraska operator's license and operating privileges for 6 months on account of Hoyle's refusal to submit to a test authorized by Nebraska's implied consent law, Neb. Rev. Stat. §§ 39-669.08 et seq. (Reissue 1978). We affirm.

Hoyle's driving his car erratically at a high rate of speed on a Lincoln street attracted the attention of Officer R. S. Kubicek of the Lincoln Police Department shortly after 2 a.m. on April 30, 1981. After Hoyle "failed" a preliminary breath test administered at the scene, Kubicek arrested Hoyle at 2:24 a.m. and transported him to the city-county jail in Lincoln.

At 2:35 a.m. in the jail Kubicek read to Hoyle an "implied consent advisement post arrest" form. Hoyle also read the form, said he understood the form and had no questions, but refused to sign that form as the "person advised." Around 3 a.m., at the request of Hoyle, Kubicek placed a call to Hoyle's attorney. In that telephone call Kubicek gave Hoyle's full name to the attorney. Hoyle testified that the attorney "just told me not to take the test." The attorney had previously represented Hoyle's brother. In giving the advice not to take the test, the attorney believed that he was talking to Hoyle's brother. After the telephone conference involving Hoyle's attorney, Kubicek asked Hoyle to

take a breath test. Based on the advice given by his attorney during the telephone call, Hoyle refused to take the test. Realizing the mistaken identity of his caller, the attorney telephoned Kubicek some 7 minutes after the initial call, i.e., around 3:07 a.m. The attorney testified that Kubicek said "it was too late" for the test because the officer had "turned the machine off already."

The director of the Department of Motor Vehicles found that Hoyle's refusal to submit to the test was not reasonable, and revoked Hoyle's operator's license and operating privileges. This revocation was affirmed by the district court.

The long-range objective of the implied consent law is reduction of carnage caused through operation of motor vehicles by drivers with impaired ability as a result of drinking alcohol, an intoxicating and dangerous drug. The effect will be protection of the public and not merely punishment of the offending driver. The more immediate purpose of the implied consent law is the test authorized to provide evidence of the alcohol contained in the blood of one arrested for driving while under the influence of alcoholic liquor. See Neb. Rev. Stat. § 39-669.07 (Reissue 1978). In this manner the implied consent law supplies a means to obtain evidence of a driver's intoxication or sobriety, as well as a system for detecting the drunken driver. See, *Ziemba v. Johns*, 183 Neb. 644, 163 N.W.2d 780 (1968); *Peterson v. State*, 261 N.W.2d 405 (S.D. 1977); *Currier v. Motor Vehicles*, 20 Wash. App. 16, 578 P.2d 1325 (1978); *Krueger v. Fulton*, 169 N.W.2d 875 (Iowa 1969); *People v. Shorkey*, 23 Ill. App. 3d 662, 321 N.E.2d 46 (1974); cf. *Zidell v. Bright*, 264 Cal. App. 2d 867, 71 Cal. Rptr. 111 (1968).

If a driver's refusal to submit to a test authorized by law is reasonable under the circumstances, there can be no revocation of the driver's license and operating privilege. See § 39-669.16. See, also, *Martinez v. Peterson*, 212 Neb. 168, 322 N.W.2d 386

(1982); *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973). On the other hand, if the refusal to submit to the test is not reasonable, revocation of the driver's license and operating privilege is a consequence of such refusal. See, §§ 39-669.15 and 39-669.16; *Stevenson v. Sullivan*, 190 Neb. 295, 207 N.W.2d 680 (1973); cf. *Wiseman v. Sullivan*, *supra*. Justifiable refusal of the test depends upon some illegal or unreasonable aspect in the nature of the request, the test itself, or both.

In a driver's course through the implied consent law, there comes a "point of no return." After a reasonable opportunity to make a decision has been afforded a motorist, a decision simply has to be made. Will the motorist submit to the test, "Yes" or "No"? See *People v. Shorkey*, *supra*. In the oft-cited case of *State v. Pandoli*, 109 N.J. Super. 1, 4, 262 A.2d 41, 42 (1970), there is the following: "Having in mind the remedial purpose of the statute, and the rapidity with which the passage of time and the physiological processes tend to eliminate evidence of ingested alcohol in the system, it is sensible to construe the statute to mean that anything substantially short of an unqualified, unequivocal assent to an officer's request that the arrested motorist take the test constitutes a refusal to do so. [Citation omitted.] The occasion is not one for debate, maneuver or negotiation, but rather for a simple 'yes' or 'no' to the officer's request." As a corollary to *Pandoli*, a motorist is not required to execute mental gymnastics in order to respond to an officer's proper request for the test.

Nebraska law does not recognize any conditional or qualified refusal to take a test authorized by the implied consent law. See *Winter v. Peterson*, 208 Neb. 785, 305 N.W.2d 803 (1981). "A refusal to submit to a chemical test occurs within the meaning of the implied consent law when the licensee, after being asked to submit to a test, so conducts himself as to justify a reasonable person in the requesting offi-

cer's position in believing that the licensee understood that he was asked to submit to a test and manifested an unwillingness to take it." *Martinez v. Peterson, supra* at 171, 322 N.W.2d at 388. To constitute a refusal it is only required that a driver understand that he has been asked to take a test and that such driver has manifested an unwillingness to take the requested test. See, *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979); *Winter v. Peterson, supra*; *Martinez v. Peterson, supra*. Nothing in the record indicates that Hoyle did not understand that he was requested to take a test authorized by the implied consent law. After the officer read the implied consent form to Hoyle, Hoyle himself read the form and had no question about it.

The issue in this case is whether a motorist's subsequent offer to take a test to determine alcoholic content of blood cures or nullifies an earlier refusal to submit to the test requested by the arresting officer.

A driver who has been arrested for operating a motor vehicle upon a public street or highway while under the influence of intoxicating liquor is not entitled to have a lawyer present during administration of a test authorized under the Nebraska implied consent law. See *Wiseman v. Sullivan, supra*. A refusal to grant a motorist's request to contact an attorney before consenting to a test under the Nebraska implied consent law affords no reasonable ground for refusing to submit to the test. See, *Rusho v. Johns*, 186 Neb. 131, 181 N.W.2d 448 (1970); *Stevenson v. Sullivan, supra*. A driver is not entitled to consult with a lawyer before taking a test, nor is the test required to be delayed by a driver's request that he be permitted to contact a lawyer concerning the test requested by the arresting officer. See *Winter v. Peterson, supra*.

In *Heffernan v. Kissack*, 192 Neb. 637, 638, 223 N.W.2d 486, 487 (1974), we held: "A single request to submit to a test is sufficient. There is no require-

ment that a second request be made if the person arrested refuses to submit to the test." See, also, *Winter v. Peterson, supra.* If consultation with an attorney before a driver's decision whether to take the test is irrelevant to the question of reasonable refusal, the quality or accuracy of an attorney's advice given before a driver's refusal is equally irrelevant to that question.

There is nothing in § 39-669.15 (refusal to submit to the test) which implies additional time for reflection or reconsideration after a driver's refusal to take the test. In fact, the statute indicates to the contrary, viz, "*If* a person arrested pursuant to section 39-669.08 refuses to submit to the chemical test of blood, breath, or urine required by that section, *the test shall not be given* . . . ." (Emphasis supplied.) There are several factors militating against the argument for additional time to allow a driver's subsequent offer to take the test. As time elapses between arrest and the test, the reliability and accuracy of the test diminishes. See, *Peterson v. State*, 261 N.W.2d 405 (S.D. 1977); *Harlan v. State*, 113 N.H. 194, 308 A.2d 856 (1973). The time element may require involvement of an expert to extrapolate information derived from a delayed test. See *Peterson v. State, supra.* This tends to unnecessarily compound or complicate matters of evidence. Also, permitting a delayed test at the subsequent offer of the motorist would require officers to wait and see if there was a change of mind by the refusing motorist, and would require officers to forego other responsibilities in order to arrange the belated test—all contrary to the clear intent behind the implied consent law that the test be submitted and completed expeditiously. See, *Peterson v. State, supra*; *Krueger v. Fulton*, 169 N.W.2d 875 (Iowa 1969); *People v. Shorkey*, 23 Ill. App. 3d 662, 321 N.E.2d 46 (1974); *Zidell v. Bright*, 264 Cal. App. 2d 867, 71 Cal. Rptr. 111 (1968); *Currier v. Motor Vehicles*, 20 Wash. App. 16, 578 P.2d 1325 (1978); *State v. Palmer*, 291 Minn.

302, 191 N.W.2d 188 (1971). By the clear weight of the authority presented to us, and we so hold, a motorist's subsequent offer to take the blood alcohol test previously refused does not nullify or cure such driver's initial refusal to take the test requested by the arresting officer. We believe that to be the proper rule. Any other interpretation would serve only to frustrate the implied consent law.

We must affirm the judgment of the district court in view of what has been done according to Hoyle.

AFFIRMED.

WHITE, J., dissenting.

I agree that this court in *Winter v. Peterson*, 208 Neb. 785, 787, 305 N.W.2d 803, 806 (1981), directly held that "[a] single request to submit to a test is sufficient. There is no requirement that a second request be made if the person arrested refuses to submit to the test." I am convinced that this is too harsh a result.

The Supreme Court of Hawaii in *State v. Moore*, 62 Hawaii 301, 307, 614 P.2d 931, 935 (1980), observed: "It is true that many courts have held that there is a binding 'refusal to submit' where a motorist is offered a chemical test and at first refuses or delays in consenting but subsequently changes his mind and requests a test. [Citations omitted.] We, however, decline to hold with a rule of law which would rigidly and unreasonably bind an arrested person to his first words spoken, no matter how quickly and under what circumstances those words are withdrawn. We consider the better rule to be one which takes into consideration the fairness to all parties of permitting an arrested person later to change his mind." The Hawaii court then quoted at 307-08, 614 P.2d at 935, the North Dakota Supreme Court in *Lund v. Hjelle*, 224 N.W.2d 552 (N.D. 1974): " 'Since the accuracy of a chemical test under [the Implied Consent Law] does not depend upon its being administered immediately after an arrest, accident or other event, and thus a delay for a reasonable period of time while an arrested person considers or reconsiders a

decision whether or not to submit to a chemical test will not frustrate the object of the Legislature in enacting [the Implied Consent Law], we hold that where, as here, one who is arrested for driving while under the influence of intoxicating liquor first refuses to submit to a chemical test to determine the alcoholic content of his blood and later changes his mind and requests a chemical blood test, the subsequent consent to take the test cures the prior first refusal when the request to take the test is made within a reasonable time after the prior first refusal; when such a test administered upon the subsequent consent would still be accurate; when testing equipment or facilities are still readily available; when honoring a request for a test, following a prior first refusal, will result in no substantial inconvenience or expense to the police; and when the individual requesting the test has been in police custody and under observation for the whole time since his arrest.' "

The Hawaii court concluded at 308, 614 P.2d at 935: "We adopt the criteria of the North Dakota Supreme Court. We hold that unless a delay would materially affect the test results or prove substantially inconvenient to administer, a subsequent consent may cure a prior refusal to be tested."

A total of 7 minutes elapsed between the first refusal and the change of mind. That first mistaken refusal produces for the appellant here disastrous consequences, subjecting him not only to the underlying charge, if meritorious, but to an additional charge of refusing to submit to a chemical test. We think this is both on its face patently unfair and unreasonable. The majority cites in support of this position the case of *Wohlgemuth v. Pearson*, 204 Neb. 687, 285 N.W.2d 102 (1979). The facts of the case are distinguishable here. In *Wohlgemuth* the only question was not whether there was a manifestation of an intent to refuse, but whether or not the defendant

was, in fact, capable of making a refusal at all. See the dissent of Boslaugh, J., at 692.

As there was no harm to the state's position by allowing the defendant to change his mind and to take the test within a reasonable period after the first refusal, I would reverse the decision of the trial court.

BOSLAUGH, J., joins in this dissent.

JUDY AND PATRICK OSMERA ET AL., APPELLANTS, V. THE SCHOOL DISTRICT OF SEWARD, IN THE COUNTY OF SEWARD, IN THE STATE OF NEBRASKA, ET AL., APPELLEES.

343 N.W.2d 886

Filed January 27, 1984. No. 82-726.

Estoppel. The essential elements of equitable estoppel are: As to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Appeal from the District Court for Seward County: WILLIAM H. NORTON, Judge. Affirmed.

John F. Recknor of Barlow, Johnson, DeMars & Flodman, for appellants.

Blevens, Blevens & Jacobs, for appellees.

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

SHANAHAN, J.

Judy and Patrick Osmera commenced an action in

the district court for Seward County seeking an injunction to prevent the School District of Seward and its board of education (Seward) from closing the Ulysses attendance center until a majority of the patrons of the former Ulysses school district either petitioned or voted to close the attendance center. (Reference to "Osmeras" includes all plaintiffs voters of the Ulysses school district who have joined in the lawsuit.) Finding that the Osmeras failed to prove the elements of equitable estoppel, the district court denied the injunction. We affirm.

Before the 1958-59 school year, Seward decided not to accept nonresident high school tuition students. Thereafter, Seward and the Class I school districts undertook a plan for reorganization of the districts. On December 17, 1958, the Ulysses school board (Ulysses) and Seward undertook negotiations for possible merger of the two districts. Ulysses was a Class II school district maintaining a high school.

In March 1959 the voters of the Class I districts defeated the plan for reorganization of Seward and the Class I districts. Seward reaffirmed its refusal regarding nonresident high school tuition students. To counter that refusal by Seward, citizens of the rural areas considered building a rural high school, but this alternative proved unattractive. The Class I districts began negotiations with Seward so that their students might attend school in Seward. On June 6, 1959, there emerged from those negotiations a document entitled "Cooperative Reorganization Commitments" involving Seward and the Class I districts. Ulysses never participated in the negotiations or "Cooperative Reorganization Commitments" achieved by the Seward and the Class I districts.

The Cooperative Reorganization Commitments included specific and express provisions, namely: "Each presently existing Class I School District will be designated as a Ward School and supervised by a Ward School Committee of three members who are

patrons of that district. No Ward School will be closed, except after a vote or petition by a majority of the school patrons in the area that formerly comprised that school district" (Commitment No. 2), and "Class I school districts signing and filing such petitions may, if they wish, place therein a condition that the same shall not be acted upon until the total assessed valuation of the Seward School District shall equal the sum of Fourteen Million Dollars" (Commitment No. 5).

After adoption of the Cooperative Reorganization Commitments, petitions were circulated in the Class I districts for the creation of a new school district to include the Class I districts and Seward. The petitions were approved by the county reorganization committee and the state reorganization committee. During the 10-day period after the county hearing on the petitions for reorganization, pursuant to Neb. Rev. Stat. § 79-402 (Cum. Supp. 1957), some signatories withdrew their names from the petitions. As a consequence of such withdrawals, the petitions lacked 55 percent of the voters as required by § 79-402 (Cum. Supp. 1957), and the total valuation of the proposed district fell below the $14 million specified by Commitment No. 5 of the Cooperative Reorganization Commitments.

Around the time that the reorganization involving the Class I districts and Seward failed because the valuation of the proposed district fell below $14 million, the patrons of Ulysses took a straw vote which indicated a preference to consolidate Ulysses with Seward rather than the Butler County schools. On December 10, 1959, both Ulysses and Seward filed their respective petitions for Ulysses' annexation to Seward. See § 79-402 (Cum. Supp. 1957). Neither Ulysses' nor Seward's petition refers to the Cooperative Reorganization Commitments of June 6, 1959. Further, neither petition contained any other condition or exception. On December 11, 1959 (the date on which Ulysses and Seward filed their respective

petitions), another rural school district petitioned for annexation to Seward. The total, combined effect of all petitions—that by Ulysses and those of the Class I districts which had adopted the Cooperative Reorganization Commitments—was a proposed district having an aggregate valuation in excess of $14 million. Without Ulysses, valuation of the proposed district would not have equaled $14 million as required by Commitment No. 5 of the Cooperative Reorganization Commitments. Pursuant to the petitions of the various districts, including Ulysses, and with approval of the appropriate reorganization committees, Seward's reorganization became effective on February 24, 1960.

After February 24, 1960, and as provided by the Cooperative Reorganization Commitments, one-room schoolhouses of the former Class I districts were closed. Additionally, and sometime after February 24, 1960, the Ulysses high school was closed. The reorganized district (Seward) operated schools having kindergarten through eighth grade in Goehner, Staplehurst, Ulysses, and Seward, as well as operating a high school in Seward. In 1980 kindergarten students of the Ulysses attendance center were transported to Staplehurst.

As requested by Seward, the State Department of Education and the University of Nebraska-Lincoln made a survey of Seward. The survey reported considerable problems with the physical plant of the Ulysses attendance center, including sagging in the floors, water damage, a badly deteriorated roof overhang, and that the large window areas were not conducive to energy conservation. The report noted, "Any attempt to remedy these problems would undoubtedly be more expensive than what could be justified for a building of this age and type of construction. However, if the district continues to use this facility, school officials should have these conditions inspected and monitored by personnel capable of determining the structural condition and

safety of the building." The survey recommended that "[c]onsideration should be given to closing the Ulysses attendance center as soon as school officials deem it practical." After various meetings with voters of Ulysses and patrons of the Ulysses attendance center, Seward, in February 1982, decided to close the Ulysses attendance center at the end of the 1981-82 school year.

When the Ulysses attendance center was closed, Osmeras, as Ulysses voters, sued to enjoin the closing by Seward. The theory advanced by Osmeras was equitable estoppel, that is, Seward's closing the Ulysses attendance center without a vote or petition of a majority of Ulysses patrons was contrary to Commitment No. 2 of the Cooperative Reorganization Commitments.

The trial court found that Osmeras had failed to establish the elements of equitable estoppel, and refused to enjoin Seward's closing the Ulysses attendance center.

Osmeras contend the district court erred in rejecting equitable estoppel as a basis for the requested injunction.

The doctrine of equitable estoppel is based on grounds of public policy and good faith, and is interposed to prevent injustice and inequitable consequences. *Koop v. City of Omaha*, 173 Neb. 633, 114 N.W.2d 380 (1962). " '[Equitable estoppel] is interposed to prevent injury, fraud, injustice, and inequitable consequences by denying to a person the right to repudiate his acts, admissions, or representations, when they have been relied on by persons to whom they were directed and whose conduct they were intended to and did influence.' " *City of Grand Island v. Willis*, 142 Neb. 686, 697, 7 N.W.2d 457, 463 (1943) (citing 31 C.J.S. *Estoppel* § 63 (1942)).

"Ordinarily, the doctrine of equitable estoppel cannot be invoked against a municipal corporation. . . . Exceptions are made only where right and justice so demand. The doctrine is to be applied

with caution and only in exceptional cases under circumstances clearly demanding its application to prevent manifest injustice." *Christian v. Geis*, 193 Neb. 146, 149, 225 N.W.2d 868, 870 (1975). See *Warren v. Papillion School Dist. No. 27*, 199 Neb. 410, 259 N.W.2d 281 (1977).

"The essential elements of equitable estoppel are: As to the party estopped, '* * * (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts.' As to the other party, '* * * (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.' " *Pester v. American Family Mut. Ins. Co.*, 186 Neb. 793, 798-99, 186 N.W.2d 711, 714 (1971). See *County of Scotts Bluff v. Hughes*, 202 Neb. 551, 276 N.W.2d 206 (1979).

Among some of the elements of equitable estoppel to be proved, Osmeras must show conduct by Seward which was (a) false representation or concealment of a material fact pertinent to the Ulysses annexation to Seward; or (b) calculated to convey the impression that Ulysses was within the purview of the Cooperative Reorganization Commitments, namely, that the patrons of Ulysses would be entitled to vote on or petition for closing the Ulysses attendance center—a position inconsistent with Seward's present stance that Ulysses was not involved in such commitments; and (c) Ulysses' change of position as a consequence of its reliance upon Seward's con-

duct. See, *Christian v. Geis*, *supra*; *Tighe v. Security Nat. Life Ins. Co.*, 191 Neb. 271, 214 N.W.2d 622 (1974).

Although the distinct merger movements may have been relatively contemporaneous, there is no evidence that such movements were unified, orchestrated, or interdependent. Ulysses negotiated for merger with Seward in 1958, before the Cooperative Reorganization Commitments were adopted by Seward and the Class I districts in June 1959. We note that the Cooperative Reorganization Commitments relate to Seward and Class I districts with no mention of involvement of any Class II school district such as Ulysses. The petitions by Ulysses and Seward in December 1959 are silent regarding the Cooperative Reorganization Commitments which Ulysses claims as a basis for an injunction. Further, nothing indicates that Ulysses' petition was submitted in reliance upon the Cooperative Reorganization Commitments or any conduct of Seward. In summary, the evidence does not show any conduct on the part of Seward in the form of a false representation or concealment of a material fact upon which Ulysses relied in the Ulysses-Seward merger. Because conduct and reliance as elements of equitable estoppel are absent in the present case, we do not have to discuss the other elements required for application of the doctrine of equitable estoppel. The district court was correct in concluding that the doctrine of equitable estoppel was not applicable in the present case.

Osmeras also claim that school in Ulysses must continue after reorganization until "the legal voters served by the school vote by a majority for the discontinuance of the school." Brief for Appellants at 23. See Neb. Rev. Stat. § 79-426.11 (Reissue 1981). This particular part of § 79-426.11 became effective on October 19, 1963. The previous statute, § 79-426.11 (Reissue 1950), contained no such permissive provision for continuation of school until termination by a

majority vote of a school district's legal voters. Also, the reorganization contemplated by § 79-426.11 (Cum. Supp. 1963) is accomplished by an election resulting in the legal voters' approving a plan of reorganization. See Neb. Rev. Stat. § 79-426.13 (Cum. Supp. 1963 and Reissue 1981). The reorganization under examination in the present litigation was achieved by a petition of the Ulysses board of education and not by an election approving a plan of reorganization for Ulysses. See § 79-402 (Cum. Supp. 1957). Because the reorganization occurred pursuant to § 79-402 upon petition by the board of education of the Ulysses school district, the provision for continuation of school found in § 79-426.11 until termination of school by the legal voters is not germane to or controlling in the present case.

The final contention by Osmeras is that Seward acted unreasonably and arbitrarily in closing the Ulysses attendance center. Seward possessed a survey made by the State Department of Education and the University of Nebraska-Lincoln. The survey indicated unsatisfactory conditions regarding the physical plant of the Ulysses attendance center. Also, according to the survey, teachers of Ulysses had to teach a greater number of grade levels than were being taught by teachers in similar schools elsewhere in the Seward district. The action by Seward was not taken in disregard of facts or circumstances, and did have some basis which would lead a reasonable and honest person to the same conclusion reached by Seward concerning closing the Ulysses attendance center. Cf. *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983). In view of the record presented we conclude that the actions of Seward were not unreasonable and arbitrary.

For the reasons given the judgment of the district court is affirmed.

AFFIRMED.

Cite as 216 Neb. 269

B. E. IMPLEMENT CO., APPELLANT, V. VALLEY FARM, INC., A NEBRASKA CORPORATION, APPELLEE.

343 N.W.2d 892

Filed January 27, 1984. No. 82-784.

Conversion. A conversion of goods is any unauthorized or wrongful act of dominion exerted over another's personal property which deprives the owner of his property permanently or for an indefinite period of time.

Appeal from the District Court for Dundy County: JACK H. HENDRIX, Judge. Affirmed.

Lance C. Antonson of Hines & Hines, for appellant.

James D. Owens of Owens and Owens, for appellee.

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

HASTINGS, J.

This is an action for conversion of two new farm tractors brought by the plaintiff, a Texas corporation and implement dealer, against the defendant, a Nebraska corporation and also an implement dealer doing business in Benkelman, Nebraska. Trial was had to a jury, but at the close of all the evidence both parties moved for directed verdicts; that of the defendant was sustained, and the plaintiff's action was ordered dismissed. Plaintiff appeals.

The plaintiff assigns as errors generally the court's overruling of its motion and the granting of the defendant's; the exclusion from evidence of the security agreement because of lack of foundation; and the placing of the burden of proof on the plaintiff to establish that the defendant was not a buyer in the ordinary course of business under Neb. U.C.C. § 9-307 (Reissue 1980).

Contrary to the contention of the defendant, a motion for a directed verdict which is not granted is not a waiver of trial by jury. Neb. Rev. Stat. § 25-1315.01 (Reissue 1979). Therefore, in reviewing the action

of the trial court we must treat the defendant's motion for a directed verdict or dismissal as an admission of the truth of all competent evidence submitted on behalf of the plaintiff. The plaintiff is also entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *In re Estate of Thompson*, 214 Neb. 899, 336 N.W.2d 590 (1983).

By applying this rule we come to the conclusion that the action of the trial court was correct. In doing so we do not necessarily base our opinion on the reasons given by the trial judge in support of his judgment, and by the same token find it unnecessary to discuss the plaintiff's assignments of error.

Plaintiff's evidence was offered through the testimony of Aubrey Cox, its vice president, and G. W. Burdett, Jr., its sales manager. Their testimony would support the conclusion that someone who identified himself as George Higgins, and further identified himself as being engaged in agriculture, called Burdett on the telephone on or about August 22, 1978, to inquire about the purchase of two 4630 John Deere tractors. A purchase order, dated August 22, was filled out by Mr. Burdett calling for the sale of those two tractors to Higgins, with an August 23, 1978, delivery date.

Mr. Cox agreed that his signature appeared on the purchase order. There is also a signature purporting to be that of George W. Higgins, Jr., but there is no evidence as to who placed it there. The tractors were delivered to Higgins "somewhere between Oklahoma City and El Reno . . . somewhere west of Oklahoma City and then south about a mile or mile-and-a-half . . . ." The closest that either witness could fix the date of delivery was prior to the 29th, apparently in the month of August.

A retail installment contract - security agreement, exhibit 16, was prepared and dated August 29, 1978. It appears to contain the signature of Aubrey Cox

and George W. Higgins, Jr., although no verification of the latter's signature was ever produced. The exhibit recites that the debtor resides in Cleveland County, and shows the "place of filing" as Calumet, Oklahoma. However, the trial court refused to receive the exhibit in evidence because it was not declared as an exhibit at the pretrial conference nor within an additional 90 days' grace period provided by court rules. In any event, nothing appears on the face of exhibit 16 to indicate that it was ever recorded in a county clerk's or similar office. However, exhibit 3, denominated a "Financing Statement" and purporting to bear the signatures of Aubrey Cox and George W. Higgins, Jr., and describing the two 4630 tractors, bears a September 8, 1978, filing stamp of the county clerk of Cleveland County, Oklahoma.

Mr. Cox also testified that sometime after the original papers were prepared and forwarded to John Deere, he received the original note ("Retail Installment Contract - Security Agreement") from that company, as "they wanted it redrawn on the Oklahoma form." This was accomplished as of October 13, 1978, according to exhibit 5, which contains the requisite language granting a security agreement.

At some later time, according to Mr. Cox, he discovered that at least one of these tractors was supposed to be in Benkelman, Nebraska, and this action was filed.

According to the testimony of Stanley Ham, who was president of the defendant company at the time, in June of 1978 he ordered three 4630 John Deere tractors from George W. Higgins, Jr. He had his bank transfer $75,425 to Higgins' bank in Calumet, Oklahoma, which was in full payment of these tractors. He was later informed by Higgins that he could obtain but two tractors, so $25,250 was refunded to the defendant company on August 22, 1978.

The two tractors were received by Valley Farm,

according to Stanley Ham, a day or two or three later, which would be August 25 at the latest. These tractors were purchased by the defendant for resale in the course of business. As far as Ham knew, Higgins was a machinery dealer.

Tom Ham, the current president of Valley Farm, testified that the two tractors were delivered to the defendant company on August 25 or 26. Neither Stanley Ham nor Tom Ham checked for or knew that there were any liens filed on these tractors in Oklahoma.

According to their own testimony, one of these tractors was purchased from the defendant company by Roland Query, as disclosed by a purchase order dated August 12, 1978, which the witness thought should in fact have been September 12; the other tractor was sold to Dan Brown for K D Farms, Inc., by purchase order which called for a November 14, 1978, delivery but which was paid for in full by check dated September 27, 1978.

Other than the testimony of Stanley and Tom Ham, Harold McArthur, a John Deere dealer of some 45 years in Colorado, testified that he knew of George Higgins, Jr.; that Higgins advertised as a dealer in farm equipment; and that he, McArthur, had purchased some 21 John Deere tractors from him.

Both parties argue that Neb. U.C.C. §§ 9-301 et seq. (Reissue 1980) are applicable. Section 9-301 provides in part as follows: "(1) . . . an unperfected security interest is subordinate to the rights of . . . (c) . . . other buyer not in ordinary course of business . . . to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected."

Section 9-307 provides in part that "(1) A buyer in ordinary course of business (subsection (9) of section 1-201) . . . takes free of a security interest created by his seller even though the security interest is

perfected and even though the buyer knows of its existence."

A buyer in the ordinary course of business is defined by § 1-201(9) as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind . . . ."

Finally, § 9-302 provides that a "financing statement must be filed to perfect all security interests," with exceptions not applicable to the present situation.

If we accept the plaintiff's position that the defendant was a "buyer not in ordinary course of business," the fact remains that the evidence is undisputed that Valley Farm was a purchaser for value without notice, actual or implied, as of the date of purchase, August 26 at the latest. If so, any security interest of B. E. Implement is subordinate to the rights of Valley Farm under § 9-301(1) because of the September 8 filing of plaintiff's claimed financing statement.

On the other hand, accepting the defendant's position that it was a "buyer in ordinary course of business," the defendant took the tractors free of any alleged security interest as provided for in § 9-307(1).

"A conversion is any unauthorized act which deprives the owner of his property permanently or for an indefinite period of time." (Syllabus of the court.) *Mapledge Corp. v. Coker*, 167 Neb. 420, 93 N.W.2d 369 (1958).

" 'Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.' " *Indiana Harbor Belt R. Co. v. Alpirn*, 139 Neb. 14, 21, 296 N.W. 158, 159 (1941).

The acts of the defendant in assuming and exercising the rights of ownership over the tractors were neither unauthorized nor wrongfully exerted and, as

such, did not constitute conversion on its part. The judgment of the district court in dismissing the action was correct and is affirmed.

AFFIRMED.

LINCOLN COUNTY SHERIFF'S EMPLOYEES ASSOCIATION, LOCAL 546, INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, APPELLEE, V. COUNTY OF LINCOLN, NEBRASKA, APPELLANT.

343 N.W.2d 735

Filed January 27, 1984. No. 82-829.

1. **Directed Verdict.** A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict.
2. **Commission of Industrial Relations: Wages.** In selecting employment units in reasonably similar labor markets for the purpose of comparison as to wage rates and other benefits, the question is whether, as a matter of fact, the units selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate.
3. **Commission of Industrial Relations: Trial: Evidence.** There are strong policies in favor of using an array of comparable Nebraska employers rather than using employers from outside the State of Nebraska, when an appropriate array for that purpose within the state exists.
4. **Commission of Industrial Relations: Wages: Proof.** Where it is alleged that economic dissimilarities exist which have a bearing on prevalent wage rates, the burden is on the party making that allegation to establish the bearing of any such economic dissimilarities on prevalent wage rates.
5. **Commission of Industrial Relations: Administrative Law.** The Commission of Industrial Relations is an administrative agency within the purview of the Administrative Procedures Act.
6. **Commission of Industrial Relations: Administrative Law: Appeal and Error.** Our review of an order of an administrative agency, including the Commission of Industrial Relations, is generally restricted to considering whether the commission's order is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
7. **Appeal and Error.** It has long been the rule of this court that we

will not consider errors not properly assigned. The rules of this court require that each error relied upon for reversal must be separately stated in concise language.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed.

William A. Harding of Nelson & Harding, for appellant.

Ronald Rosenberg of Rosenberg, Gibson & Taute, for appellee.

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

PER CURIAM.

The appellant, the County of Lincoln, Nebraska (County), appeals from an order entered by the Nebraska Commission of Industrial Relations (CIR) setting and adjusting wages for certain members of the Lincoln County Sheriff's Employees Association, Local 546, International Brotherhood of Police Officers (Union), employed by the County in its sheriff's office. The County has assigned eight errors allegedly committed by the CIR. Our review of the assignments leads us to the conclusion that they are without merit and that the order of the CIR should be affirmed in all respects.

On May 4, 1982, the Union filed a petition with the CIR, alleging that an industrial dispute existed between the Union and the County regarding wages and benefits for the period July 1, 1981, to and including June 30, 1982. The petition further alleged that the Union and the County had reached an impasse in negotiations and that the jurisdiction of the CIR should be invoked. The County filed an answer and counterclaim on May 10, 1982. The County defended on the basis that the petition failed to state a claim upon which relief could be granted. Further, the County maintained that the CIR was without jurisdiction because the petition failed to allege that the wages, hours, and conditions of employment paid

to the Union members were not comparable to workers exhibiting the same or similar skills under the same or similar working conditions as required by Neb. Rev. Stat. § 48-818 (Reissue 1978). The County's third defense alleged that portions of the Union's petition seeking to adjudicate the rights of the County to implement its final best offer were governed by an earlier decision of the CIR and that such portions of the petition were thus rendered moot. The County counterclaimed, alleging that wages and fringe benefits paid to the County employees were above the prevailing rate and that the petition, therefore, should be dismissed.

A hearing was held before the CIR on July 15 and 16, 1982, at which time the Union presented a seven-county array consisting of both Nebraska and out-of-state counties. Throughout the presentation of the Union's case, the County objected to both the array and the Union's expert testimony, on the basis of hearsay and no proper and sufficient foundation. At the conclusion of the Union's case the County moved to dismiss the petition. When that motion was overruled, the County proceeded to present its own evidence, including two arrays prepared by the County. One array consisted of solely Nebraska counties. A second array consisted of counties within a 200-mile radius and included both Nebraska and out-of-state counties. At the conclusion of the hearing and after taking the matter under submission, the CIR filed its opinion and order on October 15, 1982. The CIR rejected the Union's array and adopted instead a Nebraska array proposed by the County. It further determined and ordered that salaries should be adjusted upward for the period effective July 1, 1982, for corporal, investigator, patrol deputy, sergeant, dispatcher, jailer, and jail supervisor (maximum only). It left unchanged minimum-maximum monthly wages for office deputy, minimum monthly wage for jail supervisor, and ordered that all other conditions of employment should remain unchanged.

The County assigns as its first series of errors the failure of the CIR to sustain its objections to the Union's survey and the failure to grant the County's motion to dismiss. The County's theory apparently is that the Union's array should not have been admitted into evidence, and absent such evidence, the Union failed to make a prima facie case, thereby entitling the County "to win." We may dispose of those assignments for two reasons. In the first instance the CIR specifically determined that it was not accepting the Union's array and was not considering it in its decision, but, instead, was using a Nebraska array proposed by the County. To suggest therefore that the order in some way contains evidence which should not have been considered by the CIR and entitles the County to a reversal is to ignore what in fact happened. The evidence was not considered by the CIR and could not be the basis for a reversal. Furthermore, once the County's objections to the introduction of evidence were overruled and its motion to dismiss overruled, the County elected to proceed to offer evidence rather than to stand on its objections. By doing so it waived any objection or error which may have been committed. A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict. *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 338 N.W.2d 601 (1983); *Baker v. Blue Ridge Ins. Co.*, 215 Neb. 111, 337 N.W.2d 411 (1983); *Schaffer v. Strauss Brothers*, 164 Neb. 773, 83 N.W.2d 543 (1957). For those reasons it is therefore unnecessary for us to further consider the County's first four assignments of error.

In its fifth assignment of error the County maintains that the CIR erred in its selection of the array for comparability purposes. However, the record is clear that the CIR selected a composite of the arrays submitted by the County. We can again dispose of

this assignment for two reasons. In the first instance one may not introduce evidence and then maintain that it was error for the court to consider the evidence introduced by that party. See *Foreman & Clark of Nebraska, Inc. v. City of Omaha*, 203 Neb. 746, 280 N.W.2d 892 (1979). But, more importantly, when one examines the array considered by the CIR, one is unable to find any abuse of discretion on the part of the CIR. Absent a showing that the eight Nebraska counties considered by the CIR did not present a suitable array, we cannot say that the CIR was arbitrary in refusing to consider every other or additional county, wherever located, which also might be comparable. The requirement of the CIR in this regard is not to consider every conceivable comparable but only to consider a sufficient representative array so that the commission can determine whether the wages paid or the benefits conferred are comparable. § 48-818. In its order the CIR specifically found: "Based upon the evidence presented, we determine that an array consisting of the Nebraska counties of Adams, Buffalo, Dawson, Dodge, Hall, Madison, Platte, and Scotts Bluff is an appropriate array for the determination of this matter." This array fully complied with the standards stated by us in *Fraternal Order of Police v. County of Adams*, 205 Neb. 682, 685, 289 N.W.2d 535, 537 (1980), wherein we said: "In selecting employment units in reasonably similar labor markets for the purpose of comparison as to wage rates and other benefits, the question is whether, as a matter of fact, the units selected for comparison are sufficiently similar and have enough like characteristics or qualities to make comparison appropriate." We believe that the CIR was correct in its conclusion that the eight-county array presented by the County was sufficient and that the out-of-state counties excluded were not necessary. We believe that there are strong policies in favor of using an array of comparable Nebraska employers rather than using em-

ployers from outside the State of Nebraska, when an appropriate array for that purpose within the state exists. Certainly, if comparables within the state cannot be found, the 1969 amendment to § 48-818 permits the CIR to look elsewhere; but, when given a choice between sufficient comparables within the state and comparables without the state, we believe it more appropriate for the CIR to confine itself to comparables within the state. We simply cannot say that the CIR acted arbitrarily when it rejected out-of-state counties in the second array submitted by the County and, instead, adopted an array consisting only of Nebraska counties presented to it by the County.

Turning, then, to the County's assignments of error Nos. 6 and 7, which we consider together, we believe, again, they are without merit. The County maintains that the CIR erred in rejecting the use of the County's economic variable deflator evidence contained in the record and in failing to reduce unit wages and fringe benefits because the evidence in the record clearly indicates that the County was above the prevalent wages and benefits.

If we understand the assignment of error, which is not always easy to do by reason of the language which parties to labor negotiations insist on using, we believe that the CIR was not in error. The CIR specifically addressed this issue in its order. It is obvious that the CIR was mindful of the requirement to consider economic variables, if relevant. Specifically, the CIR order noted: "In determining prevalent wage rates for comparable services in reasonably similar labor markets, the Commission of Industrial Relations is required to weigh, compare and adjust for any economic dissimilarities shown to exist which have a bearing on prevalent wage rates. Lincoln Fire Fighters Ass'n v. City of Lincoln, 198 Neb. 174, 180, 252 N.W.2d 607, 611 (1977).

"Where it is alleged that economic dissimilarities exist which have a bearing on prevalent wage rates,

the burden is on the party making that allegation to establish the bearing of any such economic dissimilarities on prevalent wage rates. The burden of proof is satisfied by actual proof of the facts, of which proof is necessary, regardless of which party introduces the evidence. Lincoln Fire Fighters Ass'n v. City of Lincoln, 198 Neb. 174, 178, 252 N.W.2d 607, 610 (1977)." The CIR then said: "From the evidence presented in this case, we find that [County] has not established that the economic dissimilarities shown to exist have a bearing on prevalent wage rates for the job classes in this dispute and, therefore, no adjustments have been made in the wage figures for economic dissimilarities." In failing to consider the economic variables based upon the evidence presented by the County, the CIR specifically found that the County's expert gave examples where counties were high on per capita income but wages paid to some of their sheriff personnel were lower as compared to other counties with even lower per capita income figures. Furthermore, the County's expert admitted that the exhibits presented on the employment distribution did not take into account people working for the government and that the figures presented did not show any direct relationship between wages earned in the public sector and wages earned in the private sector. We cannot say as a matter of law that the action of the CIR in refusing to adjust the wages because of economic variables was arbitrary or capricious. Because the CIR is an administrative agency within the purview of the Administrative Procedures Act, see *Nebraska Dept. of Roads Employees Assn. v. Department of Roads*, 189 Neb. 754, 205 N.W.2d 110 (1973), and because our review of an order of an administrative agency, including the CIR, is generally restricted to considering whether the commission's order is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary,

capricious, or unreasonable (*AFSCME Local 2888 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981); *General Drivers and Helpers Union v. City of West Point*, 204 Neb. 238, 281 N.W.2d 772 (1979); *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983)), we are unable to find error in the action taken by the CIR in this regard. Assignments 6 and 7 must likewise be overruled.

The County's final assignment of error is that the CIR erred in failing to properly adjust wages because it refused to take into account that wage figures had been adjusted to reflect a 40-hour workweek. We believe, however, that the CIR's order explains that matter and that the action of the CIR in failing to make the adjustment was correct. In its order the CIR specifically found: "[The County] adjusted all wage figures reported to a 40-hour work week since not all of the array members worked the same work week. The Commission finds the evidence is unclear as to whether the work weeks reflected in the surveys take into account all the hours compensated. . . . Because of this ambiguity the Commission will not adjust the reported wage rates to a 40-hour work week." We have likewise reviewed the record, as did the CIR, and we must reach the same conclusion, to wit, that the evidence is ambiguous as to whether the County made the necessary adjustment or whether the CIR should have. The assignment is likewise overruled.

The County has further argued one last matter in its brief. It maintains that the CIR established wage rates based upon an array presented by the County for the last 6 months of the fiscal year, when, in fact, the period in dispute was an entire fiscal year. We may disregard this error, again, for two reasons. In the first instance the County did not assign that as an error but merely sought to argue it in some general detail in its brief. It has long been the rule of this court that we will not consider errors not properly assigned. The rules of this court require

that each error relied upon for reversal must be separately stated in concise language. See, Neb. Ct. R. 9D(1)d (Rev. 1982); *Parkhurst v. Parkhurst*, 184 Neb. 687, 171 N.W.2d 243 (1969). Additionally, however, we have reviewed both the evidence presented by the County and the argument made by counsel with regard to this claim, and, while the Union did present evidence only with respect to the second half of the fiscal year, there is no evidence in the record that the evidence for the first 6 months would be significantly different than the second 6-month period, or that by considering the first 6-month period any significant change would be made. The burden to establish this was upon the County, and the CIR did not act arbitrarily in finding that the County had not established its burden of proof in that regard.

For these reasons we believe that the order of the CIR was in all respects correct and should be affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring.

While I concur completely with the result reached by the majority in this opinion, I believe that this case points up to us the error of our holding in *General Drivers and Helpers Union v. City of West Point*, 204 Neb. 238, 281 N.W.2d 772 (1979), in which I joined with the majority. In *General Drivers* we first held that the burden is on the moving party to demonstrate that existing wages are not comparable to the prevailing wage rate. We then went on to hold that the Commission of Industrial Relations could not obtain evidence on its own motion unless the moving party had first made a prima facie case by satisfying the burden of proof of establishing noncomparability of wages with prevailing conditions, and if the moving party failed to make a prima facie case, the action should be dismissed. On further reflection I now think that we have imposed a rule which is contrary to the entire scheme of the industrial relations law in Nebraska. The purpose of the

law is to insure continuous, uninterrupted, and proper functioning and operation of governmental services. See Neb. Rev. Stat. § 48-802(1) (Reissue 1978). In attempting to do so the Legislature has struck a balance. On the one hand, public employees are prohibited from interrupting the delivery of public services by strike or other means. On the other hand, to protect the economic interests of such public employees, there has been developed a statutory scheme whereby an administrative agency is authorized to resolve public sector employer-employee disputes. To therefore suggest that if the employees fail to make a prima facie case, the government employer in some manner is then absolved of its statutory obligation to pay comparable wages is to ignore the entire scheme. The Commission of Industrial Relations is not a court; it is an administrative agency. See *Nebraska Dept. of Roads Employees Assn. v. Department of Roads*, 189 Neb. 754, 205 N.W.2d 110 (1973). As such, it should be authorized and permitted to operate as an administrative agency, authorized to consider all of the evidence, whether brought by the employer or brought by the employee. The purpose of the act is to attempt to adjust labor disputes in the public sector as quickly as possible and not to engage in meaningless legal technicalities. Here, we have an example of employees in 1984 still attempting to adjust wages earned in 1981 because of a belief on the part of the employer that the employee failed to make a "prima facie case." I cannot believe that the purpose of the public sector law, or the public for that matter, is benefited by such procedure; and if the act does not make that as clear as I believe it does, it should be made clear. I would have overruled that portion of *General Drivers and Helpers Union v. City of West Point* which holds that a petition may be dismissed at the close of the employees' case if they have failed to make a prima facie case.

GRANT, J., joins in this concurrence.

LESTER C. SELLENTIN AND MARY A. DEVLIN, APPELLEES, V. GILMORE TERKILDSEN, APPELLANT.

343 N.W.2d 895

Filed January 27, 1984. No. 83-003.

1. **Easements: Highways: Proof.** A highway may be established by prescription when used adversely by the public continuously for a period of 10 years or more.
2. **Easements: Proof.** In order to establish the requisite public prescriptive easement, the public must show that the use and enjoyment of the land was exclusive, adverse, continuous, uninterrupted, open and notorious, and under a claim of right for the full 10-year prescriptive period.
3. **Easements: Highways: Proof.** In order to establish a roadway in favor of the public by prescriptive easement, there must be a use by the general public, under a claim of right adverse to the owner of the land, of some particular defined line of travel, and the use must be uninterrupted and without substantial change for 10 years or more, the period of time necessary to bar an action to recover the land.
4. **Easements: Presumptions.** Once a claimant shows open, visible, continuous, and unmolested use of the land for the necessary period, the use will be presumed to be under a claim of right, and once so established this presumption may be rebutted by the owner of the servient estate only by proving by a preponderance of the evidence that the use was by license, agreement, or permission.
5. **Easements: Highways.** In the case of public roads the fact that only a few members of the public still use the road does not mean that the road has been abandoned.

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

Hurt, Gallant & Flores, for appellant.

Wallace Hopkins of Marks, Clare, Hopkins, Rauth & Cuddigan, and Joseph M. Dea and Diana Merkel, for appellees.

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

KRIVOSHA, C.J.

The appellant, Gilmore Terkildsen, appeals from a judgment entered by the district court for Dodge County, Nebraska, finding that the appellees, Lester

C. Sellentin and Mary A. Devlin (Sellentin-Devlin), have acquired a permanent easement over and upon the following-described land of Terkildsen, to wit, the west half of the northeast quarter, Section 3, Township 20 North, Range 6 East, of the 6th P.M., Dodge County, Nebraska. More particularly, the easement is described as being a certain well-defined trail, 20 feet in width, running around an old riverbed or oxbow lake from the west end of public roadway No. 109 on the east side of said lake to the old public roadway No. 109 on the boundary line between Cuming and Dodge Counties in Nebraska on the west side of said lake.

The order entered by the trial court, in addition to establishing the permanent public easement, enjoined Terkildsen from restraining or erecting any fence or other barrier so as to close or prevent the use by the traveling public of said easement, and further permanently enjoined and restrained Terkildsen from threatening the life or well-being of any persons using said easement, including Sellentin-Devlin. We have reviewed the record de novo as we are required to do in cases of this nature, *Biegert v. Dudgeon*, 213 Neb. 617, 330 N.W.2d 897 (1983), and have concluded that the judgment of the trial court should be affirmed.

Sellentin-Devlin owned land described as the south half of the southwest quarter of Section 34, Township 21 North, Range 6 East, of the 6th P.M., Cuming County, Nebraska. This land was located immediately north of the land owned by Terkildsen. The lands owned by each party or their predecessors in title abut public road No. 109. As originally dedicated, public road No. 109 ran straight east and west on the Dodge-Cuming county line. A bridge which was constructed over the Elkhorn River at the place where public road No. 109 reached the river was washed out in 1944. Furthermore, the Elkhorn River changed directions at this point, forming what is described in the record as the former river chan-

nel or as an "oxbow." The oxbow, located to the north of public road No. 109, crosses the county line, causing the public using the road to deviate from the dedicated path to get around the oxbow. This deviation is the path in question in this case. Eventually, the Elkhorn River was straightened and the oxbow became a lake. However, the oxbow continues to traverse across both the Sellentin-Devlin land on the north and the Terkildsen land on the south.

The single issue in this case is whether the public has acquired an easement across the Terkildsen land for purposes of getting around that portion of the oxbow that crosses former public roadway No. 109.

The record discloses that sometime in 1980 Terkildsen blocked the path by putting a cable across it. Sellentin-Devlin continued to use the roadway after it was cabled until about March of 1981, when a padlock was placed on the chain and cable, thereby closing off the road. Moreover, there is evidence that Terkildsen threatened Sellentin if he continued to use the roadway.

The record further discloses that on August 11, 1981, a portion of roadway No. 109 was vacated by an order of both Dodge and Cuming Counties. For our purposes, however, we need not consider that action.

It has long been recognized in this jurisdiction, as in others, that a highway may be established by prescription when used adversely by the public continuously for a period of 10 years or more. See, *Lancaster County, ex rel. Rosewell, v. Graham*, 120 Neb. 785, 235 N.W. 338 (1931); *Smith v. Bixby*, 196 Neb. 235, 242 N.W.2d 115 (1976). In order to establish the requisite public prescriptive easement, the public must show that the use and enjoyment of the land was exclusive, adverse, continuous, uninterrupted, open and notorious, and under a claim of right for the full 10-year prescriptive period. *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983).

Furthermore, we have held that in order to establish a roadway in favor of the public by prescriptive easement, there must be a use by the general public under a claim of right adverse to the owner of the land of some particular defined line of travel, and the use must be uninterrupted and without substantial change for 10 years or more, the period of time necessary to bar an action to recover the land. *Sturm v. Mau*, 209 Neb. 865, 312 N.W.2d 272 (1981). Once a claimant shows open, visible, continuous, and unmolested use of the land for the necessary period, the use will be presumed to be under a claim of right, and once so established this presumption may be rebutted by the owner of the servient estate only by proving by a preponderance of the evidence that the use was by license, agreement, or permission. *Sturm v. Mau, supra*; *Biegert v. Dudgeon*, 213 Neb. 617, 330 N.W.2d 897 (1983). In the case of public roads the fact that only a few members of the public still use the road does not mean that the road has been abandoned. *Smith v. Bixby, supra.*

With those basic principles in mind we then review the record. While we do review the record de novo, we nevertheless keep in mind that where the evidence on material questions is in conflict, this court will consider the fact that the trial court observed the witnesses and their manner of testifying. *Baker v. Buglewicz*, 205 Neb. 656, 289 N.W.2d 519 (1980).

Although Terkildsen attempted to establish that the roadway had been long abandoned, several witnesses testified at the trial first with respect to the use of public roadway No. 109 and then with regard to the easement around the channel. The appellee Sellentin testified that he could recall using the road since he was a "kid." Sellentin specifically recalled that before the bridge was first washed out in 1944 the general public used public roadway No. 109; and he specifically recalled farmers west of the river hauling their grain and produce to elevators and markets on the east side of the river. He testified

further that after the bridge was washed out he continued to use the road to go hunting and fishing, traveling across the Terkildsen land to get around the river. He stated that he probably went fishing on an average of about once or twice a month and that there were other fishermen and hunters who also used this road and the deviation.

Raymond L. Still also testified. Still was a conservation officer with the Nebraska State Game and Parks Commission, a position which he has held since November 15, 1973. He stated that he became familiar with the area in question in January of 1974. Still used public roadway No. 109 for patrol purposes, though he occasionally used a private entrance belonging to Terkildsen to get to this area. Still checked the area for hunters, fishermen, trappers, and boaters, and, beginning in 1974, he saw hunters, fishermen, and trappers down by the river. Usually the people fished the oxbow, but Still stated that occasionally people would fish the river.

Furthermore, two more witnesses, Leland A. Diers and Leo Wortman, testified that they had lived in the area for many years and recalled the road being used by hunters, fishermen, and persons who camped there. They likewise testified that there was some deviation from the established roadway since at least 1944 when the bridge was washed out. The evidence further established that the public began driving on the Terkildsen hay meadow at least by 1958 or 1959, if not earlier.

We believe that the evidence in this case clearly and conclusively establishes that the general public, including the appellees, used roadway No. 109 and its deviation across Terkildsen's property for more than 10 years and that the use was open, visible, continuous, and unmolested. On that basis the public has clearly acquired the public easement granted to it by the trial court.

Appellant argues that either the use was with permission or was abandoned. As we have indicated,

the burden of establishing either of those defenses is upon Terkildsen in this case. See *Hopkins v. Hill*, 160 Neb. 29, 68 N.W.2d 678 (1955). We believe an examination of the evidence fails to disclose either the matter of permission or abandonment. For these reasons, therefore, the judgment of the district court granting the public an easement and enjoining Terkildsen from interfering with its use was correct. The judgment of the district court is affirmed.

AFFIRMED.

RAYMUND FRANCIS SHOLL, APPELLANT, V. BETTY JOAN SHOLL, APPELLEE.

343 N.W.2d 742

Filed January 27, 1984. No. 83-044.

Modification of Decree: Alimony: Appeal and Error. A material change in circumstances, not within the reasonable contemplation of the parties at the time of the alimony award, and not accomplished by the mere passage of time, may constitute good cause for modification of a decree; our determination as to whether such good cause has been shown is made de novo on the record.

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

Dennis D. King of Smith, King & Waite, for appellant.

Judy L. Raetz of Raetz & Bergfield, for appellee.

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

PER CURIAM.

The husband and petitioner below, Raymund Francis Sholl, appeals from the trial court's order dismissing his petition to terminate the alimony previously awarded to his former wife, Betty Joan Sholl, respondent below. We reverse and remand with directions.

Neb. Rev. Stat. § 42-365 (Reissue 1978) provides that, except for amounts which have accrued prior

to the service of summons on the petition to modify, orders for alimony may be modified or revoked for "good cause shown." We have said that a material change in circumstances, not within the reasonable contemplation of the parties at the time of the alimony award, and not accomplished by the mere passage of time, may constitute such good cause. Our determination as to whether such good cause has been shown is made de novo on the record. *Albers v. Albers*, 213 Neb. 471, 329 N.W.2d 567 (1983); *Sloss v. Sloss*, 212 Neb. 610, 324 N.W.2d 663 (1982).

The March 24, 1981, decree dissolving this 19-year marriage incorporated an agreement concerning the division of property and payment of alimony entered into by the parties. Pursuant to the terms of that agreement the husband was awarded all interest of the parties in and to a contract for the purchase of a retail grocery store they operated as Ray's Food Center at Gordon, Nebraska. This award was subject to indebtedness of approximately $200,000.

Pursuant to the agreement the husband was ordered to pay the wife alimony in the amount of $370 per week for 1 year and $350 per week for the following 3 years, subject to termination upon the remarriage of the wife or death of the husband.

Because of a variety of reasons beyond the husband's control, including increasing costs of operation, the husband was unable to fulfill the terms of the grocery store purchase contract. He resold the business to the contract vendor, and entered into an assignment for the benefit of his creditors which pays them 50 cents on the dollar.

The husband is presently employed as the comanager of a grocery store in Cheyenne, Wyoming, and earns $450 per week, taking home $327 per week after taxes.

The wife has moved to South Dakota and earns $575 per month take-home pay from a job as a switchboard operator.

The husband regularly paid the alimony up until

the time he sold the store. The petition giving rise to this appeal was filed on August 3, 1982. The record does not reflect when service of summons was had upon the wife, but her answer was filed on September 7, 1982.

We determine that, under the facts of this case, the change in the husband's status from an owner-operator of a business he was purchasing to that of a salaried employee is such a material change in circumstances as to constitute good cause to modify the husband's alimony obligation. Accordingly, we reverse the trial court's order of dismissal and remand with directions to enter an order modifying the amount of alimony due from and after September 7, 1982, to the sum of $100 per week payable for a period of 440 weeks from and after that date, which shall terminate in the event of the wife's remarriage or the husband's death.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., concurring.

I agree the alimony should be modified, but am of the opinion that the majority does not do enough.

Although the majority opinion acknowledges that there has been such a material change in circumstances as to constitute good cause to modify the husband's alimony obligation, it nonetheless requires him to essentially pay the $73,840 originally ordered, but over a future period of almost 8½ years instead of the approximately 2½-year remainder of the original term. Thus, it gives the husband no long-term relief and keeps both parties in bondage to each other for a decade after their marriage was dissolved. While the husband must pay, the wife must forego remarriage or forfeit payment. I would have reduced the alimony payments to $80 per week (one-fourth of the husband's net weekly pay) payable for the 132-week period of the original term remaining from and after September 7, 1982, terminable upon the wife's remarriage or the husband's death.

GRANT, J., joins in this concurrence.

KEARNEY CONVENTION CENTER, INC., APPELLANT, V. BUFFALO COUNTY BOARD OF EQUALIZATION, APPELLEE.

344 N.W.2d 620

Filed January 27, 1984. No. 83-096.

1. **Constitutional Law: Taxation: Valuation.** The Nebraska Constitution requires that taxes must be levied by valuation uniformly and proportionately on all tangible property.
2. **Taxation: Valuation.** Neb. Rev. Stat. § 77-201 (Reissue 1981) requires that all property be taxed at actual value.
3. _____: _____. Authorities charged with the duty of valuing property for taxation purposes may classify different types of property reasonably, and may use appropriate differing methods of assessing actual value in the different classifications, but the results reached by such different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate and do not exceed the actual value of the property.
4. **Taxation: Appeal and Error.** An appeal from a county board of equalization is tried in this court de novo as in an equity proceeding.
5. **Taxation: Valuation.** A taxpayer is entitled to have its property in a county assessed uniformly and proportionately with other property in the county even though the result may be that it is assessed at less than actual value.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded for further proceedings.

Robert A. Munro of Munro & Munro, P.C., for appellant.

Gerald R. Jorgensen, Deputy Buffalo County Attorney, for appellee.

Senators DeCamp, Beutler, Labedz, V. Johnson, Schmit, Higgins, Hoagland, and Pappas, amici curiae.

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

GRANT, J.

Plaintiff-appellant, Kearney Convention Center, Inc. (hereinafter taxpayer), is the owner of the Holi-

day Inn in Kearney, Buffalo County, Nebraska. The Buffalo County assessor assessed taxpayer's property for the year 1981 and fixed the actual value of the property at $3,563,765. For the prior year the actual valuation was fixed by the assessor at $2,304,430.

The taxpayer timely filed a written protest with defendant-appellee, Buffalo County Board of Equalization (hereinafter County Board). At the hearing on this protest the County Board did not change the 1981 valuation. The taxpayer then timely appealed to the district court for Buffalo County, where the matter was submitted on a joint stipulation of facts. The trial court dismissed the petition on appeal and affirmed the action of the County Board. This appeal followed.

On appeal the taxpayer's six assignments of error can be condensed to three points: (1) That the trial court erred in failing to find that two dissimilar methods of appraisal resulted in "blatant disparity in actual value between urban and agricultural real estate [and] constitutes unlawful lack of uniformity and proportionality within a class (real estate)"; (2) That the trial court erred in holding that the convention center's claim of disproportionate assessment required a comparison with all other types of property in Buffalo County; and (3) That the trial court erred in refusing to grant the convention center tax relief based on a lack of uniformity and proportionality of valuation.

For the reasons hereinafter stated we reverse and remand.

As stated above, all facts in the case were submitted in a joint stipulation of facts. Those facts show that an appraisal of all real and personal property in Buffalo County was conducted by the county assessor's office for the tax year 1981. In making the countywide appraisal for 1981, the assessor was required by the state Tax Commissioner to use the Marshall Valuation Service (published by Marshall and Swift Publication Company, and hereinafter

Marshall and Swift manual) in appraising all building improvements, and to use the Nebraska Agricultural Land Valuation Manual (hereinafter Land Manual) in appraising all real estate, including irrigated and dryland farm ground.

The valuation technique used in the Marshall and Swift manual is cost of reproduction less depreciation. Cost figures for labor and materials were stated in the Marshall and Swift manual in current (1981) dollars. This usage of current dollars was a departure from earlier assessing practices which had been based on the Nebraska Building Construction Manual prepared and issued by the Nebraska Tax Commissioner. The Nebraska construction manual had used cost figures based on 1976 dollar values, and had been used through 1980. The switch to the Marshall and Swift valuation technique for the taxable year 1981 had resulted in the increased valuation of the improvements on taxpayer's land from $2,072,730 to $3,332,065. The land itself was valued in both 1980 and 1981 at $231,700. This resulted in an overall assessed value increase as to taxpayer's improved real property of $1,259,335, or an increase of approximately 53 percent. The taxpayer's expert witness agreed that the Marshall and Swift valuation method used by the county assessor was a proper technique; that the method was properly utilized by the assessor; and that "the fair market value - actual value of the Kearney Holiday Inn was approximately equal to the valuation of $3,563,765.00 set by the Buffalo County Assessor for the year 1981." The taxpayer's expert witness concluded that the actual value or fair market value of the taxpayer's property was $3,385,576.70, or a figure equal to 95 percent of the valuation figure set by the county assessor.

As distinguished from the reproduction cost technique of the Marshall and Swift manual used to determine the actual value of taxpayer's improved real property, the Land Manual uses a valuation technique of capitalization of earnings based on

yield production of various types of soil and the geographical location of the particular land.

The Land Manual was well described in *Box Butte County v. State Board of Equalization & Assessment*, 206 Neb. 696, 702-03, 295 N.W.2d 670, 676 (1980), as follows: "The Land Valuation Manual was developed by the Department of Revenue after extensive research and is based generally on soil types and geographical locations. To be more explicit, agricultural land is classified as irrigated cropland, dryland cropland, rangeland and meadow, and pasture. These in turn are subclassified into valuation groups 1, 2, 3, and 4, based on the productivity of the particular soil, and, when necessary, are further subdivided. Finally, recognizing the decrease in rainfall and growing days when moving from the southeast corner of the state to the northwest corner, the state has been divided into seven land valuation areas. Each land classification and subclassification has a calculated per-acre dollar value, differing in each of the seven land valuation areas. In arriving at these valuations, information was obtained from various farm management companies, county agents, and others as to cash rent data, grazing fees, crop yield data, and share rental information in the various areas, and with that information, a net return to the landlord for the various classes and subclasses was determined to which was applied a capitalization rate to arrive at a value."

Buffalo County is in the south central area of the 7 land valuation areas, along with 15 other counties. As illustrative of the use of the Land Manual, the parties stipulated that the different qualities of soil for crop production in Buffalo County were appraised at the following values for the tax year 1981, using capitalization of earnings valuation technique:

Irrigated Cropland Land Valuation Group Values Per Acre			Dryland Cropland Land Valuation Group Values Per Acre		
1A1	-	$1,200	1D1	-	$640
1A	-	1,070	1D	-	585
2A1	-	940	2D1	-	510
2A	-	810	2D	-	450
3A1	-	680	3D1	-	380
3A	-	580	3D	-	320
4A1	-	470	4D1	-	225
4A	-	360	4D	-	175

(The dryland valuations in this stipulation seem to be from the Land Manual's Hall County figures rather than those for Buffalo County, but the differences are insignificant and do not affect the result in this opinion.)

The Buffalo County assessor had broken down all agricultural real estate in the county into the classifications set out in the Land Manual, and had assessed all agricultural land by applying the appropriate value per acre to each such classified acre. In assessing agricultural land in this manner, the county assessor was acting pursuant to the orders of the state Tax Commissioner, as the assessor was required to do by the terms of Neb. Rev. Stat. § 77-1330 (Reissue 1981). The county assessor used no factors other than the Land Manual in the assessment of rural farmland, and used no factors other than the Marshall and Swift manual in assessing taxpayer's improvements on its real property. We have, then, if the foregoing constituted all of the evidence before the trial court, a situation where the taxpayer and the county assessor have agreed, for all practical purposes, that the actual value of taxpayer's improved property is $3,563,765. Both parties agree that the county assessor has properly applied the techniques set forth in the Marshall and Swift manual, and taxpayer agrees that that technique "was a proper technique for real estate improvement valuation." The taxpayer agrees that the fair market value of its property was approximately that determined by the assessor. The taxpayer's expert

reaches this agreement by comparing the county assessor's Marshall and Swift valuation with the expert's valuation "based on his training, experience and review of the 1980-1981 appraisals of urban commercial properties in Buffalo County." Thus, with respect to the taxpayer's property, the value of that property, as determined by the assessor in using the prescribed Marshall and Swift manual, is essentially the same as the value determined by taxpayer's expert in using other methods. It is conceded by taxpayer that the actual value or market value of its property has been accurately determined.

With regard to all irrigated and dry cropland in Buffalo County, the situation is different. The county assessor accurately and faithfully followed the Land Manual and concluded that the value of all such cropland in Buffalo County was $219,504,741 (erroneously stated in the stipulation of facts as $219,540,741). Nowhere in the facts before this court is there any testimony that this amount is "actual value." From the county assessor's point of view this amount is the amount determined by the strict application of the Land Manual and is the amount to be used as assessed value. There is no other element used to calculate that number. We note that there are seven elements set out in Neb. Rev. Stat. § 77-112 (Reissue 1981) that may be used in a "formula" to determine actual value. In *Gradoville v. Board of Equalization*, 207 Neb. 615, 617, 301 N.W.2d 62, 64 (1981), we said, "The items set out by statute as examples of actual value, however, are not exclusive to all others. . . . ' "Many elements enter into a determination of actual value, some of which are set out in the statute." ' " Further, we stated in *Beynon Farm Products v. Bd. of Equalization*, 213 Neb. 815, 819, 331 N.W.2d 531, 534 (1983), "As we have said in the past, authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value. They are required to use methods and to consider

such relevant factors as result in a proper assessment."

In *Beynon Farm Products*, *supra*, the county assessor had used the Land Manual, and we held at 819, 331 N.W.2d at 534, "In the absence of other evidence, proof that the guidelines provided by the Tax Commissioner were applied correctly raises a presumption that the assessment is legally proper." Following that settled law, there is a presumption in this case that the assessed valuation of all farmland was legally proper. In the present case, however, the evidence presented by the taxpayer goes beyond the guidelines followed by the county assessor.

The taxpayer's expert witness's stipulated testimony was that "he has been a licensed real estate broker, practicing in Buffalo County, Nebraska for the past 25 years; that he has been a licensed real estate appraiser, practicing in Buffalo County, Nebraska for the past 8 years; that he is a member in good standing with the Buffalo County Board of Realtors (past President), Nebraska Realtors Association (past Vice President), National Association of Certified Appraisers (CA-S), and the Graduate Realtors Institute (GRI); that he is a certified VA appraiser, approved FHA appraiser, an approved F.N.M.A. appraiser, that during the last 5½ years he has prepared over 1,500 detailed real estate appraisals of both urban and rural real estate properties located in Buffalo County, Nebraska; that during the years 1980 and 1981 he prepared over 550 detailed appraisals of urban and rural property located in Buffalo County, Nebraska; that said appraisals for the years 1980 and 1981 were done for the purpose of determining the fair market value - actual value of each property so appraised by him; that the said appraisals for the years 1980 and 1981 included urban commercial and all land valuation groupings found under the Nebraska Agricultural Land Valuation Manual for irrigated and dryland cropland; that he has a working knowledge of the Marshall & Swift

Appraisal Manual valuation technique cost of reproduction less depreciation; that he is familiar with and understands the Nebraska Agricultural Land Valuation Manual valuation technique of capitalization of earnings based on yield production; that he has reviewed, studied and analyzed the land valuation grading values for irrigated and dryland cropland in the Nebraska Agricultural Land Valuation Manual that was used by the Buffalo County Assessor to reappraise the value of rural irrigated and dryland cropland for the year 1981; that he has reviewed, studied and analyzed the appraisal developed by the Buffalo County Assessor for the Kearney Holiday Inn using the Marshall & Swift Appraisal Manual . . . ."

The taxpayer's expert goes on to testify that, "in his opinion, based on his training, experience and review of his 1980-1981 appraisals of irrigated and dryland agricultural cropland properties in Buffalo County, including the use of comparative sales, the fair market value - actual value for all gradations of irrigated and dryland agricultural cropland for the year 1981 were uniformly undervalued by the Buffalo County Assessor by a multiplication factor of 2.25; that this uniform undervaluation results in irrigated and dryland agricultural cropland being uniformly valued at 44% of its actual value - fair market value."

That expert's valuation as to actual value of various kinds of farmland is set out in detail in his stipulated testimony. As an example, his valuation as to 1 acre of class 1A1 irrigated cropland is $2,700 per acre, as contrasted to $1,200 per acre under use of the Land Manual; and the expert's valuation of class 4D dry cropland was $371 per acre, as contrasted to $165 per acre under the Land Manual.

This expert's reasons for these differences were set out to be "That in his opinion, based on a review of comparative sales in Buffalo County for 1980 and 1981, the valuations contained in the Nebraska Agri-

cultural Land Valuation Manual for the year 1981 do not account for the impact of inflation on the fair market value - actual value of rural irrigated and dryland agricultural cropland." Combining that testimony with the agreed fact that the valuation of improvements was premised on 1981 dollars and that the valuation of cropland was based on 1976 dollars, and recognizing that there is no evidence of any attempt to correlate the different methods, we find that, as stated in *Konicek v. Board of Equalization*, 212 Neb. 648, 650, 324 N.W.2d 815, 816 (1982), "The discrepancy was not the result of an error of judgment but was a deliberate and intentional discrimination systematically applied throughout the county."

Article VIII, § 1, of the Nebraska Constitution provides, with exceptions not material to this case, that "[t]axes shall be levied by valuation uniformly and proportionately upon *all tangible property* . . . ." (Emphasis supplied.)

Following that constitutional command, the Nebraska Legislature has enacted Neb. Rev. Stat. § 77-201 (Reissue 1981), which provides, "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."

"Actual value" has been held many times to mean exactly the same as market value or fair market value. See, *Beynon Farm Products v. Bd. of Equalization*, 213 Neb. 815, 331 N.W.2d 531 (1983); *Hastings Building Co. v. Board of Equalization*, 212 Neb. 847, 326 N.W.2d 670 (1982).

The situation presented, then, in this case is one in which it is agreed between the taxpayer and the County Board that the taxpayer's improved real property is assessed at its actual value calculated on a 1981 dollar cost of reproduction less depreciation, and in which there is no agreement between the same parties on the actual value of farmland in the

same county. The presumption raised by the county assessor's sole reliance on the state-furnished Land Manual has disappeared when taxpayer goes forward with its evidence which shows, without rebutting evidence, that when other relevant criteria are considered, the Land Manual, using 1976 dollars, has resulted in valuations not of "actual value" but of 44 percent of actual value.

The precise question in this case was foreshadowed in *Box Butte County v. State Board of Equalization & Assessment*, 206 Neb. 696, 713, 295 N.W.2d 670, 681 (1980), where the court stated, "Perhaps one further point deserves comment. The Department of Revenue, in presenting its evidence, made reference on several occasions to the assumption that there existed in the state good intracounty equalization, as a justification for its recommendation of the use of different tools in attempting to achieve statewide equalization. It is not entirely clear from the record whether the reference was to all classes of property, agricultural and nonagricultural alike, or only to and within the class of nonagricultural alone. If it was in regard to all property, it was an invalid assumption and one discarded by the State Board because, very obviously, by authorizing different rates of increases to the two main classifications of property, it recognized a lack of equalization."

That case considered the uniformity of valuation among all counties, but this court saw therein the problem of the equalization of different types of property *within* a county and held that by the utilization of "different rates of increases to the two main classifications of property, it [the state board] recognized a lack of equalization."

The question in this case was answered in *Konicek v. Board of Equalization*, *supra*, where farm real estate was valued in accordance with the Land Manual, and improvements to land were valued in accordance with a separate manual (the predecessor

to the Marshall and Swift manual used in this case) promulgated by the state Tax Commissioner. The result in the *Konicek* case was that farmland without improvements was valued at about 20 percent of actual value, while improvements were valued at approximately actual value. Therefore, in *Konicek*, when the values were combined to arrive at the valuation of improved farm real estate, such improved farm real estate was assessed at a higher percentage of actual value than unimproved farm real estate. In *Konicek*, *supra* at 650, 324 N.W.2d at 816, we stated, "The effect of the system of assessment used to value farm real estate was to create separate classifications of unimproved farmland and improved farmland with no correlation between the classifications. This method of assessment is not permissible under the constitutional requirement that all tangible property be valued uniformly and proportionately. Real property taxes may not be equalized by classifying property and then applying the same values to the same classifications of property. *County of Gage v. State Board of Equalization & Assessment*, 185 Neb. 749, 178 N.W.2d 759 (1970)."

In this case there is absolutely no correlation shown between the assessed values set for property classified as farmland and property classified as improved real estate. We reiterate that it 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.

In *Grainger Brothers Co. v. Board of Equalization*, 180 Neb. 571, 582, 144 N.W.2d 161, 168-69 (1966), we stated, "Under the Constitution of Nebraska, Article

VIII, section 1, business inventories and real estate are in the same class for taxation purposes, and properties within the same class are required to be valued and assessed uniformly and proportionately in order that equalization obtain." We now state 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.

The evidence in this case shows that that result has not been reached. The scope of our review is clear. As stated in *Grainger Brothers Co. v. Board of Equalization*, *supra* at 582, 144 N.W.2d at 169, " 'An appeal to the district court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo. . . .' " See, also, *Benyon Farm Products v. Bd. of Equalization*, 213 Neb. 815, 331 N.W.2d 531 (1983). On our review we hold that while the district court was correct in determining that the taxpayer's property was properly assessed at its actual value, the district court erred in determining that that value had not been "unjustly and unfairly assessed in proportion to values assigned to all other property."

Applying further that standard of review set out above, we find that the actual value of taxpayer's improved real property was properly determined to be $3,563,765. We further find that taxpayer's property was not assessed uniformly and proportionately with other property, to wit, farmland, which we find, under the evidence presented in this record, to be assessed at 44 percent of its actual value.

In that situation we follow the principle set out in *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 446, 43 S. Ct. 190, 67 L. Ed. 340 (1923), and quoted with approval in *Konicek v. Board of Equalization*, 212 Neb. 648, 324 N.W.2d 815 (1982), "This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."

We find that the assessment of taxpayer's property at its actual value should be reduced to 44 percent of that value to equalize the value of taxpayer's property with other property in Buffalo County, as required by the Constitution and statutes of the State of Nebraska.

We remand the case to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. BRUCE E. MASTERS, APPELLANT.

343 N.W.2d 744

Filed January 27, 1984. No. 83-229.

1. **Police Officers and Sheriffs: Search and Seizure: Probable Cause: Motor Vehicles.** Testimony that an officer smelled marijuana is sufficient to furnish probable cause to search a vehicle without a warrant where there is sufficient foundation as to the expertise of the officer.
2. **Criminal Law: Evidence: Proof.** To prove unlawful possession of a controlled substance, the evidence must show that the accused

had physical or constructive possession with knowledge of the presence of the drug and its character as a controlled substance.

3. **Criminal Law: Appeal and Error.** Unless an error can be considered prejudicial to the rights of a defendant, it may not be considered as ground for reversal.

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

Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for appellee.

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

WHITE, J.

The appellant was tried and convicted of the offenses of knowingly or intentionally possessing marijuana, a controlled substance, weighing more than 1 pound, and possession of marijuana with intent to deliver. The trial court sentenced the appellant to consecutive terms of 18 months to 3 years on the first count and a term of 3 to 6 years on the second count.

Two errors are assigned: (1) The trial court erred in denying motions for mistrial after testimony of a police officer that appellant was involved in drugs and that a companion had other police contacts; and (2) The sentences were excessive.

A recitation of the facts surrounding the arrest will be necessary to an understanding of this appeal.

During the early morning hours of January 8, 1982, Trooper Richard D. McKain was on duty in Washington County, Nebraska. He was in his patrol car which was stopped at the intersection of Highway 73 and county road B-240. He observed a vehicle northbound on Highway 73 that appeared to have backup lights on and traveling in a forward direction. The trooper followed the vehicle and determined that the vehicle, being operated by appellant, Bruce E.

Masters, was exceeding the speed limit. The trooper turned on the patrol car's red lights and stopped the vehicle at a point approximately 2½ miles south of Fort Calhoun, Nebraska. As Trooper McKain approached the vehicle, he observed the driver and a passenger seated beside the driver. As Masters was rolling down the window of the pickup truck, Trooper McKain leaned down to talk with him and "was able to detect a slight odor of marijuana as . . . the air inside the vehicle came out."

Trooper McKain shined his flashlight around the inside of the truck "to detect where the smell came from." He observed a bottle lying on the floor and a paper bag "underneath the passenger's legs up against the seat on the passenger's side." Trooper McKain then asked Masters "if he had been drinking, what was in the bottle, and also what was in the sack." Masters answered that he had not had anything to drink, that the bottle contained fruit punch, and stated "that there was personal belongings in the sack."

Trooper McKain then examined Masters' driver's license and the vehicle registration, which disclosed that the vehicle belonged to Lawrence D. Barnes and/or Elbert C. Barnes of Fremont, Nebraska. Trooper McKain testified that he was familiar with the odor of unburned marijuana. Although he had probable cause both to search the vehicle and to arrest the occupants, *State v. Daly*, 202 Neb. 217, 274 N.W.2d 557 (1979), Trooper McKain, nevertheless, continued to question Masters concerning the contents of the paper sack and its ownership; he received the same answers as before from Masters, that "it was personal items."

Ultimately tiring of Masters' refusal to show the contents of the bag to him, Trooper McKain seized the bag and examined its contents, which were later determined to be marijuana. He then arrested Masters and Kent L. Newman, the passenger. A motion to suppress the seized marijuana was denied

by the trial court, and no complaint of that ruling is made in this court.

During the course of his testimony concerning the stop and subsequent arrest, Trooper McKain testified that he made certain radio calls. After testifying without objection that a call to the Omaha patrol dispatcher was made to ascertain whether there were any outstanding wants or warrants, he was asked, "And then after that? A . . . I was then contacted by Washington County Sheriff's office and then they advised me that they did not have any local warrants nor did Dodge County have any local warrants. They had also advised me that this party had some type of connection with drugs." Counsel for Masters immediately objected to the answer as not responsive, which objection was sustained, and moved for a mistrial, which motion was denied.

Later, Trooper McKain, again testifying to the question "What happened after that?" volunteered that Officer Magill of the Fort Calhoun Police Department "advised me that he had previous contact with Mr. Newman," the passenger. An objection to the answer was sustained, and a motion for mistrial was again overruled. In neither instance was the jury admonished to disregard the testimony.

Masters, Kent L. Newman, and Lawrence D. Barnes, the coowner of the truck, denied knowledge of the marijuana. Masters specifically denied telling Trooper McKain that the paper bag contained his personal effects.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. . . ." Neb. Rev. Stat. § 27-404(2) (Reissue 1979).

As none of the listed exceptions to § 27-404(2) permit the reception of the conversations, they were properly excluded.

A more substantial question then presents itself. Was the testimony that Masters "had some type of connection with drugs" so prejudicial that its mere

recitation in court requires reversal of Masters' conviction? See, *State v. Scott*, 211 Neb. 237, 318 N.W.2d 94 (1982); *State v. Stewart*, 209 Neb. 719, 310 N.W.2d 706 (1981). We are of the opinion, in this factual context, that it was.

In *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967), a case whose facts are remarkably similar to the facts of this case, we held that there was insufficient evidence to sustain a conviction of the crime of possession of marijuana of a driver of a vehicle, whose ownership was not shown to be that of the driver, where the marijuana was contained in a duffelbag between the feet of a passenger. We also held that absent some evidence of physical or constructive possession with knowledge of the presence of the drug, mere presence in a car where the drug is found was not sufficient to sustain a conviction.

The only proof of such constructive possession was Masters' responses to the questions of Trooper McKain that the paper bag contained his personal effects, a statement vigorously denied by Masters.

We do not deal with the appropriateness of Trooper McKain's questioning of Masters during a traffic stop, absent constitutional warnings, concerning the separate and distinct crime for which there was probable cause to search the vehicle, as that issue was not raised in this court nor in the trial court. See Annot., Right of Motorist Stopped by Police Officers for Traffic Offense to Be Informed at That Time of His Federal Constitutional Rights Under Miranda v Arizona, 25 A.L.R.3d 1076 (1969).

Absent the claim of ownership, insufficient evidence of Masters' possession of marijuana and possession with intent to deliver exists. The testimony of Masters' previous "connection with drugs" in this circumstance may have been the crucial factor in the jury's decision to believe the trooper's assertion and not the appellant's disclaimer. Obviously, where it cannot be said that absent the improper evidence

the appellant might not have been convicted, the error is not harmless.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS MINER, APPELLANT.

343 N.W.2d 899

Filed January 27, 1984. No. 83-270.

1. **Minors: Witnesses: Appeal and Error.** The question of the competency of a child witness is measured by such child's capabilities, intelligence, and understanding of the difference between truth and falsehood, and the determination of such competency rests largely in the discretion of the trial court and its determination in that regard will not be overturned absent a clear abuse of discretion.
2. **Expert Witnesses.** The opinion of an expert witness is properly admitted into evidence where the basis of the opinion and the facts on which it is based are before the jury, and the defendant has an opportunity to cross-examine such witness as to the basis of such opinion and the facts on which it is based.
3. **Expert Witnesses: Appeal and Error.** The ruling of a trial court in receiving or excluding an expert opinion will be reversed on appeal only when a clear abuse of discretion is shown.
4. **Criminal Law: Minors.** As a general rule, whether a physical act committed by a person responsible for the general care and supervision of a minor is a justifiable act, as referred to in Neb. Rev. Stat. § 28-1413 (Reissue 1979), or constitutes an unlawful assault is a question of fact to be decided by the trier of fact.
5. **Convictions: Appeal and Error.** In determining the sufficiency of evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.
6. **Sentences: Appeal and Error.** A sentence in a criminal case imposed within statutory limits will not be overturned on appeal absent an abuse of discretion by the trial judge.

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

Dennis R. Keefe, Lancaster County Public Defender, and Gerald L. Soucie, for appellant.

Paul L. Douglas, Attorney General, and Michaela M. White, for appellee.

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

HASTINGS, J.

The defendant, Douglas Miner, was charged with manslaughter in connection with the death of Kenith Pavey. A jury was waived and, after trial to the court, the defendant was convicted and sentenced to a term of imprisonment of not less than 2½ nor more than 3 years.

On appeal to this court the defendant assigns as errors: (1) The court's failure to strike the testimony of James Pavey as an incompetent witness; (2) The court's failure to strike the opinion testimony of Dr. Kutsch as having been based on insufficient foundation; (3) Conviction of the defendant upon insufficient evidence; and (4) The excessive sentence imposed on the defendant.

On December 7, 1981, the defendant was living with Karen Pavey in a trailer home in Lincoln, Nebraska, along with 2-year-old Ronald, a child born of that relationship, as well as two other children of Karen's, 5-year-old James Pavey, and 3-year-old Kenith Pavey.

According to the testimony of James Pavey, he, Kenith, and the defendant were in the kitchen, where he saw the defendant kick Kenith in the stomach. Kenith fell to the floor and was then picked up by the defendant and placed on a couch. On cross-examination the witness, in response to a leading question by defense counsel, stated that the incident took place in the bedroom. Although defense counsel was permitted to subject the witness to foundational questioning relative to his competency as a witness, the trial court overruled the motion to strike the testimony at its conclusion.

"Every person is competent to be a witness except as otherwise provided in these rules." Neb. Rev.

Stat. § 27-601 (Reissue 1979). The question of the competency of a child witness is measured by such child's capabilities, intelligence, and understanding of the difference between truth and falsehood, and the determination of such competency rests largely in the discretion of the trial court and its determination in that regard will not be overturned absent a clear abuse of discretion. *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981).

There were other claimed inconsistencies in the testimony of James Pavey, but from our examination of the record we do not believe that the trial court abused its discretion in allowing the testimony of the witness to stand. Some of the so-called conflicting testimony was caused by the nature of the questions asked by defense counsel and the manner in which they were propounded, and, at the most, simply created questions of credibility which were resolved against the defendant. There is no merit to the first claimed error.

The testimony of Karen Pavey followed that of her son and corroborated his testimony on the important points. She said that the defendant had called both Kenith and James into the kitchen to scold them, after having been told by her that they had been in her purse. She heard Kenith laugh, which she felt made the defendant a little angry. She then "heard Doug's foot scrape the floor and I turned around and saw Doug's foot catch Kenny in the stomach." She said that Kenny's eyes were big, his mouth was wide open, and he appeared to be in pain. She then saw him lean forward a little bit, take two steps backward, gasp, and fall to the floor. According to her testimony, the defendant attempted to administer mouth-to-mouth resuscitation, but apparently without success. Kenith was taken to the hospital, and he died that same day.

Dr. David Kutsch, a physician who was board certified to practice pathology and who was engaged in practice in Lincoln, Nebraska, was called as an ex-

pert witness by the State to establish the cause of death. The qualifications of the witness to testify as an expert in this field were not questioned. He testified that based on an autopsy which he performed, an examination of certain police reports, portions of the testimony given by Karen Pavey, reports of the Bryan Hospital heart team, the depositions of two expert witnesses, Dr. Charles Petty and Dr. Martin Myers, and portions of the testimony of James Pavey that his brother was kicked in the stomach, it was his opinion, to a reasonable degree of medical certainty, that Kenith Pavey died because of a kick that was administered to the epigastrium region of the victim.

It is true that Dr. Petty, testifying for the defendant, gave as his opinion that death resulted from chickenpox pneumonia. However, this simply created a question as to the credibility of the witnesses, which was resolved against the defendant, and on appeal we will not reweigh the evidence or the credibility of the witnesses. *State v. Huffman*, 214 Neb. 429, 334 N.W.2d 3 (1983).

The opinion of an expert witness is properly admitted into evidence where the basis of the opinion and the facts on which it is based are before the jury, and the defendant has an opportunity to cross-examine such witness as to the basis of such opinion and the facts on which it is based. *Danielsen v. Richards Mfg. Co., Inc.*, 206 Neb. 676, 294 N.W.2d 858 (1980). The ruling of a trial court in receiving or excluding an expert opinion will be reversed on appeal only when a clear abuse of discretion is shown. *Herman v. Lee*, 210 Neb. 563, 316 N.W.2d 56 (1982). The defendant's second assignment of error is not supported by the record.

The defendant argues that the evidence was insufficient to establish the commission of the crime of manslaughter because there was no proof of the commission of an unlawful act. A person is guilty of manslaughter who causes the death of another unin-

tentionally while in the commission of an unlawful act. Neb. Rev. Stat. § 28-305 (Reissue 1979). It is the position of the State that the "unlawful act" committed by the defendant was third degree assault. That is defined as intentionally, knowingly, or recklessly causing bodily injury to another. Neb. Rev. Stat. § 28-310 (Reissue 1979).

The defendant responds that the act which the defendant committed was privileged under the provisions of Neb. Rev. Stat. § 28-1413 (Reissue 1979), and therefore did not constitute an unlawful act. That section provides in part that a person who is responsible for the general care and supervision of a minor may use such force as may be necessary for the purpose of safeguarding or promoting the welfare of a minor, including punishment of misconduct, if such force used is not designed to cause or known to create substantial risk of causing death or serious bodily harm.

Assuming the defendant had standing to invoke the statute, whether the act committed by the defendant was privileged, or whether it constituted an assault and was therefore unlawful, presented a question of fact which was resolved against the defendant. *State v. Duis*, 207 Neb. 851, 301 N.W.2d 587 (1981). In determining the sufficiency of evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it. *State v. Huffman, supra.*

Finally, we deal with the claimed excessiveness of the sentence. Manslaughter is a Class III felony for which the penalty may be imprisonment for not less than 1 year nor more than 20 years. Neb. Rev. Stat. § 28-105 (Reissue 1979). The sentence imposed was within the minimum limits of the permissible pun-

ishment and demonstrated no abuse of discretion on the part of the trial judge. A sentence imposed within statutory limits will not be overturned on appeal absent an abuse of discretion by the trial judge. *State v. Ellefson*, 214 Neb. 747, 336 N.W.2d 88 (1983).

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

BOBBY CUMMINGS, APPELLANT, V. VINCE KIRBY, APPELLEE.

343 N.W.2d 747

Filed January 27, 1984. No. 83-325.

1. **Libel and Slander.** Absolute privilege attaches to all statements, even allegedly defamatory statements, made by an attorney and made incident to and in the course of a judicial proceeding, if the statements have some relation to the proceedings.
2. _____. In determining whether material is pertinent or relevant to the issues in a defamation action against an attorney, the privilege embraces anything that may possibly be pertinent, and all doubts should be resolved in favor of its relevancy or pertinency.
3. **Summary Judgment.** Summary judgment is appropriate where there exists no genuine issue of material fact.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Bobby Cummings, pro se.

Vince Kirby, pro se.

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

GRANT, J.

This is an action for slander brought by the appellant, Bobby Cummings, against the appellee, Vince Kirby. Kirby is an attorney who represented the appellant's mother, Iva Cummings, a plaintiff in a legal action for personal injury. That case was tried to a jury, resulting in a verdict against Iva on

December 3, 1982. A brief meeting was held between Iva and Kirby immediately after the verdict. Cummings was not at this meeting.

On December 6, 1982, Cummings and his mother met with Kirby in his law office to discuss the problems they had had with the lawsuit and the manner in which Kirby had been handling the case. During this visit, Kirby remarked he had been told that "[e]veryone in Pierce County thinks Bobby Cummings is a crook." The present action was commenced as a result of that statement.

Both parties filed motions for summary judgment with supporting affidavits, and, after hearing, the district court found that the statements made by Kirby to the appellant's mother, Iva Cummings, were in reference to matters that were incident to and in the course of judicial proceedings involving her; that the statements were relevant to the judicial function which was then being performed; and that all statements made to the appellant's mother were absolutely privileged as a matter of law. The court also found that no material issue of fact existed, entered summary judgment for Kirby, and denied summary judgment for Cummings.

Cummings assigns as error the finding that the conversation between his mother and Kirby on December 6, 1982, was absolutely privileged as a part of a judicial proceeding. For the reasons set out below we affirm the action taken by the district court.

The defense of privilege in a defamation action involving attorneys' statements is outlined in the Restatement (Second) of Torts § 586 (1977), which states at 247: "An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding."

Comment *a.* following § 586 elaborates: "The

privilege stated in this Section is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore the privilege is absolute." *Id.* at 247.

This court has adopted the view that absolute privilege attaches to defamatory statements made incident to, and in the course of, a judicial proceeding if the defamatory matter has some relation to the proceedings, and this court has cited the Restatement, *supra*, with approval. *Sinnett v. Albert*, 188 Neb. 176, 195 N.W.2d 506 (1972).

In this case Cummings asserts the privilege is not available to Kirby because the defamatory statement was made *after* the trial, and the meeting between Kirby and Cummings' mother on December 6, 1982, had no relation to the proceedings. Cummings also alleges that the attorney-client relationship between Iva Cummings and Kirby was over on December 6, 1982, when Kirby spoke with Cummings and his mother.

Cummings' mother's affidavit states the December 3, 1982, meeting with the appellee after the trial was to "find out what procedure was to be taken next with my lawsuit . . . ." The December 6, 1982, meeting was also at Kirby's office, and the purpose was to discuss the problems with the trial and with Kirby's handling of the case, including disagreements between client, attorney, and Cummings.

Moreover, at the hearing on the motion for summary judgment, Cummings submitted in evidence a letter dated December 13, 1982, from Iva Cummings to Kirby, discharging Kirby as her attorney. This letter was written a week after the meeting in which the defamatory statement was alleged to have been made, and 10 days after Cummings alleges his mother was no longer represented by Kirby. Kirby was Iva's attorney on December 6, 1982.

The reasoning of *Sinnett v. Albert*, *supra*, and of the Restatement, *supra*, extends to communications

after a trial which are pertinent to the attorney-client discussions in explaining what has occurred and what further action is possible. It is obvious that some decision had to be made with regard to a possible motion for new trial. We therefore agree with the district court that Kirby's statements to Cummings' mother were in reference to matters incident to the judicial proceedings and were consequently absolutely privileged as a matter of law.

Cummings' cause of action is legally deficient on another ground. The petition in this matter alleges that Kirby stated that others referred to Cummings as a "crook." This court has stated that the word "crook" is a word of general abuse, and while derogatory and disparaging, does not constitute a basis for recovery of damages in the absence of a specific allegation of special damages. *Nelson v. Rosenberg*, 135 Neb. 34, 280 N.W. 229 (1938). Cummings' petition did not allege any special damages.

The trial court was correct in granting Kirby's motion for summary judgment and in denying Cummings' motion for summary judgment.

AFFIRMED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, ET AL., APPELLEES, V. ROLAND MORROW, APPELLANT.

343 N.W.2d 903

Filed January 27, 1984. No. 83-410.

1. **Res Judicata.** Res judicata bars all those issues which could have been raised in the prior proceeding upon the same facts sought to be presented in the subsequent action.
2. **Collateral Estoppel.** Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with the party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation.

3. **Res Judicata: Actions: Judgments.** An acquittal or dismissal in a prior criminal prosecution is no bar to the prosecution of a later civil action, and such acquittal or dismissal concludes no issues in a later civil action.
4. **Pleadings: Waiver.** Admissions contained in a defendant's answer are judicial admissions and waive all controversy concerning the matter.
5. **Evidence: Appeal and Error.** Error in the admission of evidence is not grounds for reversal of a judgment when no prejudice results from such error; if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.

Appeal from the District Court for Merrick County: JOHN C. WHITEHEAD, Judge. Affirmed.

Roland E. Morrow, pro se.

Paul L. Douglas, Attorney General, and Harold Mosher, for appellees.

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

PER CURIAM.

Roland Morrow, defendant-appellant, asks this court to reverse the decree of the trial court which enjoins him from "operating or participating in the operation of a private school for his children of school age without complying with the School Laws of the State of Nebraska." We affirm.

This action was instituted by the State of Nebraska to enjoin defendant from violating Neb. Rev. Stat. §§ 79-201 and 79-1701 (Reissue 1981) and certain rules of the Nebraska State Department of Education. In general, the pertinent statutes require that those having control of children between 7 and 16 years of age cause such children to attend schools which meet certain requirements. The rules in question provide generally for State Department of Education approval of public and private schools, and further require a number of applications, inspections, and reports.

The record establishes that since September 1982 Morrow has been teaching his three children, two of whom at the time of trial were within the ages of 7 and 16, at home in a setting which does not comply with the pertinent statutes and which violates the aforesaid rules.

Morrow's brief assigns as error the claims that (1) the action is barred by the doctrines of res judicata and collateral estoppel; (2) injunction is not available to prevent conduct which is subject to criminal sanctions; (3) the trial court improperly allocated the burden of proof; (4) there was no showing of a compelling state interest in education; and (5) he was compelled to give incriminating evidence against himself.

The issue presented in Morrow's second assignment of error has recently been addressed in *State ex rel. Douglas v. Bigelow*, 214 Neb. 464, 334 N.W.2d 444 (1983), and decided against his position. The arguments made in connection with Morrow's third and fourth assignments of error fuse into the contentions that he, because of his sincerely held religious beliefs, is not bound by the educational laws of this state and that, in any event, there was no showing the state has a compelling interest in the education of Morrow's children. Again, these issues have been addressed and resolved adversely to Morrow in *State ex rel. Douglas v. Bigelow, supra*, and *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed* 454 U.S. 803, 102 S. Ct. 75, 70 L. Ed. 2d 72, and the authorities cited therein. We see no reason to further burden the legal literature of this state by restating these well-settled rules of law.

The remaining two issues, however, warrant analysis in the context of the facts presented by the record before us.

In the first of the two remaining assignments of error, assignment No. (1) above, Morrow argues that this civil action is barred by his acquittal in a

previous criminal prosecution. Although Morrow placed into evidence a record of the testimony offered in that prosecution, he has not offered any evidence of either the charge filed or the exact judgment rendered therein. Proof of the evidence adduced in prior litigation alone does not generally sustain the burden of establishing the applicability of either res judicata or collateral estoppel. Res judicata bars all those issues which could have been raised in the prior proceeding upon the same facts sought to be presented in the subsequent action. *Pflasterer v. Koliopoulos*, 213 Neb. 330, 328 N.W.2d 789 (1983). Collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior litigation. *Cockle v. Cockle*, 215 Neb. 329, 339 N.W.2d 63 (1983).

Obviously, the analysis which needs to be made in resolving whether either doctrine applies requires a study of the operative pleadings and judgment, as well as the evidence adduced in the prior proceeding.

This defect in Morrow's proof of the prior litigation aside, it has long been the rule in this jurisdiction that an acquittal or dismissal in a prior criminal prosecution is no bar to the prosecution of a later civil action, and such acquittal or dismissal concludes no issues in a later civil action. *Hurley v. Brotherhood of R. R. Trainmen*, 147 Neb. 781, 25 N.W.2d 29 (1946); *Hampton v. Westover*, 137 Neb. 695, 291 N.W. 93 (1940).

The final issue is raised by Morrow's fifth assignment of error. He claims that he had the right to remain free of self-incrimination under the fifth amendment to the U.S. Constitution and that this right was violated. As will be seen from the following discussion, we need not, and therefore do not,

decide at this time whether the right claimed by Morrow existed in this case.

Morrow was called as a witness in the State's case in chief and freely answered questions about the course of home study he was supplying his children. However, in response to a question regarding whether he possessed a teacher's or administrator's certificate issued by the State of Nebraska, Morrow objected on the ground that the question called for him to incriminate himself in violation of his fifth amendment privilege. His objection was sustained at that point. Later, during the course of the trial, the court overruled the objection and Morrow was asked: "[I]t is true, is it not, that you do not hold a teacher's or administrator's certificate with the State of Nebraska?" Morrow replied, "No." Morrow and the State each argue as if that response clearly constitutes an admission by Morrow that he was not certified by the state. Frankly, we do not find this statement to be particularly illuminating. Does Morrow's answer mean, "No, your assumption is not true," or "No, I do not have a certificate"? Be that as it may, we take the construction which both parties assume, and read the answer to be an admission by Morrow that he lacked state certification.

Having taken that view, the response nonetheless becomes immaterial. Paragraph 14 of Morrow's amended answer to the State's petition states: "Section 79-1229 R.R.S. Nebraska (Reissue 1976) is alleged to require school administrators and supervisors to be certified by the State. Defendant Roland Morrow has refused, for reasons of religious conviction, to submit himself to certification. Defendant believes that compliance, with the requirements of the aforesaid statute is not required, but if required, would substantially limit and and [sic] interfere with his duty to bear witness to the Lord and to further the religious mission of the home, and would constitute governmental licensure of religion

and of his home in violation of the First Amendment to the United States Constitution."

Admissions contained in a defendant's answer are judicial in nature and waive all controversy concerning the matter. *Armbruster v. Stanton-Pilger Drainage Dist.*, 203 Neb. 772, 280 N.W.2d 72 (1979); *Sleezer v. Lang*, 170 Neb. 239, 102 N.W.2d 435 (1960). The question of whether Morrow was or was not state certified in his role as administrator or supervisor of his home study school was therefore not an open question at trial. Morrow had voluntarily, conclusively, and judicially admitted his lack of such certification. The State's question in this regard was redundant.

Morrow's lack of state certification as a teacher was established by Hugh Harlan, who, in his role as head of the instructional services branch of the State Department of Education, supervised the issuance of teacher certificates. Harlan testified that neither Morrow nor Morrow's wife held Nebraska teacher's certificates. Morrow offered no countervailing evidence.

Putting aside the response elicited by the State's ambiguous question concerning Morrow's certification, there is ample, uncontradicted evidence that Morrow was without state certification in his role as administrator, supervisor, or teacher in the home study program he conducted. As such, any error, if such there was, in overruling Morrow's objection to the question was harmless.

Error in the admission of evidence is not grounds for reversal of a judgment when no prejudice results from such error; if properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal. *State v. Bromwich*, 213 Neb. 827, 331 N.W.2d 537 (1983); *In re Estate of Potts*, 144 Neb. 729, 14 N.W.2d 323 (1944).

None of Morrow's assignments of error having dis-

positive merit, the injunction decreed by the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAT L. CLASSEN, APPELLANT.
343 N.W.2d 749

Filed January 27, 1984. No. 83-411.

1. **Burglary: Evidence: Proof.** Evidence of any act of physical force, however slight, by which the obstruction to entering is removed is sufficient to prove a breaking.
2. **Speedy Trial: Pretrial Motions.** The time utilized in the disposition of pretrial motions filed by the defendant is excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 1979).

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

Owen A. Giles, for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien, for appellee.

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

PER CURIAM.

The defendant was convicted of breaking and entering with intent to steal and was sentenced to imprisonment for 2 to 6 years. He has appealed, and contends that the trial court erred in overruling his motion for discharge and that the evidence of breaking was not sufficient to sustain the verdict of guilty.

The offense was committed at about 1:45 a.m. on April 21, 1982. The defendant was apprehended inside a storage building of the Montgomery Ag Equipment Company, a farm implement and feed dealer. The building had been under surveillance by four state patrolmen. The patrolmen testified that the defendant entered the building through a

closed and locked door. That was sufficient evidence of breaking, if believed, to sustain a finding beyond a reasonable doubt. Evidence of any act of physical force, however slight, by which the obstruction to entering is removed is sufficient to prove a breaking. *State v. Campbell*, 190 Neb. 394, 208 N.W.2d 670 (1973).

Although the evidence does not show exactly how the defendant opened the door, such evidence is unnecessary where there is evidence that the door was closed and locked at the time the defendant entered the building.

The motion for discharge was based upon Neb. Rev. Stat. § 29-1207 (Reissue 1979), which requires that a defendant be brought to trial within 6 months after the information was filed. Delay attributable to the defendant is excluded in computing the statutory period.

The record in this case shows that the defendant was bound over to the district court on June 10, 1982. An information was filed on August 13, 1982. Trial commenced February 14, 1983.

The record further shows that on January 31, 1983, the defendant filed a motion for discovery, a motion for reinstatement of bond, and the motion for discharge. On February 11, 1983, these motions were heard and sustained or overruled.

The time utilized in the disposition of pretrial motions filed by the defendant is excluded under § 29-1207(4). *State v. Stewart*, 195 Neb. 90, 236 N.W.2d 834 (1975). When the time involved in disposing of the defendant's pretrial motions is excluded, the statutory requirement of 6 months is satisfied. The motion for discharge was properly overruled.

There being no error, the judgment is affirmed.

AFFIRMED.

Cite as 216 Neb. 325

STATE OF NEBRASKA, APPELLEE, V. RONALD E. REUTER, APPELLANT.

343 N.W.2d 907

Filed January 27, 1984. No. 83-429.

1. **Child Support:** The remarriage of a father does not relieve him of child support obligations fixed by a divorce decree.
2. **Judgments: Collateral Attack: Jurisdiction.** A judgment is not subject to collateral attack unless that attack rests upon a lack of jurisdiction over the parties or of the subject matter.
3. **Indictments and Informations.** The office of an information is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and be able to plead the judgment rendered thereon as a bar to a later prosecution for the same crime.
4. **Constitutional Law: Child Support: Fraud.** Article I, § 20, of the Nebraska Constitution, which provides that one shall not be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud, does not prohibit the imprisonment of one who refuses to obey a court order to support his children.
5. **Constitutional Law: Child Support: Sentences.** A sentence of imprisonment for the failure to support one's children as ordered by a court does not violate the eighth amendment to the U.S. Constitution and article I, § 9, of the Nebraska Constitution, both of which prohibit the infliction of "cruel and unusual" punishment.
6. **Sentences: Appeal and Error.** A sentence will not be set aside if it is within statutory limits unless there was an abuse of discretion by the trial court.

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

Richard L. Kuhlman, for appellant.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellee.

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

CAPORALE, J.

Following a bench trial, defendant-appellant, Ronald E. Reuter, was adjudged guilty of intentionally failing, refusing, or neglecting to support his four minor children in violation of a court order. He was

sentenced to imprisonment for a term of 1 year. This appeal followed. We affirm.

On October 3, 1977, the district court for Saunders County entered a decree which found that the court had jurisdiction of the parties and of the subject matter, that defendant was in default, that defendant and Beverly J. Reuter were married on September 28, 1968, and that they had produced four children. The decree dissolved the marriage and ordered defendant to "pay child support, through the Clerk of the District Court of Saunders County, Nebraska, the sum of $20.00 per week, per child, a total of $80.00 per week."

Since the entry of that decree, defendant moved to Oklahoma, where he was employed as a truckdriver. A URESA action was commenced in Dodge County in 1979 and was referred to the Oklahoma authorities. Defendant had made no child support payments prior to that action. After the URESA order was entered, Dodge County and the State of Nebraska, which have regularly made payments under the aid to families with dependent children program since 1981 and at times prior to that, received reimbursement in the sums of $700 in 1979, $2,000 in 1980, $2,052 in 1981, and $400 in 1982. No payments were received in 1983, although a prospective $1,848 federal income tax refund due defendant has been intercepted by the Nebraska Department of Social Services. Public funds in excess of $13,000 have been expended since 1980 in payments under the aid to families with dependent children program.

On March 19, 1983, defendant arrived in Fremont to visit his children as he was passing through town in the course of his employment as a truckdriver. He was later arrested and charged with the crime which is the subject matter of this appeal.

The assignments of error which defendant argues present the following issues: (1) Is the evidence sufficient to support the conviction? (2) Did the information contain prejudicial statements? (3) Does

the sentence constitute an unconstitutional imprisonment for debt? and (4) Is the sentence disproportionate, and thus cruel and unusual?

Neb. Rev. Stat. § 28-706 (Reissue 1979), the statute under which defendant was charged, reads in pertinent part as follows: "(1) Any person who intentionally fails, refuses, or neglects to provide proper support which he knows or reasonably should know he is legally obliged to provide to a spouse, minor child, minor stepchild, or other dependent, commits criminal nonsupport.

. . . .

"(6) Criminal nonsupport is a Class IV felony if it is in violation of any order of any court." A Class IV felony is punishable by a maximum 5 years' imprisonment, or a $10,000 fine, or both such imprisonment and fine. There is no minimum penalty. Neb. Rev. Stat. § 28-105 (Reissue 1979).

In his attack on the sufficiency of the evidence, defendant makes three arguments. The first is that he has no legal obligation to support the children. His claim is that since he and his wife were not legally married, his children were born out of lawful wedlock, and since no paternity action was brought within 4 years of the children's births, as required by Neb. Rev. Stat. § 13-111 (Reissue 1977), his obligation is a moral one only.

Defendant does not dispute the fact that the children are his; in fact, he acknowledges that they are. Whatever the impact of the 4-year statute of limitations to which he refers may be, it in no way limits the liability of a father to support his acknowledged children born out of lawful wedlock. The liability of a father to such children is the same as that of a father of children born in lawful wedlock. Neb. Rev. Stat. § 13-102 (Reissue 1977).

The second argument defendant makes concerning the sufficiency of the evidence is that it does not show he was able to support his children on March 1, 1983, as was charged by the information, and that

absent some showing he was capable of supporting his children, it could not be found that he intentionally failed, refused, or neglected to provide such support.

The evidence establishes that defendant was capable of working, was employed, and earned at least $1,000 per month. In support of defendant's argument that his ability to support his children was not established, he claims that his debts exceeded his income. He lists among his debts the sum of $329 due each month as payment on two motor vehicles. The support of one's children is a fundamental obligation which takes precedence over almost everything else and certainly over the acquisition of vehicles. Nor are we persuaded by defendant's lamentations that he has incurred hospital expenses on behalf of his current wife and the child he and she have produced. Taking on a second set of obligations does not forgive fulfillment of the first set. See, *Shipley v. Shipley*, 175 Neb. 119, 120 N.W.2d 582 (1963), and *Phillips v. Phillips*, 162 Neb. 649, 77 N.W.2d 152 (1956), stating that the remarriage of a father does not relieve him of child support obligations fixed by a divorce decree.

Defendant's last attack on the sufficiency of the evidence rests on the claim that the divorce decree and support order were void, since he and the children's mother were never legally married. The difficulty with that position, from his point of view, is that a judgment is not subject to collateral attack unless that attack rests upon a lack of jurisdiction over the parties or of the subject matter. *Schilke v. School Dist. No. 107*, 207 Neb. 448, 299 N.W.2d 527 (1980). His reliance upon *Garrett v. State*, 118 Neb. 373, 224 N.W. 860 (1929), for the proposition that the decree of dissolution is subject to collateral attack in this case is misplaced. In *Garrett* the trial court undertook to hear the divorce case within 6 months, in spite of a statute which provided that " 'no suit for divorce shall be heard or tried for a period of six (6) months after service has been had or perfected.' "

Id. at 376, 224 N.W. at 862. Thus, *Garrett* presented a case where, because the trial court acted prematurely, it was without jurisdiction. That is not the situation in the instant case. The district courts of this state are given original jurisdiction to dissolve marriages. Neb. Rev. Stat. § 42-348 (Reissue 1978). Therefore, the district court was within its statutory powers when acting to dissolve the marriage alleged in the petition before it, an allegation which defendant did not dispute at that time. Neither does Reuter claim that the court lacked personal jurisdiction over him. What defendant mistakes for a jurisdictional requirement is merely a question of fact, which was determined against him and which is not collaterally assailable.

The fact of the matter is the evidence is sufficient to support defendant's conviction of felony nonsupport of his children. It establishes as well that he deliberately elected to ignore his obligations as a father and thereby forced his children to resort to public welfare for survival.

The information filed in the trial court reads in pertinent part as follows: "On or about 1st day of March, 1983, in Dodge County, Nebraska, the abovenamed defendant then and there being, did then and there intentionally fail, refuse, or neglect to provide proper support which he knew or reasonably should have known he was legally obliged to provide, to his spouse, minor child, minor stepchild, other dependent, to-wit: *Defendant has failed to comply with his obligation to pay $20.00 per week per child for the needs of his four minor children, as ordered by the District Court of Saunders County, Nebraska,* on October 3, 1977 in violation of Section 28-706(1) R.R.S. Neb., a Class IV Felony." (Emphasis supplied.) Defendant argues that the emphasized words in the information should have been stricken or, alternatively, that the information should have been quashed, as he had moved.

Since failure to abide by a court order to provide

support is a necessary element of the felony crime of nonsupport, we find the contention impossible to understand. The gist of the argument appears to be that the "$20.00 per week per child" language is prejudicial in that there was no proof that amount of support is actually required by his children and, further, that the language is such that Reuter could have been convicted of a crime for what was a civil contempt of a support order. A single act may give rise to both civil and criminal sanctions. As of March 1, 1983, Reuter was not contributing any amount of money toward his children's support and had not since at least September of the previous year. The office of an information is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and be able to plead the judgment rendered thereon as a bar to a later prosecution for the same crime. Neb. Rev. Stat. §§ 29-1501 and 29-1604 (Reissue 1979); *State v. Last*, 212 Neb. 596, 324 N.W.2d 402 (1982). The information fulfilled its purpose and in no way prejudiced defendant's rights.

Next, defendant argues that his sentence violates article I, § 20, of the Nebraska Constitution. That section provides: "No person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud."

This issue was long ago decided against defendant's position in *Fussell v. State*, 102 Neb. 117, 166 N.W. 197 (1918). There, Fussell was convicted under a nonsupport statute. This court stated at 121, 166 N.W. at 199: "We do not think the allowance for the support of defendant's minor child bears any resemblance whatever to a debt, and therefore the constitution does not forbid imprisonment for the defendant's refusal to obey the order of the court."

Lastly, defendant argues that his sentence is cruel and unusual, in that it is disproportionate. He urges that, as such, the sentence violates the eighth

amendment to the U.S. Constitution and article I, § 9, of the Nebraska Constitution, both of which prohibit the infliction of "cruel and unusual" punishment. He urges further that the sentence violates the requirement of article I, § 15, of the Nebraska Constitution, which provides that all "penalties shall be proportioned to the nature of the offense."

No matter how cast, the argument in essence is that the sentence imposed is an excessive one.

The rule is that a sentence will not be set aside if it is within statutory limits unless there was an abuse of discretion by the trial court. *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983).

Defendant's argument seems to be that since it is common for fathers not to support their children, his 1-year prison sentence is disproportionate to his crime. This argument confuses the gravity of an offense with its frequency of occurrence. To abandon one's children to a life of poverty and reliance upon public charity is a heinous and ignoble offense and is to be treated as such. The record shows no abuse of discretion by the trial judge which worked to defendant's prejudice.

None of defendant's assignments of error having merit, the judgment and sentence of the trial court are affirmed.

AFFIRMED.

SANDRA DOAK, APPELLANT, V. MICHAEL MILBAUER, APPELLEE.

343 N.W.2d 751

Filed January 27, 1984. No. 83-433.

1. **Constitutional Law: Statutes.** Where a statute is susceptible of two constructions, under one of which the statute is valid, while under the other it is unconstitutional or of doubtful validity, that construction which gives it validity should be adopted.
2. **Paternity: Limitations of Actions.** The 4-year period of limitations embodied in Neb. Rev. Stat. § 13-111 (Reissue 1977) bars an

adult mother, through a cause of action brought on her own behalf, from establishing the paternity of her child born out of lawful wedlock to recover her own damages; however, such period of limitations does not operate to bar a cause of action brought on such a minor child's behalf by a guardian or next friend to secure the child's rights.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Gary R. Pearson, and Joe Kelly, Deputy Lancaster County Attorney, for appellant.

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

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

CAPORALE, J.

Plaintiff-appellant, Sandra Doak, filed this action on October 14, 1981, praying, inter alia, that defendant-appellee, Michael Milbauer, be declared the father of a child born unto her on August 15, 1972. The trial court sustained Milbauer's demurrer, dismissed the action, and overruled Doak's motion for a new trial. This appeal followed. We affirm.

Doak assigns as error the dismissal of her amended petition, because, she argues, the 4-year period of limitations embodied in the pertinent statute is unconstitutional. More specifically, Doak claims that the period of limitations denies children born out of lawful wedlock due process and equal protection of the law in that the right of such children to support from the natural father is limited in a manner different from that of children born in lawful wedlock. Such differing treatment, argues Doak, violates the fourteenth amendment, § 1, of the U.S. Constitution and article I, §§ 1 and 3, of the Nebraska Constitution.

The pertinent statute, Neb. Rev. Stat. § 13-111 (Reissue 1977), reads as follows: "A civil proceeding to establish the paternity of a child may be instituted

in any district court of the district where the child is domiciled or found, by the mother of such child, either during pregnancy or within four years after its birth, or by the guardian or next friend of such child. Summons shall issue and be served as in other civil proceedings, except that such summons may be directed to the sheriff of any county in the state and may be served in any county." Neb. Rev. Stat. § 13-102 (Reissue 1977) makes one whose paternity is established by court proceeding or by acknowledgment liable for the support of the child to the same extent and in the same manner as the father of a child born in lawful wedlock.

In her amended petition Doak prayed for "judgment establishing that the defendant is the natural father of her said child and for judgment against the defendant for the support of her child, costs of this action, and for such other and further relief as may be just and equitable in the premises." We note, first of all, that a prayer for equitable relief has no place or role in a nonequitable case. That matter aside, however, it is clear from other allegations that Doak seeks recovery for future support as well as for expenses and losses she incurred "during the period of plaintiff's pregnancy, confinement and recovery."

Doak's positions have their genesis in *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872, 35 L. Ed. 2d 56 (1973), which held that once a state grants children a judicially enforceable right to support from their natural fathers, the equal protection clause of the federal Constitution prohibits the state from denying the same right to children born out of lawful wedlock.

More recently, the U.S. Supreme Court has held that restrictions on support suits by children born out of lawful wedlock will survive equal protection scrutiny to the extent that they are substantially related to a legitimate state interest. However, the period for obtaining parental support must be long

enough to provide a reasonable opportunity for those with an interest in such children to bring suit on their behalves. Further, any time limit on that opportunity has to be substantially related to the state's interest in preventing the litigation of stale or fraudulent claims. *Mills v. Habluetzel*, 456 U.S. 91, 102 S. Ct. 1549, 71 L. Ed. 2d 770 (1982). Accordingly, *Mills* held a 1-year period of limitations too short. The later case of *Pickett v. Brown*, ____ U.S. ____, 103 S. Ct. 2199, 76 L. Ed. 2d 372 (1983), held a 2-year statute to also be constitutionally infirm. Other jurisdictions, through courts of various levels, have held limitation periods of various durations to be invalid. *Matter of M. D. H.*, ____ Ind. App. ____, 437 N.E.2d 119 (1982), 2 years; *State ex rel. S. M. B. v. D. A. P.*, 284 S.E.2d 912 (W. Va. 1981), 3 years; *State, Dept. of Revenue v. Wilson*, ____ Mont. ____, 634 P.2d 172 (1981), 3 years; *State Dept. of Health, etc. v. West*, 378 So. 2d 1220 (Fla. 1979), 4 years; *State, ex rel. Adult & Fam. Serv. v. Bradley*, 58 Or. App. 663, 650 P.2d 91 (1982), 6 years. On the other hand, *Shifter v. Wolf*, 120 Mich. App. 182, 327 N.W.2d 429 (1982), held a 6-year statute neither constituted a denial of equal protection nor produced an unfairness of constitutional magnitude.

There is, however, a major distinction between the statutes determined to be constitutionally infirm in the above-cited cases and the statute at hand. Those statutes found not to pass constitutional muster purported to bar children born out of lawful wedlock from themselves bringing the action after the specified period of limitations. We do not so read our statute.

The clear import of the language of § 13-111 is that the mother's cause of action to establish the paternity of her child in order to recover her damages is barred 4 years after the child's birth. There is, however, no such limitation on a cause of action brought on the child's behalf by a guardian or next friend to establish paternity and secure the child's

rights. Obviously, the phrase "either during pregnancy or within four years after its birth" can only modify the phrase which precedes it, "by the mother of such child," and not the phrase which follows it, "or by the guardian or next friend of such child," because only the mother, not the guardian or next friend, could be pregnant with "such child," unless it be the mother acting on behalf of her child. Accordingly, Doak's equal protection and due process arguments are misdirected. The dismissal of her petition has no effect upon her child's cause of action.

Even if the statute were subject to the construction that the child's, as well as the mother's, action is barred 4 years after the child's birth, and we believe it is not, it would be our obligation to adopt the constitutional construction we suggested earlier. Where a statute is susceptible of two constructions, under one of which the statute is valid, while under the other it is unconstitutional or of doubtful validity, that construction which gives it validity should be adopted. *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983); *Nebraska P.P. Dist. v. City of York*, 212 Neb. 747, 326 N.W.2d 22 (1982).

We need not, and therefore do not, determine at this time what is recoverable by whom once paternity is established. It is sufficient to observe for the present that, for example, the owner of the right to recover for past medical expenses is different than the owner of the right to receive future support from his natural father.

In this case we need only decide, as we do, that the 4-year period of limitations bars Doak, through a cause of action brought on her own behalf, who pled no legal disability during the 4 years last preceding the filing of this action, from litigating the issue of Milbauer's paternity. Doak's arguments make no suggestion that a 4-year period for an adult to bring an action on and in her behalf is constitutionally suspect.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DAVID T. WALMSLEY, APPELLEE.

344 N.W.2d 450

Filed January 27, 1984. No. 83-853.

Search and Seizure. Any consent to a search must be voluntary and not the result of duress or coercion—express, implied, physical, or psychological.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed.

K. Randy Hood, Morrill County Attorney, for appellant.

James M. Heaton, for appellee.

SHANAHAN, J.

Pursuant to Neb. Rev. Stat. § 29-824 (Cum. Supp. 1982), the State of Nebraska appeals the judgment of the Morrill County District Court suppressing evidence seized while searching the residence of David T. Walmsley (Walmsley). The judgment of the district court is affirmed.

On August 7, 1983, the dispatcher for the Morrill County Sheriff's Department received a telephone call from a woman reporting "there [were] some strange looking weeds growing behind [Walmsley's] house." In response to that report and without any further investigation, the uniformed sheriff of Morrill County went to the house where Walmsley lived with his wife and children. Having arrived at the residence around 1:10 p.m., the sheriff knocked at the front door on the south side of the house and was greeted by Walmsley's wife, Helen, who then summoned Walmsley to the front door. What happened after that varies materially according to the three who witnessed the events.

According to the sheriff, Walmsley stood on the front steps of the house as the sheriff related the report about the "strange weeds." Walmsley responded, "Yeah, I'll get rid of them." The sheriff

testified, "I said I'd like to have . . . permission to take a look at them, so he then invited me to come around behind the house. . . . 'Come on back here.' " Walmsley and the sheriff walked along a driveway on the east side of the house and proceeded toward the backyard of the Walmsley residence. The backyard was 80 feet by 50 feet, with a fence on the north and west property lines. In the backyard Walmsley motioned to a cultivated, 40-foot row of 8-inch-high marijuana plants growing along the rear of the house. Upon seeing the marijuana plants the sheriff arrested Walmsley for "manufacturing a controlled substance," took him to the sheriff's office, informed Walmsley of his "*Miranda* rights," and had Walmsley sign a form acknowledging admonition of such rights. Later in the course of his discussion with Walmsley, the sheriff "stated to him [Walmsley] that being as he and his wife both had access to the property and everything that she also could possibly be arrested on that, and he asked me not to bother her and leave her alone because she had to take care of [the] children and that he would cooperate in any way that he could." After that conversation Walmsley signed a form entitled "Permission for Search and Seizure." Walmsley and the sheriff then returned to Walmsley's residence, where the sheriff entered Walmsley's house and obtained a small bag of marijuana, some "marijuana pipes," and some "roach clips."

Helen Walmsley testified that she was just within the screen door at the front of the Walmsley house when she heard the sheriff state to Walmsley, "I had a report that you were growing marijuana," and Walmsley's reply, "No, I'm not." The sheriff responded, "Don't lie to me or I'll just arrest you and take you down to the station, and if I come back and find anything, I'll take your wife, too." Helen further testified that the sheriff threatened to put Walmsley in jail and Helen "too," if Walmsley did not cooperate. Responding to the sheriff's question-

ing about growing marijuana plants, Walmsley then replied, "Well, I guess I am," and the sheriff said, "Let me see them." Walmsley and the sheriff walked around the house to the backyard. Through the screen door at the back of the house, Helen heard the sheriff state that he wanted photographs of the plants and then tell Walmsley, "I guess I'll have to place you under arrest for manufacturing marijuana." Walmsley and the sheriff left but returned to the Walmsley house and obtained the items mentioned in the sheriff's testimony.

David Walmsley testified about the initial conversation with the sheriff at the front of the Walmsley residence, namely, the report that Walmsley was growing marijuana and Walmsley's denial of the accusation. At Walmsley's denial the sheriff stated, "Well, don't lie to me . . . [i]f you don't cooperate with me, I'll take you and your wife both." Walmsley's response was, "Well, I guess I have some, but I will get rid of it . . . ." Walmsley testified that he felt intimidated under the circumstances or pressured by the sheriff, and was afraid. When the sheriff, referring to the backyard or the marijuana, stated, "I want to look at it," Walmsley and the sheriff then went to the backyard. After the sheriff observed the plants, Walmsley was arrested and taken to the sheriff's office, where Walmsley's constitutional rights were read to him and the sheriff commented, "I know you have some more stuff in the house and I want it." Regarding the written consent for search presented to Walmsley, the sheriff told Walmsley "if you [don't] cooperate with me and sign the search form that I [the sheriff] could still go back and get your wife. . . . Well, I know there's some stuff in there. If you don't cooperate with me, I'll just go get your wife, too." Walmsley signed the "Permission for Search and Seizure" form. The sheriff and Walmsley went back to Walmsley's house, where the sheriff obtained the articles previously described in the sheriff's testimony.

Charges were filed against Walmsley, namely, unlawful manufacture and distribution of a controlled substance in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1982); possession of marijuana (more than an ounce but less than a pound), § 28-416(4) (Cum. Supp. 1982); and possession of paraphernalia, Neb. Rev. Stat. § 28-441 (Cum. Supp. 1982).

At a hearing on Walmsley's motion questioning the legality of the search and seizure by the sheriff, the district court found there was no consent to the initial search at the Walmsley residence and suppressed "all evidence seized and all statements made."

The State appeals the district court's decision regarding physical evidence seized as a result of the search of the Walmsley premises and claims Walmsley consented to a search of his premises.

The right guaranteed by the fourth amendment to the U.S. Constitution and by article I, § 7, of the Nebraska Constitution, namely, freedom from unreasonable search and seizure, may be waived by consent of the person entitled such constitutional protection. See, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *Wren v. United States*, 352 F.2d 617 (10th Cir. 1965); *United States v. Miles*, 449 F.2d 1272 (10th Cir. 1971).

The Walmsley residence—the house and the fenced backyard—were places for which Walmsley had a reasonable expectation of privacy, which society is prepared to recognize and our Constitution is obligated to protect. Cf. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); see, *Norman v. State*, 379 So. 2d 643 (Fla. 1980); *State v. Rickard*, 420 So. 2d 303 (Fla. 1982).

Where the government seeks to validate a search by consent, the burden is on the government to prove the consent claimed, i.e., the search was voluntarily permitted, invited, or agreed to by the person whose rights are involved. See, *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 1788, 20

L. Ed. 2d 797 (1968); *Wren v. United States*, *supra*; *United States v. Miles*, *supra*; *State v. Rathburn*, 195 Neb. 485, 239 N.W.2d 253 (1976); *State v. Van Ackeren*, 194 Neb. 650, 235 N.W.2d 210 (1975).

Mere submission to authority is insufficient to establish consent to a search. See, *Bumper v. North Carolina*, *supra*; *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981); cf. *Amos v. United States*, 255 U.S. 313, 41 S. Ct. 266, 65 L. Ed. 654 (1921).

The consent required to support a consensual search must be essentially free and unconstrained choice and not the product of a will "overborne" and a critically impaired "capacity for self-determination." See *Schneckloth v. Bustamonte*, *supra*; cf. *United States v. Watson*, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976).

Whether a person consented to a search is determined from the totality of circumstances surrounding the search. See, *Schneckloth v. Bustamonte*, *supra*; *State v. Van Ackeren*, *supra*.

Any consent to a search must be voluntary and not the result of duress or coercion—express, implied, physical, or psychological. See, *Schneckloth v. Bustamonte*, *supra*; *United States v. Fike*, 449 F.2d 191 (5th Cir. 1971); *Phelper v. Decker*, 401 F.2d 232 (5th Cir. 1968); 68 Am. Jur. 2d *Searches and Seizures* § 48 (1973); cf. *State v. Billups*, *supra*.

Whether there is a consensual search is a question of fact determined by the trial court—a decision which will not be set aside unless clearly erroneous. See *State v. Van Ackeren*, *supra*.

In determining whether the trial court's findings are clearly erroneous, the Supreme Court recognizes that the trial court is the "trier of fact," and the Supreme Court takes into consideration that the trial court observed the witnesses. See, *State v. Van Ackeren*, *supra*; *State v. Billups*, *supra*; cf. *Gregory v. Davis*, 214 Neb. 408, 334 N.W.2d 1 (1983).

In this case there is a disputed chronology concerning the sheriff's comments about the possible

arrest of Helen Walmsley. The sheriff admitted telling Walmsley at the sheriff's office that Helen "could possibly be arrested" for some offense related to the controlled substance, marijuana. On the other hand, Walmsleys indicate that the sheriff made such expression during the initial contact at the Walmsley residence. The sheriff's comments might reasonably lead Walmsley to conclude that discovery of marijuana on the premises would be probable cause to arrest Helen for illegal possession of a controlled substance. Cf. *United States v. Bolin*, 514 F.2d 554 (7th Cir. 1975), where the threatened arrest of the defendant's girl friend in his home, an arrest without probable cause, was held to preclude consent to a search of the defendant's premises. A fortiori the same consequence should exist in a situation involving a wife as in the present case.

Incarceration of a wife and concern at separation from children while their parents are in custody has to produce a mental state gravely and adversely affecting one's ability to make decisions. The trial court found that the sheriff's comments constituted duress or coercion of a psychological nature and to such an extent that Walmsley's consent to the search was impossible under the circumstances. There is no question that there was a search at the initial contact with Walmsley. The trial court resolved the dispute in chronology by finding that the threat of Helen's arrest occurred at the initial contact and thereby prevented consent, i.e., voluntariness, for the search and discovery of marijuana and paraphernalia on the premises. The illegality of the search at the initial contact precludes any propriety of the related and subsequent search upon return to the Walmsley residence after the initial contact by the sheriff.

Since the State has not argued any recognized exception to the warrant requirement except consent

to a search, there remains no ground on which the search may be upheld.

On the facts presented in this case, there is no showing that the decision of the district court is clearly erroneous. Consequently, the judgment of the district court is affirmed.

AFFIRMED.

DOUGLAS N. FLETCHER, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, ET AL., APPELLANTS.

344 N.W.2d 899

Filed February 3, 1984. No. 82-554.

1. **Expert Witnesses.** Expert testimony should not be received, or if received should be stricken, if it appears that the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.
2. **Torts: Proximate Cause: Proof.** Where a plaintiff fails to prove that a defendant's actions, even if negligent, were the proximate cause, or a proximately contributing cause, of the accident and resulting injuries, the case must be dismissed.

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

Paul L. Douglas, Attorney General, and John R. Thompson, for appellants.

John H. Bernstein of Higgins, Okun & Bernstein, for appellee.

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

GRANT, D.J.

Plaintiff, Douglas N. Fletcher, brought this action to recover for his personal injuries incurred when a pickup truck in which he was riding as a passenger was driven into a bridge abutment at the entrance to

a bridge. Plaintiff properly filed his tort claim under Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981). After denial of his claim plaintiff filed his amended petition alleging generally that the accident and his resulting injuries were proximately caused by the negligence of defendants, State of Nebraska, Department of Roads, and the State of Nebraska (hereinafter collectively defendant), in "permitting unreasonable delays by their contractors of the repairs and maintenance of the approach to said bridge," in "negligently and carelessly permitting the contractor to remove the existing guardrails for an unreasonable period of time," and in failing to install and maintain safety beam guardrails on the approach to the bridge. Trial was had to the district court, sitting without a jury, as required by § 81-8,214. The court found for the plaintiff, made certain "conclusions of fact," and entered judgment against defendant for $741,859.46. Defendant appeals.

With regard to plaintiff's allegations concerning "permitting unreasonable delays," the trial court found that "[d]efendant was negligent in failing to supervise and/or take appropriation action against the Nider-Jergensen Construction Company to prevent the unreasonable delays in this project" and "in permitting the Nider-Jergensen Construction Company to remove the guardrail in question for an unreasonable period of time," and that each recited act of negligence "was a proximately-contributing cause of the injuries sustained by the plaintiff." Lengthy testimony was adduced at the trial to establish that on March 21, 1977, a contract was executed between defendant and Nider-Jergensen to resurface and generally rebuild some 4 miles of roadway on U.S. Highway 6 from the vicinity of the Platte River to the junction of Highway 31 and Highway 6. On the same day, defendant entered into a contract with Joseph T. Grof Construction Company to erect new guardrails at bridge 34157, a bridge over a stream just east of the Platte River, the site of the

accident. Various dates of beginning work were established, such as July 25, 1977, for Nider-Jergensen's asphalting, and September 6, 1977, for Grof's guardrail work. For unexplained reasons Nider-Jergensen did not complete its work within the contractual 25 working days, and indeed did not complete its contract until November 23, 1977, on which date the project was "temporarily suspended" by the State, due to winter conditions. On December 12, 1977, defendant advised Nider-Jergensen that the State had accepted Nider-Jergensen's work as of November 23, 1977, and that the company was relieved of further responsibility for the job. During the course of its contract, Nider-Jergensen had removed the guardrails at the bridge in question on October 5 and 6, 1977. Grof was not called on to install the new guardrails on the bridge until May of 1978. The accident in question happened on December 16, 1977.

Insofar as the trial court predicated defendant's liability for plaintiff's injuries on defendant's action or lack of action under contracts with third parties, such holding is in error. Only legal confusion could result if members of the general traveling public were in some way considered to be third-party beneficiaries of every construction contract entered into by the State of Nebraska with outside contractors, or if it be determined that the duty the State owes to the traveling public could be measured by the State's performance under such contracts. The actions of the State in entering into, and in the performance under, such contracts are "discretionary functions" of the State and cannot afford the general public a basis for tort claims negligence actions against the State. In *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), the U.S. Supreme Court considered the "discretionary function" exclusion of the Federal Tort Claims Act. That exclusion, as set out in 28 U.S.C. § 2680 (1976), is essentially the same as § 81-8,219(1)(a), which provides that the provisions of the State Tort Claims

Act shall not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency . . . ."

In *Dalehite*, *supra* at 35-36, the Court stated: "It [a discretionary function] also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations." Negligence against the State ordinarily cannot be predicated on the State's alleged failure to "take appropriate action" against a construction company for contractual delays alleged to be unreasonable. Such appropriate actions are the responsibility of the executive branch of the government, and the ultimate control over such action or inaction is at the ballot box, not in individual negligence cases.

Such a disposition of the first two findings of negligence, however, does not in any way dispose of this case, but that disposition does clear away unnecessary underbrush. The basic holding of the trial court in determining responsibility in this case rests on the trial court's finding that "[d]efendant was negligent in maintaining this location in an unreasonably unsafe condition, to-wit: with an exposed bridge rail, unprotected by a guardrail, barricades, or other temporary protective devices, and such negligence was a proximately-contributing cause of the injuries sustained by the plaintiff." Such a finding, if legally proper and factually supported by the evidence, would determine a violation of defendant's duty to the traveling public, which the trial court had properly determined to be the duty "to maintain its highways in a reasonably safe condition for travel by persons using the same, and to use ordinary care to protect such persons from dangerous places near the traveled portion thereof." That statement accurately reflects Nebraska law as set out in *Clouse v. County of Dawson*, 161 Neb. 544, 74 N.W.2d 67 (1955), *King v. Douglas County*, 114 Neb.

477, 208 N.W. 120 (1926), and *Richardson & Gillispie v. State*, 200 Neb. 225, 263 N.W.2d 442 (1978), *supp. op.* 200 Neb. 781, 265 N.W.2d 457.

In this case defendant had released Nider-Jergensen from all responsibility and had accepted its work as of November 23, 1977, and the defendant had chosen not to require guardrails to be installed until the following spring. Defendant's "discretionary function" planning in that regard may not be the basis for a tort claims action, but defendant's actual conduct in maintaining its highways and bridges as it did after the contractor was released falls squarely within the State Tort Claims Act.

The facts in that regard follow. As set out above, guardrails on the approach to the bridge in question had been removed on October 5 and 6, 1977. The bridge was without guardrails until new guardrails were installed in May of 1978. The trial court found that defendant had posted "some signs, notices or warnings, but no conclusion is reached as to the adequacy thereof."

Taking that somewhat truncated finding, the record may fairly be said to show that defendant had installed a "soft-shoulder" sign approximately two-tenths of a mile west of the bridge, at least three delineator 3-inch circular reflectors approximately 25 feet apart and starting 150 feet west of the bridge, and three bridge hazard signs. The last of the three bridge hazard signs was at the bridge abutment itself, and since the bridge was 26.5 feet wide, and thus wider than the road's 24-foot width, this one bridge hazard sign satisfied both the state and federal manual requirements as to bridge warning signs where the width of the bridge exceeds the width of the highway. The remaining two bridge hazard signs were approximately 25 feet and 50 feet to the west of the abutment sign itself. We determine that since there was compliance with the U.S. Department of Transportation/Federal Highway Administration Manual on Uniform Traffic Control De-

vices for Streets and Highways (1971) (adopted by the Legislature of the State of Nebraska), the signs were adequate to warn the traveling public of the upcoming bridge. In view of our disposition of the case, and the nature of the trial court's findings, we need not determine whether that conclusion was sufficient to discharge the State from liability.

Further facts as to which there is no dispute are that no guardrails, barricades, or other temporary protective devices were present. The evidence further shows that there was a steep decline beginning at the outer edge of the shoulder of the road near the bridge and that at the bridge itself that decline went sharply down over large rocks to a stream of water.

On December 16, 1977, plaintiff had just completed his season as a foreman for the Burlington Northern railroad. Since that night was the last that the labor gang would work together for the season, a group of the workers met at a tavern in Ashland, Nebraska, at about 5 p.m. Both plaintiff and Robert Sharp were in the group. Mr. Sharp was to give plaintiff a ride to Sharp's home near Washington, Nebraska, where plaintiff's wife was to meet plaintiff and return to their home in Fremont. Plaintiff and Mr. Sharp were drinking beer at the rate of approximately one to two beers per hour until they left the tavern at some time between 8 p.m. (Mr. Sharp's testimony) and 9:30 p.m. (the rescue squad was notified at 9:36 p.m.). The two got into Mr. Sharp's four-wheel-drive pickup truck and proceeded east on Highway 6 toward the bridge in question, some 4 miles to the east, with Mr. Sharp driving and plaintiff in the passenger's seat.

As the vehicle neared the bridge, Mr. Sharp was adjusting the truck radio. While he was so engaged, the right wheels of the truck left the pavement. The truck proceeded toward the bridge abutment, and after traveling approximately 50 to 100 feet, and without any application of brakes, collided with the abutment at a speed of between 55 m.p.h. (as re-

membered by the driver) and 63 m.p.h. (as testified to by defendant's expert witness).

The highway at the entrance to the bridge was 24 feet wide, the bridge was 26.5 feet wide, and the railing was on the bridge parapet another few inches to the south. Thus, the extended railing was approximately 2 feet 6 inches south of the south edge of the highway pavement, extending toward eastbound traffic. The railing was metal, and curved away from the road at the end. At the impact this bridge railing went into the right front of the truck, entering the body of the truck some 6 inches to the left of the right front wheel, penetrating along the passenger's side of the engine, through the firewall, and up through the passenger's space in the truck's cab, and going out through the roof of the cab.

Plaintiff suffered severe injuries, primarily in that he incurred a partial loss of use of his right arm. He had not returned to work at the time of the trial in 1982.

In support of his position that defendant was negligent, plaintiff had the burden of proving that the installation of the guardrail would have prevented his injury and that the failure to install such a guardrail was therefore the proximate cause, or a proximately contributing cause, of his injuries. To sustain that burden plaintiff adduced evidence in the form of an opinion from Richard Large, a qualified engineer and an "accident-reconstruction" expert. Mr. Large testified that he was familiar "to some extent" with the purpose of the placement of guardrails and warning signs in connection with highways and bridges and that he was familiar with the type of guardrail ultimately installed at the bridge in question "[o]nly to the extent that I have seen them."

The following portion of the cross-examination of the expert witness fairly reflects the knowledge and expertise of the witness as to this particular incident. "Q. Do you know what the center of gravity

of the vehicle in question was? A. Between the wheels or vertically? Q. The vertical center of gravity. A. No, I don't. Q. So you didn't use that in your determinations at all? A. No, I didn't. Q. . . . Did you make any study at all, scientific or mathematical calculations or determinations, as to the possibility of vaulting or rolling over the guard rail had it been there? A. I've referenced some information with respect to that, yes. But I have not made an independent analysis of that. Q. Did the information you referenced have anything to do with the — did it specifically relate to a vehicle of the type, weight, and center of gravity of the vehicle in question? A. I don't know. It related to the weights, center of gravity is not given, except in cases where there were large vehicles involved, where I'm sure that the center of gravity would be higher than a passenger car. Q. So to make an accurate conclusion from any study, you would have to know the center of gravity and weight and other unusual characteristics of the vehicle as opposed to a passenger vehicle, wouldn't you, passenger car? A. Well, you have to know a lot more data than that, but that should be taken into consideration, yes. . . . Q. . . . And as I understand it then, you did not make any study taking any of those things into consideration? A. Well, as I indicated to you before, I have referenced some tables that concerned the results of a lot of barrier impact tests, and that's the extent of what I've done. Q. But not with specific reference to details on this particular vehicle? A. As I indicated, the center of gravity, vertical location, was not given. Q. Okay. Did you make any studies to determine if the ground were frozen to various depths, whether the guard rail posts would consume the energy of the encroaching vehicle or possibly snap? A. Well, I think you have to be more definitive about your question. *I haven't made any studies with respect to this guard rail system concerning a vehicle colliding with it*, so I

haven't done that either." (Emphasis supplied.)

In addition, careful review of the record shows that with regard to the factual basis on which he predicated his testimony the expert witness studied the accident scene photographs, other photographs of the scene taken later, drawings of the proposed construction, and the weekly working day reports of the contractors. Nowhere in his testimony did the witness ever state that he knew and based his opinion evidence on what kind of a vehicle was involved, the weight and height of such a vehicle, whether seatbelts were being used, the height of the guardrail, or the speed of the car at the moment it would have struck the nonexistent guardrail.

As later testimony developed, guardrails are designed primarily for the protection of passenger cars. Although much of his testimony was excluded, defendant's expert did present data as to the higher vertical center of gravity of a 1976 Chevrolet four-wheel-drive, short wheelbase pickup truck, which had larger-than-standard tires and heavy-duty springs—a vehicle of the type driven by Mr. Sharp. The general effect of a portion of testimony admitted from defendant's expert witness indicated, at the least, that the higher center of gravity and bumper configuration presented a different factual problem than presented by a passenger car running into a guardrail and that the speed of a vehicle running into a guardrail was important.

Nonetheless, over objection, plaintiff's expert witness was permitted to testify, in answer to a question as to his opinion as to the difference "in terms of potential injuries that could occur when a vehicle strikes a bridge rail and potential injuries that could occur when a vehicle strikes a guard rail," as follows: "If there is a guard rail installed, such as was installed after this accident, and with a vehicle running essentially parallel to the roadway and trying to get back up to the roadway, it would have deflected it back onto the bridge and there wouldn't

have been any injuries involved. There would have been some damage to the pickup, but no injuries to the passenger at that location."

We recognize that Neb. Rev. Stat. § 27-705 (Cum. Supp. 1982) provides that "[t]he expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." We have stated that "[e]xpert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture." *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 804, 277 N.W.2d 236, 241 (1979), quoted with approval in *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982).

In the instant case plaintiff's witness was permitted to testify, over objection, that the presence of guardrails would have resulted in the truck in effect being diverted back into its proper lane of travel with "no injuries to the passenger."

Further, the expert was required by § 27-705, on cross-examination, "to disclose the underlying facts or data" for his opinion. In this case the witness not only did not disclose such data but affirmatively established that he had no such data. There may well be the fortuitous, safe result testified to by the expert if a vehicle strikes a guardrail at a speed of 10 m.p.h., but it is pure speculation that the same safe result will follow when a pickup truck hits any fixed object at a speed of 55 m.p.h.

To show that guardrails are not the complete answer to all such accidents, and only as an example, we note the factual statement and factual result in *Shover v. General Motors Corp.*, 198 Neb. 470, 471, 253 N.W.2d 299, 301 (1977), where the facts were set out as follows: "The accident occurred when the

right front corner of the station wagon struck a guardrail on the right side of the highway. The station wagon continued along the guardrail until the right front struck the pier or abutment of an overpass. The rear of the station wagon then swung around to the west and the station wagon skidded across the highway and into the median where it overturned. The driver and all the passengers were injured. Roy sustained very severe injuries in the accident." In that case the vehicle was traveling at 65 m.p.h.

In this case there was no "reconstruction" of an accident that had occurred. Instead, on the flimsy data apparently considered by the witness, an accident was "constructed" or created. The expert gave no reasons for his opinion, and his conclusions are pure speculation and totally insufficient to form a basis for any opinion. The opinion testimony of plaintiff's expert witness had no proper foundation and should have been excluded.

As stated in *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 306-07, 275 N.W.2d 77, 81 (1979), "If an expert witness is to be permitted to render an opinion without prior disclosure of the underlying facts or data upon which his opinion is based, then the expert must at least establish by competent evidence that the matter involved in the opinion is of such nature that experts within the specific field could render an opinion. Moreover, when requested by the trial court, such expert should be required to produce sufficient evidence to establish that the underlying facts or data are of such a nature that an expert in the particular field would use or would rely upon such facts to reach a conclusion. Flory v. Holtz, 176 Neb. 531, 126 N.W.2d 686; Brugh v. Peterson, 183 Neb. 190, 159 N.W.2d 321."

Without such evidence plaintiff has not carried his burden of proof to establish that any action or inaction of defendant was a proximately contributing cause of plaintiff's injuries. The trial court prop-

erly determined that the driver of the pickup truck "was negligent in the operation of his vehicle by exceeding the speed which was reasonable and proper under the conditions existing, by failing to maintain a proper lookout, and by failing to keep his vehicle under reasonable control," but the court erred in failing to find that the negligence of the driver was the sole proximate cause of the accident and plaintiff's injuries.

In this connection we note the case of *Brown v. State*, 205 Neb. 332, 287 N.W.2d 676 (1980), where the facts were very similar to this case. In *Brown* a young driver drove into a bridge abutment, after first driving off the paved portion of the highway several times. This collision resulted in the death of the plaintiff's son. In the *Brown* case, as in this case, the guardrails to the bridge had not been installed at the time of the accident. In *Brown*, however, even more facts were stipulated; namely, the loaded weight of the passenger automobile, and the fact that, under the design specifications of the guardrail for the bridge, the guardrail would withstand an impact greater than that which the Brown automobile and occupants would exert on the guardrail even at a speed greater than that at which the automobile was traveling. We held at 337, 287 N.W.2d at 680, "While evidence was introduced as to the purpose and function of guardrails, the record contains nothing which would indicate conclusively that had the guardrails been in position at the time of the accident the resulting accident and death of the decedent would not have occurred." We recognize that in *Brown* we affirmed the decision of the trial court that the sole proximate cause of the accident was the negligence of the driver. In the present case, where there is no admissible evidence to support the contrary decision of the trial court, the same decision must be reached.

The plaintiff has not met his burden of proof. There is no proof that defendant's actions, if negli-

gent, were a proximately contributing cause of the accident, and, on the contrary, the facts show that the sole proximate cause of the accident was the negligence of the driver of the car in which plaintiff was riding. The case must be dismissed.

REVERSED AND DISMISSED.

SANITARY AND IMPROVEMENT DISTRICT NO. 145 OF DOUGLAS COUNTY, NEBRASKA, APPELLANT, V. CHARLES A. NYE, APPELLEE.

343 N.W.2d 753

Filed February 3, 1984. No. 82-605.

1. **Limitations of Actions: Pleadings: Demurrer.** A petition alleging a cause of action not commenced within the time prescribed by the appropriate statute of limitations is subject to a demurrer.
2. **Limitations of Actions: Pleadings.** If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Richard K. Lydick of Lydick & Peterson, for appellant.

Edward F. Fogarty of Fogarty, Lund & Gross, for appellee.

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

SHANAHAN, J.

Sanitary and Improvement District No. 145 of Douglas County, Nebraska (S.I.D.), sued its attorney, Charles A. Nye (Nye), for malpractice. S.I.D. appeals the Douglas County District Court's judgment sustaining Nye's demurrer and dismissing the action. We affirm.

According to the allegations of S.I.D.'s petition, in 1965 S.I.D. was in the process of annexing certain

real estate. Nye was the attorney for S.I.D. In order to complete the annexation approved by S.I.D., Nye was supposed to file S.I.D.'s annexation certificate with the Douglas County clerk. (See Neb. Rev. Stat. § 31-761 (Reissue 1960).) Nye failed to file the certificate in 1965, but continued as attorney for S.I.D. until February 1, 1979. In June 1981 S.I.D. discovered Nye's failure to file the certificate, filed the certificate to complete the annexation, and on February 12, 1982, sued Nye for malpractice.

Nye filed a demurrer reciting that S.I.D.'s petition failed to state a cause of action and that any claim of S.I.D. was barred by the statute of limitations. Nye's demurrer was sustained and S.I.D.'s petition was dismissed. S.I.D. appeals the judgment of the district court dismissing S.I.D.'s petition.

A petition alleging a cause of action not commenced within the time prescribed by the appropriate statute of limitations is subject to a demurrer. See *Schmer v. Gilleland*, 185 Neb. 54, 173 N.W.2d 391 (1970).

If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute. See, *George P. Rose Sodding & Grading Co. v. Dennis*, 195 Neb. 221, 237 N.W.2d 418 (1976); *Jones v. Johnson v. Pullen*, 207 Neb. 706, 300 N.W.2d 816 (1981).

" 'The traditional rule is that the statute begins to run as soon as the action accrues, and the cause is said to accrue when the aggrieved party has the right to institute and maintain a suit. In a contract action this means as soon as breach occurs, and in tort, as soon as the act or omission occurs.' " *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 294, 338 N.W.2d 594, 597 (1983).

To toll the statute of limitations, S.I.D. advocates that, after the attorney's failure to file a certificate to complete annexation in 1965, Nye had a daily duty

to file the certificate and that the time limit for bringing an action against Nye did not begin to run until discovery of the omitted certificate in June 1981.

The gravamen of S.I.D.'s complaint against Nye is the attorney's failure to file the certificate necessary to complete annexation so that S.I.D. could tax real estate within the annexed area. This omission took place in 1965 and was the solitary breach of duty under the circumstances upon which any claim for malpractice could be based. Recurring losses of tax revenue as a result of property being excluded from assessment bear upon possible damage caused by the omission, but S.I.D.'s cause of action accrued when Nye failed to file the certificate to complete annexation. From 1965 to the present, and subject to provisions for undiscovered claims not reasonably discoverable, there has been a 2-year statute of limitations regarding claims for professional negligence. See Neb. Rev. Stat. §§ 25-208 (Reissue 1964) and 25-222 (Reissue 1979). S.I.D.'s petition does not show any excuse for the failure to commence the action before February 12, 1982, approximately 17 years after the attorney's failure to file the certificate to complete the annexation. S.I.D. was required to show some justifiable preclusion of discovery, namely, the cause of action could not reasonably be discovered within the 2-year period prescribed by statute. Absent such showing in its petition, S.I.D. failed to plead a cause of action, and Nye's demurrer was properly sustained by the district court. For this reason the judgment of the district court dismissing S.I.D.'s suit is affirmed.

AFFIRMED.

Cite as 216 Neb. 357

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1536, APPELLEE, V. CITY OF FREMONT, NEBRASKA, APPELLANT.

345 N.W.2d 291

Filed February 3, 1984. No. 82-633.

1. **Commission of Industrial Relations: Appeal and Error.** The standard of review by the Supreme Court of orders and decisions of the Commission of Industrial Relations is generally restricted to considering whether the order of the commission is supported by substantial evidence, whether it acted within the scope of statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
2. **Commission of Industrial Relations: Evidence: Proof.** The burden is on the moving party in a Neb. Rev. Stat. § 48-818 (Cum. Supp. 1982) case to demonstrate that existing wages are not comparable to the prevalent wage rate.
3. **Commission of Industrial Relations: Evidence: Appeal and Error.** Determinations made by the Commission of Industrial Relations in accepting or rejecting claimed comparables are within the field of expertise of the commission and should be given due deference.
4. **Commission of Industrial Relations: Wages: Evidence.** With regard to a determination of conditions of employment under Neb. Rev. Stat. § 48-818 (Cum. Supp. 1982), the Commission of Industrial Relations will enter an order either adjusting the condition of employment or find a subject city's condition to be lesser or greater than the prevalent, and adjust the overall compensation accordingly, if, in the compared-to cities, the exact content of a condition of employment is clear from the total evidence.
5. _____: _____: _____. Experience and longevity are proper matters to be considered in determining the wages to be paid to employees within the same job classification.
6. _____: _____: _____. Where the employer has a large number of job classifications, but established lines of progression and established relationships between lines of progression, "key classifications" may be utilized to establish wages for all classes, provided reasonable requirements of prevalence and relevance are met.
7. **Commission of Industrial Relations: Wages: Evidence: Appeal and Error.** Guidelines used by the Commission of Industrial Relations to be followed in using the "key job classification" in a proceeding to determine compensation for public employees are not statutory requirements, and failure of evidence to strictly comply with guidelines does not require the Supreme Court to find that the action of the commission in developing the "key job classification" was arbitrary and capricious.

8. **Commission of Industrial Relations: Evidence: Expert Witnesses.** In a proceeding before the Commission of Industrial Relations, the hearing performs a truth-seeking function in settling controversies between the parties. It runs contrary to that function to suggest that unfavorable evidence in the form of an expert's opinion may be kept from either party in the interest of justice and to prevent prejudice.
9. **Expert Witnesses.** An expert witness should not be allowed to express an opinion where the evidence showed there was no adequate basis for the opinion.

Appeal from the Nebraska Commission of Industrial Relations. Reversed and remanded with directions.

Kelley Baker and Gerald B. Buechler, Jr., of Nelson & Harding, for appellant.

Thomas C. Lansworth of Bauer, Galter & Geier, for appellee.

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

HASTINGS, J.

The respondent, City of Fremont, Nebraska (City), has appealed from the decision of the Commission of Industrial Relations (CIR), which entered an opinion and order dated July 14, 1982, establishing wages for 33 different job classifications, beginning August 1, 1981. For reasons which we will specifically discuss, we must reverse the order of the CIR and remand the matter for further proceedings.

The International Brotherhood of Electrical Workers Local 1536 (Union) filed a petition with the CIR on August 28, 1981, alleging an industrial dispute existed because the Union and the City had reached an impasse in the negotiation of a new collective bargaining agreement.

At the pretrial conference the Union orally moved to be allowed to call James L. Jensen, the City's expert witness, as a witness for the Union's case in chief. The City objected, and both parties filed briefs with the CIR. The CIR ruled in favor of the

Union and permitted it to call Mr. Jensen. At trial the City objected to the Union calling Mr. Jensen as a witness, moved to dismiss at the close of the Union's case, and renewed its objection in the motion for new trial.

The City contends the CIR erred in (1) failing to grant the City's motion to dismiss, since the Union failed to prove "same or similar work" or a prima facie case of noncomparability; (2) ordering wages without taking into account the differences in pay schedules in compared-to locations regarding the length of time it takes a worker to advance from the minimum to maximum pay level on the salary schedule; (3) establishing wages without sufficient data; (4) ordering wage increases in excess of the evidence regarding certain classifications of workers; (5) calculating of overall compensation, since evidence shows that the City was above the prevalent in payment of fringe benefits; (6) allowing the Union to use the City's expert witness when competent expert witnesses were available; and (7) ordering wage and fringe benefits for nonbargaining Union employees.

In our review of orders and decisions of the CIR, we are restricted to considering whether the order of that agency is supported by substantial evidence justifying the order made, whether it acted within the scope of statutory authority, and whether its action was arbitrary, capricious, or unreasonable. *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983); *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981), *modified* 209 Neb. 597, 309 N.W.2d 65 (1981).

The law is clear that the burden is on the moving party in a Neb. Rev. Stat. § 48-818 (Cum. Supp. 1982) case to demonstrate that existing wages are not comparable to the prevalent wage rate. *General Drivers and Helpers Union v. City of West Point*, 204 Neb. 238, 281 N.W.2d 772 (1979). It is necessary for the Union to establish by evidence what were "the

prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions." § 48-818.

In making the comparison required by statute, it is necessary to take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employee.

In the present case the Union has satisfied the burden of proof of establishing a prima facie case of noncomparability. The Union's evidence consisted of comparisons with employees of the Nebraska cities of Beatrice, Grand Island, Hastings, Norfolk, and North Platte; the public power districts of Central Nebraska Public Power and Irrigation District and Nebraska Public Power District; and the Iowa cities of Ames, Cedar Falls, and Muscatine.

The City's evidence consisted of comparisons with employees of the Nebraska cities of Beatrice, Bellevue, Columbus, Grand Island, Hastings, Kearney, Norfolk, and North Platte; the public power districts of Norris Public Power District, Loup Public Power District, and the Nebraska Public Power District (Kramer plant); and the following cities outside Nebraska: McPherson and Manhattan, Kansas; Ames and Ankeny, Iowa; and Yankton, South Dakota.

From the arrays of both parties there were seven common employers: the Nebraska cities of Beatrice, Grand Island, Hastings, Norfolk, and North Platte; Nebraska Public Power District (Kramer plant); and Ames, Iowa. From these common employers the CIR created its array used to compute wages.

The CIR, in reaching its conclusion that the seven-member array was appropriately balanced and suf-

ficiently similar with enough like characteristics to be appropriate, used the figures presented by both parties, with minor adjustments for discrepancies. Reasons given for the discrepancies were that (1) the parties did not always agree which job class in a specific locality matched the key job class in Fremont; (2) the parties disagreed on what the maximum pay scale is on Grand Island's pay plan; and (3) the Union provided adjusted wage figures which took into account changes in pay rate since the filing of the petition.

Determinations made by the CIR in accepting or rejecting claimed comparables are within the field of expertise of the CIR and should be given due deference, and, by necessity, in attempting to arrive at comparables, require granting some discretion to the CIR. *AFSCME Local 2088 v. County of Douglas*, *supra*.

The second assignment of error and primary contention of the City is that the CIR failed to take into account the differences in pay schedules in compared-to locations regarding the length of time it takes a worker to advance from the minimum to the maximum pay level. The CIR, in denying the motion for new trial and reconsideration, found that this issue had been considered by the CIR when it rendered its original decision.

Fremont had a salary schedule of 2½ years, compared to salary schedules of 10 years for Grand Island, 8 years for Hastings, 5 to 8 years for North Platte, 7 years for Norfolk, and 4½ years for Ames, Iowa. The City argues the CIR should have adopted offered evidence of what the pay would have been for the other cities, determined at the 2½-year mark, in order to restructure Fremont's salary schedule.

The Union argues the salary schedule is not at issue, and since the CIR set wages by plugging in high and low salary figures to set the salary structure, the CIR should not consider midrange salary compu-

tations. The Union also argues the evidence offered at trial by the City was not to establish a prevalent wage, but to show that there was an inappropriate classification comparison used for the "key job classifications."

In the pretrial order the structure of the salary schedule was not among the items listed by the Union as being at issue. Nor was the issue of salary schedule raised in the City's answer or amended answer. The City did not request the CIR to amend the pay schedule, because it was satisfied with its salary schedule, but thought the other cities' pay periods should be adjusted to be comparable to the short term used in Fremont.

The City contends adjustments should have been made in other employers' compared-to schedules to reflect the differences in salary schedules, or, at the very least, the City should now be permitted to adjust its salary schedule to the comparable employers. We do not agree with the Union's assertion that the salary schedule was not at issue.

The Union further argues an adjustment in the salary schedule to reflect a 2½-year midrange adjustment would be inappropriate because the method of adjustment is one used for determining compensation in teacher pay cases and may not necessarily be applied to nonteacher cases.

With regard to a determination of conditions of employment under § 48-818, the CIR has the following alternatives: If, in the compared-to cities, the exact content of a condition of employment is clear from the total evidence, the CIR may enter an order either as to that condition of employment or find that the subject city's condition in this regard is lesser or greater than the prevalent, and adjust the "overall compensation" accordingly.

Section 48-818 states in part: "The findings and order or orders may establish or alter the scale of wages, hours of labor, or conditions of employment, or any one or more of the same." We believe the

timing difference in the salary schedules—which, it seems to us, is another way of defining experience and longevity in employment—is a condition of employment in this situation which must be adjusted to reach a comparability determination.

"The salary step schedule merely determined that employees with less than 1 year's experience, employees with 1 year's experience, and employees with more than 2 years' experience, all within the same job classification, should be paid wages differently depending upon their experience. It was a recognition that experience and longevity in employment may provide a basis for an increase in compensation over the starting salary fixed for a particular job classification." *Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth*, 205 Neb. 567, 569, 288 N.W.2d 729, 731 (1980).

Evidence offered by the City, but *apparently* disregarded in part by the CIR, was a series of exhibits, Nos. 2 to 12, prepared by James L. Jensen. These exhibits consisted of minimum, midrange, and maximum salary ranges for a variety of occupations in the various cities surveyed. He explained the purpose of using midrange figures as follows: "We use the mid-range salary for a number of reasons. I want, first of all, to determine that they have a range of salary and how they're generally structured for any given class of work. And so that we know that after a person's been on the job for two, two and a half years, normally think of that person as being able to function at a journeyman level for whatever that job might be. So I'd like to know what the salary is for — at that stage of a person's development of the job. Also we need to know the maximum salaries. . . . The mid-range salary I use is, if we can determine it is — and usually we can — is what the person would normally be paid in that job after being on the job for two to two and a half years."

If we understand what the CIR did, it computed a

minimum and maximum salary for Fremont, using those comparable figures from the cities in its array. As a result—and again we must add the limiting word "apparently"—Fremont will now be paying maximum salaries after 2½ years, whereas Grand Island does not reach that point until 10 years; North Platte, sometime between 5 to 8 years; Norfolk, after 7 years; and Ames, Iowa, for 4½ years.

Referring to the City's exhibits 2, 6, and 9, as well as table 23 of the CIR's opinion and order, we can perhaps demonstrate the objection raised by the City. The following is a listing of the minimum, midrange, and maximum hourly wages paid by comparable cities surveyed for three randomly selected occupations:

	Water Serviceman II		
Grand Island	$5.43	$6.29	$6.86
North Platte	6.16	6.82	7.50
Norfolk	5.43	6.00	7.23
Ames, Iowa	6.33	7.56	8.45
Fremont *	5.93	7.90	7.90
	Lineman First Class		
Grand Island	7.68	8.99	9.86
North Platte	8.24	9.04	11.37
Norfolk N/A			
Ames, Iowa	9.74	11.04(?)	11.04
Fremont *	8.63	11.87	11.87
	Meter Reader		
Grand Island	5.10	5.94	6.49
North Platte	5.87	6.48	7.16
Norfolk	5.16	5.70	6.91
Ames, Iowa	5.56	6.30	7.41
Fremont *	5.22	6.96	6.96

*As a result of the order of the CIR.

We may accept from the record the fact that the relationship between the minimum and maximum salaries of the surveyed cities and Fremont seems to be reasonable. However, the disparity appears when attempting to correlate the midrange salaries,

realizing that Fremont must pay that salary all during the time that the other cities do not reach their maximum salary levels, Grand Island, for example, for up to another 7½ years.

There may be a logical explanation for what the CIR did in this regard, but it does not appear in its order. For that reason the order of the CIR must be reversed and the cause remanded with directions to adjust the wage schedules for timing differences, or to justify its failure to do so.

The City also complains that the CIR erred in establishing wages without sufficient data to utilize the key class method. In establishing the wages for the 33 job classes, the CIR surveyed 13 key job classes to set wages within each progression. Specifically, the City argues that (1) the CIR did not meet two of the nine criteria established by the CIR to promote use of the key class method; (2) the CIR established wages for Lineman First Class in excess of the evidence for that class of workers; and (3) the CIR did not provide the City with an offset for more favorable fringe benefits or adjust the fringe benefits according to what was prevalent.

The City contends the Union failed to satisfy guidelines (5) and (6), which, in summary form, are: (5) "Key classifications" together with related lines of progression must permit direct or computed establishment of at least 85 percent of the classes involved; and (6) The "key classifications" or wage rates tendered should have at least one in each regular line of progression, or lines of progression should be established as comparable, or their relative market value established or apparent to the commission from its previous experience.

The City argued that Utility Technician II, Tree Trimmer IV, and Electric Serviceman II classifications should be eliminated because there were four or fewer comparisons within the seven-employer array and that such a reduction would leave only 25 classes, or 75.75 percent of the 33 classes of work.

Furthermore, the City also argued that the nonbargaining classes of Electrical Technician II and Engineering Technician II should be eliminated to reduce the figure to 74.19 percent.

In *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981), the CIR guideline (5) was interpreted. We allowed the CIR to add several nonsurvey positions to fit within one of the clerical lines of progression to reach the required percentage of job classifications. In the present case we find no error in the CIR including nonbargaining classes to meet the required percentage of job classifications. The technical argument on the specific number of comparisons is a more difficult question.

The City contends job classifications based upon three and four comparisons should be rejected because they fall short of the CIR's expressed preference, suggesting that it has rejected the use of two employers and three employers where there were other comparable employments available. However, we believe the CIR should be allowed to make a statistically significant determination with three comparisons in a seven-employer array.

We believe that where the employer has a large number of job classifications, but established lines of progression and established relationships between lines of progression, "key job classifications" may be utilized to establish wages for all classes, provided reasonable requirements of prevalence and relevance are met. We think that to set down a specific mathematical rule in § 48-818 cases would limit the discretion allowed the CIR to make comparability determinations.

Also, guidelines used by the CIR are not statutory requirements, and the failure of the evidence to strictly comply with the guidelines does not require us to find the action of the CIR in developing "key job classifications" was arbitrary and capricious. Thus, despite the CIR's past expressed preference for six to eight comparisons, the actual number of

comparisons needed is a question of reasonableness for the CIR.

The City next argues guideline (6) is not met because (1) there is not a key class in each line of progression, (2) there is no evidence to conclude the lines of progression are comparable, and (3) there is no proof of the relative market value. *In AFSCME Local 2088 v. County of Douglas, supra*, we found the requirements of guideline (6) could be satisfied by all the evidence taken as a whole, and the requirement concerning the lines of progression is only one of three options of that guideline.

In the present case a comparison of the job classifications in the bargaining unit with the Union wage rate exhibits proves the Union submitted key classification data in every line of progression, and computation of wage rates based on the key classification data is possible for 100 percent of the classes involved in the bargaining unit. The City's contention is unsupported by the evidence.

The City also claimed the CIR established wages for Lineman First Class in excess of the evidence for that classification of workers. The basis of the City's argument is that the selection of Lineman Apprentice as the "key job classification" was inappropriate because the duties of the class were in dispute. Again, the City's contention is unsupported. The Union submitted evidentiary exhibits and testimony relevant to this dispute. The CIR considered this evidence along with the City's evidence and resolved this dispute. We find this portion of the decision to be supported by substantial evidence.

The utilization of percentages of key classifications may distort the value of jobs below and above the key classification by valuing a class below the key class somewhat lower than what might be established by the market, while at the same time valuing a class above the key class somewhat higher than what might be established by the market. However, we believe this risk of somewhat higher valuation is

acceptable in order to make the task of analyzing large numbers of job classifications manageable.

We affirm the use of the "key job classification" by the CIR in arriving at comparable salaries for public employees having a large number of classifications.

In addition, the City contends there should have been an offset or adjustment because almost every one of the fringe benefits was above the prevalent. This contention that the CIR failed to consider fringe benefits is unsupported by the record. The CIR's order specifically states: "In considering 'overall compensation' the Commission finds that fringe benefits and other working conditions in dispute shall remain unchanged." Furthermore, tables 14 through 22, attached to the CIR order, are sufficient substantial evidence to support the CIR's decision, and we conclude the CIR decision is not arbitrary or unreasonable in this regard.

The sixth assignment of error argued by the City is the CIR's allowing the Union to call the City's expert witness, James L. Jensen, to testify. In *IAFF Local 831 v. City of No. Platte*, 215 Neb. 89, 337 N.W.2d 716 (1983), where the same issue was presented, we allowed the union to call the city's expert witness as a witness in its case in chief when the expert was merely called upon to express an opinion he had already formed prior to trial. In that case we said: "The trial performs a truth-seeking function in settling controversies between the parties. It runs contrary to that function to suggest that unfavorable evidence in the form of an expert's opinion may be kept from either party in the interest of justice and to prevent prejudice." *Id.* at 98, 337 N.W.2d at 722.

In the case before us Mr. Jensen was not called upon to make any additional investigation, but was called upon to express opinions he had already formed prior to trial. We believe the CIR was correct to allow Mr. Jensen to testify.

The City further argues that although Mr. Jensen is a qualified expert witness in this matter, his expert testimony should have been excluded because he had insufficient foundation upon which to base his opinion. An expert witness should not be allowed to express an opinion where the evidence reveals there is no adequate basis for the opinion. *Plattsmouth Pol. Dept. Coll. Barg. Comm. v. City of Plattsmouth*, 205 Neb. 567, 288 N.W.2d 729 (1980).

The City relies on our holding in *Plattsmouth Pol. Dept.*, *supra*, to argue the expert's testimony did not include a verification of actual work performed by those classified under various job positions.

In the present case Mr. Jensen is not without knowledge of the working conditions and content of individual job classifications in the compared-to utilities offered by both sides. First, the Union presented comparability evidence on each of the utility employers in its array, separate from the testimony of Mr. Jensen and of other witnesses. Second, Mr. Jensen has conducted wage and fringe benefit surveys for various municipalities for 16 years.

Prior to his consulting work, Mr. Jensen was employed as an administrative assistant by the city of Ames, Iowa, one of the compared-to utilities in the arrays of both parties. He had conducted the annual wage survey for Fremont for the last 5 years. These surveys included wage and fringe benefit comparisons for electrical, water, and sewage employees in Fremont and several Nebraska cities. The other cities in Mr. Jensen's prior surveys included Grand Island, Hastings, Norfolk, North Platte, and Beatrice. As a consultant, Mr. Jensen had previously participated in drafting Grand Island's job descriptions, drafted those of Beatrice and Fremont, developed a job classification plan for Hastings, and was in the process of developing a job classification plan for North Platte.

The third reason to find sufficient foundation is that Mr. Jensen personally visited the surveyed utili-

ties, and upon arriving at a given site checked with and visited with supervisors, department heads, or employees in verifying the job descriptions for comparability. Mr. Jensen did not always contact the actual personnel filling positions for every job in the survey, but, instead, used his judgment whether it was practical or feasible to track down and observe crews of personnel in action. We find that sufficient foundation existed to form an adequate basis to express an opinion.

The last assignment of error is that the CIR erred in ordering wages and fringe benefits for nonbargaining units Electrical Technician II and Engineering Technician II. The Union agrees with the City that these two classifications are not within the bargaining unit and should be excluded. This court agrees.

The action of the CIR in this case is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MELVIN D. STRONG AND PATRICIA A. STRONG, APPELLANTS, V. K & K INVESTMENTS, INC., DOING BUSINESS AS K & K DISTRIBUTING, ET AL., APPELLEES.

343 N.W.2d 912

Filed February 3, 1984. No. 82-648.

1. **Summary Judgment.** The purpose of a summary judgment proceeding is to pierce allegations of pleadings and to show conclusively that the controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law.
2. _____. The granting of summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party.
3. **Master and Servant: Negligence.** In order to sustain a recovery under the doctrine of respondeat superior, the relationship of master and servant must be shown to exist at the time of the injury and with respect to the particular transaction resulting in the alleged

tort, and the servant must be shown to be acting within the scope of his employment.

4. _____: _____. The conduct of a servant is within the scope of employment if, but only if, it is of the kind he is employed to perform, it occurred substantially within the authorized time and space limits, and it is actuated, at least in part, by a purpose to serve the master.
5. _____: _____. A master, in selecting an employee, must exercise a degree of care commensurate with the nature and danger of the business in which he is engaged and the nature and grade of service for which the servant is intended, but is required to hire employees possessing only such skill as is ordinarily and reasonably commensurate with the work to be performed by them.
6. **Master and Servant: Liability.** Where the facts present no conflict and furnish the basis for but a single inference, and that favorable to the master, his freedom from liability is to be determined by the court as a matter of law.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

J. Michael Moriarty, for appellants.

John C. Brownrigg of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellees.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and NORTON, D.J., and COLWELL, D.J., Retired.

NORTON, D.J.

This is an appeal from the district court for Douglas County, Nebraska, sustaining a motion for summary judgment.

The case arises out of an altercation which occurred on or about December 20, 1980. Melvin and Patricia Strong, husband and wife, were general managers of the Best Western Omaha Inn, a hotel located in Omaha, Nebraska. Defendant-appellee K & K Investments, Inc., is a liquor and beer distributor in and about Omaha, Nebraska. Persons in the employ of K & K were also named as defendants in the trial court. Those persons are not parties to this appeal.

On or about December 19, 1980, K & K sponsored a

Christmas party for its personnel. For these purposes it had rented space at the Omaha Inn. Alcoholic beverages were furnished by K & K and were served at the party. It appears that the party concluded around midnight, at which time certain of the K & K personnel left the party area and went into the hotel lobby and/or public lounge. The party area and lounge are located at opposite ends of the hotel. In the lounge entertainment and beverages were available. Working or assisting in the lounge at that time were Rodney and Gary Strong, sons of the plaintiffs.

At approximately 1 a.m., December 20, 1980, the lounge closed and the patrons began to leave. Shortly thereafter, an altercation broke out upon the premises of the hotel. Melvin Strong was notified. Upon reaching the parking lot of the hotel, he found a fight in progress, involving his sons and certain K & K personnel. In what Mr. Strong described as an attempt to stop this fight, he became involved, and sustained various injuries which he claims were the result of an intentional assault and battery upon him by K & K personnel.

In addition to the foregoing facts the evidence produced at the time of the hearing on the motion indicates that the K & K personnel involved in this altercation had attended the Christmas party and had consumed alcoholic beverages furnished by K & K. The evidence further indicates that, following the party, these same persons had gone into the public lounge and some were served drinks. The evidence also indicates that previous to this date some of those persons had been involved in fights and that one of them had been convicted of assault and battery. There is no evidence to show, or even raise the inference, that the latter facts were known to K & K on December 19 and 20, 1980.

Subsequently, an action for damages was filed, and K & K was joined as a defendant by reason of its employment of the other defendants. In due course,

K & K filed a motion for summary judgment. After a hearing the trial court sustained that motion and dismissed plaintiffs' petition as to K & K. In its order the trial court stated in part: "The Court finds that the closing of the sponsored event and the removal therefrom in space and time of the melee separate K & K from any causal connection with plaintiff's injuries, on any theory of asserted primary or vicarious liability cognizable in law. There is no genuine issue as to any material fact which, resolved favorably to plaintiff, would fasten liability upon K & K . . . ." The only issue presented to us by this appeal is the propriety of the trial court's action in sustaining the motion.

It is fundamental that the purpose of a summary judgment proceeding is to pierce allegations of pleadings and to show conclusively that the controlling facts are otherwise than alleged and that the moving party is entitled to judgment as a matter of law. *Frazier, Inc. v. 20th Century Builders, Inc.*, 188 Neb. 618, 198 N.W.2d 478 (1972). It is equally as fundamental that the granting of summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party. *Hiram Scott College v. Insurance Co. of North America*, 187 Neb. 290, 188 N.W.2d 688 (1971); *Juergens & Anderson v. Redding*, 198 Neb. 289, 252 N.W.2d 291 (1977).

In their assignments of error the plaintiffs claim that material issues of fact did exist in this case which, if resolved favorably to them by the trial court, would have resulted in liability being imposed upon K & K for any one of the following reasons: (1) Breach of K & K's duty as employer to control use by its employees of chattels belonging to K & K; (2) Breach of K & K's duty as employer to control the conduct of its employees on premises in the possession of K & K; (3) The doctrine of respondeat

superior; or (4) Negligence by K & K in hiring and retaining employees known to have violent propensities or in providing such employees, in a public building, a party at which large quantities of alcoholic beverages were served.

It might be well at this point to note that woven into the fabric of plaintiffs' assignments of error is the implication of liability based upon negligence or implied negligence for the act of furnishing alcoholic beverages to others who thereafter commit a tort upon third persons. Plaintiffs apparently take the position that the provisions of Neb. Rev. Stat. § 53-180 (Cum. Supp. 1982) in some fashion enlarge the civil liability of K & K as master, simply because it furnished or served alcoholic beverages to persons standing in a servant relationship to it. However, there is no longer a dramshop or civil liability act imposing strict liability for violations of this statute in Nebraska. See *Holmes v. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976). This implication is rejected insofar as it might permeate the assignments of error, as it was obviously rejected by the trial court.

Bearing this in mind, there are only two issues involved in this appeal. The first is whether or not material facts existed which would justify submitting to a jury the question of the nature and extent of K & K's business activities. The second, while in part conditioned upon a determination of the first question, also involves the scope of responsibility imposed by law upon an employer in hiring and retaining employees.

This court has previously stated that in order to sustain a recovery under the doctrine of respondeat superior, the relationship of master and servant must be shown to exist at the time of the injury and with respect to the particular transaction resulting in the alleged tort, and the servant must be shown to be acting within the scope of his employment. *Sperry v. Greiner*, 175 Neb. 524, 122 N.W.2d 463

(1963). Further, the court has stated that the conduct of a servant is within the scope of employment if, but only if, it is of the kind he is employed to perform, it occurred substantially within the authorized time and space limits, and it is actuated, at least in part, by a purpose to serve the master. *Johnson v. Evers*, 195 Neb. 426, 238 N.W.2d 474 (1976). In the earlier case of *Scott v. Service Pipe Line Co.*, 159 Neb. 36, 65 N.W.2d 219 (1954), the court said: "The acts of an employee are within the scope of the employment if, and only if, such acts are the class he is employed to perform or incidental thereto, or are the result of special instructions or directions to perform them. . . . In the absence of special authority it is not enough, in order to establish liability on the part of an employer, to show that the employer has an interest in what is being done; it must be made to appear that the employee whose act is in question has authority to perform the class of service to which the act belongs." (Syllabi of the court.)

When we examine the facts as known to us, together with all favorable inferences resolved in the plaintiffs' favor, it becomes readily apparent that the conduct in question occurred some time after and some distance from the place where the Christmas party was held and that any social or other contact between the employer and employee had ended when the party closed at midnight, December 19, 1980. No evidence appears that K & K required these persons to attend the Christmas party; but, more specifically, no evidence appears that there was any direction on the part of K & K that its personnel were to remain at the hotel after the party or engage in tortious acts. And, finally, there is no evidence of any subsequent ratification of their behavior by K & K. No other conclusion can be reached than the fact that what occurred was an independent, spontaneous act by the parties engaging in the altercation, was not within the normal activities of the employees, and certainly could not be said

to have been in furtherance of the business of K & K. On this basis one is left with the obvious: that no master-servant relationship existed at the time of the alleged tort.

Plaintiffs argue that whatever the situation may be, K & K was negligent in hiring and retaining employees known to have violent propensities. The applicable rule with regard to this matter appears to be as follows: "The master, in selecting an employee, must exercise a degree of care commensurate with the nature and danger of the business in which he is engaged and the nature and grade of service for which the servant is intended, but is required to hire employees possessing only such skill as is ordinarily and reasonably commensurate with the work to be performed by them." 57 C.J.S. *Master and Servant* § 559 at 271 (1948). The evidence discloses that the K & K personnel involved in this altercation were hired for purposes directly connected with the business of distributing the products of K & K. Based on this evidence, one could not say that they were unsuitable employees for the purpose for which they were originally hired or that K & K did not exercise ordinary and reasonable care in their selection. No rule of law requires the employer to search all records that exist to satisfy himself that an employee will not engage in conduct not allied with the purposes for which he was retained.

Where the facts present no conflict and furnish the basis for but a single inference, and that favorable to the master, his freedom from liability is to be determined by the court as a matter of law. 57 C.J.S., *supra* § 617. See, also, *Schwartz v. Riekes & Sons*, 195 Neb. 737, 240 N.W.2d 581 (1976); *Kessler v. Bates & Rogers Construction Co.*, 155 Neb. 40, 50 N.W.2d 553 (1951). As we reexamine this matter, we cannot but conclude that the facts present no conflict and lead but to a single inference. While the granting of a motion for summary judgment must be used with caution, it should not be necessary for a court to

submit an issue merely on the basis of speculation.

Having agreed with the trial court that no material facts exist requiring determination by the trier of fact, we affirm the judgment sustaining the motion and dismissing the petition as to K & K.

AFFIRMED.

ADOLPH KRESHA, APPELLANT, V. RAYMOND L. KRESHA, APPELLEE.

344 N.W.2d 906

Filed February 3, 1984. No. 82-754.

1. **Jury Instructions: Appeal and Error.** In determining the sufficiency of jury instructions on appeal to this court, such instructions are to be read as a whole; and when they fairly submit the case and the jury could not have been misled, there is no prejudicial error.
2. **Jury Instructions.** It is not error for the trial court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
3. **Rules of the Road: Motor Vehicles.** The statutory rules of the road in Nebraska are not applicable to the operation of motor vehicles on private property unless specifically so provided. Neb. Rev. Stat. § 39-603 (Reissue 1978).
4. _____: _____. In the absence of statutory regulation common-law rules apply.
5. **Courts.** The common law is inseparably identified with the decisions of the courts and can be determined only from such decisions in former cases bearing upon the subject under inquiry, and absent controlling decisions from state courts, precedents in other jurisdictions become persuasive.
6. **Negligence: Motor Vehicles.** An operator, in backing a vehicle at places other than a public street or highway, must exercise ordinary care. The situation may require the keeping of a lookout and, under some circumstances, an effective warning signal of the intention to back. Generally speaking, the backing does not constitute negligence where the operator does everything that a reasonably prudent person can do to avoid injury to others.
7. **Jury Instructions.** Trial court's instructions to jury in this case examined and found sufficient.
8. **Witnesses.** A party has a right to cross-examine a witness with regard to an interest which affects credibility.

9. **Insurance.** Where the fact of insurance is relevant to some issue in the case, it cannot properly be excluded, but where not relevant to any such issue, evidence of the existence of insurance coverage is inadmissible.
10. **Rules of Evidence.** 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. Neb. Rev. Stat. § 27-403 (Reissue 1979).
11. **Evidence: Juries.** Where different minds may draw different conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined.
12. **Directed Verdict.** In considering the propriety of a directed verdict, the trial court must resolve every controverted fact in favor of the party against whom the verdict is sought and give that party the benefit of every inference which can reasonably be drawn.

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

George H. Moyer, Jr., of Moyer, Moyer, Egley & Fullner, for appellant.

Barlow, Johnson, DeMars & Flodman, for appellee.

WHITE and CAPORALE, JJ., and BRODKEY, J., Retired, and BLUE, D.J., and COLWELL, D.J., Retired.

BRODKEY, J., Retired.

Plaintiff below, Adolph Kresha, appeals to this court from the verdict of the jury and judgment entered thereon by the district court for Butler County in favor of the defendant, Raymond L. Kresha, in an action brought to recover damages for injuries sustained when the defendant, Adolph's son, allegedly backed into him with a pickup truck. The case was submitted to the jury on the sole issue of the negligence of the defendant, the contributory negligence of the plaintiff not having been submitted to the jury, although pled as a defense in the action.

In his brief on appeal to this court, the plaintiff makes numerous assignments of error which he con-

tends entitle him to a reversal of the judgment in favor of the defendant. The principal issue involved in this appeal is whether the court erred in submitting the case to the jury on improper instructions. The plaintiff also alleges that the court erred in overruling his motion in limine; in not sustaining his motion for a directed verdict of liability against the defendant; and in refusing to admit evidence of the defendant's liability insurance.

By way of background the record reveals that the incident giving rise to this lawsuit occurred in the middle of a field on the farm operated by the defendant, Raymond Kresha (also known as Larry), who is the son of the plaintiff. It appears that Adolph had stopped by the farm that morning to obtain a sample of grain from a farm truck located in the field in question. He testified that he observed Raymond driving onto the field and followed him in his truck. He parked his truck approximately 15 feet north of the grain truck previously referred to.

Raymond testified that he saw his father follow him into the field, and thought that he was going to get a grain sample from the truck. He then decided to back his truck up to the grain truck so that his father could use the back of the pickup as a platform to aid him in reaching the sample. He further testified that as he began to back his truck, he observed his father walking around the front of the grain truck, and also saw his father looking at him. He stated that he backed his truck diagonally across the furrows of the field at approximately 4 miles per hour. When he was 10 to 15 feet from the truck, he looked into his rearview mirror and saw his father standing near it and looking at him. He slowed his pickup by taking his foot off the gas pedal, and then put on the brake and was "practically stopped" before the accident occurred. He testified that, despite his use of the brakes, the pickup slid down the last furrow next to the truck and into the side of the grain truck. Raymond admits that he does not

know what his father did while the pickup moved the last 10 feet, and further admitted that he did not have Adolph in view the entire time that he was backing up.

Adolph's testimony was that he had climbed onto the grain truck and collected a sample in a cup, and then began to climb down. He stated that he heard a motor running, looked to the north, and for the first time saw Raymond's truck backing toward him, with the wheels spinning, about 17 feet away. Whereupon, he got as close to the cab of the grain truck as he could. He indicated that the left rear of the pickup struck him, and then pulled forward. He testified that he fell over and felt terrific pain in his legs, head, arm, and shoulder.

The principal issue in this case is whether the trial court improperly instructed the jury on the issues presented, as contended by the plaintiff. Plaintiff argues that the instruction on lookout and control was incomplete and therefore erroneous, and also argues that certain requested instructions were improperly refused.

The law is well settled that in determining the sufficiency of jury instructions on appeal to this court, such instructions are to be read as a whole; and when they fairly submit the case and the jury could not have been misled, there is no prejudicial error. *Duling v. Berryman*, 193 Neb. 409, 227 N.W.2d 584 (1975). We have also held that it is not error for the court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case. *Baumann v. Hutchinson*, 124 Neb. 188, 245 N.W. 596 (1932).

To determine whether the instructions given by the trial court in this case were sufficient, it is first necessary that we determine what law applies to the operator of a motor vehicle on private property, or, specifically, in the middle of a farm field. The first question that presents itself, therefore, is whether

the statutory rules of the road in Nebraska are applicable. It is clear that they are not. Neb. Rev. Stat. § 39-603 (Reissue 1978) specifically provides in part: "The provisions of sections 39-601 to 39-6,122 relating to operation of vehicles refer exclusively to operation of vehicles upon highways except where a different place is specifically referred to in a given section . . . ." See, also, *Bassinger v. Agnew*, 206 Neb. 1, 290 N.W.2d 793 (1980); *Johns v. Glidden*, 173 Neb. 732, 114 N.W.2d 767 (1962). In the absence of statutory regulation we must therefore ask what law is applicable to such situations. It is clear that in that event the common law applies. See, Comment to NJI 7.01; *Bassinger v. Agnew, supra*; *Johns v. Glidden, supra*; *Anderson v. Wilcox*, 189 N.W.2d 541 (Iowa 1971).

The next question that logically presents itself is, How do we determine what the common law is? This question is answered in *Whitehorn v. Dickerson*, 419 S.W.2d 713 (Mo. App. 1967), in which that court stated at 717: "Though it is said that the common law imports a system of unwritten law, not evidenced by statute, but by tradition and the opinions and judgments of the sages of the law . . . the common law is inseparably identified with the decisions of the courts and can be determined only from such decisions in former cases bearing upon the subject under inquiry. Musser v. Musser, 281 Mo. 649, 656-660, 221 S.W. 46, 47-48(2)." In *Whitehorn* the court also held that absent controlling decisions from state courts, precedents in other jurisdictions become persuasive.

The common-law duty of a driver backing his vehicle on private property was considered and discussed in *Ybarra v. Wassenmiller*, 206 Neb. 164, 291 N.W.2d 725 (1980), which case involved an accident occurring when a camper-trailer was backing up in the parking lot of a bank and collided with a bank guard. In that case this court applied the rule that the driver of an automobile must exercise ordinary

care in backing his machine, so as not to injure others by the operation, and this duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured. Likewise, in *Boardman v. McNeff*, 177 Neb. 534, 129 N.W.2d 457 (1964), which was a farm accident case, the court pointed out that the defendant had a duty to use due care in the control and operation of his tractor, the court stating at 539-40, 129 N.W.2d at 461: "The negligence which was alleged related to the defendant's control and operation of the tractor. The defendant knew that the plaintiff was present. There was evidence from which the jury could find that the defendant knew that the plaintiff had stepped between the disk and the pickup and was unfastening the chain. Under such circumstances it was the duty of the defendant to use due care in the control and operation of the tractor to avoid injuring the plaintiff."

The measure of care required of the operator of a motor vehicle in an open field may well be different from that required of such operator when driving his vehicle upon a road or highway. In *Bennett v. Young*, 266 N.C. 164, 171, 145 S.E.2d 853, 859 (1966), that court stated: "Of course, one driving a motor vehicle in an open field, with no reason to suppose any other person is nearby, is not to be held to the same degree of vigilance in maintaining a lookout, whether proceeding forward or backward, as is one driving upon a heavily traveled highway. But where the motorist has reason to believe that any pedestrians or other vehicles may be in his intended path, he must exercise for their safety the care which a reasonable man would use under the same circumstances, even though he be driving upon private property."

The general law is well summarized in 60A C.J.S. *Motor Vehicles* § 349(1)(b) at 468 (1969), as follows: "[A]n operator, in backing a vehicle at places other than a public street or highway, must exercise ordinary care. . . . [T]he situation may require the

keeping of a lookout, and, under some circumstances, an effective warning signal of the intention to back. . . . [G]enerally speaking, the backing does not constitute negligence where the operator does everything that a reasonably prudent person can do to avoid injury to others."

We now examine the instructions given by the trial judge to the jury in this case. In its charge to the jury the trial court gave the jury the definition of "negligence" as set out in NJI 3.02, as follows: "Negligence is doing something which an ordinary, prudent person would not have done under similar circumstances, or failing to do something which an ordinary, prudent person would have done under similar circumstances." The court also, in its instruction No. 8, set out the duty owed by the defendant in the operation of his truck, as follows: "It is the duty of the driver of a motor vehicle, in operating the same, to keep such diligent watch and lookout and have his vehicle under such reasonable control as will at all times enable him to avoid an accident.

" 'Reasonable control,' as used in this instruction, requires that drivers of motor vehicles take into consideration such factors as the speed of their vehicle, and all other factors affecting driving conditions that may have been developed by the evidence.

"A driver must use ordinary care and such senses of sight and hearing and such other instruments as are at his command to avoid an accident, and it is the duty of drivers to look and see that which is within the limits of danger."

The instruction above set out is basically the first three paragraphs of NJI 7.03, dealing with "Lookout and Reasonable Control." Some modification was made to the instruction by the court in order to adapt the wording to the "off-the-highway" situation that was involved in this case.

Among the plaintiff's requested instructions was a modified version of the "lookout" instruction, which

included the final NJI paragraph which had been deleted by the court in the instructions prepared by it: "The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully at a place not on a street or highway or he is driving where he has a right to be. He must keep a lookout in the direction of travel or in the direction from which others may be expected to approach and he is bound to take notice of the driving surface, to observe the conditions along the way and to know what is in the path of his vehicle for a reasonable distance."

Plaintiff argues that this paragraph should have been included in the instructions to the jury because the jury must be informed in what direction the driver had a duty to look. While it is true that the NJI instructions shall be given where applicable, *Jones v. Foutch*, 203 Neb. 246, 278 N.W.2d 572 (1979), we find no prejudicial error in the court's failure to include the final paragraph as set out above. It must be remembered that the jury was instructed of the duty of the defendant to "keep such diligent watch and lookout" and to "look and see that which is within the limits of danger." In the context of the case, since the driver was backing up when the accident occurred, and the only area of danger was behind him, we cannot conclude that the jury was misled with regard to the direction in which the driver should have looked. We conclude that the trial court, in its instruction, properly gave the common-law duty imposed upon a driver while backing on private property, and the substance of the missing paragraph was, we believe, adequately covered in the instruction as given, and no prejudice resulted to the plaintiff.

Plaintiff also argues that it was error for the court to omit the portion of the "lookout" instruction which requires a driver to take notice of the condition of the driving surface. We believe that that duty was adequately covered by that part of the

instruction requiring the driver to consider "all other factors affecting driving conditions that may have been developed by the evidence." We do not believe the jury could have been misled by the instruction. We find the language of the court in *Patterson v. Edgerton Sand & Gravel Co.*, 227 Wis. 11, 277 N.W. 636 (1938), to be persuasive. In that case the court stated at 18, 277 N.W. at 639: "[F]urthermore, in so far as the private character of the premises was involved herein, the jury was rightly and sufficiently instructed that 'the questions of negligence as applied to Wescott, the driver, are not covered by the law of the road or the rules applying to a public highway; but his actions are to be tested according to the ordinary standards of prudence and care which persons ordinarily exercise when driving a truck or anything of the kind upon private grounds.' That instruction was applicable and ample in respect to the questions submitted to the jury as to negligence on the part of Wescott in failing to keep a proper lookout, and in failing to give a proper signal of his intention to back the truck."

We also comment briefly on plaintiff's other requested instructions. One of the instructions requested was as follows: "The law does not forbid the backing of a motor vehicle, and to do so does not constitute negligence, but the driver must exercise ordinary care in backing his machine so as not to injure others by the operation, and his duty requires that he adopt sufficient means to ascertain whether others are in the vicinity who may be injured.

"It is his positive duty to look backward for approaching vehicles or pedestrians and to give them timely warning of his intention to back, when a reasonable necessity for it exists.

"He must not only look backward when he commences his operation, but he must continue to look backward in order that he may not collide with or injure those lawfully using the premises."

The foregoing requested instruction is a modifica-

tion of a principle set out in *Chew v. Coffin*, 144 Neb. 170, 12 N.W.2d 839 (1944), in which case it was applied to a vehicle backing from a driveway into a street. We have since held that while it is the duty of the driver to keep a lookout in the direction of anticipated danger, he cannot be expected to maintain a constant lookout in one direction. *Colton v. Benes*, 176 Neb. 483, 126 N.W.2d 652 (1964); *Gross v. Johnson*, 174 Neb. 273, 117 N.W.2d 534 (1962). It would therefore appear that the third paragraph of the offered instruction was inapplicable and an incorrect statement of the law as it applies to this case. The first two paragraphs of the offered instruction, while accurate, are, we believe, covered in substance by the court's instructions on negligence, lookout, and control. There was no prejudice in the refusal of the court to give the requested instruction.

Plaintiff also requested an instruction to the effect that the statutes of Nebraska require the installation of a horn on a vehicle and that the law contemplates an opportune use of the horn to apprise pedestrians of the approach of a vehicle.

As has previously been pointed out, the statutory rules of the road are generally inapplicable to private property. However, notwithstanding, this court has held that in backing an automobile onto a street or highway, a driver must give a signal of his intention to back *when a reasonable necessity for it exists*. *Fries v. Goldsby*, 163 Neb. 424, 80 N.W.2d 171 (1956); *Taulborg v. Andresen*, 119 Neb. 273, 228 N.W. 528 (1930). In backing a vehicle the operator's duty to sound a horn is not an absolute one, but depends upon the circumstances at the time. *Ybarra v. Wassenmiller*, 206 Neb. 164, 291 N.W.2d 725 (1980).

We conclude that in instructing the jury of the defendant's duty to use such instruments as are at his control, and by instructing on the definition of negligence, the trial court sufficiently apprised the jury of the driver's duty. It was not necessary, nor would it have been proper, to give the instruction

discussing a specific duty to sound a horn. See, *Johnson v. Haddix*, 522 S.W.2d 859 (Ky. App. 1975); *Halley v. Brown*, 92 N.H. 1, 24 A.2d 267 (1942).

We have examined the remaining instructions requested by the plaintiff, most of which were not discussed in his brief, and we find that the court properly instructed on every issue that was necessary to submit to the jury. The offered instructions were either inapplicable to the facts involved in this case or were covered in substance by the court's other instructions, keeping in mind that all that was necessary to instruct upon was the common-law rule of the duty to use ordinary care, all as previously discussed in this opinion.

We briefly comment upon the other assignments of error made by the plaintiff in this case. He complains that the trial court improperly overruled a motion in limine filed by him. Plaintiff had sought to prevent the defendant from mentioning contemporaneous litigation involving the parties, and other incidents, tending to show hostility or hard feelings between the two. Defendant wished to present such evidence to impeach the plaintiff. The court received the evidence on the theory that it affected the credibility of other witnesses, and also had a bearing on the determination of damages. The law is well settled that considerable latitude is allowed in eliciting from a witness, or in attempting to elicit and to establish, bias, hostility, or interest of the witness bearing upon his credibility. *Smith v. Hornkohl*, 166 Neb. 702, 90 N.W.2d 347 (1958).

A party has a right to cross-examine a witness with regard to an interest which affects credibility. *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983). The evidence of the other litigation involving the family members and the relationship between the various family members were relevant to establish bias and hostility toward one family member and against another. It was properly admitted.

Plaintiff also assigns as error the court's refusal to permit him to prove that defendant had liability insurance. Plaintiff claimed that the evidence would negate the inference that he was acting out of malice in filing the suit, and would rehabilitate the witness' testimony.

It is the established law of this jurisdiction that where the fact of insurance is relevant to some issue in the case, it cannot properly be excluded, but where not relevant to any such issue, evidence of the existence of insurance coverage is inadmissible. *Swartz v. Peterson*, 199 Neb. 171, 256 N.W.2d 681 (1977). See, also, Neb. Rev. Stat. § 27-411 (Reissue 1979). Plaintiff's malice, or lack of malice, in filing the lawsuit is irrelevant to the issues of negligence or damages. The purpose of offering the evidence of liability insurance was merely to indicate that defendant may not have had to pay any judgment rendered against him. However, whether relevant or irrelevant, we believe the court properly exercised its discretion under Neb. Rev. Stat. § 27-403 (Reissue 1979), which states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Finally, plaintiff contends that the court erred in refusing to direct a verdict of liability against the defendant.

The rule is well established that where different minds may draw different conclusions from the facts proved, or if there is a conflict in the evidence, the matter at issue must be submitted to the jury to be determined. *Boardman v. McNeff*, 177 Neb. 534, 129 N.W.2d 457 (1964). In considering the propriety of a directed verdict, the trial court must resolve every controverted fact in favor of the party against whom the verdict is sought and give that party the benefit of every inference which can reasonably be

drawn. *Stephen v. City of Lincoln*, 209 Neb. 792, 311 N.W.2d 889 (1981). Both sides presented evidence as to how the accident occurred and where the plaintiff was located at various times. Some of the evidence was in dispute. Considering the evidence presented and giving the defendant the benefit of all favorable inferences, we cannot say that the trial court was in error when it refused to direct a verdict of liability in favor of the plaintiff. Reasonable minds could differ as to whether an inference of negligence should be drawn, and, therefore, the issue of liability was a question to be determined by the jury.

In view of what we have stated above, we conclude that the verdict of the jury and judgment of the court entered thereon were not clearly wrong and therefore must be affirmed.

AFFIRMED.

FLOBERT INDUSTRIES, INC., A CORPORATION, APPELLANT, V. JOHN H. STUHR, JR., ET AL., APPELLEES.

343 N.W.2d 917

Filed February 3, 1984. No. 82-780.

1. **Issue Preclusion.** For the theory of issue preclusion to bar further litigation on a specific issue, the issue concluded must be identical, must have been raised or could have been raised and litigated in the prior action, must have been material and relevant to the disposition of the prior action, and the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.
2. **Judgments: Issue Preclusion.** Although an issue is actually litigated and determined by a final and valid judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded where a new determination of the issue is warranted by factors relating to the allocation of jurisdiction or venue among the courts of the state.
3. **Trespass.** In order to maintain trespass to land the plaintiff must be the owner of, or in possession of, the land when the acts complained of were committed.

Appeal from the District Court for Boone County: JOHN M. BROWER, Judge. Affirmed.

Warren L. Reimer of Ptak, Ptak & Reimer, for appellant.

Stanley J. Oliverius and Bernard L. McNary of Oliverius & McNary, for appellees.

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

HASTINGS, J.

Plaintiff commenced this action in the Boone County District Court to enjoin the defendants from trespassing and encroaching upon certain property and to recover damages from trespasses which occurred since September 24, 1978. The defendants answered by denying the allegations and setting up as a defense to the second cause of action that the defendants were the owners in fee of the land, a railroad right-of-way. The trial court found in favor of the defendants, denied the injunction, and dismissed the plaintiff's petition. We affirm.

The northwest quarter of Section 18, Township 22 North, Range 6 West, of the 6th P.M., Boone County, Nebraska, was acquired by Benton Cotterman from the United States by patent in 1884. On September 13, 1886, Benton Cotterman and his wife, Lena, conveyed by warranty deed to Fremont, Elkhorn and Missouri Valley Railroad Company, predecessor in title to Chicago and Northwestern Railway Company (C. & N.W. Ry. Co.), the railroad right-of-way consisting of a 100-foot strip of land across the middle of the quarter section. That deed contained the provision that "if at any time after said Railroad shall have been constructed, the said party of the second part, its successors and assigns, shall abandon said road, or the route thereof shall be changed so as not to be continued over said premises, the land hereby conveyed and all rights in and to the same, shall revert to the said party of the first, their heirs and assigns."

In 1903 the Fremont, Elkhorn and Missouri Valley

Railroad Company conveyed the right-of-way to the C. & N.W. Ry. Co. C. & N.W. Ry. Co. used the right-of-way until 1970, when it sought approval from the Interstate Commerce Commission to abandon the line. The final order of the Commission was confirmed on July 26, 1971, effective August 23, 1971. Meanwhile, C. & N.W. Ry. Co. conveyed its interest in the right-of-way by quitclaim deed to Flobert Industries, Inc. (plaintiff), dated February 6, 1969, recorded April 10, 1972.

Between the years 1972 and 1973 the plaintiff removed the rails and ties located on the right-of-way. From 1972 to 1976 the plaintiff paid real estate taxes on the land, removed a fence across the north boundary, and occasionally inspected the land until 1978.

In September 1893 Benton Cotterman conveyed the portion of the quarter section lying west of the right-of-way to his wife, Lena. In November 1892 Benton Cotterman conveyed the east portion of the quarter section to Charles Preusser. Subsequently, in February 1902 the Cottermans conveyed the west portion of the quarter section to Charles Preusser also. In these transactions the deeds conveyed only the land on either side of the right-of-way. In other words, the land under the right-of-way was not deeded to Charles Preusser.

The northwest quarter section was by subsequent conveyances deeded to John W. Stuhr and Jane C. Stuhr. The Stuhrs obtained title to the real estate by warranty deed dated February 2, 1953, recorded February 6, 1953. Each of the deeds in the chain of title excepted the railroad right-of-way out of the balance of the quarter section.

The Stuhrs conveyed their interest in the quarter section to their sons John H. Stuhr, Jr., and Mark F. Stuhr (defendants) by warranty deed dated December 13, 1973, recorded May 4, 1976. That deed did not contain an exception to the right-of-way.

After the C. & N.W. Ry. Co. ceased to use the right-of-way in 1971, the Stuhrs fenced off the north

boundary line, pastured cattle, and cut noxious weeds on the property. In 1978 the Stuhrs had the right-of-way leveled and have been farming the property since that time. Defendants have paid the property taxes for the years 1977 until the present.

In October 1978 the plaintiff brought suit in the county court of Antelope County against the defendants to recover certain salvaged railroad materials. In April 1980 the Antelope County Court found generally for the plaintiff on its petition and dismissed the defendants' cross-petition for damages when it found the plaintiff to be in actual possession of the real estate, that plaintiff was exercising control over the right-of-way and had not abandoned it, and that plaintiff was entitled to bring the action to recover the salvaged railroad materials. The county court awarded the plaintiff possession of certain steel culverts and granted no other damages or relief. The plaintiff and defendant in that action are the same parties to the present action.

After the amended petition for this trespass action was filed June 5, 1980, the defendants located and obtained quitclaim deeds to the railroad right-of-way from the heirs of Benton and Lena Cotterman.

The plaintiff assigns as error the Boone County District Court's finding that the plaintiff was not in actual possession of the subject property and not entitled to maintain an action in trespass. The basis upon which the plaintiff contends error existed is that (1) the issue of actual possession of real estate was previously adjudicated by the Antelope County Court and could not be relitigated in the Boone County District Court and that (2) title acquired after trespass is no defense in an action for trespass.

The basis of the plaintiff's claim is that though it is not the legal owner, it is the one in possession. Furthermore, the plaintiff contends that for the purpose of determining possession, the Antelope County Court decision precludes any relitigation of this issue. We note that the trial court here, the Boone

County District Court, found that the plaintiff had no greater right to possession of the real estate than the defendants.

It is the rule that to bar further litigation on a specific issue, the issue concluded must be identical, must have been or could have been raised and litigated in the prior action, must have been material and relevant to the disposition of the prior action, and the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *JED Constr. Co., Inc. v. Lilly*, 208 Neb. 607, 305 N.W.2d 1 (1981). While it is true that the parties are the same, that some of the material facts judicially determined in the former action are identical, and that the issue of who had possession of real estate was raised in both actions, the determination of possession of the real estate in the former action was given only as a general finding to defeat the defendants' claim to personal property by adverse possession of the real estate and the appurtenances attached to it.

This court, having carefully reviewed the evidence and exhibits from the action in Antelope County, finds that the plaintiff's contention that res judicata, or more aptly defined as "issue preclusion," applies to this case is without merit. Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: "(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them." Restatement (Second) of Judgments § 28 at 273 (1982).

Comment *d.* of the Restatement, *supra* at 279 reads as follows: "*Courts of the same state (Subsection (3)).* Not infrequently, issue preclusion will be asserted in an action over which the court render-

ing the proper judgment would not have had subject matter jurisdiction. In many such cases, there is no reason why preclusion should not apply; the procedures followed in the two courts are comparable in quality and extensiveness, and the first court was fully competent to render a determination of the issue on which preclusion is sought. In other cases, however, there may be compelling reasons why preclusion should not apply. For example, the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims and thus may be wholly inappropriate to the determination of the same issues when presented in the context of a much larger claim . . . [o]r the legislative allocation of jurisdiction among the courts of the state may have been designed to insure that when an action is brought to determine a particular issue directly, it may only be maintained in a court having special competence to deal with it. In such instances, after a court has incidently [sic] determined an issue that it lacks jurisdiction to determine directly, the determination should not be binding when a second action is brought in a court having such jurisdiction. The question in each case should be resolved in the light of the nature of litigation in the courts involved and the legislative purposes in allocating jurisdiction among the courts of the state."

It is our opinion that the Antelope County Court incidentally determined the issue of possession of real estate only to dispose of the defendants' claim to the personal property by adverse possession, and it would be wholly inappropriate to not relitigate this issue in the trespass action. When considering Neb. Rev. Stat. § 25-401 (Reissue 1979), local actions involving real estate, which states in part, "All actions to recover damages for any trespass upon or any injury to real estate shall be brought only in the county where such real estate or some part thereof is situated," it seems even more appropriate to re-

litigate the issue of possession in the Boone County District Court. Although § 25-401 is actually a venue statute and not a subject matter jurisdiction statute, we believe the exception to issue preclusion still applies.

Having denied the issue of possession to be precluded, this court, having carefully reviewed the evidence and exhibits, agrees with the trial court and finds that the plaintiff did not have possession of the property, nor did the plaintiff have control over the property; that any right to the real estate was derived from the right of the C. & N.W. Ry. Co.; and that although the plaintiff had a right to remove the personal property, it had no greater right to possession of the real estate than the defendants.

Finding that the plaintiff did not have possession of the real estate or any right to possession of the real estate, it is prevented from bringing this action in trespass unless it has a claim to title. In order to recover for trespass the plaintiff need only have title or possession of the land when the acts complained of were committed. *Franz v. Nelson*, 183 Neb. 137, 158 N.W.2d 606 (1968).

Here, we point out that the trial court correctly noted the east property line of the western tract of land conveyed to Mrs. Cotterman was in fact the west boundary of the railroad right-of-way; that the west boundary line of the eastern tract of land conveyed to Mr. Preusser was in fact the east boundary line of the right-of-way; and that because of these deeds, the true owner of the fee title at the time of abandonment was Benton Cotterman, his heirs, or assigns. The evidence is uncontroverted that the defendants have obtained quitclaim deeds to the railroad right-of-way from Benton and Lena Cotterman's heirs and are the owners in fee.

Having neither possession nor title, the petition is dismissed, and it is not necessary to consider the claim that title acquired after trespass is not a defense in an action for trespass.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

VOLTMER FAMILY FARMS, INC., A NEBRASKA CORPORATION, APPELLANT, V. BOARD OF EQUALIZATION OF RICHARDSON COUNTY, NEBRASKA, APPELLEE.

343 N.W.2d 755

Filed February 3, 1984. No. 83-006.

1. **Easements.** An easement gives no title to the real estate on which the servitude is imposed.
2. _____. An easement is not an estate in land, and the estate in fee simple from which an easement is granted is not reduced to a lesser estate as a result of the easement.
3. _____. An easement is an interest in real estate, an incorporeal hereditament, which permits use of another's land for a specific purpose.
4. **Taxation: Valuation.** Nonexempt real estate in Nebraska is subject to taxation at its actual value.

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

Hoch & Steinheider, for appellant.

Richard L. Halbert, for appellee.

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

SHANAHAN, J.

Voltmer Family Farms, Inc. (Voltmer), appeals the judgment of the district court for Richardson County affirming the action of the board of equalization of that county in determining the actual value of Voltmer's real estate. We affirm.

In order to alleviate flooding and drainage problems caused by the Nemaha River, drainage district No. 1 (and its successor, drainage district No. 7) of Richardson County by proceedings in eminent domain in 1949 acquired a right-of-way affecting

Voltmer's farmland, namely, an easement for a river channel and drainage works, including earth removal, construction of levees, and a "floodway." The president of Voltmer testified that in connection with the condemnation proceedings, appraisers told him that the land subject to the easement would be removed from the county's tax rolls. The petition filed by the drainage district contained no allegation that the land within the easement would be removed from the tax rolls.

As the channel of the Nemaha crossed Voltmer's land, and adjacent to the river, there was a floodplain bordered by a levee—all according to the right-of-way or easement acquired by the drainage district. From 1970 to the present action in the district court, Voltmer's farm of 160 acres, including the land subject to the easement, has been on the county tax rolls. As a result of Voltmer's protest and a hearing before the Board of Equalization of Richardson County, the actual value of the land subject to the easement was reduced by 50 percent. Voltmer claims that the land within the easement should have "zero valuation" and that the land within the easement should not have been taxed to Voltmer. The district court found that Voltmer failed to prove the board of equalization's action was unlawful, and affirmed the board's action in determining the actual value of Voltmer's real estate for taxation.

The record reflects misunderstanding regarding the nature of an easement and the manner of reaching actual value for taxable real estate which is subject to an easement.

An easement gives no title to the real estate on which the servitude is imposed. See, *Alvin v. Johnson*, 241 Minn. 257, 63 N.W.2d 22 (1954); *Kleih v. Van Schoyck*, 250 Wis. 413, 27 N.W.2d 490 (1947); *Morris v. Townsend*, 253 S.C. 628, 172 S.E.2d 819 (1970); *Douglas v. Medical Investors, Inc.*, 256 S.C. 440, 182 S.E.2d 720 (1971).

An easement is not an estate in land, and the es-

tate in fee simple from which an easement is granted is not reduced to a lesser estate as a result of the easement. See, *Town of Menasha v. City of Menasha*, 42 Wis. 2d 719, 168 N.W.2d 161 (1969); *Douglas v. Medical Investors, Inc.*, *supra*.

An easement is an interest in real estate, an incorporeal hereditament, which permits use of another's land for a specified purpose. See, *Independent Sch. Dist. v. DeWilde*, 243 Iowa 685, 53 N.W.2d 256 (1952); *Peaslee v. Saginaw Drain Comr.*, 365 Mich. 338, 112 N.W.2d 562 (1961); *Alvin v. Johnson*, *supra*; *Farnes v. Lane*, 281 Minn. 222, 161 N.W.2d 297 (1968); *Morris v. Townsend*, *supra*; *Douglas v. Medical Investors, Inc.*, *supra*; cf. *Consolidated School District No. 102 v. Walter*, 243 Minn. 159, 66 N.W.2d 881 (1954).

The drainage district did not acquire fee title to the Voltmer real estate located within the boundaries of the easement, but obtained only a right to use land in accordance with the stated purpose for which the easement was acquired. Acquisition of the easement did not transfer, reduce, or otherwise alter Voltmer's fee in the land within the confines of the easement.

"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." Neb. Rev. Stat. § 77-201 (Reissue 1981). See *Hastings Building Co. v. Board of Equalization*, 212 Neb. 847, 326 N.W.2d 670 (1982).

"In an appeal from a county board of equalization on the ground that the property has been valued in excess of its actual value, the sole issue to be determined is the actual value of the property. . . . There is a presumption that the valuation made by a board of equalization is correct. However, this presumption disappears when competent evidence to the contrary is introduced. The reasonableness of the

valuation then becomes a question of fact to be determined from the evidence. . . . The burden of proof remains upon the party contesting the valuation to establish that the valuation was incorrect." *Otradovsky v. Board of Equalization*, 206 Neb. 559, 560-61, 294 N.W.2d 334, 336 (1980). For purposes of taxation "actual value," "market value," and "fair market value" mean exactly the same thing. See *Hastings Building Co. v. Board of Equalization*, *supra*.

It is true that one area of the Voltmer real estate may have a value less than another, when different areas within the entire tract are viewed as isolated and independent parts. However, Voltmer's title to the entire tract, that is, title to the land inside and outside the easement, united the 160 acres so that the easement's location at a particular site within the taxable unit was a burden borne by and affecting the whole tract. The easement's resultant burden was a factor to be considered in determining the fair market value (actual value) of the tract's unified acres—a factor for the formula found in Neb. Rev. Stat. § 77-112 (Reissue 1981) to ascertain "actual value" of taxable property. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization*, 179 Neb. 415, 138 N.W.2d 641 (1965). Unification of the areas inside and outside the easement eliminates Voltmer's theory of separate valuation of those areas. The theory of separate valuation was Voltmer's only attack upon the determination of actual valuation made by the board of equalization. In rejecting Voltmer's theory we find that Voltmer has not rebutted the presumption of correct valuation made by the board of equalization. The judgment of the district court affirming the action of the board of equalization is correct.

Voltmer has alleged that in the condemnation proceedings to acquire the easement, the appraisers told Voltmer that the land within the easement would be removed from the county's tax rolls. Ap-

praisers in eminent domain proceedings are not representatives of the condemning authority, e.g., the drainage district, but, rather, are "disinterested" freeholders called upon to ascertain the compensation due the landowner as a result of the taking. See Neb. Rev. Stat. § 31-321 (1943). The rights acquired and consequential liabilities for governmental acquisition of the easement are determined by the declarations in the petition of taking filed at the commencement of the proceedings in eminent domain. See *Danish Vennerforning & Old Peoples Home v. State*, 191 Neb. 774, 217 N.W.2d 819 (1974); cf., *Gable v. State*, 176 Neb. 789, 127 N.W.2d 475 (1964); *Richardson v. Big Indian Creek Watershed Conservancy Dist.*, 181 Neb. 776, 151 N.W.2d 283 (1967). The statement attributed to the appraisers is a promissory stipulation not contained in the petition of taking and does not affect the easement acquired over Voltmer's land. See *Danish Vennerforning & Old Peoples Home v. State, supra*; cf. *Blobaum v. State*, 179 Neb. 304, 137 N.W.2d 855 (1965); cf., also, *Gable v. State, supra*. Therefore, whether such representation was made by the appraisers is irrelevant to the questions before us.

For the reasons given the judgment of the district court is affirmed.

AFFIRMED.

IN RE ESTATE OF LAURA M. NICHOLSON.
BLANCHE J. WILLY, APPELLANT AND CROSS-APPELLEE, V. MARION POWERS AND THE OMAHA NATIONAL BANK, PERSONAL REPRESENTATIVES OF THE ESTATE OF LAURA M. NICHOLSON, APPELLEES AND CROSS-APPELLANTS.

343 N.W.2d 758

Filed February 3, 1984. No. 83-080.

1. **Decedents' Estates: Contracts: Evidence.** Where one is claiming the estate of a deceased person under an alleged oral contract,

the evidence of the agreement and its terms must be clear, satisfactory, and unequivocal.

2. _____: _____: _____. Evidence of declarations of a deceased person concerning a parol contract does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Daniel J. Duffy and Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Larry E. Welch of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees.

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

BOSLAUGH, J.

This action was commenced by the filing of a claim in proceedings to administer the estate of Laura M. Nicholson, deceased. The claimant, Blanche J. Willy, alleged that she had furnished private duty nursing care to the decedent from April 1973 until her death in September 1978, pursuant to an agreement with the decedent that she would leave her entire estate to the claimant.

The claim was disallowed by the personal representatives of the deceased. A petition for allowance of the claim was filed, and, after hearing, the county court found there had been no proof of an oral contract or performance of such a contract. Upon appeal to the district court the motion of the personal representative The Omaha National Bank for a summary judgment was sustained.

In *In re Estate of Nicholson*, 211 Neb. 805, 320 N.W.2d 739 (1982), we reversed the summary judgment in favor of the defendants and remanded the cause to the district court for trial. The issues to be determined were whether an oral agreement to make a will existed, and, if so, whether there was

part performance such that the contract could be deemed to have been "executed" before January 1, 1977, within the purview of Neb. Rev. Stat. § 30-2351 (Reissue 1979), and such that a court of equity could compel specific performance.

Upon remand the trial court found that the evidence did not establish an oral agreement as alleged by the claimant and that the claimant had been fully paid for her services to the deceased. The claimant has again appealed to this court.

The record shows that beginning sometime in 1972, the claimant was employed by Hugo Nicholson, the late husband of the decedent, to provide private nursing care. Although not a registered nurse or a licensed practical nurse, the claimant provided geriatric nursing services on a private basis. The claimant cared for Hugo Nicholson at a salary rate of $3.50 per hour until his death in April 1973.

The claimant testified that sometime prior to Hugo's death he requested a commitment from the claimant that she would care for his wife, Laura, after his death. The claimant agreed to do so, and beginning shortly after Hugo's death she began to provide care and companionship to the deceased. In the beginning Laura was not in need of nursing care, but the claimant drove her to the doctor, to the hairdresser, to the grocery store, and to church. The claimant accompanied Laura on trips, and testified that she often took Laura to the claimant's home and cooked for Laura. The claimant testified that she kept herself available for Laura Nicholson, who often called her and requested services and companionship.

Although the claimant had been paid weekly by Hugo, the claimant testified that Laura told her after his death, "Blanche, I don't want to pay you; I'll take care of you when I die." Laura told her several times, "You'll be surprised, Blanche. I'm leaving you everything I have, but I expect you to take care of me." The claimant testified that she was

not paid for her services nor did she ever submit a bill prior to July 1978. In 1978 Laura Nicholson became ill and required full-time nursing care. The claimant testified that at that time Laura requested her to submit bills because the claimant would no longer be able to work part-time and Laura knew she needed the money. The claimant submitted statements for her services from April 1978 until Laura's death in September 1978, and she was paid for these services.

The will of Laura Nicholson, dated May 19, 1978, which was admitted to probate, provides in pertinent part: "EIGHTH. I give the sum of Five Thousand Dollars ($5,000.00), my davenport, large chair and foot stool, my secretary, my twin beds, my bedroom chest and night stand to my friend Blanche J. Willy presently of 350 North 41st Avenue, Omaha, Nebraska in appreciation of all of the kind and helpful things she has done for me." The claimant accepted the tangible property but has not accepted the $5,000 bequest.

Catherine Murphy, a registered nurse who sometimes substituted for the claimant in caring for Laura Nicholson, testified that she was not paid by Nicholson but was paid by the claimant. She testified that Laura Nicholson told her that Laura planned to "leave [Blanche] everything I have."

The claimant has assigned as errors the finding that an oral agreement did not exist and the failure of the court to find that there had been sufficient part performance of the contract prior to January 1, 1977. The personal representatives cross-appeal, assigning as error the failure of the court to determine that the contract was not executed prior to January 1, 1977, and thus that the requirements of § 30-2351 must be met.

We try the issues de novo and reach an independent conclusion without being influenced by the findings of the trial court, except to give weight to the fact that the trial court saw the witnesses and

observed their demeanor. *Chicago Lumber Co. v. Horner*, 210 Neb. 833, 317 N.W.2d 87 (1982); Neb. Rev. Stat. § 25-1925 (Reissue 1979).

Section 30-2351 sets forth the standard of proof in actions based upon a contract to make a will. The statute provides: "A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after January 1, 1977, can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract. The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills."

Since it is undisputed that no writing exists, a contract cannot be established pursuant to § 30-2351. The issue is whether an oral agreement existed and, if so, whether it was executed prior to January 1, 1977.

Where one is claiming the estate of a deceased person under an alleged oral contract, the evidence of the agreement and its terms must be clear, satisfactory, and unequivocal. *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982); *Guynan v. Guynan*, 208 Neb. 775, 305 N.W.2d 882 (1981); *Kimmel v. Roberts*, 179 Neb. 8, 136 N.W.2d 208 (1965).

In the present case the only evidence of an oral agreement was the testimony of the claimant and Catherine Murphy concerning statements made to them by the deceased. Evidence of declarations of a deceased person concerning a parol contract does not amount to direct proof of the facts claimed to have been admitted by those declarations. Such evidence, when not supported by other evidence, is generally entitled to but little weight. *In re Estate of Layton, supra*; *O'Neal v. First Trust Co.*, 160 Neb. 469, 70 N.W.2d 466 (1955).

The evidence does show that the claimant pro-

vided companionship to the deceased, without pay, from 1973 through 1977. The record further shows that the claimant paid Mrs. Murphy, her substitute. However, this evidence was not clear and unequivocal proof of an agreement.

The evidence does not disclose with the requisite clarity the terms of the alleged agreement. Although the claimant agreed to care for Laura Nicholson, the nature of the services she was to provide was not clear and her compensation was not discussed at that time. From 1973 to 1978 Laura Nicholson required no nursing care. The claimant provided various services such as companionship and cooking during this time and was not compensated for them. The testimony does not clearly reveal that the alleged promises made by the deceased to take care of the claimant or to leave her everything were made as consideration for these services. It can be concluded from the evidence that these promises were based upon an appreciation of the claimant's kindness and friendship. The statements allegedly made by Laura Nicholson with regard to taking care of the claimant or leaving her everything are not consistent, in that it is unclear how much of the monetary estate, if any, the claimant would receive. When the claimant provided nursing care during the last illness of the deceased, the claimant was paid for her services.

As we view the record, the claimant failed to show by clear, satisfactory, and unequivocal evidence the terms of the alleged oral agreement to bequeath the entire estate to her. As we stated in *In re Estate of Layton*, *supra* at 529, 323 N.W.2d at 823, " ' "It is very proper that the assertion of such a contract, especially when it is claimed to be entirely in parol, should be regarded by the court with grave suspicion, and the establishment thereof required by evidence which clearly indicates the minds of the parties met upon the terms of the contract sought to be established." ' *Rudolph v. Hartung*, 202 Neb. 678,

683, 277 N.W.2d 60, 63 (1979). One can hardly say that the minds of the parties met upon the terms of an oral agreement when the record does not reveal with certainty what the terms of the alleged agreements were."

Declarations of intention or of the wishes of the parties do not tend to support a conclusion that a contract to bequeath has been proven by clear, definite, satisfactory, and unequivocal evidence. *Eagan v. Hall*, 159 Neb. 537, 68 N.W.2d 147 (1955). In the present case we at best can conclude only that Laura Nicholson stated that she planned to leave claimant all or a portion of her estate.

There being no proof of a contract, we need not consider the other assignments of error or the cross-appeal. The judgment of the district court is affirmed.

AFFIRMED.

RICHARD GRINT ET AL., APPELLANTS, V. PAUL HART ET AL., APPELLEES.

343 N.W.2d 921

Filed February 3, 1984. No. 83-355.

1. **Equity: Appeal and Error.** In an action in equity we review the matter de novo without reference to the findings of fact made by the trial court, but where the testimony or evidence is in irreconcilable conflict, we take into consideration that the trial court observed the witnesses.
2. **Injunction.** A party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle it to relief.
3. **Waters.** A watercourse is defined by statute as any depression or draw 2 feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse.
4. _____. Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow.

5. _____. In order to constitute an exception to the general rule that surface water may be repelled, at least some of the distinctive attributes of a watercourse must be demonstrated.
6. **Easements: Proof.** Prescriptive rights are not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence.
7. _____: _____. A claimed easement must be viewed from both ends of the prescriptive period. The nature and extent or scope of the user must from the beginning be clearly established. At the end of the period it must appear in retrospect that there has been no material change or variance from the limits or course adopted or established at the beginning. A lesser user prevents a right to an easement and a greater user is of no importance until the full prescriptive period has elapsed from the initiation of the greater use. The law requires that the easement must be clearly definable and precisely measured.
8. **Easements: Abandonment: Proof.** Abandonment of a prescriptive easement must be pled and proved, the burden of proof being on the party alleging it.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Affirmed.

Robert E. Wheeler of Stowell & Wheeler, P.C., for appellants.

Bernard B. Smith of Smith & Smith, for appellees.

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

WHITE, J.

This is an action in equity to enjoin the defendants from obstructing a watercourse and for damages sustained by the plaintiffs. After trial on the issues the trial court inspected the premises and entered judgment for the defendants. We affirm.

Plaintiffs relied on two theories in the trial court. The first theory is that the waterflow across the lands involved constitutes a watercourse and, as such, defendants have no right to obstruct or repel the waterflow to the detriment of the plaintiffs. The second theory advanced by plaintiffs is that they have a prescriptive easement which allows them the right to drain the waters from their land onto the defendants' land.

Since this is an action in equity, we review the matter de novo without reference to the findings of fact made by the trial court, but where the testimony or evidence is in irreconcilable conflict, we take into consideration that the trial court observed the witnesses. We also take into consideration the fact that the trial court did view the premises, and we will give appropriate weight thereto. *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982).

The record reveals the following facts. Richard and Margaret Grint, plaintiffs-appellants, are the owners of the southeast quarter of Section 7, Township 19 North, Range 17 West, of the 6th P.M., in Custer County, Nebraska. Paul and Arlene Hart, defendants-appellees, own Section 17, Township 19 North, Range 17 West, of the 6th P.M., Custer County, Nebraska. The plaintiffs' property lies north of the defendants' property, and the general flow of drainage in this area is from northwest to southeast. There are approximately nine sections of land to the north and west of the land of the parties that drain in this direction. In its natural state water flows from the northwest, across the plaintiffs' land, and into a lagoon or swampy area on the southwest corner of the Sargent golf course. To the south of the lagoon a natural ridge exists on defendants' land, commencing at the northwest corner of their section and extending to the east and to the south. This ridge is from 9 to 11 feet above the golf course land and serves to prevent any water in the lagoon from flowing south onto the defendants' land.

At the time defendants acquired their land in 1954, there was an artificial V-shape cut in the ridge. In times of deluge this cut would serve to drain excessive water that assembled in the lagoon. It is uncontroverted that the water in question is surface water as defined by Nebraska law. See, *Kuta v. Flynn*, 182 Neb. 479, 155 N.W.2d 795 (1968); *Sullivan v. Hoffman*, 207 Neb. 166, 296 N.W.2d 707 (1980).

At trial Paul Hart testified that after heavy rains

in the spring of 1962, he constructed a dam in the cut to prevent any overflow water from the lagoon from draining onto his land. Both defendants testified that no water flowed through this cut from 1954 until 1962. The dam which defendants placed in the artificial cut remained intact until the spring of 1972 when a resident golfer and his friend, without the defendants' knowledge or permission, dug a small slit in the dam in order to alleviate the flooding on the golf course. The defendants discovered the small opening in 1974; however, they testified that to their knowledge no water flowed through the dam until the snowmelt in 1978. In the spring of that year Willard Hart, defendants' son, constructed a new dam to the north of the old one and close to the county road so that the defendants would know if the dam had been tampered with. Shortly thereafter, Harold Grint and others met with Paul Hart and asked him to remove the dam. Apparently relying on the group's representation that corrective action would be taken to alleviate the drainage problems in the area, the defendants removed the dam.

In August 1981, nothing having been done to remedy the drainage problem in the area, the defendants' son, during a period of unusually wet weather, again filled the cut. No water has flowed through the cut since.

Plaintiffs contend that in 1978, 1981, and 1982, when the cut was filled, it caused water to back up from the lagoon and flood a portion of their land. This flooding resulted in the inability to plant crops or the crops drowning in standing water.

Plaintiffs rely on *Pint v. Hahn*, 152 Neb. 127, 40 N.W.2d 328 (1949), for their proposition that the artificial cut made through the natural ridge created a watercourse in which the defendants have no right to dam or obstruct to the detriment of the plaintiffs. It is elementary that a party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle him to relief. The

issue remains, then, as to whether a watercourse, natural or artificial, drained the surface water on the lands in question.

A watercourse is defined by statute as "[a]ny depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." Neb. Rev. Stat. § 31-202 (Reissue 1978).

" ' "To constitute a water course, it must appear that the water usually flows in a particular direction; and by a regular channel, having a bed with banks and sides; and (usually) discharging itself into some other body or stream of water. It may sometimes be dry. It need not flow continuously; but it must have a well defined and substantial existence. * * * there is a broad distinction between a stream and brook, constituting a water course, and occasional and temporary outbursts of water occasioned by unusual rains or the melting of snows, flowing over the entire face of a tract of land, and filling up low and marshy places, and running over adjoining lands, and into hollows and ravines which are in ordinary seasons destitute of water and dry." ' " *Barry v. Wittmersehouse*, 212 Neb. 909, 912-13, 327 N.W.2d 33, 35 (1982).

In the instant case diffused waters were assembled in a low area. Any water that did flow through the artificial cut would spread out in a diffused state over the defendants' land and eventually, after filling the low areas, will flow into a natural watercourse located on defendants' land. This watercourse then flows into the Loup River.

In *Barry v. Wittmersehouse*, *supra* at 912, 327 N.W.2d at 35, we held that "[i]n order to constitute an exception to the general rule that surface water may be repelled, at least some of the distinctive attributes of a watercourse must be demonstrated."

We are convinced that no watercourse existed for the drainage of the surface water in question. In

truth, the effect of refilling the artificial cut was to keep this water flowing in its natural state.

There being no watercourse unlawfully blocked by the defendants, the question then becomes whether or not the plaintiffs have an easement which would force the defendants to maintain a cut in the ridge.

In the recent case of *Stricker v. Knaub*, 215 Neb. 372, 338 N.W.2d 757 (1983), we noted that prescriptive rights are not looked upon with favor and generally must be proved by clear, convincing, and satisfactory evidence. We further held that " '[a] claimed easement must be viewed from both ends of the prescriptive period. The nature and extent or scope of the user must from the beginning be clearly established. At the end of the period it must appear in retrospect that there has been no material change or variance from the limits or course adopted or established at the beginning. A lesser user prevents a right to an easement and a greater user is of no importance until the full prescriptive period has elapsed from the initiation of the greater use. The law requires that the easement must be clearly definable and precisely measured.' " *Id.* at 377-78, 338 N.W.2d at 761.

Even if we were to hold that the plaintiffs did meet the burden of proving a prescriptive easement, the record reveals that any such easement has long been abandoned.

Although the year is in dispute, there was evidence adduced at trial that the artificial cut was filled by Paul Hart in 1962. William Skolil, plaintiffs' predecessor in interest, knew that Paul Hart filled the cut. He did not complain. No water flowed through the cut, to the knowledge or damage of the defendants, until the snowmelt in the spring of 1978. Except for the small slit made by the golfers in 1972 and the conditional reopening in 1978, the artificial cut was effectively filled from 1962 to the present. We find that the defendants have effectively pled and proved abandonment of any ease-

ment that the plaintiffs may have enjoyed. See, *Whipple v. Nelson*, 143 Neb. 286, 9 N.W.2d 288 (1943); *Lackaff v. Bogue*, 158 Neb. 174, 62 N.W.2d 889 (1954).

It is clear from the record that much of the land in this general area is burdened by water drainage problems which increase in severity yearly. The record also conclusively shows that the plaintiffs have been damaged as a result of the defendants refilling the artificial cut in the ridge. We fail to see, however, how it can be said that the plaintiffs have any remedy, legal or equitable, against the defendants.

AFFIRMED.

RUSSELL F. MORAVEC, APPELLANT, V. RICHARD E. MORAVEC ET AL., APPELLEES.

343 N.W.2d 762

Filed February 10, 1984. No. 82-794.

1. **Fireman's Rule: Negligence.** A fireman or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or occupant owes no greater duty than to refrain from injuring him by willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care.
2. **Rescue Doctrine: Negligence.** Under the rescue doctrine it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger and attempting to remove or eliminate the hazard; that is, the less the danger to the third party, the less the risk the volunteer is justified in taking.

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

Blevens, Blevens & Jacobs, for appellant.

Barlow, Johnson, DeMars & Flodman, for appellees.

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

WHITE, J.

This is an action for personal injuries suffered by the plaintiff, an employee of defendants, when he was attempting to remove a hazardous condition from defendants' home. The trial court sustained defendants' motion for summary judgment and plaintiff appeals. We reverse and remand.

The following facts are established by the deposition of plaintiff, and for the purposes of review of the propriety of the ruling are undisputed. At the time he sustained his injuries plaintiff-appellant, Russell F. Moravec, was the 21-year-old son and employee of defendants-appellees, Richard E. and Maryann Moravec. Plaintiff's employment duties involved general farm labor on defendants' farm. When defendants were not home, they generally left work instructions for plaintiff on the kitchen table in their residence.

On September 10, 1980, after Russell had completed his work assignment he returned to defendants' residence for additional instructions. As Russell approached the house, he observed a haze through the window. Upon opening the front door plaintiff was immediately met with black smoke. He proceeded through the entryway into the kitchen, where he observed that the source of the smoke was a kettle located on the kitchen stove. Russell then shouted a warning for any occupants to "get out." He then grabbed the kettle, but it was too hot to handle. Using a sweat shirt to pick up the kettle, he started to take it outside. The plaintiff was nearly to the door when the kettle, which contained lard, exploded, severely burning him. As he was exiting the house, Russell again yelled "get out," as the exploding lard had caused numerous small fires in the

house. Russell twice reentered the house to shout warnings and attempt to telephone for assistance. Unable to see the dial because of the thick smoke, he drove to the neighbors' for help.

Maryann Moravec had been stewing tomatoes earlier that day, and Russell thought the kettle contained burning tomatoes. It was not until later that plaintiff discovered his mother had been rendering lard in the kettle and had inadvertently turned the burner to "high" instead of "off" before leaving the house.

The trial court, in sustaining defendants' motion for summary judgment, held that the fireman's rule was applicable and stated that "[a]n individual who undertakes to fight a fire on the premises of another assumes the risk of the premises as he finds them."

The sole issue raised by this appeal is whether the trial court correctly applied the fireman's rule to preclude plaintiff's recovery. We hold that under the facts of this case the rescue doctrine, not the fireman's rule, is controlling.

The fireman's rule, most recently set out in *Lave v. Neumann*, 211 Neb. 97, 99-100, 317 N.W.2d 779, 781 (1982), is as follows: " '[A] fireman or individual fighting a fire on the premises of an owner or occupant is a bare licensee to whom the owner or occupant owes no greater duty than to refrain from injuring him by willful or wanton negligence or a designed injury, except in certain cases where there may be the duty to warn of hidden danger or peril known to the owner or occupant but unknown to or unobservable by the fireman in the exercise of ordinary care.' "

The defendants cite no case, nor could we find any, in which the fireman's rule was applied to an individual fighting a fire who was not a professional or volunteer fireman.

"Although one who negligently causes a fire, necessitating the calling of a professional or volunteer fireman to fight the fire, is not ordinarily held

liable, on the basis of such negligence, for injury to the fireman incurred in the course of carrying out his function, a person other than a professional or volunteer fireman who attempts to control a fire or to save life or property from a fire has generally been treated by the courts as standing in a different position than a fireman, and as not being subject to the rule of nonliability as applied to firemen. Thus, aside from issues of duty and breach of duty on the part of one alleged to have negligently caused a fire, the courts have for the most part been concerned with the so-called rescue doctrine in determining whether a recovery was allowable for personal injury to or the death of a person other than a fireman who sustained the injury or death in an attempt to control a fire or to save life or property from a fire." Annot., Liability of One Negligently Causing Fire for Injuries Sustained by Person other than Firefighter in Attempt to Control Fire or to Save Life or Property, 91 A.L.R.3d 1202, 1205 (1979). See, also, 35 Am. Jur. 2d *Fires* § 34 (1967).

Under the rescue doctrine it is not contributory negligence for a plaintiff to expose himself to danger in a reasonable effort to save a third person or the property of a third person from harm. The extent of the risk which the volunteer is justified in assuming under the circumstances increases in proportion to the imminence of the danger and the value to be realized from meeting the danger and attempting to remove or eliminate the hazard; i.e., the less the danger to the third party, the less the risk the volunteer is justified in taking. *Lave v. Neumann*, *supra*; *Wolfinger v. Shaw*, 138 Neb. 229, 292 N.W. 731 (1940).

We are of the opinion that the rescue doctrine is applicable in this case and the fireman's rule is not. We further conclude that whether or not the plaintiff acted as a reasonable person would have acted under similar circumstances is a question for a jury and should have been submitted to it.

REVERSED AND REMANDED.

ROBERT CHARLES MCCHESNEY, APPELLEE, V. CITY OF NORTH PLATTE, APPELLEE, AND NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

343 N.W.2d 925

Filed February 10, 1984. No. 83-015.

1. **Liquor Licenses.** Under the provisions of Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982), the arbitrary recommendation of denial of the issuance of a liquor license made by a local governing body, based only on the belief that there are sufficient licenses in existence, does not, standing alone, justify the denial of an otherwise valid application.
2. **Administrative Agencies: Liquor Licenses.** The Nebraska Liquor Control Commission may deny a retail liquor license to a qualified applicant only if it finds that one or more of the requirements of Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982), including public convenience and necessity, are not present.
3. **Administrative Agencies: Liquor Licenses: Appeal and Error.** Neither the district court nor this court is entitled to review the record de novo to make those enumerated findings required by Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982). Rather, such reviewing courts are entitled to determine whether the findings of the Nebraska Liquor Control Commission are supported by substantial evidence or whether such findings were arbitrary or capricious.
4. _____: _____: _____. The failure of the Nebraska Liquor Control Commission to make the findings of fact and conclusions of law provided for in Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982) does not make its order void, but only irregular, which requires a reviewing court to remand the case to the commission with directions to make such findings in support of any order to be made.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Reversed and remanded with directions.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellant.

John A. Gale of Girard and Gale, for appellee McChesney.

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

HASTINGS, J.

The appellee, Robert Charles McChesney, filed an

application with the appellant, Nebraska Liquor Control Commission, for a retail off-sale beer license to be located at a Kwik Stop facility at Jeffers and B Streets in North Platte, Nebraska. On the basis of a finding that the "local governing body recommended denial of said application," the application was denied. On appeal to the district court the decision of the commission was reversed and a license was ordered to be issued. The commission has appealed.

The main proposition of law relied upon by the commission is the statement that a recommendation of denial by a local governing body, standing alone, affords a sufficient basis to support an order of the commission denying an application for a liquor license. Cited as authority for that proposition are *Kerrey's, Inc. v. Neb. Liquor Control Comm.*, 213 Neb. 442, 329 N.W.2d 364 (1983), and *72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission*, 199 Neb. 729, 261 N.W.2d 614 (1978). This court has made statements to that effect, but each must be examined in the context in which it was uttered.

The basis upon which the later pronouncements were made appears to be the case of *Allen v. Nebraska Liquor Control Commission*, 179 Neb. 767, 140 N.W.2d 413 (1966). That case held that the commission could rely on the adverse recommendation made by a city council based on its existing ordinance limiting the number of liquor licenses to be issued within that city. This court said: "Under the Nebraska Liquor Control Act the commission is required to seek the recommendation of the city as regards the grant or denial of an application within 30 days. The effect of this provision is to afford evidence to sustain or deny an application, as the case may be, even though the commission is not bound by the recommendation." *Id.* at 772, 140 N.W.2d at 416.

Allen was cited as authority in *72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission, supra*, in which we *held* that the recommendation of the

city council founded upon a policy expressed by ordinance limiting the number of licenses affords a sufficient evidentiary basis to support the Nebraska Liquor Control Commission's action. Unfortunately, we did not so limit our language in the body of the *72nd Street Pizza* opinion, wherein we said: "We adhere to our holding that the recommendation of the city council to the commission that a license be denied affords a sufficient evidentiary basis for an order of the commission denying the license." *Id.* at 738-39, 261 N.W.2d at 619.

That statement was repeated in *Kerrey's, Inc. v. Neb. Liquor Control Comm.*, *supra*, but was simply dicta, used partially to support our holding that the record did not disclose a negative recommendation by the Omaha City Council but simply a refusal to approve the application, citing *Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission*, 203 Neb. 176, 277 N.W.2d 693 (1979). Our holding in *Kerrey's, Inc.*, was that although Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982) provides that evidence of the recommended denial of a license made by the local governing body *may* be sufficient to justify a denial made by the commission, the burden was not on the applicant to obtain the approval or recommendation of the city council.

All of which finally points up the fact that since *Allen*, *72nd Street Pizza*, and *Joe and Al's IGA* have been decided, the Legislature has incorporated some rather radical changes in the procedure when considering a license application. Section 53-132, amended in 1981, now provides that a license shall be issued to any qualified applicant if it is found by the commission that such applicant possesses certain qualifications and that "(2) . . . (d) the issuance of the license is or will be required by the present or future public convenience and necessity."

That section goes on to provide that in making the foregoing determination the commission shall consider 10 different factors, including the recommen-

dation of the local governing body. We therefore believe that, along with population, nature of the neighborhood, the existence of other retail licenses, zoning restrictions, and sanitation conditions, the commission shall consider the recommendation of the local governing body. The arbitrary recommendation of denial made by a city council, based only on the belief that there are sufficient licenses, does not now, if it ever did, standing alone, justify the denial of an otherwise valid application.

In this case efforts by the North Platte City Council to pass an ordinance limiting the maximum number of licenses to be issued for North Platte failed on a January 15, 1980, vote of 6 to 2. However, when requested to make a recommendation as to the issuance of the license in this particular case, the council, on May 4, 1982, by a 5 to 2 vote, recommended that this particular application be denied because "[t]here is already a sufficient number of Liquor outlets in North Platte."

At the hearing before the commission, according to the affidavit of an officer of Kwik Stop Food Stores, Inc., a number of customers had expressed a desire to be able to buy beer at the same time and place as they purchase gasoline and food, and that some people prefer to buy beer at a beer-only facility rather than at a regular liquor store. There was also testimony that there was in existence a package liquor store 2 blocks to the north of the proposed location, another one 2½ blocks to the north, and a third license 4 blocks to the south.

In spite of the statutory requirement that the commission consider whether the issuance of the license is or will be required by the present or future public convenience and necessity, the commission refused to issue the license on the only expressed ground that "the local governing body recommended denial of said application."

As we read § 53-132, the commission may deny a license application only if the applicant is not "fit,

willing, and able to properly provide the service proposed," or cannot "conform to all provisions, requirements, rules, and regulations," or has not "demonstrated that the type of management and control exercised over the licensed premises will be sufficient," or that "the issuance of the license is [not] or will [not] be required by the present or future public convenience and necessity."

Neither this court nor the district court is entitled to review the record de novo to make those enumerated findings itself. Rather, on appellate review we determine only whether the findings of the commission are supported by substantial evidence or whether they were arbitrary or capricious. Neb. Rev. Stat. § 84-917 (Reissue 1981). However, the failure of the commission to make the findings of fact and conclusions of law required by Neb. Rev. Stat. § 84-915 (Reissue 1981) does not make its order void, but only irregular. *Prigge v. Johns*, 184 Neb. 103, 165 N.W.2d 559 (1969).

On the basis of the record presented here, the district court should not have ordered the license to be granted. *72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission*, 199 Neb. 729, 261 N.W.2d 614 (1978). It should have remanded the cause to the commission, with directions to make the findings of fact and conclusions of law specified in § 53-132 in support of its order to be made.

The judgment of the district court is reversed, and the cause is remanded with directions to the district court to remand the case to the commission to make findings of fact and conclusions of law supporting the order which it may issue.

REVERSED AND REMANDED
WITH DIRECTIONS.

Cite as 216 Neb. 421

SARGENT FEED & GRAIN CO., APPELLANT, V. WAYNARD ANDERSON ET AL., APPELLEES.

344 N.W.2d 59

Filed February 10, 1984. No. 83-020.

1. **Pretrial Motions: Evidence.** A failure to appropriately respond within the time allotted to a properly served request for admission of facts constitutes an admission of the facts sought to be elicited.
2. **Summary Judgment: Final Orders.** An order vacating a summary judgment is not a final order.
3. **Courts: Judgments.** A trial court may modify or vacate its judgments within the term, but the power to do so rests in the sound legal discretion of the court and may not be done arbitrarily.
4. _____: _____. The discretion of a trial court to modify or vacate its judgments within the term is a judicial discretion which is subject to review.
5. _____: _____. A party which has secured a judgment is entitled to retain that judgment, and it may not be set aside in the absence of a sound legal reason for doing so.
6. **Trial: Courts.** It is the duty of the courts to prevent abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice.
7. _____: _____. This court will not tolerate or reward a course of conduct deliberately designed to disrupt the orderly administration of justice.
8. **Judgments: Motions to Vacate.** Generally, the neglect or fault of counsel for the adverse party is not a basis for vacating a judgment against that party.

Appeal from the District Court for Blaine County: JAMES R. KELLY, Judge. Reversed and remanded with directions.

Robert E. Wheeler of Stowell & Wheeler, P.C., for appellant.

Steven O. Stumpff of Stumpff & Washburn, for appellees.

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

PER CURIAM.

This action was commenced to recover damages resulting from the breach of an alleged contract for the sale of 5,000 bushels of corn by the defendants to

the plaintiff. The petition, filed July 20, 1981, alleged that the contract was made over the telephone on May 1, 1980, and a confirmatory memorandum was sent to the defendant Waynard Anderson on September 19, 1980.

On October 1, 1981, a demurrer filed by the defendants was overruled. Joseph J. Divis appeared for the defendants at this hearing.

On October 8, 1981, the plaintiff's request for admissions was served upon the defendants by mailing a copy to Joseph J. Divis, their attorney. The defendants failed to answer or respond to the request for admissions within the 30 days specified in the request and as provided in Neb. Rev. Stat. § 25-1267.41 (Reissue 1979).

A failure to appropriately respond within the time allotted to a properly served request for admission of facts constitutes an admission of the facts sought to be elicited. *Mueller v. Shacklett*, 156 Neb. 881, 58 N.W.2d 344 (1953); *Kissinger v. School District No. 49*, 163 Neb. 33, 77 N.W.2d 767 (1956). When the defendants failed to respond to the request for the admission of facts within the time allotted, the facts sought to be elicited were admitted and no longer subject to controversy in the action.

On December 11, 1981, the plaintiff filed a motion for summary judgment alleging that because of the defendants' failure to answer the request for admissions, all matters of which an admission was requested should be deemed admitted. The motion was noticed for hearing on January 25, 1982. In the event the motion was overruled the case was to proceed to trial immediately after the hearing on the motion.

On February 23, 1982, a notice of hearing for March 19, 1982, was served upon the defendants. On March 22, 1982, a notice of hearing on the motion for summary judgment for April 5, 1982, was served upon the defendants. On May 17, 1982, a notice of

hearing on the motion for May 28, 1982, was served upon the defendants.

On June 17, 1982, a notice of hearing on the motion for summary judgment and trial to be held on June 30, 1982, was served upon the defendants.

Finally, after serving five notices for hearing upon the defendants, the motion for summary judgment was heard on June 30, 1982. The defendants were still represented by Joseph J. Divis at this hearing.

On the day of the hearing the defendants' attorney filed an answer, which had been verified by the defendants on January 20, 1982, and an "Appearance and Motion in Response to Plaintiff's Motion for Summary Judgment" which alleged that the defendants should not be required to respond to the request for admissions until an issue in regard to the statute of frauds had been determined and adjudicated.

On the motion of the plaintiff the defendants' answer was stricken, and the matters of fact requested to be admitted in the request for admissions served on October 8, 1981, were deemed admitted. The motion for summary judgment was sustained. The trial court found that the defendants were in default and that the plaintiff was entitled to recover the sum of $4,100, with interest and costs, from each of the defendants.

On July 12, 1982, the defendants, appearing by their present counsel, filed a motion for new trial. A motion to vacate the summary judgment was filed on July 26, 1982. These motions were heard on July 27, 1982, and the judgment entered on June 30, 1982, was set aside. It is this order which the plaintiff contends was erroneous.

The matter was tried a second time on November 17, 1982. At this hearing the trial court found in favor of the defendants and dismissed the petition. The plaintiff then appealed to this court.

The order of July 27, 1982, which set aside the summary judgment entered on June 30, 1982, was not an appealable order. In *Otteman v. Interstate Fire &*

Cas. Co., Inc., 171 Neb. 148, 105 N.W.2d 583 (1960), we held that an order vacating a summary judgment was not a final order, and dismissed the appeal from such an order. See, also, *Rehn v. Bingaman*, 157 Neb. 467, 59 N.W.2d 614 (1953); *Pressey v. State*, 173 Neb. 652, 114 N.W.2d 518 (1962); *Bringewatt v. Mueller*, 201 Neb. 736, 272 N.W.2d 37 (1978). The plaintiff had no opportunity to have the order of July 27, 1982, reviewed until a final order had been entered in the action. That occurred after the second trial before a different district judge on November 17, 1982.

A trial court may modify or vacate its judgments within the term, but the power to do so rests in the sound legal discretion of the court and may not be done arbitrarily. *A. Hirsh, Inc. v. National Hair Co.*, 210 Neb. 397, 315 N.W.2d 236 (1982). The discretion is a judicial discretion which is subject to review.

A party which has secured a judgment is entitled to retain that judgment, and it may not be set aside in the absence of a sound legal reason for doing so.

The record in this case fails to show any legal basis for the order of the trial court on July 27, 1982, which set aside the summary judgment that had been entered on June 30, 1982. In setting aside the judgment for the plaintiff, the trial court stated: "I must say that this case has been mishandled from the inception. I haven't had a case like this. Everyone is entitled to their day in Court and you will agree with that too, Mr. Wheeler. The Andersons have not had their day in Court — through no fault of their own.

"I find I properly granted the motion for your summary judgment but in all fairness to the parties, I am going to grant your motion for new trial. I am going to set aside my former order of the summary judgment, both of them.

"You have asked that you do not answer the requests for admissions; I am going to require you to answer the requests for admissions. You may do

so, it doesn't hurt you Mr. Stumpff; I am confident of your ability to do that. You are given 20 days to answer the request for admissions and we are going to get this case heard."

The record before us contains no justification whatever for the delay occasioned by the failure of the defendants to answer the petition in this case and respond to the plaintiff's request for admissions.

It is the duty of the courts to prevent abuse of process, unnecessary delays, and dilatory and frivolous proceedings in the administration of justice. *Beliveau v. Goodrich*, 185 Neb. 98, 173 N.W.2d 877 (1970). This court will not tolerate or reward a course of conduct deliberately designed to disrupt the orderly administration of justice. *Morgan v. Weiner*, 173 Neb. 715, 114 N.W.2d 720 (1962).

The neglect and fault of the defendants' counsel, Joseph J. Divis, could not be a basis for setting aside the judgment in this case. Certainly his conduct is not chargeable to the plaintiff. If anyone must lose because of the neglect of a lawyer, it should be the party who selected and employed that lawyer as his counsel.

The record fully supports the action of the trial court in granting the plaintiff summary judgment on June 30, 1982. It does not support the order of July 27, 1982, vacating the summary judgment, which was an abuse of discretion.

The judgment of the district court is reversed and the cause remanded with directions to reinstate the judgments against the defendants which were entered on June 30, 1982.

REVERSED AND REMANDED WITH DIRECTIONS.

THE HAAKINSON & BEATY CO., APPELLEE, V. INLAND INSURANCE COMPANY, APPELLANT.

344 N.W.2d 454

Filed February 10, 1984. No. 83-089.

1. **Constitutional Law: Statutes: Public Policy.** Constitutional or statutory provisions, absent an infirmity in the law itself, govern what is the public policy. Where the lawmaking power speaks on a particular subject, over which it has constitutional authority to speak, the public policy in such a case is what the statute provides.
2. **Constitutional Law: Statutes: Courts: Contracts: Public Policy.** As a general rule, courts cannot declare agreements or acts authorized by statute to be contrary to public policy unless the courts are first prepared to determine that the statute authorizing the act is itself unconstitutional.
3. **Statutes: Contracts.** It has long been the law, in both this jurisdiction and elsewhere, that the law of the state is an inherent part of every contract and that every contract is made with reference to and subject to the existing law, and every law affecting the contract is read into and becomes a part thereof.
4. **Contracts: Parties.** A third-party beneficiary's rights depend upon, and are measured by, the terms of the contract between the promisor and promisee. The right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, which must affirmatively appear from the language of the instrument when properly interpreted or construed; and the liability so appearing cannot be extended or enlarged on the ground alone that the situation and circumstances of the parties justify or demand further or other liability. It has been said that before the beneficiary may accept the benefits of the contract, he must accept all of its implied, as well as express, obligations.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

James W. Hewitt, for appellant.

Dennis R. Riekenberg of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

KRIVOSHA, C.J.

This appeal presents to the court a case of first impression in this jurisdiction and concerns itself with

the question of whether a forum selection clause, in an indemnity bond, requiring suit to be brought where the project or any part thereof is situated is valid and enforceable as against a materialman seeking to collect on the bond. The trial court found the provision of the bond to be contrary to the public policy of the State of Nebraska, and therefore void and unenforceable. Additionally, the trial court determined that the materialman was not bound by the clause. We believe that the trial court was in error and that the judgment must be reversed and the cause remanded.

R. R. Butler Construction, Inc. (Butler), a Nebraska corporation, entered into a contract with Walnut Community School District (Walnut), located in Pottawattamie County, Iowa, to construct a building addition for the school district. On February 19, 1979, Butler, as principal, executed a labor and material payment bond with Inland Insurance Company (Inland) as surety, an insurance company registered to do business in Nebraska. Among other provisions, the bond contained the following: "3. No suit or action shall be commenced hereunder by any claimant: . . . c) Other than in a state court of competent jurisdiction in and for the county or other political subdivision of the state in which the Project, or any part thereof, is situated, or in the United States District Court for the district in which the Project, or any part thereof, is situated, and not elsewhere." The provisions of subparagraphs (a) and (b) are not material to our discussion.

During the course of construction, Butler ordered materials for the project from the appellee, The Haakinson & Beaty Co. (Beaty), a corporation doing business in Iowa. After the materials had been delivered to the jobsite and Butler failed to pay, Beaty brought suit on the bond, in the district court for Douglas County, Nebraska, to recover the amount due and owing. Although final payment on the job was certified to by the architect on July 12, 1980, suit

was not brought by Beaty on the bond until January 15, 1982. Inland filed a motion to dismiss, contending that, under the provisions of the bond, suit could only have been brought in the appropriate county in Iowa, if in state court, or the appropriate U.S. District Court in Iowa, if in federal court. As we have indicated, the trial court overruled the motion to dismiss and granted summary judgment in favor of Beaty and against Inland for the amount owing, and Inland perfected its appeal to this court.

Inland assigns as error that (1) the trial court erred in finding that the forum selection clause in the bond was not valid and was contrary to public policy, and (2) the trial court erred in finding that a third-party beneficiary was not bound by the terms and conditions of the contract under which suit was brought.

While the question of attempting to determine whether the provisions of a contract are contrary to public policy is not always easy and clear, in the instant case we believe the answer is apparent. The provision of the bond in question is in accordance with Neb. Rev. Stat. § 25-415 (Reissue 1979), which provides as follows: "If the parties have agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless (1) the court is required by statute to entertain the action; (2) the plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action; (3) the other state would be a substantially less convenient place for the trial of the action than this state; (4) the agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or (5) it would for some other reason be unfair or unreasonable to enforce the agreement." Section 25-415 is part of the Model Uniform Choice of Forum Act adopted by the Legislature of the State of

Nebraska in 1969. See 1969 Neb. Laws, ch. 179, §§ 1-5, pp. 769-70.

Can we therefore say that a provision of a contract enacted pursuant to a statute adopted by the Legislature of the State of Nebraska is contrary to public policy? We believe that, under generally recognized rules applicable to cases of this nature, we cannot. What is public policy must be determined from a consideration of the federal and state Constitutions, the laws, the decisions of the courts, and the course of administration, and not by the varying opinions of laymen, lawyers, or judges. See 17 Am. Jur. 2d *Contracts* § 177 (1964). Constitutional or statutory provisions, absent an infirmity in the law itself, govern what is the public policy. That is to say, where the lawmaking power speaks on a particular subject, over which it has constitutional authority to speak, the public policy in such a case is what the statute provides. See, *Chicago, B. & Quincy R. R. Co. v. McGuire*, 219 U.S. 549, 31 S. Ct. 259, 55 L. Ed. 328 (1911); *United States v. Freight Association*, 166 U.S. 290, 17 S. Ct. 540, 41 L. Ed. 1007 (1897). As a general rule, courts cannot declare agreements or acts authorized by statute to be contrary to public policy unless the courts are first prepared to determine that the statute authorizing the act is itself unconstitutional. See, 17 Am. Jur. 2d, *supra*; *Chicago, B. & Quincy R. R. Co. v. McGuire*, *supra*. No one has contended, nor are we able to determine, that the provisions of § 25-415 are either beyond the authority of the Legislature or inherently unconstitutional. If, then, § 25-415 is a valid exercise by the Legislature, we are compelled to determine that the provision contained in Inland's bond is not void as being contrary to public policy. Quite to the contrary; it is valid because it is consistent with the public policy as reflected in the act authorizing such provisions. To hold otherwise would be to ignore the will of the people as reflected by their elected representatives.

In declaring the provision of Inland's bond valid, enforceable, and not contrary to public policy, we quickly add, however, that whether the exceptions contained in § 25-415 are specifically spelled out in the bond or not, they are a part of the bond and must be considered by any court when called upon to determine whether the action should be dismissed. It has long been the law, in both this jurisdiction and elsewhere, that the law of the state is an inherent part of every contract and that every contract is made with reference to and subject to the existing law, and every law affecting the contract is read into and becomes a part thereof. See, *Bobbitt v. Order of United Commercial Travelers*, 180 Neb. 285, 142 N.W.2d 351 (1966); *State v. Hurley*, 201 Neb. 569, 270 N.W.2d 915 (1978); *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979). By granting to the trial court the opportunity to refuse to dismiss the action where facts consistent with the limitations of § 25-415 exist, the courts are not denied their inherent authority to consider appropriate matters presented to them. We do not believe that the forum clause in question is akin to the provisions in a contract which shorten the statute of limitations or require binding arbitration, as suggested by Beaty. The courts are still given wide latitude under appropriate circumstances to permit the action to be heard. We believe that the provisions of § 25-415 are valid, and, likewise, the provisions of the bond are enforceable.

Beaty argues that even if the provision is not void as being contrary to public policy, nevertheless, it does not apply to Beaty because Beaty is not one of the parties who "agreed in writing" to this provision, as required by the statute, but, instead, Beaty is a third-party beneficiary who is not bound by the terms of the agreement. In support of its position Beaty cites to us the case of *Forburger Stone Co. v. Lion Bonding & Surety Co.*, 103 Neb. 202, 170 N.W. 897 (1919). While it is true that this 4 to 3 decision

seems to stand for the proposition advanced by Beaty, we believe that a reading of the decision makes it clear that *Forburger* stands alone and is contrary to both the law in this jurisdiction and elsewhere. In 17 Am. Jur. 2d, *supra* § 315 at 743-44, the author notes: "A third-party beneficiary's rights depend upon, and are measured by, the terms of the contract between the promisor and promisee. The right of a third party benefited by a contract to sue thereon rests upon the liability of the promisor, which must affirmatively appear from the language of the instrument when properly interpreted or construed; and the liability so appearing cannot be extended or enlarged on the ground alone that the situation and circumstances of the parties justify or demand further or other liability. It has been said that before the beneficiary may accept the benefits of the contract, he must accept all of its implied, as well as express, obligations. It has also been said that if the beneficiary accepts, he adopts the bad as well as the good, the burden as well as the benefit. The right of a third person for whose benefit a promise is made is affected with all the infirmities of the contract as between the parties to the agreement." This holding is consistent with the decisions of our own court, where, as early as 1894 in *Simms v. Summers*, 39 Neb. 781, 58 N.W. 431 (1894), we adopted a similar rule. See, also, *In re Estate of Reynolds*, 131 Neb. 557, 268 N.W. 480 (1936); *Dealers Electrical Supply v. United States F. & G. Co.*, 199 Neb. 269, 258 N.W.2d 131 (1977).

As noted by Justice Cornish in one of the three dissents in *Forburger*, *supra* at 209, 170 N.W. at 899: "Just as the stream can never rise higher than its source, nor the less include the greater, nor the accidental be more regarded than the intentional, nor one reap where he has not sown, so the promisor is never bound to more than his promise, and the stranger to the contract can have no better nor higher rights in the contract than the parties to it.

He gets any possible right he may have through the promise made to the obligee, and that is the promise that must be left as made and only as made."

It would be a strange situation if one could sue on a contract and gain all of its benefits, and yet be permitted to ignore any of its obligations. *Forburger* is simply a voice in the wilderness and should be disregarded. Beaty, as a third-party beneficiary under this bond, received benefits from the bond and, likewise, was subject to all of its burdens, including the forum selection clause. To the extent that *Forburger* stands to the contrary, it is overruled.

Absent a showing by Beaty that any of the exceptions of § 25-415 are applicable, we believe that the forum selection clause of the bond is valid and binding on Beaty and that the trial court was in error in overruling the motion by Inland to dismiss and in granting summary judgment in favor of Beaty. For this reason the judgment of the trial court is reversed and the cause remanded with instructions to proceed in accordance with this opinion.

REVERSED AND REMANDED.

WHITE, J., concurring.

The Legislature, for reasons best known to itself, has seen fit to permit a licensed Nebraska insurance company to issue policies which deny persons claiming under those policies access to the courts of the State of Nebraska.

While legislation may indeed express the public policy of the state, to a greater extent the state Constitution does also.

Article I, § 13, of the Constitution of the State of Nebraska states: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

Neb. Rev. Stat. § 25-415 (Reissue 1979) excepts from the choice of forum provisions a number of categories set forth in the majority opinion. As I

am not convinced that the statute, as written, denies meaningful access to a judicial forum (though not a Nebraska forum), I reluctantly concur.

I do, however, state unhesitatingly that absent the exceptions of the statute, the Model Uniform Choice of Forum Act would clearly violate our Constitution.

HASTINGS, J., joins in this concurrence.

LINCOLN GRAIN, INC., A KANSAS CORPORATION, APPELLANT, V. COOPERS & LYBRAND, A PARTNERSHIP, APPELLEE.

345 N.W.2d 300

Filed February 10, 1984. No. 83-094.

1. **Actions: Pleadings.** The character of an action as one in tort or on contract is determined by the nature of the grievance, not by the form of the pleadings, with consideration being given to the facts which constitute the cause of action.
2. _____: _____. Where a petition contains a cause of action for breach of contract, additional averments appropriate to a tort action will not change the action from contract to tort.
3. _____: _____. One may sue in tort when there has been negligence in the performance of a contract.
4. **Appeal and Error.** Ordinarily, the Nebraska Supreme Court will dispose of a case on appeal on the theory on which it was presented in the lower court.
5. **Trial: Evidence: Appeal and Error.** The appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion, as the admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, which must determine the relevancy and possible prejudicial effect of the proffered evidence.
6. **Rules of Evidence: Words and Phrases.** "Unfair prejudice," in the context of Neb. Rev. Stat. § 27-403 (Reissue 1979), is such prejudice as has a tendency to suggest a decision on an improper basis.
7. **Negligence.** The assumption of risk doctrine is predicated upon an implied consent to be treated negligently, and generally relates to one voluntarily undertaking a known risk even though he is otherwise in the exercise of reasonable care.
8. _____. A plaintiff who voluntarily assumes a risk of harm arising from the negligent conduct of the defendant cannot recover for such harm.

9. _____. The contributory negligence of the client is a defense in an accountant malpractice action only where such negligence has contributed to the accountant's failure to perform his contract and to report the truth.
10. **Jury Instructions.** The true meaning of a set of instructions is to be determined from a consideration of all that is said in them and not from picking out and emphasizing one errant word.
11. _____. An instruction should be couched in neutral and nonargumentative language.
12. **Tort-feasors: Negligence: Liability.** The doctrine that an intervening act cuts off the liability of a tort-feasor comes into play only when the intervening cause is not foreseeable.
13. **Directed Verdict.** A motion for directed verdict is to be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded for a new trial.

Karen B. Flowers and David M. Geier of Bauer, Galter & Geier, for appellant.

Maureen E. McGrath of Kutak Rock & Huie, and Joseph A. Clark III, for appellee.

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

CAPORALE, J.

In this appeal plaintiff-appellant, Lincoln Grain, Inc., a grain dealer, challenges the judgment entered, pursuant to a jury's verdict, dismissing its action against defendant-appellee, Coopers & Lybrand, public accountants, which alleges that Lincoln Grain was damaged by Coopers & Lybrand's negligent failure to perform its contractual duties in accordance with generally accepted auditing standards. We reverse and remand for a new trial.

This marks the second appearance of these parties before this court in matters related to the instant

case. In *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983), hereinafter referred to as *Lincoln Grain I*, we held that any causes of action Lincoln Grain might have had for the alleged malpractice of Coopers & Lybrand in conducting audits for the 1973 and 1974 fiscal periods were barred by the 2-year period of limitations prescribed in Neb. Rev. Stat. § 25-222 (Reissue 1979).

In this action Lincoln Grain pleads that it engaged Coopers & Lybrand to conduct an audit for the fiscal year ending June 30, 1975, and that Coopers & Lybrand failed to conduct that audit in accordance with generally accepted auditing standards. In its answer Coopers & Lybrand asserts a variety of defenses, including claims that Lincoln Grain assumed the risk of employee fraud and was contributorily negligent. In addition, Coopers & Lybrand sued the directors and officers of Lincoln Grain as third-party defendants, claiming that if Coopers & Lybrand were found liable to Lincoln Grain, the third-party defendants would become liable to Coopers & Lybrand for their failure to properly discharge their duties to Lincoln Grain. No issue as to the propriety of that third-party action is presented to us.

The record establishes that Lincoln Grain, Inc., engaged Coopers & Lybrand, as it had in past years, to perform an audit of Lincoln Grain's financial statements for the aforesaid fiscal period and render an opinion thereon. As part of that audit, Coopers & Lybrand investigated the accuracy of the valuation placed upon the inventory of Lincoln Grain's Iowa division. The Iowa division was involved in the buying and selling of grain and other agricultural commodities, but had no storage or shipping facilities. Its inventory consisted only of contracts to sell or purchase commodities. At the end of the fiscal year a value was placed upon the inventory by reference to the market price for the particular commodity as of that day.

On June 30, 1975, Lincoln Grain valued the inven-

tory of its Iowa division at nearly $2 million, and included this valuation in compiling its financial statements. On September 12, 1975, Coopers & Lybrand issued a report which stated: "In our opinion, the aforementioned financial statements present fairly the financial position of Lincoln Grain, Inc. at June 30, 1975 and the results of its operations and changes in its financial position for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year."

The generally accepted auditing standards in evidence include the following with respect to fieldwork: "2. There is to be a proper study and evaluation of the existing internal control as a basis for reliance thereon and for the determination of the resultant extent of the tests to which auditing procedures are to be restricted. 3. Sufficient competent evidential matter is to be obtained through inspection, observation, inquiries, and confirmations to afford a reasonable basis for an opinion regarding the financial statements under examination."

In November of 1975 the treasurer of Lincoln Grain became concerned with the large cash needs of the Iowa division and began to investigate the reasons. In early 1976 the manager of the Iowa division, who was also a vice president of Lincoln Grain, admitted to falsifying the inventory valuations. Later investigation determined that instead of having a nearly $2 million inventory as of June 30, 1975, the inventory of the Iowa division had only a $143,000 value. The Iowa division closed for new business in February of 1976.

Lincoln Grain contends that if the audit had been conducted in accordance with generally accepted auditing standards, the fraudulent activities of its employee would have been discovered at an earlier time, and that it was damaged by the delayed discovery. Specifically, Lincoln Grain complains, among other things, that Coopers & Lybrand failed

to discover that the actual commodity contract prices on some of the contracts checked by Coopers & Lybrand did not correspond with those listed on the inventory; that nearly half the freight rates listed on the inventory were wrong; and that the figure used to value the net position was not consistent with available external market information.

Lincoln Grain assigns as error the actions of the trial court in (1) refusing to receive into evidence Lincoln Grain's exhibit 10; (2) submitting the assumption of risk defense to the jury; (3) submitting the contributory negligence defense to the jury; and (4) charging the jury in the language of instruction Nos. 9, 10, and 11.

It seems appropriate to begin our analysis with a review of the nature of the action before us. Although the dividing line between breaches of contracts and torts is often dim and uncertain, it has been said that the character of an action as one in tort or on contract is determined by the nature of the grievance, not by the form of the pleadings, with consideration being given to the facts which constitute the cause of action. *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954); 1 Am. Jur. 2d *Actions* § 8 (1962). While in *Fuchs v. Parsons Constr. Co.*, 166 Neb. 188, 88 N.W.2d 648 (1958), we said that where a petition contains a cause of action for breach of contract, additional averments appropriate to a tort action will not change the action from contract to tort, we have also said that one may sue in tort when there has been negligence in the performance of a contract. *Driekosen v. Black, Sivalls & Bryson, supra.* The injury in such a case results not from a breach of the contract but from negligence in the performance of it, for accompanying every contract is a common-law duty to perform with care, skill, reasonable expediency, and faithfulness the thing agreed to be done. A negligent failure to observe any of these conditions is a tort as well as a breach of contract. *Driekosen v.*

Black, Sivalls & Bryson, *supra*; 74 Am. Jur. 2d *Torts* § 24 (1974). Moreover, to the extent there is a choice, 74 Am. Jur. 2d, *supra*, the parties elected to try this case as if it were one in tort. Ordinarily, as we do in this case, we will dispose of a case on appeal on the theory on which it was presented in the lower court. *O'Keefe Elevator v. Second Ave. Properties*, *ante* p. 170, 343 N.W.2d 54 (1984); *Kearney Clinic Bldg. Corp. v. Weaver*, 211 Neb. 499, 319 N.W.2d 95 (1982).

The appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion, as the admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, which must determine the relevancy and possible prejudicial effect of the proffered evidence. *State v. Coca*, *ante* p. 76, 341 N.W.2d 606 (1983); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982).

Exhibit 10, the subject of Lincoln Grain's first assignment of error, is Coopers & Lybrand's report to Lincoln Grain's management concerning the audit for the fiscal year ending June 30, 1974. It was submitted to Lincoln Grain on December 24, 1974, together with a cover letter in which Coopers & Lybrand states: "Our examinations disclosed no matters related to the systems of internal control and accounting procedures of Lincoln Grain, Inc., Lincoln Industries, Inc. and The 25 Corporation, Inc. which we felt were of such significance to warrant inclusion herein."

In its report concerning the 1975 audit, dated January 27, 1976, Coopers & Lybrand details deficiencies in the internal controls of Lincoln Grain, the same controls which existed at the time of the 1974 report.

Lincoln Grain contends that the 1974 report is relevant to the issue of its exercising due care and the issue of proximate cause. More specifically, Lincoln Grain contends that since Coopers & Lybrand, as a defensive matter, alleged and offered proof that

Lincoln Grain was negligent in the type of internal controls implemented to protect the integrity of its records, Lincoln Grain should be allowed to introduce the 1974 statement of Coopers & Lybrand that the internal controls in use in 1974, and continued in 1975, presented no problem. Its argument continues to the conclusion that reliance on the statements of its outside auditor is highly relevant to Coopers & Lybrand's contention that Lincoln Grain was contributorily negligent.

It appears the trial court excluded exhibit 10 on the ground that although it might have relevance, that relevance was overwhelmed by the prejudice it inflicted on Coopers & Lybrand. Although, as discussed later in this opinion, the concept of contributory negligence has a very limited role in this case, the proffered evidence is certainly relevant to the determination of the proximate cause of Lincoln Grain's damages. The fact that *Lincoln Grain I* held any cause of action for the claimed mispreparation of the 1974 audit report to be time barred does not mean that the report is not relevant to the issues presented by this suit on the 1975 audit. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. Neb. Rev. Stat. § 27-403 (Reissue 1979); *In re Estate of Camin*, 212 Neb. 490, 323 N.W.2d 827 (1982).

Most, if not all, items which one party to an action offers in evidence are calculated to be prejudicial to the opposing party; therefore, it is only "unfair prejudice" with which we are concerned. In the context of § 27-403 such prejudice means a tendency to suggest a decision on an improper basis. See, *United States v. Figueroa*, 618 F.2d 934 (2d Cir. 1980); Fed. R. Evid. 403 advisory committee note discussing the federal rule, after which § 27-403 is patterned. It is not unfairly prejudicial under the circumstances of this case to make the trier of fact

aware that the very internal control systems which Coopers & Lybrand now condemns were previously found by it not to be worthy of adverse comment. The trial court abused its discretion by refusing to receive exhibit 10 into evidence.

Lincoln Grain's first assignment of error is therefore sustained. For this reason and the reasons discussed hereinafter, the case must be remanded for a new trial. Because the issues presented by the remaining assignments of error are likely to reoccur upon retrial, we review them as well.

As to the second assignment of error, the trial court instructed the jury, in essence, that if Lincoln Grain knew and appreciated the danger of employee fraud, voluntarily or deliberately exposed itself to that danger, and was proximately damaged as a result, then and in that event the verdict must be for Coopers & Lybrand.

The assumption of risk doctrine is predicated upon an implied consent to be treated negligently, and generally relates to one voluntarily undertaking a known risk even though he is otherwise in the exercise of reasonable care. *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964); *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982). Restatement (Second) of Torts § 496 A at 560 (1965) states the general principle as follows: "A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct *of the defendant* cannot recover for such harm." (Emphasis supplied.) Lincoln Grain's employee is not the defendant. The assumption of risk instruction is clearly inapplicable to an action charging that an accountant negligently breached an agreement to render professional accounting services. The defendant in this case is an independent, professional contractor engaged to conduct an independent audit; certainly it cannot be said that one who engages such an accountant assumes the risk that the accountant will fail to adhere

to proper professional standards in performing the contractual duties of the engagement.

The third assignment of error presents a more complicated problem. In substance, the trial court instructed the jury that if it found Coopers & Lybrand to have been negligent, then it must consider whether Lincoln Grain had been contributorily negligent—that is, whether Lincoln Grain had failed to properly monitor and review the Iowa division's financial data; failed to properly supervise that division; failed to take notice of information in its possession which should have put it on notice of the falsifications of the Iowa division's manager; and whether Lincoln Grain furnished to Coopers & Lybrand incorrect data relating to the Iowa division. If so, and if such negligence on the part of Lincoln Grain was the proximate or a proximately contributing cause of Lincoln Grain's damage, then the jury should compare the negligence of both Lincoln Grain and Coopers & Lybrand and otherwise proceed in accordance with the comparative negligence instructions.

Although the role of the contributory negligence defense in an action against an accountant is one of first impression in this jurisdiction, it has been faced by other jurisdictions and has been the subject of comment by writers. *Craig v. Anyon*, 212 A.D. 55, 208 N.Y.S. 259 (1925), *aff'd* 242 N.Y. 569, 152 N.E. 431 (1926); *National Surety Corp. v. Lybrand*, 256 A.D. 226, 9 N.Y.S.2d 554 (1939); *Shapiro v. Glekel*, 380 F. Supp. 1053 (S.D.N.Y. 1974); Annot., 92 A.L.R.3d 396 (1979); Hawkins, *Professional Negligence Liability of Public Accountants*, 12 Vand. L. Rev. 797 (1959); Menzel, *The Defense of Contributory Negligence in Accountant's Malpractice Actions*, 12 Seton Hall 292 (1983).

We agree with the view of the *National Surety* and *Shapiro* courts that accountants are not to be rendered immune from the consequences of their own negligence merely because those who employ them

may have conducted their own business negligently. Allowing such a defense would render illusory the notion that an accountant is liable for the negligent performance of his duties. We hereby adopt the rule enunciated by the *National Surety* and *Shapiro* courts, and articulated by Hawkins and Menzel, that the contributory negligence of the client is a defense only where it has contributed to the accountant's failure to perform the contract and to report the truth. The evidence here is such that whether Lincoln Grain was contributorily negligent in its dealings with the auditors and whether such negligence contributed to Coopers & Lybrand's failure to perform its contract in accordance with generally accepted auditing standards are questions of fact for the jury under an instruction in accordance with the foregoing rule.

Lincoln Grain's fourth, and last, assignment of error questions three additional instructions. The first of these is instruction No. 9, which reads: "Under the engagement agreement between the parties, and under Generally Accepted Auditing Standards, the defendant did not undertake to do a detailed fraud audit, or to disclose fraud or defalcations. The defendant must be aware of the possiblity [sic] that fraud may exist in the plaintiff company. However, an ordinary audit cannot be relied upon to assure that fraud or deliberate misrepresentations by plaintiff's management will be discovered. The defendant is not an insuror [sic] or guarantor if it turns out that fruad [sic] occurred and the defendant did not discover it. The defendant does have a responsibility for failing to detect fraud when such failure *clearly* results from the defendant's failure to comply with Generally Accepted Auditing Standards. The subsequent discovery of fraud does not of itself mean that the defendant's examination was negligently done." (Emphasis supplied.)

Lincoln Grain argues that the use of the word

"clearly" serves to confuse the jury with respect to its burden of proof.

The court instructed the jury elsewhere that Lincoln Grain was to show by "a preponderance of the evidence" that Coopers & Lybrand was negligent by not conforming to the generally accepted auditing standards, and correctly defined the meaning of the phrase "preponderance of the evidence." We have said that the true meaning of a set of instructions is to be determined from a consideration of all that is said in them and not from picking out and emphasizing one errant word. *Lang v. Kerr*, 180 Neb. 106, 141 N.W.2d 759 (1966). See, also, *Landmesser v. Ahlberg*, 184 Neb. 182, 166 N.W.2d 124 (1969). Although an instruction should be couched in neutral and nonargumentative language, the word "clearly" adds nothing of legal significance to the instruction. We are of the opinion that when the instructions in this case are read as a whole, the inclusion of the offending word does not render instruction No. 9 prejudicially erroneous.

Lincoln Grain also contends that this instruction misstates its theory of the case. Lincoln Grain argues it is not claiming that Coopers & Lybrand had the duty to detect fraud, but that Coopers & Lybrand's failure to perform its audit properly resulted in the failure of Lincoln Grain to discover the falsifications of its Iowa division manager as early as it otherwise would have. That may be the case, but the instruction nonetheless correctly defines the duty undertaken by Coopers & Lybrand and is therefore proper.

In instruction No. 10 the trial court undertook to define the duties corporate directors owe their corporation. No authority is cited that such duties are owed by corporate directors to the accountants the corporation engages. The instruction has no relevance to the cause of action between Lincoln Grain and Coopers & Lybrand. Whether the instruction has relevance to the third-party petition between

Coopers & Lybrand and Lincoln Grain's officers and directors, whether it correctly states the law with respect thereto, and whether said third-party action is viable are matters not before us, as they have neither been briefed nor argued, and are therefore not considered.

The last instruction of which Lincoln Grain complains is No. 11, which states: "In conducting an opinion audit, an auditor is required to obtain certain written representations from management, to afford the auditor a reasonable basis for its opinion on the financial statements. Therefore, management owes a duty to the auditor of exercising reasonable care in preparing and giving these written representations." This instruction is not taken from the general auditing standards in evidence. Lincoln Grain argues that this instruction is much like the trial court's contributory negligence instruction, in that if it is a proper statement of the law, accountants would never be liable for their negligence.

Coopers & Lybrand contends, on the other hand, that the instruction is supported by Restatement (Second) of Torts § 552(1) (1977). That section is concerned with negligent misrepresentation. "(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information *for the guidance of others in their business transactions*, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." (Emphasis supplied.) *Id.* at 126-27. This section of the Restatement is inapplicable to the facts presented by this case. The information in question was not supplied to Coopers & Lybrand for its guidance in its business transactions with others, but for its use in auditing and verifying Lincoln Grain's own financial statements.

Coopers & Lybrand also contends that Lincoln

Grain's witness stated it was management's responsibility to prepare inventory certificates. Nowhere, however, is there support for the contention that Lincoln Grain owes a duty to Coopers & Lybrand in its preparation of these certificates. In point of fact, one of Coopers & Lybrand's duties was to verify the valuation placed upon the inventory by Lincoln Grain. As such, the instruction is patently erroneous.

There remains for consideration Coopers & Lybrand's argument that even if all of Lincoln Grain's assignments of error are valid, that circumstance does not justify reversal of the judgment of dismissal, since Coopers & Lybrand's motions for a directed verdict should have been granted in any event. It is true that instructing a jury erroneously is not prejudicial error when such instructions result in a verdict for the party who was entitled to a directed verdict. *McClellen v. Dobberstein*, 189 Neb. 669, 204 N.W.2d 559 (1973). We have already determined that Coopers & Lybrand was not entitled to a directed verdict, in that the evidence presents fact questions for the jury on the contributory negligence issue. Nonetheless, we comment briefly on Coopers & Lybrand's remaining two contentions in this regard.

Its first remaining argument is that there was an intervening and superseding cause for Lincoln Grain's losses, which cuts off Coopers & Lybrand's liability. The doctrine that an intervening act cuts off the liability of a tort-feasor comes into play only when the intervening cause is not foreseeable. *Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982); *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 205 N.W.2d 523 (1973). Thus, the doctrine does not apply here, for it is foreseeable that the negligent failure to detect falsifications will likely result in continued falsifications.

Coopers & Lybrand's last ground in support of its

directed verdict argument is that Lincoln Grain did not show it solely relied on the audit in keeping its Iowa division open. That Lincoln Grain must show such sole reliance is not supported by any authority cited to us except *Stanley L. Bloch, Inc. v. Klein*, 45 Misc. 2d 1054, 258 N.Y.S.2d 501 (1965). In that case the auditor specifically advised the client of inaccuracies in its financial reports, and the client disregarded or failed to act on that advice. That is not the situation here; the question of the relationship between the manner in which Coopers & Lybrand conducted the audit and Lincoln Grain's losses is one of proximate cause and is for the jury. Coopers & Lybrand also cites a trial court's decision, *Gordon v. Lipoff*, 320 F. Supp. 905 (W.D. Mo. 1970), as supporting its position. Whatever precedential value a trial court's decision may have, the case does not support Coopers & Lybrand's position. That case was decided under the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a. et seq. (1976), and a rule thereunder, and held that corporate managers could not maintain an action for lost profits against the accountants under that act and rule.

We must bear in mind that a motion for directed verdict is to be treated as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Bank of Valley v. Mattson*, 215 Neb. 596, 339 N.W.2d 923 (1983). The evidence in this case is such that it certainly cannot be said as a matter of law that Lincoln Grain's losses were not caused by the manner in which Coopers & Lybrand performed its duties.

REVERSED AND REMANDED
FOR A NEW TRIAL.

KRIVOSHA, C.J., not participating.

Cite as 216 Neb. 447

WILSON CONCRETE COMPANY, APPELLEE, V. DARRELL RORK, APPELLANT.

343 N.W.2d 764

Filed February 10, 1984. No. 83-125.

1. **Workmen's Compensation.** The statute authorizing an increase in a workmen's compensation award limits the basis for modification to that increased incapacity due solely and only to the compensable accident.
2. _____. Before recovery may be had for an increase of incapacity due solely to the injury, within the meaning of Neb. Rev. Stat. § 48-141 (Reissue 1978), the applicant must prove by a preponderance of the evidence that his incapacity has been increased; that is, that there now exists a material and substantial change for the worse in the applicant's condition—a change in circumstances that justifies a modification, distinct and different from that for which an adjudication had been previously made.
3. **Workmen's Compensation: Appeal and Error.** In reviewing findings of fact in workmen's compensation cases, the Supreme Court is not free to weigh the facts anew. The findings of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

John A. Wagoner, for appellant.

Kenneth H. Elson, for appellee.

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

HASTINGS, J.

This is an appeal from the Nebraska Workmen's Compensation Court, which dismissed the defendant's application to modify a previous disability award. We affirm.

The defendant, Darrell Rork, was employed as a dispatcher and batch man by the plaintiff, Wilson Concrete Company. On February 5, 1979, the defendant suffered injuries while squatting in a manhole attempting to thaw frozen pipes with a steam hose. As a result of this accident, the defendant was awarded, on rehearing, temporary total disability

from February 8, 1979, until January 26, 1980, and thereafter 25-percent permanent partial disability to the body as a whole. The rehearing proceeding was commenced March 26, 1981, and the award was entered July 6, 1981.

On April 8, 1982, the defendant commenced an action in the compensation court to obtain a modification of the award of July 6, 1981. On August 5, 1982, the compensation court found that the defendant had failed to prove by a preponderance of the evidence that his incapacity had increased. On January 5, 1983, the case was tried on rehearing, and the compensation court again found the defendant had failed to prove by a preponderance of the evidence that his incapacity had increased. This is the determination from which the defendant appeals to this court.

Modification of workmen's compensation awards is governed by Neb. Rev. Stat. § 48-141 (Reissue 1978), which states in part: "[T]he amount of any . . . award payable periodically for six months or more may be modified as follows: . . . at any time after six months from the date of the . . . award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury . . . ."

That statute has consistently been applied to place the burden of proving by a preponderance of the evidence on the applicant for modification that the increase in his incapacity was due solely and only to the injury resulting from the original accident. *Sidel v. Spencer Foods*, 215 Neb. 325, 338 N.W.2d 616 (1983); *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 94 N.W.2d 492 (1959); *Chadd v. Western Cas. & Sur. Co.*, 166 Neb. 483, 89 N.W.2d 586 (1958).

The defendant-applicant Rork contends the compensation court erred in failing to find him totally and permanently disabled, based upon the loss of earning power and because of the continuous suffering of pain which limits his employment opportunities. Rork further argues that in a modification pro-

ceeding in a workmen's compensation case, the whole question of the employee's physical condition can again be inquired into as of that time.

While Rork is correct about the law, he is in error with regard to his interpretation of the law as it applies to this case. It is true that in a modification proceeding the whole question of an employee's physical condition can again be inquired into, *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976), but before recovery may be granted for an increase of incapacity due solely to the injury, the applicant must prove by a preponderance of the evidence that incapacity has increased; that is, that there now exists a material and substantial change for the worse in the applicant's condition—a change in circumstances that justifies a modification, distinct and different from that for which an adjudication had been previously made. *Chadd v. Western Cas. & Sur. Co.*, *supra*.

The argument presented by Rork seems to be that due to continuous pain suffered from the original injury, the capacity to work has been further diminished. He testified the pain in his left hip suffered from the original injury has extended to the right hip and right leg as of May 1982. In support of this testimony medical testimony was also presented. The medical testimony, consisting of depositions of various doctors received into evidence, is quite revealing in this case.

Dr. Jackson J. Bence, Rork's treating orthopedic surgeon, opined in his second deposition, December 22, 1982, that Rork's disability, as far as his back was concerned, was substantially the same as it was when Dr. Bence gave his first deposition in November 1980 and that he had the same percentage of disability.

Dr. John G. Yost, an orthopedic surgeon who examined Rork on behalf of the plaintiff, felt Rork's subjective complaints far outweighed any and all objective findings, and on the date of the second ex-

amination Rork probably had a 30-percent permanent partial disability of his body as a whole. Dr. Yost explained that his opinion in his first deposition of 10-percent permanent partial disability to the body as a whole was based upon the assumption that Rork would rehabilitate himself. Dr. Yost, in the second deposition, testified there was no difference in his opinion because the 10 percent was on the basis if his back were rehabilitated, whereas the 30 percent was based upon his disability in May 1982, although the 30-percent disability could be diminished.

Dr. John C. Goldner, a neurologist who examined Rork for the first time on March 26, 1982, when asked to compare the disability evaluations between October 1980 and May 1982, testified that "[Rork's] pain is somewhat greater even though his neurologic examination is unchanged."

Based upon the testimony of the medical experts, we find the order of the compensation court in finding that Rork has failed to prove by a preponderance of the evidence that his incapacity has increased is not clearly wrong.

In reviewing findings of fact in workmen's compensation cases, the Supreme Court is not free to weigh the facts anew. The findings of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Randall v. Safeway Stores*, 215 Neb. 877, 341 N.W.2d 345 (1983); *Davis v. Western Electric*, 210 Neb. 771, 317 N.W.2d 68 (1982).

The issue before this court is whether the applicant has sustained an increase in disability since the compensation court's award on rehearing on July 6, 1981, due solely to the defendant's injury on February 5, 1979.

It appears that the defendant is more dissatisfied with the original finding on rehearing which awarded Rork temporary total disability for approximately 11 months and thereafter a 25-percent

permanent partial disability rather than total permanent disability. While the applicant Rork may have experienced some additional pain from the injury, there is not sufficient evidence to support Rork's contention that the pain has caused a material and substantial change for the worse in his condition. In addition, this court has often followed the rule that pain alone is not compensable under the workmen's compensation statute. *O'Connor v. Anderson Bros. Plumbing & Heating*, 207 Neb. 641, 300 N.W.2d 188 (1981); *Borowski v. Armco Steel Corp.*, 188 Neb. 654, 198 N.W.2d 460 (1972).

The finding of the Workmen's Compensation Court that the defendant failed to prove by a preponderance of the evidence that his incapacity had increased is supported by the record and is not clearly wrong, and as such is affirmed.

AFFIRMED.

WHITE, J., dissents.

THOMAS W. MOORE, APPELLANT, V. THE SISK CO., ALSO KNOWN AS R. E. SISK & CO., ALSO KNOWN AS R. E. SISK & ASSOCIATES, INC., APPELLEE.

343 N.W.2d 767

Filed February 10, 1984. No. 83-309.

1. **Workmen's Compensation.** The plaintiff in a workmen's compensation case must prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment.
2. _____. It is the rule in workmen's compensation cases that the course of employment requirement tests work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of employment, and in the course of an activity whose purpose is related to the employment.
3. **Workmen's Compensation: Appeal and Error.** In reviewing workmen's compensation cases this court is not free to weigh the facts anew. Our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case, and they will not be set aside unless clearly wrong.

4. _____: _____. In testing the sufficiency of the evidence to support the findings of the compensation court, every controverted fact must be resolved in favor of the successful party, and such party should have the benefit of every inference that can be drawn therefrom.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Richard L. Kohn, for appellant.

Deborah K. Long and Stanley D. Cohen, for appellee.

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

HASTINGS, J.

This is an appeal from the Nebraska Workmen's Compensation Court which dismissed the plaintiff's petition because he failed to prove by a preponderance of the evidence that his disability resulted from an accident arising out of and in the course of employment, as defined by the Nebraska workmen's compensation law.

The plaintiff, Thomas Moore, filed this action seeking an award for injuries sustained to his knee as a result of a car accident on Interstate 80 outside of Omaha. A single-judge court determined that his injuries were compensable for 22.5 percent permanent partial disability, and granted vocational rehabilitation services and medical care. Following an application for rehearing filed by the defendant, the three-judge panel entered its order dismissing the petition.

On appeal to this court the only assignment of error necessary for us to consider is the plaintiff's contention that the compensation court erred in finding that plaintiff had failed to sustain his burden of proof to establish that he was injured during the course of his employment.

The plaintiff's accident occurred on the afternoon of December 6, 1977, when he accompanied Alma

Hansen, the driver of the car, en route to Omaha. Plaintiff claims he was on his way to Omaha as an employee of the defendant, The Sisk Co., to deliver a random sampling process and to make a presentation to sell a workshop to the Center Bank, a client of the defendant. Moore further stated he was reviewing notes for his presentation to the bank at the time of the accident.

There is a direct conflict in the testimony offered by the defendant. Alma Hansen, driver of the vehicle in which the plaintiff was a passenger, could not recall the purpose of the trip, but did remember that Moore was not looking over papers on the way to Omaha.

John Roth, who was a former coemployee with Moore, told the court that he had worked on the Center Bank deal, had helped secure the workshop sale scheduled for December 13 and 14, and that following the bank's prior commitment no further action was needed.

On or about October 13, 1977, the plaintiff had secured Center Bank's commitment to attend a December 13 and 14 workshop. Further testimony was offered by Robert Sisk, president of The Sisk Co., that after receiving a call report from Moore and a check from Center Bank, there were no more duties for the salesmen to complete before the seminar.

The plaintiff assigns as one of three errors the finding of the Workmen's Compensation Court that he did not sustain his burden of proving by a preponderance of the evidence that he was injured while in the course of employment.

Under the Nebraska Workmen's Compensation Act the claimant has the burden of proof to establish by a preponderance of the evidence that unexpected or unforeseen injury was in fact caused by the employment. There is no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment. Neb. Rev. Stat. § 48-151(2) (Reissue 1978).

Whether or not travel falls within the scope and course of employment in a particular case must be determined by the facts in each case. *Stoll v. School Dist. (No. 1) of Lincoln*, 207 Neb. 670, 301 N.W.2d 68 (1981). It is also the rule in workmen's compensation cases that the course of employment requirement tests work connection as to time, place, and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment. *Stoll, supra.*

In reviewing workmen's compensation cases the Supreme Court is not free to weigh the facts anew. Our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case, and after a rehearing will not be set aside unless clearly wrong. *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983). In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Davis v. Western Electric*, 210 Neb. 771, 317 N.W.2d 68 (1982).

Our review of the record assures us that the evidence was sufficient to sustain the findings of the compensation court. The determination of the Workmen's Compensation Court was not clearly wrong and as such is affirmed.

AFFIRMED.

Cite as 216 Neb. 455

TRANSPORT WORKERS UNION OF AMERICA LOCAL 223, APPELLANT, V. THE TRANSIT AUTHORITY OF THE CITY OF OMAHA, NEBRASKA, DOING BUSINESS AS METRO AREA TRANSIT, APPELLEE.

344 N.W.2d 459

Filed February 10, 1984. No. 83-606.

1. **Commission of Industrial Relations: Jurisdiction.** The authority of the Commission of Industrial Relations is limited to that granted to it by legislative act, and such authority, when granted, must be narrowly construed.
2. _____: _____. In an appropriate case the Commission of Industrial Relations may enter temporary orders affecting the wages, hours, and terms and conditions of employment of an employee pending the resolution of a labor dispute, and its authority under the act is not limited to preventing the discharge of an employee by the employer.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded.

Thomas F. Dowd and John P. Fahey of Dowd, Fahey & Ashford, and J. Patrick Green, for appellant.

Soren S. Jensen and J. Russell Derr of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, for appellee.

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

KRIVOSHA, C.J.

In this appeal we are asked to determine what, if any, authority the Commission of Industrial Relations (CIR) has to enter temporary orders concerning wages, hours, and terms and conditions of employment while the CIR is attempting to resolve a labor dispute pending before it. The trial court, in its order entered on July 29, 1983, found that the CIR's authority to enter a temporary order was limited. The trial court held that the CIR could not order a governmental employer to maintain the employee's wages, hours, or terms and conditions of

employment during a dispute. According to the trial court, the CIR could only order an employer to refrain from discharging an employee. We believe that the district court was in error in this regard and that the order of the district court must be reversed and the cause remanded.

The appellant, Transport Workers Union of America Local 223 (Transport Workers), and the appellee, The Transit Authority of the City of Omaha, Nebraska, doing business as Metro Area Transit (MAT), had previously entered into an existing collective bargaining agreement which expired on June 30, 1983. At the expiration of that agreement MAT notified its employees as follows: "Effective Midnite, June 30, 1983, the contract between TWU Local 223, and MAT expired.

"There is no agreement for a Contract extension. As a result, any restrictions on management and operating rights, contained in the Contract, are no longer in effect.

"For the present, wages and fringes will be continued at the existing levels." MAT's bargaining representative indicated, during negotiations, that MAT might institute changes in working conditions following the expiration of the agreement, and, in fact, MAT did change certain practices with respect to paying tool and clothing allowances to its employees.

Transport Workers then filed a petition with the CIR, seeking to invoke the authority of the CIR to help resolve the labor dispute which existed between Transport Workers and MAT. Transport Workers also filed a motion for a temporary order with the CIR. On July 12, 1983, a hearing was held on the motion, and on July 13, 1983, the CIR entered an order, pursuant to the provisions of Neb. Rev. Stat. §§ 48-816(1) and 48-811 (Cum. Supp. 1982), directing that "the employment status of employees shall not be altered in any way pending disposition of the Petition herein by the Commission." While the lan-

guage of the order, standing alone, may seem vague, when one reads the entire order entered by the CIR, including its findings and its reference to both §§ 48-811 *and* 48-816(1), it is clear that the CIR intended, by its order of July 13, 1983, to order MAT not to alter any of the wages, hours, or terms and conditions of employment during the time that the parties were attempting to resolve their dispute, without first obtaining authority from the CIR. After the order was entered by the CIR, MAT then altered its "pick system," which is essentially a system whereby drivers are allowed to bid on routes and times of work.

Transport Workers filed an action in the district court for Douglas County, Nebraska, seeking enforcement of the CIR's temporary order. See *IBEW Local 763 v. Omaha P.P. Dist.*, 209 Neb. 335, 307 N.W.2d 795 (1981). After a hearing the district court for Douglas County, Nebraska, denied the relief sought by the Transport Workers, on the grounds that the order of the CIR was beyond the jurisdiction of the CIR, finding specifically that the CIR's authority under § 48-811 was limited solely to restraining the employer from terminating the employee. While it is true, as noted by MAT, that the authority of the CIR is limited to that granted to it by legislative act and that such authority, when granted, must be narrowly construed, see *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979), it is likewise true that one may not, when reading the clear meaning of the statutes, simply read out of the statutes that which is clearly there.

There are several provisions of the CIR act which clearly grant to the CIR the authority to act as it did in this case. The trial court, at the urging of MAT, concluded that the provisions of § 48-811 did not grant to the CIR the authority to enter temporary orders concerning wages, hours, or terms and conditions of employment pending the resolution of an in-

dustrial dispute. We believe that this conclusion standing alone is correct. Section 48-811 provides in part: "No adverse action by threat or harassment shall be taken against any employee because of any petition filing by such employee, and the *employment status* of such employee shall not be altered in any way pending disposition of the petition by the commission." (Emphasis supplied.) We think it clear that the meaning of the words "employment status" in § 48-811 means precisely what it says. That is, no employer may, without cause, change an employee's status as an employee under the provisions of § 48-811, pending disposition of the petition.

If § 48-811 were the only provision relevant to this discussion, then the argument made by MAT might be correct. However, § 48-811 is not the only authority. Section 48-816 provides in part: "The commission shall have power and authority upon its own initiative or upon request of a party to the dispute to make such temporary findings and orders as may be necessary to preserve and protect *the status of the parties, property and public interest involved, pending final determination of the issues.*" (Emphasis supplied.) MAT argues that § 48-816 is nothing more than a repeat of § 48-811. However, a simple reading of the statute makes it clear that such could not be the case. In the first instance, the reference in § 48-816 is to "parties." Certainly this cannot mean the employer. Obviously, the employer is not concerned that the employee will discharge the employer. Therefore, if the CIR has authority to make temporary orders to protect "the status of the parties," it obviously must have authority to do something more than simply make sure that the employer does not fire the employee, as referred to in § 48-811. And, likewise, protecting the property and public interest obviously means something more than preserving the employment status. It may very well be that it is in the public interest to be assured that public employees, who do not have the

right to strike or hinder, delay, limit, or suspend the continuity or efficiency of governmental services, should continue to receive their previous salaries or be afforded the same terms and conditions of employment while the employer, the employee, and the CIR attempt to resolve the differences. See Neb. Rev. Stat. § 48-821 (Reissue 1978). Whatever preserving and protecting the public interest may mean, it obviously means something more than simply preventing the discharge of a public employee by a public employer.

Furthermore, Neb. Rev. Stat. § 48-819.01 (Cum. Supp. 1982) has a bearing here. Section 48-819.01 provides: "Whenever it is alleged that a party to an industrial dispute has engaged in an act which is in violation of any of the provisions of sections 48-801 to 48-838, or which interferes with, restrains, or coerces employees in the exercise of the rights provided in sections 48-801 to 48-838, the commission shall have the power and authority to make such findings and to enter such temporary or permanent orders as the commission may find necessary to provide adequate remedies to the injured party or parties, to effectuate the public policy enunciated in section 48-802, and to resolve the dispute." It seems clear to us that reducing employees' wages or changing the hours or terms and conditions of employment during an industrial dispute might interfere with or coerce employees attempting to exercise their right to bargain under the provisions of the act. That would explain the reason the Legislature granted to the CIR the authority to enter temporary orders necessary to retain the status quo of the parties while the dispute is resolved. See *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979). MAT argues that while an individual employee cannot be demoted or terminated, or threatened with demotion or termination, nevertheless, the public employer may adjust the terms or conditions of employment. We see little difference be-

tween demoting an employee and simply reducing his wages or changing his hours or terms and conditions of employment until he finds his employment unbearable. Obviously, this is not what is intended by the nature of the act. To be sure, the authority of the CIR to enter temporary orders is not unlimited. As we noted in *University Police Officers Union v. University of Nebraska*, *supra* at 18, 277 N.W.2d at 537: "We will not now attempt to enumerate all the possible circumstances under which the CIR may exercise its authority. We do note, however, that the authority granted to the CIR under the present act in general and section 48-816, R.R.S. 1943, in particular, is limited in nature. We would anticipate that the CIR will exercise that jurisdiction in as narrow a manner as may be necessary." The authority does, however, appear to us to be sufficient in this case. To hold otherwise would be to completely repeal §§ 48-816 and 48-819.01 by judicial fiat.

MAT further argues that permitting the CIR to enter temporary orders retaining the status quo of the parties would be, in effect, compelling the parties to continue a contract which had expired. We do not agree. To begin with, there may never be any "contract" in the sense of a complete document executed by both of the parties. The act makes it quite clear that the CIR cannot compel the governmental employer to enter into a contract if the governmental employer chooses not to do so. See Neb. Rev. Stat. § 48-810.01 (Reissue 1978). Nevertheless, even though the CIR cannot compel the governmental employer to enter into a contract, it is clear that the CIR can enter a final order setting wages, hours, and terms and conditions of employment which are binding upon the employer, and which, in every sense, is therefore a contract, though none may formally exist between the parties. Likewise, in the present instance, while the bargaining agreement between the parties may have expired, the employment contract between the parties goes on. The em-

ployees continue to provide services, and the employer is obligated to continue to make some payment. The act in question simply grants to the CIR discretionary authority, when it appears appropriate, to order that the status quo of the parties be retained until the dispute is resolved. The employee may not be entitled to insist on changes in wages, hours, or terms and conditions of employment, and the employer, on the other hand, may be required to continue making payment and providing terms and conditions of employment identical to those which existed prior to the dispute. When so ordered by the CIR in its discretion, it may very well be that it will preserve the interests of the public and will fulfill the public policy of the act to ensure the uninterrupted and continued functioning and operation of governmental services.

We therefore believe that the district court should have entertained the request made by the Transport Workers and should have entered appropriate orders carrying out the orders previously entered by the CIR. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. RAYMOND J. VOSLER, APPELLANT.

345 N.W.2d 806

Filed February 17, 1984. No. 82-411.

1. **Homicide: Jury Instructions.** If there is at least some evidence which would permit the jury to find a defendant charged with first degree murder guilty of manslaughter, the court is required to charge the jury concerning the elements of manslaughter.
2. **Criminal Law: Insanity: Jury Instructions.** When insanity has not been pled as a defense and evidence concerning the defendant's mental condition is introduced solely to establish that he lacked the ability to intend the obvious and probable consequences of his voluntary act, and thus is offered to rebut the presumption which

flows from his act, it is not appropriate to instruct the jury as to the elements of the insanity defense.

3. **Criminal Law: Mental Health.** A trial court may not require a psychiatric examination of a criminal defendant when he puts his mental condition in issue solely to support his claim that he lacked the mental ability to form the intent required as an element of the crime with which he is charged.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for a new trial.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

PER CURIAM.

Defendant was charged with first degree murder. Pursuant to the jury's verdict, he was adjudged guilty of second degree murder and now appeals. We reverse and remand for a new trial.

On November 26, 1981, defendant's wife was hospitalized as the result of a drug overdose which she had taken because of despondency over an extramarital affair she had been having with the victim, a close friend of the defendant. Both the defendant and his wife's paramour had been with her at the intensive care unit of the hospital. After the visit the defendant left the hospital and obtained a gun from a friend on the pretext of going hunting. There is evidence which, if believed by the jury, would support a finding that defendant returned to the hospital intending to commit suicide in the presence of his wife in order to induce in her sufficient guilt so as to prevent her from later marrying the victim. Upon walking into his wife's room defendant saw the victim hugging and kissing defendant's wife. At about the same time, the victim said something such as

"things sure happen fast," whereupon the defendant pulled out the gun and shot and killed his wife's paramour.

Defendant pled not guilty and the cause was set for trial. He moved for discovery, including the results and reports of any mental examinations made in connection with the case. Reciprocal discovery was granted pursuant to statute. Defense counsel orally advised the State that defendant intended to call two psychiatric witnesses to testify concerning defendant's ability to form the necessary criminal intent at the time of the act, but did not file any written notice of an intention to plead not responsible by reason of insanity. Thereafter, the State moved for an order appointing and authorizing a physician qualified and engaged in the practice of psychiatry to examine the defendant. In granting the order the court made clear that if the defense did not introduce the testimony of its experts regarding intent, the State could not introduce the testimony of its expert on that issue. The court also stated that "any direct admissions of guilt that might be made by the defendant to an examining medical expert would not be admissible to prove that element. In other words, it would be limited strictly to rebuttal."

At trial both of defendant's experts did testify. One of them opined that the defendant had no mental illness. The other testified that although the defendant did not qualify for an insanity defense, he likely had a suicide plan when he entered the hospital room and that the shooting was done in response to an "irresistible impulse" provoked by the unexpected occurrence of encountering his wife and her paramour in the hospital room. The psychiatrist called by the State testified that the defendant was not mentally ill and had a logical and carefully thought-out plan to achieve the goal of killing the victim. He did testify that, based on what the defendant told him, he would agree that the defendant had acted on an irresistible impulse, but stated it as

his opinion that in light of the record such was not in fact the case.

Although the record before us contains no verdict form relating to a finding of insanity, the court's instructions did inform the jury that one of its options was to find the defendant not responsible by reason of insanity. The instructions defined insanity in the usual terms as the inability to understand the nature and quality of his act and the inability to distinguish between right and wrong, or to know that such act was wrong and deserved punishment. The court also instructed the jury that intent was an element of each of the crimes of first and second degree murder. The definition of intent included the customary language that it is a mental process and therefore is rarely, if ever, susceptible of proof by direct evidence and may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct.

The defendant contends the trial court erred in (1) refusing an instruction on the offense of manslaughter, (2) permitting the State to examine the defendant on the issue of his ability to form the requisite intent, and (3) overruling defendant's objection to its instruction and verdict form, permitting the jury the option of finding defendant not responsible by reason of insanity.

In order to find one guilty of first degree murder, he must have killed "purposely and with deliberate and premeditated malice." Neb. Rev. Stat. § 28-303 (Reissue 1979). To be convicted of second degree murder, one must have caused death "intentionally, but without premeditation." Neb. Rev. Stat. § 28-304 (Reissue 1979). To be adjudged guilty of manslaughter, one must have killed "without malice . . . upon a sudden quarrel." Neb. Rev. Stat. § 28-305 (Reissue 1979). In all trials for murder the jury before whom such trial is had, if the defendant is found guilty, shall ascertain whether it be murder in the first or second degree, or manslaughter. Neb. Rev.

Stat. § 29-2027 (Reissue 1979). As pointed out in *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982), *appeal on retrial* 214 Neb. 685, 335 N.W.2d 309 (1983), the question which must be answered in determining if the record sustains defendant's first assignment of error under § 28-305 is whether there is at least some evidence which would permit the jury to find the defendant guilty of killing without malice upon a sudden quarrel. If such evidence existed the court was required to charge the jury concerning the elements of the lesser-included offense of manslaughter. Although defendant addresses this issue as if it involved the question of a lesser-included offense, it does not. Manslaughter is not a lesser-included offense of first degree murder as "lesser-included offense" is defined in *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982). A lesser-included offense is one the elements of which are such that it is impossible to commit the greater without at the same time having committed the lesser.

In the context of the evidence in this case, it becomes important to determine what is meant by a "sudden quarrel," as the phrase is used in § 28-305. Certainly, a sudden quarrel does not necessarily require an exchange of angry words contemporaneously with the killing.

In *State v. Worley*, 178 Neb. 232, 132 N.W.2d 764 (1965), this court found the evidence that defendant therein shot the victim without any exchange of words sometime after a display of anger to be adequate to support a manslaughter instruction. As noted earlier, upon the record in this case the jury would have been justified in finding that the defendant returned to the hospital with the intention of committing suicide in the presence of his wife and that he was provoked into killing the victim by the display of affection between his wife and the victim. Accordingly, this is not a case such as was presented in *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978). Therein, there was no conflict in the evi-

dence requiring the jury to choose between the charged offense and the lesser-included offense of second degree sexual assault. That is to say, the jury could only believe or else not believe the victim, who was the only source of testimony concerning the element of penetration. Therefore, the jury could only find the defendant either guilty as charged or not guilty. Neither is the case before us one such as was presented in *State v. Beers*, 201 Neb. 714, 271 N.W.2d 842 (1978), wherein Beers and his wife had been estranged and living apart and substantial time had elapsed between Beers' observance of another kissing his wife and the fatal shooting by him of yet another party.

The record before us sustains defendant's first assignment of error herein under the requirements of § 29-2027; the judgment of conviction must therefore be reversed.

Inasmuch as the matter must be retried and the same concerns presented by the remaining two issues will arise again, we address them at this time.

Defendant argues that insanity was never an issue in this case; that his psychiatric evidence was directed only toward showing that when he shot his wife's paramour, the act was not done with premeditated malice as required by the crime with which he was charged. Consequently, urges the defendant, the court should not have given the insanity defense instruction, nor should it have given the jury a verdict form providing it with the opportunity to find defendant not responsible by reason of insanity.

In *Washington v. State*, 165 Neb. 275, 85 N.W.2d 509 (1957), the evidence included testimony that the defendant Washington had subnormal mentality. This court said that although the degree of subnormal intellect might not be so extreme as to render the accused unable to distinguish between right and wrong and thus not justify a finding that he was not responsible by reason of insanity, nonetheless, evidence of an accused's condition of mind at the time of the

crime is admissible to show the absence of deliberation or premeditated design. We thus held therein that the trial court had erred in instructing the jury that defendant's intelligence could be considered solely in connection with the penalty to be imposed. In *Starkweather v. State*, 167 Neb. 477, 93 N.W.2d 619 (1958), the defendant, having pled not guilty and not guilty by reason of insanity, was convicted of first degree murder. This court said therein that a special diminished capacity instruction need not be given where the jury had otherwise been properly instructed that intent was an element of the crime charged. In that case no issue was raised as to the giving of an insanity defense instruction, as insanity such as to excuse the criminal act had been put in issue by the defendant. In *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964), the defendant was convicted of first degree murder as the result of a homicide committed during the perpetration of a robbery. On appeal the death penalty was reduced to life imprisonment because of evidence that the 19-year-old defendant had a low intellect, was easily led by others, and had no prior criminal record. This court ruled therein that the trial court had committed no prejudicial error in instructing the jury on the issue of insanity, a defense not specifically raised by the defendant. In *Hall* the defendant introduced evidence that he was feebleminded and that, as a result, his ability to distinguish right from wrong was impaired. The *Hall* opinion observed that the law is well settled that the only test for excusing criminal conduct is whether the defendant knows the difference between right and wrong, or understands the nature and quality of his act, irrespective of what the mental condition is called. This court then quoted with approval language from a California case to the effect that if one offers evidence as to his mental infirmity with the objective of mitigating his punishment, the court may instruct the jury as to

the legal standard by which accountability for that criminal conduct is to be determined.

While evidence of an accused's mental condition at the time the offense was committed is always admissible to prove absence of intent, our law does not recognize as a defense the concept of "irresistible impulse." Therefore, any opinion of a mental health expert based on the theory of "irresistible impulse" is irrelevant and therefore inadmissible for any purpose. *State v. Jacobs*, 190 Neb. 4, 205 N.W.2d 662 (1973); *Bothwell v. State*, 71 Neb. 747, 99 N.W. 669 (1904).

One of sound mind is conclusively presumed to intend the obvious and probable consequences of his voluntary act. *State v. Ortiz*, 187 Neb. 515, 192 N.W.2d 151 (1971). It has been held that even in those criminal cases wherein a specific intent is an element of the crime, an accused, if sane, is presumed to intend the necessary and probable consequences of voluntary, unlawful acts which are knowingly performed. Such presumption, although rebuttable in cases where a specific intent is an element of the crime, is sufficient to establish a prima facie case as to intent and will prevail, unless from a consideration of all the evidence the trier of fact entertains a reasonable doubt that such an intention existed. *Kirkendall v. State*, 152 Neb. 691, 42 N.W.2d 374 (1950). As we have seen, although there is but one type of insanity which will support a finding of not guilty or not responsible by reason of insanity, there are a variety of mental conditions which bear upon the ability to form a specific intent. A specific intent, in turn, bears at least upon the degree of criminality which may be assessed and may determine whether any criminality exists at all. Therefore, when insanity has not been pled as a defense and evidence concerning the defendant's mental condition is introduced solely to establish that he lacked the ability to intend the obvious and probable consequences of his voluntary act, and thus is of-

fered to rebut the presumption which flows from his act, the trial court should not define for the jury the elements of the insanity defense. Such defense is not an issue in the case unless the defendant has pled it as a defense and has otherwise complied with the provisions of Neb. Rev. Stat. § 29-2203 (Cum. Supp. 1982), or as in *Hall*, when testimony aimed at establishing an insanity defense has been allowed.

Defendant correctly argues that any instruction concerning an unpled and unproved insanity defense is likely to confuse a jury as to the proper role the evidence concerning the defendant's mental condition is to play in its determinations. The insanity defense instruction should not have been given. On the other hand, an instruction to the jury that any evidence received concerning defendant's mental condition bears only on the presence or absence of the intent necessary to prove the crime charged would not hold the same capacity to confuse and, under the circumstances presented herein, would be proper.

Defendant argues in his remaining assignment of error that his examination by the State was not authorized by § 29-2203 and, further, that the examination violated his fifth amendment privilege against self-incrimination.

That statute, in pertinent part, provides that one prosecuted for an offense may "plead that he or she is not responsible by reason of insanity at the time of the offense," but that no evidence offered by the defendant for the purpose of establishing his or her insanity shall be admitted unless prior notice of the intention to rely upon the insanity defense is given. Statutes, although they must be construed sensibly, are not open to construction as a matter of course. They are to be construed only when they are ambiguous. *Spilinek v. Spilinek*, 215 Neb. 35, 337 N.W.2d 122 (1983); *State v. Coffman*, 213 Neb. 560, 330 N.W.2d 727 (1983); *North Star Lodge #227 v. City of Lincoln*, 212 Neb. 236, 322 N.W.2d 419 (1982);

County of Douglas v. Board of Regents, 210 Neb. 573, 316 N.W.2d 62 (1982). The language of § 29-2203 specifically provides that it applies to one who pleads "not responsible by reason of insanity." There is no ambiguity in that language, and it cannot be construed to apply to situations wherein one puts his mental condition into issue for some purpose other than establishing lack of responsibility by reason of insanity.

Turning to the question of whether defendant's examination by the State violated his privilege against self-incrimination under the circumstances of this case, we start with the basic premise that the fifth amendment to the U.S. Constitution, made applicable to the states through the fourteenth amendment, commands that no person shall be compelled in any criminal case to be a witness against himself. In *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), during bifurcated proceedings required by Texas law in capital cases, Smith had been convicted of a felony murder, and a hearing was held regarding the penalty to be imposed. During that hearing, conducted before a jury, Smith offered no psychiatric testimony himself. The State then called as a witness a psychiatrist who had examined Smith to determine his competency to stand trial. The psychiatrist's testimony at the hearing was based on information obtained from that examination of Smith. Based on the privilege against self-incrimination, the Court refused to allow such testimony at the penalty stage of the proceeding at which the State still had the burden of establishing the proper penalty. It refused to analogize the situation to "a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity at the time of his offense. When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting

his proof on an issue that he interjected into the case." 451 U.S. at 465.

In light of *Estelle* we are inevitably drawn to the conclusion that the introduction into evidence of the testimony of the State-retained psychiatrist, who examined defendant under court order, violated his privilege under the fifth amendment. Defendant's use of evidence of his mental condition to rebut the charge that he acted with premeditation and malice was aimed squarely at an element of the crime which the State had the burden to prove; that is, whether the defendant had the intent required to commit murder.

The issue is not one in connection with which the State is without resources to controvert defendant's evidence. As we stated earlier, the State has operating for it the presumption that an accused is presumed to intend the necessary and probable consequences of his voluntary act. The State was also able to cross-examine any witnesses the defendant presented. The State could also have an appropriate witness attend the trial and testify on the issue based upon what the witness learned as a result of the evidence adduced at trial.

Prior to trial, the defendant filed a discovery motion requesting the State to disclose the results and reports of any physical or mental examination made in connection with its prosecution of Vosler. As such, under Neb. Rev. Stat. § 29-1916(2) (Reissue 1979), defendant may have waived his privilege against self-incrimination concerning like material in his possession or under his control. From the record it appears that such reciprocal discovery was granted to the State. In short, this case is not one in which the State was bereft of resources, absent a mental examination, to dispute defendant's claim that he acted without the requisite intent when he shot his wife's paramour.

The State contends that defendant's introduction of expert psychiatric testimony concerning his

ability to form the criminal intent, which was an element of the crime with which he is charged, is really an attempt to raise the defense of insanity, and, as such, the court was empowered to compel Vosler's psychiatric examination by state authorities. While, even absent the compliance with § 29-2203, a court may have the inherent power to order a psychiatric examination of a defendant who places his sanity in issue, *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968) (see, also, cases cited in *Estelle v. Smith*, *supra*, including *United States v. Cohen*, 530 F.2d 43 (5th Cir. 1976), *cert. denied* 429 U.S. 855, 97 S. Ct. 149, 50 L. Ed. 2d 130, and *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967), *vacated and remanded on other grounds* 392 U.S. 651, 88 S. Ct. 2145, 20 L. Ed. 2d 1317 (1968)), such is not the case when a defendant is only attempting to rebut the existence of the intent element of a crime with which he is charged. When one pleads insanity and offers evidence on that issue, such a plea carries with it an implicit, although not legally operative, admission of the State's charges. Such a plea necessarily carries with it the assertion that the commission of the act, along with the intent, was the result of the defendant's inability to understand the nature and quality of the act or distinguish right from wrong.

On the other hand, a person who introduces evidence of his mental condition to rebut the presumption that the act he performed was coupled with the requisite intent makes no admission of the crime. Such evidence is offered to show only that the crime charged was not committed. It carries with it no concession of the State's case and does not interject an issue foreign to the State's burden of proof. Throughout the proceedings, the State is contending that the defendant committed the crime, and the defendant is contending he did not. In such a situation the fifth amendment requires that the State prove its case without compelling the defendant to submit to

interviews by those in its employ. Defendant's final assignment of error is well taken.

The judgment is reversed and the cause remanded for a new trial in keeping with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting in part.

I concur in that part of the opinion of the court which holds that the judgment must be reversed because of the failure to submit an instruction on manslaughter to the jury as a lesser offense.

I also concur in the statement that the concept of "irresistible impulse" or compulsive behavior is not recognized as a defense in Nebraska.

Nebraska follows the M'Naghten rule as to the defense of insanity and does not recognize a defense based upon the doctrine of irresistible impulse. "The test of responsibility for crime is the defendant's capacity to understand the nature of the act alleged to be criminal and the ability to distinguish between right and wrong with respect to the act." *State v. Jacobs*, 190 Neb. 4, 6, 205 N.W.2d 662, 663 (1973). See, also, *Wright v. The People*, 4 Neb. 407 (1876). "The doctrine of irresistible impulse or 'moral insanity' has not been recognized as a defense or excuse for crime in this state." *State v. Jacobs*, *supra* at 6, 205 N.W.2d at 663. " 'The doctrine of moral insanity or uncontrollable impulse, upon which counsel seem mainly to rely, is not recognized in the jurisprudence of this state.' We are not disposed to depart from the rule as to the test of legal responsibility thus announced, which has the support of an unbroken line of decisions in this state, beginning with the case of *Wright v. People*, 4 Neb. 407." *Bothwell v. State*, 71 Neb. 747, 750, 99 N.W. 669, 671 (1904). See, also, *State v. Long*, 179 Neb. 606, 139 N.W.2d 813 (1966).

In a jurisdiction which does not recognize the doctrine of irresistible impulse, evidence of a mental condition, other than intoxication or subnormal mentality, which does not amount to legal insanity may

not be considered in determining whether the crime charged or a lesser offense was committed. Therefore, evidence of an "irresistible impulse" without proof that the defendant suffers from intoxication or subnormal mentality or a mental disease existing to such a high degree as to overwhelm reason, judgment, and conscience so that the accused would be unable to understand the nature and quality of his act and to distinguish right from wrong is not admissible to negate specific intent.

The real danger in permitting psychiatric evidence of mental or emotional disorders short of insanity to negate intent is to substantially destroy the M'Naghten rule and to clutter practically every trial with some sort of expert opinion evidence as to whether the defendant possessed the requisite intent to commit the crime charged.

In the present case evidence of an "irresistible impulse" on the part of the defendant was inadmissible because it concededly did not amount to proof of legal insanity.

In this case the trial court was faced with a unique situation, since the two psychiatrists called by the defendant were allowed to testify without objection by the State that the defendant shot the victim as the result of an irresistible impulse. These expert witnesses testified in substance that the defendant had no significant mental illness but suffered from a compulsive neurosis characterized by high levels of anxiety and tension; that the defendant knew the nature and quality of his act and knew the difference between right and wrong; and that the defendant did not qualify for the defense of insanity under the law of Nebraska.

The opinion of the court states that the jury should have been instructed that any evidence received concerning the defendant's mental condition would bear on the presence or absence of the intent necessary to prove the crime charged. In view of the evidence then before the jury, the effect of such an in-

struction would be to advise the jury that it might consider the evidence as to irresistible impulse in determining whether the defendant possessed the necessary intent to kill the victim.

Under the circumstances in this case and in view of the testimony of the defendant's expert witnesses, the trial court should have instructed the jury that insanity had not been pleaded or proven. The court should have informed the jury of the elements of the insanity defense, explained that the defendant had put on no proof that he was insane, that the law therefore presumes he is sane and intended the probable consequences of his acts, and that any evidence with regard to an "irresistible impulse" could not be considered as a basis for a finding of insanity or that the defendant did not have the required intent at the time he committed the act charged.

Where psychiatric testimony is relevant and admissible, the trial court may require the defendant to submit to a psychiatric examination by an expert appointed by the court or selected by the State.

Neb. Rev. Stat. § 29-1916(2) (Reissue 1979) provides that a defendant who obtains an order under the provisions of Neb. Rev. Stat. §§ 29-1912 to 29-1921 (Reissue 1979) waives his privilege against self-incrimination for the purposes of the operation of the provisions of that section. The defendant in this case moved for discovery under § 29-1912, and an order granting reciprocal discovery was made.

Such an examination is specifically authorized where the defendant has pleaded not guilty by reason of insanity at the time of the offense. Neb. Rev. Stat. § 29-2203 (Cum. Supp. 1982). The reasons which support the right of the State to compel such an examination where the defendant pleads insanity are equally applicable in any case where psychiatric evidence may be offered by the defendant.

As the U.S. Supreme Court observed in *Estelle v. Smith*, 451 U.S. 454, 465, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981): "When a defendant asserts the insanity

defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." Even though the State in this case failed to object to the evidence of an "irresistible impulse," fundamental fairness should prevent a defendant who uses such psychiatric testimony in his defense from denying the State an opportunity to meet and rebut that evidence. See *People v Mangiapane*, 85 Mich. App. 379, 271 N.W.2d 240 (1978), holding that the State is entitled to a psychiatric examination of the defendant whenever he puts his mental condition into issue in any form.

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

GLORIA MAY, APPELLANT, V. HALL COUNTY LIVESTOCK IMPROVEMENT ASSOCIATION, APPELLEE.

344 N.W.2d 629

Filed February 17, 1984. No. 82-581.

1. **Directed Verdict.** The party against whom a verdict is directed is entitled to have all controverted facts resolved in his favor and to have the benefit of every reasonable inference deducible from the evidence.
2. **Negligence: Invitor-Invitee.** A possessor of land is not an insurer of the safety of business invitees on its land.
3. _____: _____. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (3) fails to exercise reasonable care to protect them against the danger.
4. **Trial: Directed Verdict.** Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury.

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

Roger Lott of Muffly, Lott & Oglesby, for appellant.

James A. Beltzer of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and CAMBRIDGE, D.J.

CAMBRIDGE, D.J.

This is an appeal in a slip and fall case. The trial court sustained the defendant's motion for a directed verdict at the close of the plaintiff's case.

The plaintiff has appealed, contending that the evidence presented by her was sufficient at law to sustain a jury verdict against the defendant for damages.

As we must, we assume the truth of the material and relevant evidence presented by the plaintiff, find every controverted fact in her favor, and give her the benefit of every reasonable inference deducible from the evidence. *Syas v. Nebraska Methodist Hospital Foundation*, 209 Neb. 201, 307 N.W.2d 112 (1981).

On April 12, 1977, the plaintiff attended the horseraces at Fonner Park Racetrack, Grand Island, Nebraska. The defendant owned and operated the park. The plaintiff, in addition to paying the general charge for admission into the grandstand, paid for admittance into a reserved area thereof, enclosed by metal railings, where there were tables and chairs from which the races could be observed. The area had a cement floor. Food, soft drinks, and beer, purchased either at concession stands located in the area or from waitresses who served the tables, were consumed in the area. The plaintiff sat at one of those tables, and on various trips from and to the table she saw "slippery places" and liquid on the cement in the areas around her table but not near her table; she never looked under her own table before the accident to see if there was any liq-

uid under the table or around her chair. The plaintiff stood up most, if not all, of the sixth race, and when she saw that the horse she had bet was going to win, she started to take steps to go, and her left foot slipped; she tried to break her fall by catching the leg of the table with her right foot, but did not succeed. After regaining consciousness the plaintiff recalled that the bottom or lower part of her right pantleg was wet. According to the food concession manager, who arrived on the scene while the plaintiff was still lying on the floor and who remained there until the plaintiff had left, there were no spills, liquids, or debris of any kind on the floor where the plaintiff had fallen, and the floor was dry; and when spills did occur, there was a procedure for cleaning them up. As a result of the fall, the plaintiff sustained head injuries and a broken right hip with complications in the healing of that fracture.

The defendant was not an insurer of the safety of business invitees on its premises. It is well-established law in this state that a possessor of premises is under a duty to use reasonable care to make his premises safe for a business visitor or to give him adequate warning to enable him to avoid harm when certain conditions are true. See NJI 8.22 and 8.23 and the authorities cited thereunder. As stated by the court in *Syas v. Nebraska Methodist Hospital Foundation*, *supra* at 203-04, 307 N.W.2d at 114, in referring to NJI 8.22: "This instruction tracks Restatement (Second) of Torts § 343 (1965):

" 'A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

" '(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

" '(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

" '(c) fails to exercise reasonable care to protect them against the danger.'

"Our cases are consistent. See, *Crawford v. Soennichsen*, 175 Neb. 87, 120 N.W.2d 578 (1963); *Brandert v. Scottsbluff Nat. Bank & Trust Co.*, 194 Neb. 777, 235 N.W.2d 864 (1975)."

The plaintiff contends in her brief to this court that something wet on the floor caused her to slip and fall, but the bill of exceptions in this case simply does not support that claim. It is apparent from the foregoing recital of facts that the plaintiff failed to produce any evidence which could have reasonably satisfied the jury that the physical harm suffered by the plaintiff was caused by a condition or activity on the defendant's premises. Giving full weight to all of the plaintiff's evidence and all inferences reasonably deducible therefrom, it can be concluded that such conditions and activities did in fact exist on the defendant's premises at the time in question, but there is literally no evidence in the record establishing that any one of them was the proximate cause or a proximately contributing cause of the plaintiff's slip and fall and the physical harm which resulted therefrom.

Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury. See *Syas v. Nebraska Methodist Hospital Foundation*, 209 Neb. 201, 307 N.W.2d 112 (1981).

In view of the foregoing it is unnecessary for this court to rule upon the plaintiff's contention that because of the manner in which business was being conducted on the defendant's premises, she should not be required to prove that the defendant had either actual or constructive knowledge of the condition or activity which purportedly caused her to slip and fall. In each of the cases cited by the plaintiff in support of that contention, i.e., *Ciminski v. Finn*

Corp., 13 Wash. App. 815, 537 P.2d 850 (1975), and those in Annot., 85 A.L.R.3d 991 (1978), the condition on the premises causing physical harm had either been proved or was genuinely at issue.

AFFIRMED.

IN RE APPLICATION OF OCHSNER.
DUANE OCHSNER ET AL., APPELLEES, V. THE GLENWOOD TELEPHONE MEMBERSHIP CORPORATION, APPELLANT.
344 N.W.2d 632

Filed February 17, 1984. No. 82-658.

Administrative Law: Actions: Final Orders: Statutes. For purposes of Neb. Rev. Stat. § 49-301 (Reissue 1978), an administrative proceeding is a pending action when the agency's final order is rendered.

Appeal from the Nebraska Public Service Commission. Affirmed.

Charles W. Hastings, for appellant.

Conway and Connolly, P.C., for appellees.

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

WHITE, J.

This is an appeal from an order of the Nebraska Public Service Commission which approved an application to obtain local telephone service from the Juniata exchange of the Lincoln Telephone and Telegraph Company. The applicants reside in the adjacent Roseland exchange of The Glenwood Telephone Membership Corporation.

Several assignments of error are presented, but only one issue is involved, the effect of the amendment of Neb. Rev. Stat. § 75-613 (Reissue 1981) by 1982 Neb. Laws, L.B. 229, which law became effective July 17, 1982. See § 75-613 (Cum. Supp. 1982).

A short discussion of the factual setting is neces-

sary. On July 22, 1981, applicants, farmers and residents of the Glenwood telephone service area, filed an application for service from the Juniata exchange. Hearing was had and an order approving the application was entered by the commission on May 17, 1982. The Glenwood Telephone Membership Corporation filed a timely motion for rehearing. An order denying the motion for rehearing was filed on August 24, 1982.

Appellant, in effect, concedes, and the record supports, that the four requirements of § 75-613 (Reissue 1981) for a granting of the application were established by the applicants.

Essentially, the objection by applicants to the service offered by Glenwood is the toll charges they would have to incur whenever they would call members of the Juniata exchange, the applicants' primary community of interest. This court in *Reis v. Glenwood Telephone Membership Corp.*, 202 Neb. 187, 274 N.W.2d 539 (1979), held that where the subscribers' community of interest lay outside the service area, the necessity of using long-distance service regularly was sufficient evidence of inadequate service under § 75-613(1) (Reissue 1976).

The amended version of § 75-613(1) (Cum. Supp. 1982) reads as follows: "Upon the completion of the hearing on such an application, if a hearing is required, the Public Service Commission may grant the application, in whole or in part, if the evidence establishes all of the following: (1) That such applicant or applicants are not receiving, and will not within a reasonable time receive, reasonably adequate exchange telephone service from the company furnishing such service in the exchange service area in which the applicant or applicants reside or operate. *The fact that an applicant is required to pay toll charges for long distance telephone calls to an exchange service area adjacent to the territory in which the applicant resides or operates shall not be deemed to constitute inadequate exchange telephone*

service from the company furnishing such service." (Emphasis supplied.)

It is obvious that if 1982 Neb. Laws, L.B. 229, was binding on the Public Service Commission on the date the final order was entered, this case must be reversed.

Involved here is Neb. Rev. Stat. § 49-301 (Reissue 1978): "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute."

Appellant argues that § 49-301 does not apply, since no judicial proceeding was pending, and a cause of action for transfer of the territory under the repealed statute ceased to exist on July 17, 1982. While it is clear that § 49-301 applies to all civil, criminal, and administrative actions, there appears to be an inconsistency in Nebraska case law as to when an action is deemed "pending" within the meaning of the general saving statute in an administrative proceeding. Cf., *United Mineral Products Co. v. Nebraska Railroads*, 177 Neb. 802, 131 N.W.2d 388 (1964); *Kaup v. Sweet*, 187 Neb. 226, 188 N.W.2d 891 (1971); *Clark v. Sweet*, 187 Neb. 232, 188 N.W.2d 889 (1971); *Schilke v. School Dist. No. 107*, 207 Neb. 448, 299 N.W.2d 527 (1980).

To the extent that there are conflicts between these cases, we are of the opinion that *Kaup v. Sweet*, *supra*, and *Clark v. Sweet*, *supra*, represent the law in this jurisdiction. *Kaup* and *Clark* indicate that, for purposes of § 49-301, an administrative action is "pending" when the agency's final order is rendered.

In the instant case, as in *Kaup*, both the filing of the petition and the agency's final order occurred before the effective date of the respective repealing statutes. It was only by reason of the fact that a motion for rehearing was filed and not denied until August 24, 1982, that the question of which law ap-

plies arises at all. Had the Public Service Commission acted in overruling the motion for rehearing prior to the effective date of the repealing act, there is no question but that the repealing act would not have applied.

The filing of a motion for rehearing is not the reopening of the proceedings but merely an opportunity for the finder of fact to reexamine the correctness of the actions which have already been taken. That determination is made by looking back at the time the action is taken and not by looking at what has occurred after the date the order is entered. Ordinarily, a motion for rehearing is made for the purpose of directing attention to matters that were overlooked or mistakenly conceived in the original decision. Therefore, the petition contemplates reconsideration based upon the original record. *Atchison etc. Ry. Co. v. United States*, 284 U.S. 248, 52 S. Ct. 146, 76 L. Ed. 273 (1932); *Lambert Constr. Co. v. State*, 115 N.H. 516, 345 A.2d 396 (1975).

We therefore hold that § 75-613 (Reissue 1981), not § 75-613 (Cum. Supp. 1982), was the controlling law for the purposes of the appellees' application. The appellees, having met the requirements of the former statute, are entitled to an affirmance in this court.

AFFIRMED.

BOSLAUGH, J., concurs in the result.