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# REPORTS OF CASES

DECIDED BETWEEN

JANUARY 4, 1985 and MAY 16, 1985

IN THE

# Supreme Court of Nebraska

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## VOLUME CCXIX

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DONALD C. PATTON

OFFICIAL REPORTER

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1985

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For the benefit of the State of Nebraska

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# TABLE OF CASES REPORTED


Aandahl, In re Interest of ..... 414
Abbott v. Benson ..... 28
Adams; Harrold v. ..... 139
Allen v. IBP, Inc. ..... 424
American Charter Fed. Sav. & Loan Assn.; Moore v. ..... 793
Anderson; States v. ..... 545
Anderson v. Farm Bureau Ins. Co. ..... 1
Applegate v. Applegate ..... 532
Application of S.I.D. No. 65, In re ..... 647
Armstrong v. Hartford Life Ins. Co. ..... 128
Austin; State v. ..... 420

Banner County Farms, Inc.; Van Pelt v. ..... 478
Bargen; State v. ..... 416
Basin Elec. Power Co-op v. Frenchman Valley Irr. Dist. ..... 412
Basin Elec. Power Co-op v. Little Blue N.R.D. ..... 372
Basin Elec. Power Co-op v. Twin Valley Cons'n Assn. ..... 413
Baumbach v. Standard Chem. Mfg. Co. ..... 324
Bayer v. Father Flanagan's Boys' Home ..... 824
Beardmore Suburban Chevrolet; Wendt v. ..... 775
Beatrice, City of v. Goodenkauf ..... 756
Beatrice Manor v. Department of Health ..... 141
Bellevue, City of v. Douglas ..... 868
Bennett; State v. ..... 601
Benson; Abbott v. ..... 28
Benson; Cambridge v. ..... 28
Benson; Hamilton v. ..... 28
Benson; Inlow v. ..... 28
Benson; Malone v. ..... 28
Benson; Menard v. ..... 28
Benson; Pinney v. ..... 28
Benson; Svoboda v. ..... 28
Benton v. Board of Ed. of Sch. Dist. No. 17 ..... 134
Bideaux; State v. ..... 718
Birkel v. Hassebrook Farm Serv. ..... 286
Bish v. Fletcher ..... 863
Black; Griess v. ..... 295
Bleick v. City of Papillion ..... 574
Blue Cross; OB-GYN v. ..... 199
Board of Ed. Lands & Funds v. Jarchow ..... 88
Board of Ed. of Sch. Dist. No. 17; Benton v. ..... 134

Board of Ed. of Sch. Dist. No. 54; Eshom v. ..... 467
Board of Equalization; Richman Gordman v. ..... 250
Bodtke; State v. ..... 504
Bohaty v. Briard ..... 42
Boll v. Boll ..... 486
Brand; State v. ..... 402
Briard; Bohaty v. ..... 42
Brown v. Knox ..... 189
Buckingham v. Wray ..... 807
Burgess v. Omahawks Radio Control Org. ..... 100

Cal-Neb Land Co.; First Fed. Sav. & Loan Assn. v. ..... 887
Cambridge v. Benson ..... 28
Carter; Himes v. ..... 734
Casper; State v. ..... 641
Casselman, In re Estate of ..... 516
Casselman, In re Estate of ..... 653
Catholic Bishop; Egan v. ..... 365
Charley v. Farmers Mut. Ins. Co. ..... 765
Christopher v. Evans ..... 51
Circle 76 Fertilizer v. Nelsen ..... 661
City of Beatrice v. Goodenkauf ..... 756
City of Bellevue v. Douglas ..... 868
City of Omaha; S.I.D. No. 95 v. ..... 564
City of Papillion; Bleick v. ..... 574
Clark; Neff v. ..... 521
Cline v. Franklin Pork, Inc. ..... 234
Cohen; Ellis & Guy Advg. v. ..... 340
Commercial Nat. Bank; Prososki v. ..... 607
Conley; State ex rel. NSBA v. ..... 617
Contempt of Sileven, In re ..... 34
Cooper v. Cooper ..... 64
Corbet, Inc. v. County of Pawnee ..... 622
County of Pawnee; Corbet, Inc. v. ..... 622
Craig; State v. ..... 70
Creager v. Creager ..... 760
Crisp; State v. ..... 265
Cummings v. Curtiss ..... 106
Curtiss; Cummings v. ..... 106

Darling, In re Trust Estate of ..... 705
Daub; Smith v. ..... 698
Denbeck; State v. ..... 672
Department of Corr. Servs.; State Code Agencies Ed. Assn. v. ..... 555
Department of Ed.; Department of Ed. Teachers Assn. v. ..... 555
Department of Ed. Teachers Assn. v. Department of Ed. ..... 555
Department of Health; Beatrice Manor v. ..... 141

Department of Labor; State v. ..... 81
Department of Motor Vehicles; Raymond v. ..... 821
Department of Personnel; Drinkwine v. ..... 291
Department of Pub. Insts.; State Code Agencies Ed. Assn. v. ..... 555
Department of Pub. Welfare; State Code Agencies Ed. Assn. v. ..... 555
Douglas, State ex rel. v. Faith Baptist Church ..... 34
Douglas; Video Consultants v. ..... 868
Draper; Mohrlang v. ..... 630
Drinkwine v. Flebbe ..... 291
Dubas v. Commercial Nat. Bank ..... 607
Duden; Darling v. ..... 705

Egan v. Catholic Bishop ..... 365
Election Commissioner; Quigley v. ..... 110
Ellis & Guy Advg. v. Cohen ..... 340
Ellis; State v. ..... 408
Else v. Else ..... 878
Eshom v. Board of Ed. of Sch. Dist. No. 54 ..... 467
Estate of Casselman, In re ..... 516
Estate of Casselman, In re ..... 653
Evans; Christopher v. ..... 51

Faith Baptist Church; State ex rel. Douglas v. ..... 34
Farm Bureau Ins. Co.; Anderson v. ..... 1
Farmers Mut. Ins. Co.; Charley v. ..... 765
Farmland Foods; Zaleski v. ..... 157
Father Flanagan's Boys' Home; Bayer v. ..... 824
Fiene; State v. ..... 397
First Fed. Sav. & Loan Assn. v. Cal-Neb Land Co. ..... 887
First Nat. Bank; Circle 76 Fertilizer v. ..... 661
Fitzke; State ex rel. NSBA v. ..... 271
Fix; State v. ..... 674
Flebbe; Drinkwine v. ..... 291
Fleming v. Goosey ..... 824
Fletcher; Bish v. ..... 863
Ford v. Ford ..... 13
Frank; State ex rel. NSBA v. ..... 271
Franklin Pork, Inc.; Cline v. ..... 234
Frenchman Valley Irr. Dist.; Basin Elec. Power Co-op v. ..... 412

G. Kay, Inc., In re Petition of ..... 24
Gall v. Great Western Sugar Co. ..... 354
Ganz; Smith v. ..... 432
Gates Eng'g Co.; Mennonite Deaconess Home & Hosp. v. ..... 303
General Motors Corp.; Kizzier Chevrolet Co. v. ..... 319
Gering Irr. Dist.; Peterson v. ..... 275
Gering Irr. Dist.; Peterson v. ..... 281
Giese; State ex rel. NSBA v. ..... 353

Glockel v. State Farm Mut. Auto. Ins. Co. ..... 222
Glover v. Wurtele ..... 812
Gonzales; State v. ..... 846
Goodenkauf; City of Beatrice v. ..... 756
Goodon; State v. ..... 186
Goodyear Tire & Rubber Co.; Williams v. ..... 748
Goosey; Fleming v. ..... 824
Graham v. Waggener ..... 907
Great Western Sugar Co.; Gall v. ..... 354
Greathouse; Van Pelt v. ..... 478
Griess, In re Guardianship of ..... 295
Groves; State v. ..... 382
Growers Seed Assn.; NC+ Hybrids v. ..... 296
Gugelman; Security State Bank v. ..... 132
Gutchewsky v. Ready Mixed Concrete Co. ..... 803

Hamilton v. Benson ..... 28
Harrold v. Spaghetti Tree, Inc. ..... 139
Hartford Life Ins. Co.; Armstrong v. ..... 128
Hassebrook Farm Serv.; Birkel v. ..... 286
Havelock Bank v. Woods ..... 57
Herman Bros.; G. Kay, Inc. v. ..... 24
Hessel; Richman Gordman v. ..... 250
Hiatt v. Tallmage ..... 635
Hillside Hog Feeders, Inc.; Cline v. ..... 234
Himes v. Carter ..... 734
Hinzman v. Richman Gordman ..... 875
Howsden v. Rolenc ..... 16
Hugelman; State ex rel. Laughlin v. ..... 254
Hunter; State v. ..... 850
Hurley; State v. ..... 829

IBP, Inc.; Allen v. ..... 424
IGT Nebraska, Inc. v. Douglas ..... 868
In re Application of S.I.D. No. 65 ..... 647
In re Contempt of Sileven ..... 34
In re Estate of Casselman ..... 516
In re Estate of Casselman ..... 653
In re Guardianship of Griess ..... 295
In re Interest of Aandahl ..... 414
In re Interest of R.H., T.H., and J.H. ..... 904
In re Interest of S.A.S. ..... 500
In re Interest of S.S.L. ..... 911
In re Petition of G. Kay, Inc. ..... 24
In re Trust Estate of Darling ..... 705
Inlow v. Benson ..... 28

J.H., In re Interest of R.H., T.H., and ..... 904

Jarchow; State v. ..... 88
Jedlicka; Bohaty v. ..... 42
Johnson; Patteson v. ..... 852
Johnson; SapaNajin v. ..... 40
Johnston v. State ..... 457
Jones; State v. ..... 184
Jost; State v. ..... 162

Kahrhoff v. Kohl ..... 742
Kallos; Mader v. ..... 579
Kaminski; Macfie v. ..... 524
Kandt, State ex rel. v. North Platte Baptist Church ..... 694
Kerwood v. Kerwood ..... 186
Kizzier Chevrolet Co. v. General Motors Corp. ..... 319
Knox; Brown v. ..... 189
Koch v. Koch ..... 195
Kochenash v. Kochenash ..... 538
Kohl; Kahrhoff v. ..... 742
Krug; Hiatt v. ..... 635
Kula v. Prososki ..... 626

Lainson v. Lainson ..... 170
Lake v. Piper, Jaffray & Hopwood Inc. ..... 731
Lancaster Co. Mental Health Bd.; Aandahl v. ..... 414
Landen; Mangan v. ..... 643
Larsen; Yankton Prod. Credit Assn. v. ..... 610
Larson v. Transit Auth. of Omaha ..... 539
Laughlin, State ex rel. v. Hugelman ..... 254
Lebsack; Quigley v. ..... 110
Lichti; State v. ..... 894
Lincoln Fed. Sav. & Loan Assn.; Rosenberg v. ..... 689
Little Blue N.R.D.; Basin Elec. Power Co-op v. ..... 372

Macfie v. Kaminski ..... 524
Mader v. Kallos ..... 579
Malek; State v. ..... 680
Malone v. Benson ..... 28
Mangan v. Landen ..... 643
McCollister v. McCollister ..... 711
McConnell; Priest v. ..... 328
McCoy; Security State Bank v. ..... 132
McKichan; State v. ..... 560
McLaughlin v. Self-Insurance Servs. ..... 260
Menard v. Benson ..... 28
Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co. ..... 303
Mid-State Co-op; Circle 76 Fertilizer v. ..... 661
Milder v. Fletcher ..... 863
Minnesota Mining & Mfg. Co.; Mulder v. ..... 241

Mohrlang v. Draper ..... 630
Moore v. American Charter Fed. Sav. & Loan Assn. ..... 793
Moss; State v. ..... 327
Mulder v. Minnesota Mining & Mfg. Co. ..... 241
Mullinex; State v. ..... 81

NC+ Hybrids v. Growers Seed Assn. ..... 296
NSBA, State ex rel. v. Conley ..... 617
NSBA, State ex rel. v. Fitzke ..... 271
NSBA, State ex rel. v. Frank ..... 271
NSBA, State ex rel. v. Giese ..... 353
Nebraska Dept. of Ed. Teachers Assn. v. Department of Ed. ..... 555
Nebraska P.S.C.; G. Kay, Inc. v. ..... 24
Nebraska State Personnel Bd.; Drinkwine v. ..... 291
Neff v. Clark ..... 521
Neil v. Neil ..... 820
Nelsen; Circle 76 Fertilizer v. ..... 661
Nemec v. Nemec ..... 891
North Platte Baptist Church; State ex rel. Kandt v. ..... 694

OB-GYN v. Blue Cross ..... 199
O'Hanlon; Darling v. ..... 705
Ohler; State v. ..... 840
Oldfield; State v. ..... 81
Omaha, City of; S.I.D. No. 95 v. ..... 564
Omaha, Transit Auth. of; Larson v. ..... 539
Omahawks Radio Control Org.; Burgess v. ..... 100
Owen v. Owen ..... 587

Papillion, City of; Bleick v. ..... 574
Parsons v. Parsons ..... 736
Patteson v. Johnson ..... 852
Pawnee, County of; Corbet, Inc. v. ..... 622
Penney; State v. ..... 81
Perkins; State v. ..... 491
Peterson; State v. ..... 866
Peterson; Tank v. ..... 438
Peterson v. Gering Irr. Dist. ..... 275
Peterson v. Gering Irr. Dist. ..... 281
Petition of G. Kay, Inc., In re ..... 24
Pieper; Drinkwine v. ..... 291
Pinney v. Benson ..... 28
Piper, Jaffray & Hopwood Inc.; Lake v. ..... 731
Pointer v. State ..... 315
Priest v. McConnell ..... 328
Prososki; Kula v. ..... 626
Prososki; Shotkoski v. ..... 213
Prososki v. Commercial Nat. Bank ..... 607

Quigley v. Lebsack ..... 110

R.H., T.H., and J.H., In re Interest of ..... 904
R.L.; State v. ..... 911
Raymond v. Department of Motor Vehicles ..... 821
Ready Mixed Concrete Co.; Gutchewsky v. ..... 803
Richman Gordman; Hinzman v. ..... 875
Richman Gordman v. Board of Equalization ..... 250
Robbins v. Robbins ..... 151
Robertson; State v. ..... 782
Rockwood v. Rockwood ..... 21
Rolenc; Howsden v. ..... 16
Rolf; State v. ..... 917
Rolling; State v. ..... 800
Rosenberg v. Lincoln Fed. Sav. & Loan Assn. ..... 689
Ross v. Ross ..... 528
Russell v. Casselman ..... 653

S.A.S., In re Interest of ..... 500
S.I.D. No. 65, In re Application of ..... 647
S.I.D. No. 95 v. City of Omaha ..... 564
S.S.L., In re Interest of ..... 911
Salmon v. Salmon ..... 899
SapaNajin v. Johnson ..... 40
Sav. & Loan Assn., American Charter Fed.; Moore v. ..... 793
Sav. & Loan Assn., First Fed. v. Cal-Neb Land Co. ..... 887
Sav. & Loan Assn., Lincoln Fed.; Rosenberg v. ..... 689
Saville; State v. ..... 81
Sch. Dist. No. 17, Board of Ed. of; Benton v. ..... 134
Sch. Dist. No. 54, Board of Ed. of; Eshom v. ..... 467
Schmode's, Inc. v. Wilkinson ..... 209
Schnakenberg v. Schroeder ..... 813
Schroeder; Schnakenberg v. ..... 813
Schwartz; State v. ..... 833
Security State Bank v. Gugelman ..... 132
Security State Bank v. McCoy ..... 132
Self-Insurance Servs.; McLaughlin v. ..... 260
Shotkoski v. Prososki ..... 213
Sides Constr. Co.; Witherspoon v. ..... 117
Sileven, In re Contempt of ..... 34
Smith; State v. ..... 176
Smith v. Daub ..... 698
Smith v. Ganz ..... 432
Soe; State v. ..... 797
Sonntag v. Sonntag ..... 583
Spaghetti Tree, Inc.; Harrold v. ..... 139
Standard Chem. Mfg. Co.; Baumbach v. ..... 324

State Code Agencies Ed. Assn. v. Department of Corr. Servs. ..... 555
State Code Agencies Ed. Assn. v. Department of Pub. Insts. ..... 555
State Code Agencies Ed. Assn. v. Department of Pub. Welfare ..... 555
State ex rel. Douglas v. Faith Baptist Church ..... 34
State ex rel. Kandt v. North Platte Baptist Church ..... 694
State ex rel. Laughlin v. Hugelman ..... 254
State ex rel. NSBA v. Conley ..... 617
State ex rel. NSBA v. Fitzke ..... 271
State ex rel. NSBA v. Frank ..... 271
State ex rel. NSBA v. Giese ..... 353
State Farm Mut. Auto. Ins. Co.; Glockel v. ..... 222
State; Johnston v. ..... 457
State; Pointer v. ..... 315
State v. Austin ..... 420
State v. Bargen ..... 416
State v. Bennett ..... 601
State v. Bideaux ..... 718
State v. Bodtke ..... 504
State v. Brand ..... 402
State v. Casper ..... 641
State v. Craig ..... 70
State v. Crisp ..... 265
State v. Denbeck ..... 672
State v. Department of Labor ..... 81
State v. Ellis ..... 408
State v. Fiene ..... 397
State v. Fix ..... 674
State v. Gonzales ..... 846
State v. Goodon ..... 186
State v. Groves ..... 382
State v. Hunter ..... 850
State v. Hurley ..... 829
State v. Jarchow ..... 88
State v. Johnston ..... 457
State v. Jones ..... 184
State v. Jost ..... 162
State v. Lichti ..... 894
State v. Malek ..... 680
State v. McKichan ..... 560
State v. Moss ..... 327
State v. Mullinex ..... 81
State v. Ohler ..... 840
State v. Oldfield ..... 81
State v. Penney ..... 81
State v. Perkins ..... 491
State v. Peterson ..... 866

State v. Robertson ..... 782
State v. Rolf ..... 917
State v. Rolling ..... 800
State v. Saville ..... 81
State v. Schwartz ..... 833
State v. Smith ..... 176
State v. Soe ..... 797
State v. Stewart ..... 347
State v. Timm ..... 687
State v. Ware ..... 594
State v. Wiley ..... 740
State v. Wilkinson ..... 685
State v. Williams ..... 587
States v. Anderson ..... 545
Stehlik v. Daub ..... 698
Steinkruger v. Steinkruger ..... 477
Stewart; State v. ..... 347
Sturzenegger v. Sturzenegger ..... 812
Svoboda v. Benson ..... 28
Swift & Co.; McLaughlin v. ..... 260

T.H., and J.H., In re Interest of R.H., ..... 904
Tallmage; Hiatt v. ..... 635
Tank v. Peterson ..... 438
Timm; State v. ..... 687
Transit Auth. of Omaha; Larson v. ..... 539
Trust Estate of Darling, In re ..... 705
Twin Valley Cons'n Assn.; Basin Elec. Power Co-op v. ..... 413

V.S.; State v. ..... 500
Van Pelt v. Greathouse ..... 478
Vann; Ellis & Guy Advg. v. ..... 340
Video Consultants v. Douglas ..... 868
Voichoskie v. Voichoskie ..... 670

Waggener; Graham v. ..... 907
Ware; State v. ..... 594
Wefso; S.I.D. No. 65 v. ..... 647
Wendt v. Beardmore Suburban Chevrolet ..... 775
Wentz v. Wentz ..... 554
Western Surety Co.; Griess v. ..... 295
Wiley; State v. ..... 740
Wilkinson; Schmode's, Inc. v. ..... 209
Wilkinson; State v. ..... 685
Williams; State v. ..... 587
Williams v. Goodyear Tire & Rubber Co. ..... 748
Witherspoon v. Sides Constr. Co. ..... 117
Woods; Havelock Bank v. ..... 57

Wray; Buckingham v. ..... 807
Wurtele; Glover v. ..... 812

Yankton Prod. Credit Assn. v. Larsen ..... 610
York v. York ..... 883
Yrkoski v. Yrkoski ..... 372

Zaleski v. Farmland Foods ..... 157
Zemanek v. Zemanek ..... 503

## CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

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No. 83-445: **Hladky v. City of David City.** Stipulation allowed; appeal dismissed.

No. 83-739: **Standen v. City of Omaha.** Stipulation allowed; appeal dismissed.

No. 83-848: **Tracy v. Boyle.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 83-883: **O'Neill Production Credit Association v. Ted Olson Enterprises, Inc.** Stipulation allowed; appeal dismissed with prejudice.

No. 84-117: **State v. Fisher.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-178: **In re Estate of Driskell.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 84-208: **Dept. of Health v. Good Samaritan Hospital.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 84-279: **State v. Marco.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-337: **Morgan v. Morgan.** Stipulation allowed; appeal dismissed.

No. 84-341: **Tuttle v. Tuttle.** Stipulation allowed; appeal dismissed.

No. 84-359: **Larson v. Larson.** Stipulation allowed; appeal dismissed with prejudice at cost of appellant.

No. 84-381: **Guest v. Farmers Irrigation District of Scotts Bluff Co.** Stipulation allowed; appeal dismissed.

No. 84-409: **Nider-Jergensen Construction Co. v. H.J. Miller Construction, Inc.** Stipulation allowed; appeal dismissed.

No. 84-419: **Nider v. H.J. Miller Construction, Inc.** Stipulation allowed; appeal dismissed.

No. 84-463: **State Security Savings Co. v. Colson.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 84-464: **State Security Savings Co. v. Colson.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 84-483: **State v. Holman.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-484: **Boyden v. Jensen.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 84-514: **Pechar v. City of Omaha.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-528: **State v. Williams.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-542: **Schachter v. Scotts Bluff County Board of Commissioners.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 84-545: **State v. Austin.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-547: **State v. Canaday.** Judgment affirmed; see Rule 7A.

No. 84-551: **In re Interest of Sand.** By order of the court dated February 13, 1985, appeal dismissed as moot.

No. 84-562: **Kelley Bean Co., Inc. v. Karubas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-573: **Cluck v. Cluck.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-574: **Teleconnect, Inc. v. Cordell.** Stipulation allowed; appeal dismissed.

No. 84-597: **Hoffman v. Hoffman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-609: **Kernick v. City of Atkinson.** Stipulation allowed; appeal dismissed.

No. 84-639: **State ex rel. Farey v. Augustine.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-646: **Pohl v. Hanway.** Motion of appellee for summary affirmance sustained; appeal dismissed as moot.

No. 84-647: **State v. Harrington.** Motion of court-appointed

counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-653: **State v. Laws.** Judgment affirmed; see Rule 7A.

No. 84-656: **Kotschwar v. Kotschwar.** Stipulation allowed; appeal dismissed.

No. 84-670: **State v. Chism.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-675: **State v. Arnold.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-676: **State v. Biggerstaff.** Judgment affirmed; see Rule 7A.

No. 84-679: **Boyer v. Christensen.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 84-684: **McLean Trucking Co. v. Spencer.** Stipulation allowed; appeal dismissed.

No. 84-688: **Van Nortwick v. Van Nortwick.** Stipulation allowed; appeal dismissed.

No. 84-696: **Napravnik v. Metropolitan Utilities District.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-704: **State v. Stutzman.** Judgment affirmed; see Rule 7A.

No. 84-710: **State v. Smith.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-714: **In re Interest of Brase.** Stipulation allowed; appeal dismissed.

No. 84-717: **State v. Kraemaer.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-723: **H.J. Miller Construction, Inc. v. Nider-Jergensen Construction Co.** Stipulation allowed; appeal dismissed.

No. 84-724: **Miller v. Nider-Jergensen Construction Co.** Stipulation allowed; appeal dismissed.

No. 84-737: **Ginn v. Ginger Cove, Inc.** Stipulation allowed; appeal dismissed.

No. 84-740: **Johnson v. On The Road Again.** Stipulation

allowed; appeal dismissed at cost of appellant.

No. 84-742: **State v. Balltrip.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-749: **Ziegler v. Boardwalk Assoc., Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 84-753: **State v. Christie.** Judgment affirmed; see Rule 7A.

No. 84-760: **State v. Bray.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-762: **Brazeal v. Brazeal.** Stipulation allowed; appeal dismissed.

No. 84-767: **Watson v. Nick's Gyros of America, Inc.** Stipulation allowed; appeal dismissed.

No. 84-773: **State v. Mateer.** Judgment affirmed; see Rule 7A.

No. 84-774: **Moskovits v. Conry.** Judgment affirmed; see Rule 7A.

No. 84-778: **State v. Simants.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 84-785: **Woods v. Douglas County.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-786: **State v. Bussard.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-793: **Mills v. De-Luxe Manufacturing & Distributors, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-805: **Nebco Intermodal, Inc. v. Otoe County.** Stipulation allowed; appeal dismissed with prejudice, each party to pay own costs.

No. 84-808: **Bredfeldt v. Graves.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 84-814: **O'Keefe v. Benson.** By order of the court, appeal dismissed because of lack of jurisdiction; see Rule 7B(1).

No. 84-818: **State v. Frazier.** Judgment affirmed; see Rule

7A.

No. 84-822: **State v. Neemeyer.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-832: **State v. Copple.** Judgment affirmed; see Rule 7A.

No. 84-834: **Drake v. Lisko.** Stipulation allowed; appeal dismissed.

No. 84-836: **Fitzgerald v. State Farm Mutual Automobile Ins. Co.** Stipulation allowed; appeal dismissed.

No. 84-839: **Ayres v. Ayres.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-840: **State v. Duran.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-841: **State v. Piper.** Judgment affirmed; see Rule 7A.

No. 84-846: **State v. Ethofer.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-854: **State v. Al-Hafeez.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 84-857: **State v. Gamez.** Judgment affirmed; see Rule 7A.

No. 84-858: **State v. Adams.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-863: **Lonnecker v. Central States Health & Life Co. of Omaha.** Stipulation allowed; appeal dismissed.

No. 84-864: **Gardner v. Gardner.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 84-865: **Bruner v. Vacca.** By order of the court, appeal dismissed; judgment affirmed; see Rule 7A.

No. 84-866: **Liebl v. Vacca.** By order of the court, appeal dismissed; judgment affirmed; see Rule 7A.

No. 84-873: **Rinner v. Workmen's Plumbing & Heating Co.** Stipulation allowed; appeal dismissed with prejudice.

No. 84-879: **York Travel, Inc. v. Harry.** Stipulation allowed; appeal dismissed with prejudice.

No. 84-881: **Bridgmon v. Midwest Coast Transport, Inc.**

Stipulation allowed; appeal dismissed.

No. 84-883: **Frost v. Frost.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-886: **Houser v. American Family Mutual Insurance Co.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 84-887: **Waller v. Park Place Pontiac.** Stipulation allowed; appeal dismissed.

No. 84-888: **State v. Holmes.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-895: **Woods v. Monfort of Colorado, Inc.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 84-896: **State v. Lehman.** Judgment affirmed; see Rule 7A.

No. 84-899: **State v. Livingston.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-903: **Wilson v. Soucie.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-905: **In re Estate of Koch.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 84-906: **State v. Bernt.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-912: **State v. Marion.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-923: **Fritzinger v. Howells Elevator, Inc.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-931: **State v. Fields.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-934: **State v. McGill.** Judgment affirmed; see Rule 7A.

No. 84-935: **State v. Smith.** Judgment affirmed; see Rule 7A.

No. 84-938: **Sack Lumber Co. v. City of Auburn.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 84-943: **Sloggett v. State.** Stipulation allowed; appeal dismissed with prejudice.

No. 84-945: **State v. Tate.** Judgment affirmed; see Rule 7A.

No. 84-951: **Chiles, Heider & Co., Inc. v. Pawnee Meadows, Inc.** Motion of appellee for summary dismissal denied; on court's own motion, appeal dismissed per Rule 7.

No. 84-953: **Galyen v. Galyen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-962: **State v. Sizemore.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-964: **State v. Phelps.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-969: **State v. Hanna.** Judgment affirmed; see Rule 7A.

No. 84-972: **State v. Zajac.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-973: **State v. Cosentino.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-976: **Howard v. Schmunk.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-979: **Rakes v. Dejong.** Stipulation allowed; appeal dismissed.

No. 84-980: **Nolan Trucking, Inc. v. Joe and Martha Pfeifer & Sons.** Stipulation allowed; appeal dismissed.

No. 85-002: **State v. Sanders.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-006: **Tipton v. Sorensen.** Stipulation allowed; appeal dismissed with prejudice.

No. 85-014: **State v. Siegfried.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-015: **State v. Petitte.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-017: **State Bank of Palmer v. Scoular-Bishop Grain Co.** Stipulation allowed; appeal dismissed.

No. 85-018: **P.R. Halligan, Post 163 v. Schultz.** Stipulation allowed; appeal dismissed with prejudice.

No. 85-019: **Mitchell v. City of Omaha.** Motion of appellant

to dismiss appeal sustained; appeal dismissed.

No. 85-020: **Farm Bureau Mutual Insurance Co. v. Grothe.** Stipulation allowed; appeal dismissed.

No. 85-022: **Hoffman v. Banner County School District.** Stipulation allowed; appeal dismissed.

No. 85-025: **Colt Industries, Inc. v. Orsborn.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-026: **Kurcz v. Northwestern Steel & Supply Co.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 85-032: **State v. Foral.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-033: **Hoschar v. Ryan.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-036: **Lozier Corp. v. Clark.** By order of the court, reversed and the judgment of the Nebraska Appeal Tribunal reinstated.

No. 85-038: **State v. Francis.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-039: **State v. Fleischacker.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-048: **Bittner v. Prothman.** By order of the court, appeal dismissed; see Rule 7A.

No. 85-049: **State v. Petersen.** Judgment affirmed; see Rule 7A.

No. 85-051: **In re Estate of Vogt.** Affirmed as modified by order of the court.

No. 85-054: **State v. Thomas.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-056: **McHenry v. First National Bank & Trust Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 85-059: **In re Estate of Manning.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-060: **Adams v. Adams.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-063: **Tri-County Bank & Trust v. Smiley.** Stipulation allowed; appeal dismissed.

No. 85-068: **County of Richardson v. Usher.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 85-069: **State v. O'Donnell.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-073: **State v. Krogh.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-080: **Knuth v. Nebraska Antenna Service, Inc.** Stipulation allowed; appeal dismissed.

No. 85-086: **State v. Olson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-090: **State v. Wyatt.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-100: **Clark v. Clark.** Judgment affirmed; see Rule 7A.

No. 85-102: **Lobdell v. Hunt Transportation, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 85-103: **Hartner v. Hartner.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-116: **Scottsbluff Production Credit Assoc. v. Farmers State Bank.** Stipulation allowed; appeal dismissed.

No. 85-126: **First National Bank of Ainsworth v. Davis.** Stipulation allowed; appeal dismissed without prejudice.

No. 85-127: **State v. Barlow.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-133: **State v. Williams.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-144: **Lindberg v. Quiring.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-155: **Leach Land Co., Inc. v. Colburn.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-156: **First National Bank v. Hagebush.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-186: **Fowler v. State.** Motion of appellant to dismiss

appeal sustained; appeal dismissed.

No. 85-187: **Fowler v. Dittman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-197: **In re Interest of Pazos.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-202: **State v. Root.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-239: **State v. Jackson.** Motion of appellant to dismiss appeal with prejudice sustained; appeal dismissed.

# CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

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DEROY ANDERSON ET AL., APPELLEES AND CROSS-APPELLANTS, V. FARM BUREAU INSURANCE COMPANY OF NEBRASKA, A CORPORATION, APPELLANT AND CROSS-APPELLEE.

360 N.W.2d 488

Filed January 4, 1985. No. 83-530.

1. **Directed Verdict.** In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence but whether there is any evidence upon which a jury can properly proceed to find a verdict for the parties producing it, upon whom the burden of proof is imposed.
2. **Trial: Evidence: Proof.** Where several inferences are deducible from the facts presented, which inferences are opposed to each other but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover.

Appeal from the District Court for Banner County: JOHN D. KNAPP, Judge. Reversed and remanded with directions to dismiss.

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

John F. Simmons of Wright, Simmons & Selzer, for appellees.

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

GRANT, J.

This is an action brought by plaintiffs-appellees, DeRoy Anderson and Gerald Anderson, father and son, who farm lands as a partnership in Banner County, Nebraska. Plaintiffs are collectively referred to as Andersons or individually by the first name of each. The Andersons brought the action to recover under the theft provision of their farmowners' insurance policy issued by defendant, Farm Bureau Insurance

Company of Nebraska (hereinafter Farm Bureau). The theft provision of the policy under which the Andersons sought recovery provides coverage for "direct loss by theft (but excluding escape, mysterious disappearance, inventory shortages, wrongful conversion and embezzlement)."

At the trial the Andersons generally presented evidence showing they did not have as much wheat to take out of two of their storage facilities as they had put into those two facilities. The described storage facilities were a round bin and a Quonset hut, located near Highway 71, or, as shown by Gerald's testimony, "on the place on the highway that Dad [DeRoy] owns . . . ." Farm Bureau made a motion for a directed verdict in its favor, both at the conclusion of the Andersons' case and at the conclusion of all the evidence. These motions were overruled, and the case was submitted to the jury, which returned a verdict for the Andersons, awarding $8,690.76 in damages. Farm Bureau filed a motion to compel a remittitur and a motion for new trial. The district court ordered the motion for new trial be granted unless the Andersons consented to a reduction of the judgment to reflect the amount of coverage the Andersons had paid for under the coinsurance clause of the policy. The Andersons consented, and judgment was entered in their favor in the reduced amount of $5,080.83. Farm Bureau appeals from the overruling of its motions for a directed verdict, and the Andersons cross-appeal from the order reducing their damages. Although a remittitur has been ordered and the jury verdict consequently reduced, Farm Bureau, the party for whose benefit the remittitur was ordered, may appeal from the reduced judgment, and the Andersons may cross-appeal. Neb. Rev. Stat. §§ 25-1929 and 25-1936 (Reissue 1979).

In its appeal Farm Bureau assigns four errors, including the assignment that the trial court erred in overruling Farm Bureau's motion for a directed verdict made after both Andersons and Farm Bureau had rested. We determine that this assignment of error is correct, and find that Farm Bureau's motion for a directed verdict should have been sustained and the case dismissed. This disposition of the case makes it unnecessary to consider Farm Bureau's other assignments of

error, and also disposes of the Andersons' cross-appeal. For the reasons hereinafter stated the judgment of the trial court is reversed, the cause is remanded with directions to dismiss the Andersons' petition, and the Andersons' cross-appeal is dismissed.

The evidence presented showed that Gerald and DeRoy Anderson are experienced farmers who, among other crops, produce wheat. They store some of their harvested wheat in a bin and a Quonset hut near Highway 71. In 1979 these storage facilities were 10 miles from the home of DeRoy and 6 miles from the separate residence of Gerald. In the summer of 1977 the Andersons filled the Quonset hut with part of their harvested wheat crop. In March 1978 they cleaned out what was left of the 1977 crop in the bin near Highway 71 and also took 581 bushels from the Quonset hut. The Andersons testified that in 1978 they put 8,240 bushels of wheat in the round bin near Highway 71.

The Andersons produced records and testimony to show a total of 20,834 bushels of wheat were in the Quonset hut and bin on January 1, 1979. The Andersons further testified that 2,058 bushels were sold to the Kimball County Grain Co-operative between April 26 and May 16, 1979, and that in November of 1978 they had entered into a contract with a Wyoming elevator company, called D.R.W. Inc., to sell 16,000 bushels of wheat to D.R.W. at a price of $2.68 per bushel. It was agreed between the Andersons and D.R.W. that a written contract for this sale and purchase of 16,000 bushels of wheat was executed, but at the time of trial the contract itself could not be produced because it had disappeared both from the Andersons' and the D.R.W. files. Between March 15 and May 30, 1979, the testimony showed that 15,490 bushels were picked up by D.R.W., pursuant to the contract. The Andersons claimed 3,286 bushels of wheat were stolen from the bin and/or Quonset hut, because in cleaning out the bin and Quonset hut only 17,548 were sold by the Andersons—2,058 to the Kimball elevator and 15,490 to D.R.W. Inc. This total amount was 3,286 bushels short of the 20,834 bushels their records showed were stored there.

Under the terms of the contract between the Andersons and D.R.W. Inc., D.R.W. was to pick up and load the wheat at the

bin and the Quonset hut near Highway 71. Because D.R.W. did not always show up when it informed the Andersons, and because it took over an hour to install and take down the horizontal powerhead attached to the bin, enabling the removal of grain, the powerhead was left on and the Quonset hut left unlocked so that D.R.W. would have easy access. The powerhead was installed sometime prior to March 15, 1979, when D.R.W. picked up the first load. The Quonset hut was unlocked on April 26, 1979; and from the time of the installation of the powerhead and the unlocking of the Quonset hut, the wheat was unsecured and easily accessible to anyone.

On May 7, 1979, D.R.W. informed the Andersons that there was not enough wheat remaining in the Quonset hut to fill the 16,000-bushel contract. It was on this day that the Andersons first discovered a shortage, and Beulah Anderson, wife of DeRoy, noted on her calendar, "Where's the wheat?" The Andersons testified that there was never unusual spillage of wheat near the named storage facilities, nor were there any strange or unusual tire tracks, nor was there any evidence of forced entry or exit.

On June 25, 1979, DeRoy contacted a Farm Bureau employee, Sandra Faden. On July 18, 1979, DeRoy visited with Sheriff Robert Stoddard about the wheat loss. On October 3, 1979, Lyle Bown, claims adjuster for Farm Bureau, met with DeRoy at the Quonset hut. Eventually, the Andersons were notified by Farm Bureau that their claim was denied.

The dispositive question presented is whether there was sufficient evidence to support the verdict. For this purpose we must consider the evidence in the light most favorable to the Andersons and give them the benefit of all inferences that reasonably can be drawn from the evidence. In *Popken v. Farmers Mutual Home Ins. Co.*, 180 Neb. 250, 255, 142 N.W.2d 309, 313 (1966), we stated:

> The plaintiffs may establish their case by circumstantial evidence as well as by direct evidence.
>
> However, circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the

> conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. Mullikin v. Pedersen, 161 Neb. 22, 71 N.W.2d 485.
>
> The evidence must be such as to make the plaintiffs' theory of causation reasonably probable, not merely possible.
>
> In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Weston v. Gold & Co., 167 Neb. 692, 94 N.W.2d 380.
>
> Where several inferences are deducible from the facts presented, which inferences are opposed to each other, but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover. Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N.W.2d 728.
>
> Conjecture, speculation, or choice of quantitative possibilities are not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other.

See, also, *Raff v. Farm Bureau Ins. Co.*, 181 Neb. 444, 149 N.W.2d 52 (1967).

The Andersons have failed to meet their burden of proof in this case; for while an inference of theft is possible, it is not the only conclusion which can reasonably be drawn, nor is it the prime contender in this insurance terms tournament: mysterious disappearance, embezzlement, and wrongful conversion are, at the very least, equally formidable.

If, as the Andersons contend, an inference of theft may be fairly and reasonably drawn from the evidence that they had stored 20,834 bushels in the Quonset hut and bin and sold only 17,548 bushels in 1979, equally justifiable inferences, consistent with the facts proved and inconsistent with the Andersons' right to recover, are that the wheat was stored in another bin, that an employee truckdriver for D.R.W. or D.R.W. itself took a load

of wheat for himself or itself, or that D.R.W. or its drivers failed to keep track of all the wheat they hauled away.

The Andersons' harvest records are kept by Beulah Anderson in a ledger identified as exhibit 2 in the trial. The record shows the harvest according to field in each year and the storage facility to which the wheat was trucked. The Andersons contend 13,175 bushels of wheat were stored in the Quonset hut in 1977. Of these 13,175 bushels, 855 bushels were harvested off the "Blake" place and not recorded in exhibit 2. These 855 bushels were recorded as having been deposited in the Quonset hut by Gerald on a separate piece of notebook paper identified as exhibit 3 at the trial. When asked why no bushels were recorded under the "Blake" heading, Beulah answered that this grain was taken to storage facilities elsewhere. Likewise, 2,370 bushels from the 1978 harvest off the "school" section are recorded by Gerald as being stored in the east bin, but Beulah, noting the absence of any recording under the school section in her notebook, testified the wheat had been stored by Gerald elsewhere. Thus, Beulah's testimony would suggest 3,225 bushels of wheat had not been stored in the Quonset hut and bin, as the Andersons contend.

D.R.W. had free access to the bin from the time the powerhead was installed and to the Quonset hut from the time it was unlocked. Not only could one of its drivers have misappropriated the grain but the corporation itself may have inadvertently taken more than it paid for. None of these actions constitute "theft" under the terms of the insurance policy in question.

Even though DeRoy later denied it, he had indicated to both the insurance company and D.R.W. that he suspected the D.R.W. drivers; and the Andersons, although they felt the business practices of D.R.W. were less than efficient, did not themselves keep track of the number of loads and weights taken from the bin and Quonset hut storage facilities.

Ultimately, the evidence goes no further than to give support to at least three inconsistent inferences, and the judgment must go against the parties who have the burden of proof. In this connection, DeRoy summed up the situation in his answers on cross-examination, when he testified:

Q. [Farm Bureau's counsel] And as a matter of fact you cannot say the wheat was stolen?
A. It wasn't there.
Q. But you don't know that it was stolen, you testified to that, didn't you?
A. Our inventory come up short, that is all we know.

The judgment of the trial court is reversed, and the cause is remanded with directions to dismiss the Andersons' petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

KRIVOSHA, C.J., participating on briefs.

WHITE, J., not participating.

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

I concur in the result reached by the majority, but believe the majority has unnecessarily promoted a "circumstantial evidence" rule in civil cases which I believe to be outmoded and not proper in light of present day circumstances. My reason for concurring in the result is very simple. The policy in question clearly required the district judge to sustain the motion for directed verdict under the facts in this case.

Coverage D3(a) of the policy provides: "Any direct losses by theft shall be construed to include only losses where clear and satisfactory evidence is established regarding the theft." The evidence offered by the insureds did not satisfy that requirement. The Andersons could not recover when the most the evidence established was that there was opportunity for someone to steal the grain. The reason for sustaining the motion for a directed verdict is not because of the circumstantial evidence rule but, rather, because of the terms of the policy.

But for the language of the policy, I believe the majority opinion would be in error. While I believe that the majority has accurately set out the Nebraska rule regarding circumstantial evidence in a civil case as that rule has been on occasion announced by this court, I believe that if one reviews that rule it will be apparent that the rule is both inconsistent with what we have now done in criminal cases, see *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981), and internally inconsistent.

The rule, as set out in the majority opinion, reads as follows:

(1) "The plaintiffs may establish their case by circumstantial evidence as well as by direct evidence.

(2) "However, circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the *only one* that can fairly and reasonably be drawn therefrom. [Citation omitted.]

(3) "The evidence must be such as to make the plaintiffs' theory of causation *reasonably probable*, not merely possible.

(4) "In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is *any evidence* upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. [Citation omitted.]

(5) "Where several inferences are deducible from the facts presented, which inferences are opposed to each other, but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover. [Citation omitted.]

(6) "Conjecture, speculation, or choice of quantitative possibilities are not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other."

(Emphasis supplied.) Quoting *Popken v. Farmers Mutual Home Ins. Co.*, 180 Neb. 250, 142 N.W.2d 309 (1966). I have numbered the paragraphs simply for ease of discussion.

To begin with, I believe the rule as we have formulated it over the years, and as we continue to repeat it now, is internally inconsistent. In paragraph (2) we require that in order for the judgment to be sustained, and, again, presumably before the court may submit the matter to the jury, the circumstantial evidence must be such that the conclusion reached by the jury is the only one that can be fairly and reasonably drawn therefrom.

Then, in paragraph (3), we say that the evidence must be such as to make the plaintiffs' theory of causation reasonably probable, not merely possible. It seems to me that if the conclusion reached is the only reasonable one, it must necessarily be reasonably probable. The converse, however, is not logically required to be true. A conclusion could be reasonably probable, yet not be the only reasonable conclusion. Nor is the "only reasonable conclusion" theory consistent with paragraph (4), which states that the trial court's examination is not to determine whether the conclusion reached is the only one that can be reached but, rather, whether the evidence is such that the jury can reach a conclusion advocated by the party introducing the circumstantial evidence.

The "only reasonable conclusion" test requires that the circumstantial evidence must in effect disprove every theory other than the one upon which the party offering the evidence relies. This is a stricter standard than that which we now require in criminal cases. In *State v. Buchanan, supra* at 28, 312 N.W.2d at 689, we said: "One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt." The net effect of the *Buchanan* decision was to declare that in criminal cases one may be convicted on the basis of circumstantial evidence even though the conclusion reached by the jury is not the *only* one that can fairly and reasonably be drawn therefrom. It seems inappropriate for us to continue to maintain a much more stringent rule in civil cases than in criminal cases, given the fact that criminal cases require proof beyond a reasonable doubt and civil cases require only that proof be established by a preponderance of the evidence. It appears to me that that is not a consistent or logical position for the law to take.

Furthermore, it appears to me that the rule herein in *Anderson* is in conflict with what this court previously said in *Danielsen v. Richards Mfg. Co., Inc.*, 206 Neb. 676, 294 N.W.2d 858 (1980). While we cited the "only reasonable conclusion" rule in *Danielsen*, we then went on to say, in syllabus 2. of that case:

> Conjecture, speculation, or choice of possibilities is not proof. However, where there is evidence which will lead a reasoning mind to one conclusion rather than another, the evidence will be held to support the verdict. The circumstantial evidence must be such as to make plaintiff's contention as to the fact reasonably probable, not merely possible.

Though the language is a little confusing, what is clear is that in *Danielsen* we did not require that before circumstantial evidence be admitted it appear that only one conclusion could be reasonably reached. We permitted the trial court to submit the case to the jury, including evidence that the equipment used in the operation may or may not have been supplied by the defendant, depending upon whether the jury believed the circumstantial evidence. In approving the district court's submission of the evidence to the jury, we said in *Danielsen, supra* at 681, 294 N.W.2d at 861:

> "The evidence must be such as to make the plaintiff's theory of causation *reasonably probable*, not merely possible." [Citation omitted.] Applying that principle to the present case, and assuming that the evidence is wholly circumstantial, the evidence was sufficient to make the identification of the source of the broken rongeur reasonably probable and not merely possible. We hold that the evidence was sufficient to permit the jury to find, with reasonable certainty, that Richards was the supplier of the rongeur used in the surgery performed on the plaintiff.

(Emphasis supplied.) The lesson of *Danielsen* seems to be that while we require that circumstantial evidence have some probability, we do not require it to be such that the jury can reach only *one* conclusion.

In the case of *Arterburn v. St. Joseph Hospital & Rehabilitation Center*, 220 Kan. 57, 61, 551 P.2d 886, 890 (1976), the Kansas court discussed the circumstantial evidence rule in civil cases, saying:

> Circumstantial evidence, in a civil case, in order to support a verdict need not rise to that degree of certainty which will exclude every reasonable conclusion other than

> that reached by the jury. It suffices that such evidence affords a basis for a reasonable inference by the court or jury of the occurrence of the fact in issue, although some other inference equally reasonable might be drawn therefrom [citation omitted].

The Kansas court went on to say at 63, 551 P.2d at 892:

> Therefore when a number of possible causes are shown for the damage to a plaintiff in a civil case, some of which are attributable to the defendant, while others are not, the plaintiff must show by a preponderance of the evidence to the satisfaction of the jury, that the cause attributed to the defendant is more probable than that attributed to other persons or agencies. There must be a rational basis for concluding it is more probable than not that the defendant's negligence caused the plaintiff's damage. It is not necessary for the plaintiff to eliminate all other possible causes of his injury in order to present a jury question [citation omitted].

Moreover, in *Smith, Aplnt. v. Bell Telephone Co. of Pa.*, 397 Pa. 134, 137, 153 A.2d 477, 479 (1959), the Pennsylvania court noted:

> Although some of the formulations appear to be mutually inconsistent, they have sometimes been used together. . . . The formula that "the circumstances must be so strong as to preclude the possibility of injury in any other way and provide as the only reasonable inference the conclusion plaintiff advances" is not a correct statement of the rule to be applied by the judge on deciding a motion for either a nonsuit or binding instructions. If that were the rule what would be the province of the jury? In no case where there was more than one reasonable inference would the jury be permitted to decide. Insofar as this rule is stated in our cases it is disapproved.

My quarrel is simply with our continuing to promote a rule of law in civil cases which requires that before circumstantial evidence may be sufficient to support a verdict, and therefore sufficient to be submitted to the jury, the conclusion to be reached must be the *only one* that can be fairly and reasonably drawn. I suggest the better rule is what I would describe as the

"mere reasonableness" test.

This test may be described as expressed by the Connecticut Supreme Court in *Console v. Nickou*, 156 Conn. 268, 275, 240 A.2d 895, 898 (1968), wherein it said:

> "The test of the sufficiency of proof by circumstantial evidence is whether rational minds could reasonably and logically draw the inference. *Andrea v. New York, N.H. & H.R. Co.*, 144 Conn. 340, 344, 131 A.2d 642; *Pierce v. Albanese*, 144 Conn. 241, 256, 129 A.2d 606, appeal dismissed, 355 U.S. 15, 78 S. Ct. 36, 2 L. Ed. 2d 21. The proof need not be so conclusive that it precludes every other hypothesis. It is sufficient if the proof produces in the mind of the trier a reasonable belief that it is more probable than otherwise that the fact to be inferred is true. . . ."

See, also, *Wiley v. United Fire & Casualty Company*, 220 N.W.2d 635 (Iowa 1974); *Martelle v. Thompson*, 283 Minn. 279, 167 N.W.2d 376 (1969); *Pennsylvania Glass Sand Corp. of Okl. v. Ozment*, 434 P.2d 893 (Okla. 1967).

If I were limited in my decision to the circumstantial evidence rule and not to the language of the policy, I would have affirmed the decision.

CAPORALE, J., concurring in the result.

I join in that portion of Chief Justice Krivosha's concurring opinion which observes that the result reached by the majority is required by the language of the policy. The case should therefore have been decided on that basis. I am unwilling to review the civil circumstantial evidence rule, or to speculate as to whether its rationale is still viable, when the facts of the case before us do not require that we engage in either exercise.

BARTON H. FORD, APPELLANT, V. PATRICIA A. FORD, APPELLEE.

360 N.W.2d 495

Filed January 4, 1985. No. 83-610.

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

Ronald H. Stave of Stave & Coffey, P.C., for appellant.

Thomas J. Monaghan of Monaghan, Tiedeman & Lynch, for appellee.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired.

PER CURIAM.

Barton H. Ford appeals an order of the district court for Douglas County requiring Barton to pay Patricia A. Ford alimony in the amount of $450 per month for a period of 2 years. We affirm.

Barton and Patricia were married on November 8, 1980. No child has been born of their marriage, and no real estate or personal property beyond miscellaneous household appliances has been acquired by the Fords.

In October 1980, approximately 1 month before her marriage to Barton, Patricia lost her job with an advertising agency, which paid $800 per month. At the date of marriage Barton was employed at a monthly salary of $1,500.

After marrying Patricia, Barton moved into Patricia's rented residence. Patricia had two children, ages 11 and 13, from a previous marriage, and for whom Patricia was receiving $385 per month in child support.

In January 1981 Patricia found employment at a dress shop and was initially paid $4 per hour, later increased to $4.25 per hour some 6 months later. Patricia voluntarily left her employment in June 1982 to spend more time with her children (after working for the dress shop approximately 1 year and 4 months). In September 1982 Patricia resumed employment with a part-time job because Barton said they needed to make more money to cover household expenses. As a maid in the part-time employment, Patricia was paid $5 per hour for an

average workweek of 25 hours. Patricia also had additional part-time employment in cleaning houses.

In October 1981, on account of an economic downturn in industry, Barton was discharged from his job but sought other business opportunities in the form of a franchise restaurant or bar. Barton was unemployed from October 1981 until July 1982, when Barton acquired a 35-percent interest in a business which paid Barton a starting salary of $60 per week and later increased Barton's salary to $500 per week in January 1983. During his period of unemployment from October 1981 until July 1982, Barton also received a distribution from a family trust, that is, $690 quarterly. At the time of trial in 1983, the trust distribution to Barton had been decreased to $444 quarterly. During his marriage to Patricia, Barton received $35,000 in liquidation of a business interest acquired before his marriage to Patricia. Also, Barton obtained $50,000 in loans on life insurance.

In the course of investigating and "attempting to develop business opportunities," Barton spent substantial sums. Throughout Barton's investigation of possible businesses, Patricia paid the majority of the household expenses. Patricia's paycheck was deposited in the joint account maintained by Barton and Patricia, as were the child support payments for Patricia's children. Occasionally Barton would give Patricia a check for some household expenses.

Patricia and Barton separated in January 1983; Barton filed his petition on February 16, 1983; and the district court entered a decree of dissolution on July 8, 1983.

The district court ordered Barton to pay alimony in the amount of $450 per month to Patricia for a period of 2 years. Barton contends that "permanent alimony" is error under the circumstances. At the entry of decree Barton was 30 years old, Patricia was 35, and both parties were in good health.

Among factors to be considered by a court in determining reasonable alimony are the circumstances of the parties, duration of the marriage, and contributions to the marriage by each party. See Neb. Rev. Stat. § 42-365 (Reissue 1984).

Although the marriage existed for only a brief duration, the facts substantiate that Patricia was the major provider for the

household, especially during the time when Barton was unemployed and investigating new business ventures. While Patricia's earnings were deposited in a joint account with Barton and used for annual family expenses in excess of $20,000, Barton expended in excess of $63,000, which was used almost entirely in exploring new business interests, none of which materialized.

"In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criteria under the statute as well as under the former decisions of this court is one of reasonableness." *Magruder v. Magruder*, 190 Neb. 573, 576, 209 N.W.2d 585, 587 (1973).

> Determining what is reasonable alimony under given circumstances is never an easy task. The standard of reasonableness by its very nature defies clear and specific quantification inasmuch as the determination of reasonableness is directly tied to the virtually unique circumstances of each case. In *Altschuler v. Coburn*, 38 Neb. 881, 890, 57 N.W. 836, 838 (1894), we noted that an attempt to give a specific meaning to the word *reasonable* is " 'trying to count what is not number, and measure what is not space.' "

*Gleason v. Gleason*, 218 Neb. 629, 633, 357 N.W.2d 465, 468 (1984).

In *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984), we held that the division of property and the awarding of an attorney fee in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. The same standard of review applies with respect to an issue of the reasonableness of alimony ordered by a trial court. In our de novo review of the record in this case, we conclude that the trial court did not abuse its discretion in decreeing that Barton pay Patricia reasonable alimony as indicated.

The court awards to Patricia the sum of $500 for the services of her attorney regarding the appeal.

AFFIRMED.

# SUSAN HOWSDEN, SPECIAL ADMINISTRATOR OF THE ESTATE OF JUANA LEE ROLENC, DECEASED, APPELLANT, V. CLEMENT F. ROLENC ET AL., APPELLEES.

360 N.W.2d 680

Filed January 4, 1985. No. 83-637.

1. **Divorce: Abatement, Survival, and Revivor.** The general rule is that an action for dissolution of a marriage abates upon the death of one of the parties and is not subject to revivor.
2. **Causes of Action: Fraud: Abatement, Survival, and Revivor.** Causes of action for deceit or fraud survive notwithstanding the death of the person entitled to the same.
3. **Decedents' Estates: Public Policy: Homicide.** There is a strong public policy against allowing a person who commits a homicide to benefit in any way from the death of the victim.
4. **Divorce: Motions to Vacate: Fraud: Homicide: Abatement, Survival, and Revivor.** An action to vacate a decree of dissolution for fraud survives the death of a party whose death is the result of a homicide committed by the other party to the proceeding.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Reversed and remanded for further proceedings.

Edward D. Hotz of Hotz, Kizer & Jahn, P.C., for appellant.

Hyman Polsky of Bailey, Polsky, Cada & Todd, and George Brugh, for appellees.

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

BOSLAUGH, J.

Susan Howsden, as special administrator of the estate of Juana Lee Rolenc, appeals from the order of the trial court denying her motion for revivor filed in the marriage dissolution proceeding in which Juana Lee Rolenc was the petitioner and Clement F. Rolenc the respondent.

The original petition in the dissolution action was filed on March 31, 1981. On June 12, 1981, without either of the parties being present in person in court, a decree of dissolution was entered by the trial court pursuant to an amended petition, affidavit, and stipulation filed by the petitioner that day. The decree dissolved the marriage, awarded custody of the minor

child of the parties to the respondent, and made no division of property.

On December 2, 1981, within the 6-month period provided in Neb. Rev. Stat. § 42-372 (Reissue 1984), the petitioner filed an affidavit and motion to vacate and set aside the decree of dissolution. The affidavit and motion alleged that the decree had been obtained by fraudulent representations made by the respondent to the petitioner, that the parties had continued to live together until on or about November 20, 1981, and that the petitioner was not competent at the time she signed the petition, affidavit, and stipulation because of injuries she had sustained in an automobile accident. The petitioner alleged the divorce action was initiated only as a convenience to the respondent, as a means to rearrange his financial affairs, and she agreed to it only upon his representation they would remarry. The petitioner further alleged she discovered in November 1981 that her husband's representations were false, that he never intended to remarry her, and that he intended to defraud her of her property rights and alimony. Although the motion sought to vacate the decree entirely, it is clear that the petitioner intended that the marriage remain dissolved and that she obtain custody of the minor child, child support, and a division of property.

Juana Lee Rolenc died on May 11, 1983, 5 days before the hearing. The record has been enlarged to show that on October 15, 1984, the respondent pleaded guilty to a charge of second degree murder in causing her death. The principal issue before us is whether the action to vacate the decree of dissolution for fraud, which abated upon the death of the petitioner, which was caused feloniously by the respondent, is subject to revivor. The appellant has also requested attorney fees for services rendered from the date the motion to vacate was filed up to the present time.

The general rule is that an action for dissolution of a marriage abates upon the death of one of the parties and is not subject to revivor. *Williams v. Williams*, 146 Neb. 383, 19 N.W.2d 630 (1945). The theory of the general rule is that the death of one of the parties destroys the subject matter of the action and that matters of alimony and property rights are only incidental to the main object of the action.

We believe the general rule is not applicable where unusual circumstances such as are present in this case are involved. The motion filed by the petitioner was premised on fraud by the respondent. Neb. Rev. Stat. § 25-1401 (Reissue 1979) provides that causes of action for any deceit or fraud shall survive, notwithstanding the death of the person entitled to the same.

There is a strong public policy against allowing a person who commits a homicide to benefit in any way from the death of the victim. Neb. Rev. Stat. § 30-2354 (Reissue 1979) provides in part:

> (a) A surviving spouse, heir or devisee who feloniously and intentionally kills or aids and abets the killing of the decedent is not entitled to any benefits under the will or under this article, and the estate of the decedent passes as if such spouse, heir, or devisee had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of such devisee passes as if the devisee had predeceased the decedent.
>
> (b) Any joint tenant who feloniously and intentionally kills or aids and abets the killing of another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and such joint tenant has no rights by survivorship. This provision applies to joint tenancies and tenancies by the entirety in real and personal property, joint accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of coownership with survivorship incidents.
>
> (c) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills or aids and abets the killing of the principal obligee or the individual upon whose life the policy is issued is not entitled to any benefit under the bond, policy or other contractual arrangement, and it becomes payable as though such beneficiary has predeceased the decedent.
>
> *(d) Any other acquisition of property or interest by the killer or by one who aids and abets the killer is treated in accordance with the principles of this section.*

(Emphasis supplied.)

The effect of the death of the petitioner at the hands of the respondent was to forestall any equitable division of the marital estate and to permit the respondent to retain all of the property for himself.

In *Jacobson v. Jacobson*, 146 N.J. Super. 491, 370 A.2d 65 (1976), the husband, who was charged with killing his wife, moved to abate a pending divorce action. In holding that the action should not abate as to the issue of equitable division of property, the court stated at 493-97, 370 A.2d at 66-68:

> The novel question is whether, by reason of the deceased wife's inability to pursue her divorce action, her estate and her heirs should be deprived of her rightful entitlement to equitable distribution.
>
> . . . .
>
> . . . If the wife had lived and secured her divorce, the court would have dealt with the assets and property of the parties, allocated those in an equitable manner between them and then would have considered the matters of custody, alimony and the rest. This is now impossible, made so by the homicide.
>
> . . . .
>
> If I were to abate the issue of equitable distribution because the wife is dead, then no equitable distribution takes place because no divorce can be entered. The assets in the name of and held by the husband would remain his, undisturbed. If it should develop that he is responsible for his wife's death, then he would be profiting by his own wrongdoing. The four children of this marriage, the heirs of the wife and the natural objects of her bounty, would thus be deprived of rights which are important property rights to them.
>
> "No one should be allowed to profit [from] his own wrong." This was the law established in this state in *Whitney v. Lott*, 134 *N.J. Eq.* 586 [36 A.2d 888] (Ch. 1944), announcing the legal principle that the felonious killer of a testator, who inherits under the last will and testament, cannot take; equity imposed a constructive trust on such inheritance in favor of the other rightful

> heirs. The court invoked the common law principle against permitting one to profit by his own wrong. This ruling was followed in *Estate of Kalfus v. Kalfus*, 81 *N.J. Super.* 435 [195 A.2d 903] (Ch. 1963); *Estate of Wolyniec v. Moe*, 94 *N.J. Super.* 43 [226 A.2d 743] (Ch. 1967).
>
> . . . .
>
> Sitting in equity where we regard as valid the maxim that equity regards that as done which ought to be done, where we follow precedent that a wrongdoer should not profit by his own wrong, it strikes me as wrong, unfair and grossly inequitable to permit the husband in this case to thwart the intent of the Legislature to grant married women rights in property which they never enjoyed before — to recognize their contributions to marriage as wives and homemakers.
>
> I therefore hold that this case presents unusual, tragic facts and circumstances that call out to equity to find a remedy. Equitable distribution is the remedy and I will not abate it. The estate of the deceased wife should be added as a party to the action, with leave to proceed in the interests of her heirs. My decision is based on the tragic circumstances of this case. Other situations should be dealt with on their own peculiar facts.

See, also, *Craddock's Adm'r v. Craddock's Adm'r*, 158 Va. 58, 163 S.E. 387 (1932), in which the Supreme Court of Appeals of Virginia held that an action to set aside a judgment in a divorce action was subject to revivor after the deaths of the parties.

For the reasons stated it was error for the trial court to deny the motion for revivor under the circumstances of this case. We decide only that the action should be revived in the name of the personal representative of Juana Lee Rolenc and allowed to proceed to determine whether by fraud and homicide the respondent deprived the petitioner of an equitable division of the marital estate which she would have received except for her death, which was caused by the respondent. All other issues, including the right of the personal representative to recover attorney fees and expenses, if any, from the respondent are reserved for determination by the trial court.

The order of the trial court is reversed and the cause

remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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JAMES E. ROCKWOOD, APPELLEE, V. ARLINE S. ROCKWOOD, APPELLANT.

360 N.W.2d 497

Filed January 4, 1985. No. 83-773.

1. **Property Division: Appeal and Error.** The division of property in marriage dissolution cases is a matter initially entrusted to the sound discretion of the trial judge, which will be reviewed on appeal de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.
2. **Property Division.** While there is no precise mathematical formula to be used in determining the fairness of a property division, generally speaking, awards in marriage dissolution proceedings vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case.
3. **Property Division: Pensions.** The trial court retains broad discretion in valuing pension rights and in dividing such rights between the parties.
4. **Property Division.** The ultimate test for division of marital property is one of reasonableness.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Thomas R. Wolff, for appellant.

Michael N. Schirber of Schirber Law Offices, P.C., for appellee.

KRIVOSHA, C.J., WHITE, and SHANAHAN, JJ., and MCCOWN, J., Retired, and BUCKLEY, D.J.

MCCOWN, J., Retired.

This is a dissolution of marriage proceeding in which the wife has appealed from that portion of the decree making a division of the marital property. Appellant contends that the failure of the trial court to award her a portion of appellee's military pension was unreasonable and an abuse of discretion. We

affirm the decree of the district court.

The parties were married on November 21, 1973. The husband is a member of the U.S. Air Force, with approximately 15 years of military service. He has been stationed at Offutt Air Force Base near Omaha, Nebraska, for approximately 5 years. The wife is a civilian employee at Offutt. No children were born of the marriage. Decree of dissolution was entered September 9, 1983.

The district court awarded appellant her own civil service pension to which she had contributed approximately $4,000, savings accounts and other property valued at approximately $5,000, alimony for 6 months in the total amount of $2,250, and the family home with a net value of slightly more than $15,000. Appellee received savings accounts and other property worth approximately $15,000, and his military pension, and was ordered to pay $500 attorney fees and costs and reimburse his wife approximately $500 for certain expenses.

The division of property in marriage dissolution cases is a matter initially entrusted to the sound discretion of the trial judge, which will be reviewed on appeal de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. *Ford v. Ford, ante* p. 13, 360 N.W.2d 495 (1985); *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). While there is no precise mathematical formula to be used in determining the fairness of a property division, " ' "[g]enerally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved depending upon the facts and circumstances of the particular case." ' " *Martin v. Martin*, 215 Neb. 508, 510, 339 N.W.2d 754, 756 (1983).

Neb. Rev. Stat. § 42-366 (Reissue 1984) requires that the trial court include pension and retirement plans in the marital estate. In this case the district court specifically awarded the entire value of the house to the wife "in lieu of any interest of Respondent in Petitioner's military service pension or retirement benefits . . . ."

It appears from the record that the pension will not vest until the husband completes 20 years of military service, which could not occur for approximately 5 more years. If the pension vested

then, it would pay approximately $625 per month for the balance of the husband's lifetime only. The appellant values this pension at $234,000 and argues that 50 percent of that value should be included in the marital estate and one-fourth of the pension assigned to the wife.

There is no evidence in the record as to the present value of the husband's pension, nor is there any testimony that it cannot be valued. The wife's pension was valued at the $4,000 she had contributed, although the evidence showed that the employer was also responsible for additional contributions. It is quite obvious that the value of the military pension under any appropriate method of valuation would be only a very small fraction of the amount claimed by the appellant.

Section 42-366 requires the court to include any pension and retirement plans in the marital estate. It does not require each pension to be divided between the parties, nor does it require any specific method of valuation. Indeed, it is obvious that in many cases where husbands and wives each have pensions, the most practical solution may well be to assign each pension to its primary owner and make any necessary adjustments in the property division with property other than the pensions.

We reaffirm our holding that the trial court retains broad discretion in valuing pension rights and in dividing such rights between the parties. *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981).

The ultimate test for division of marital property is one of reasonableness. *Burger v. Burger*, 215 Neb. 699, 340 N.W.2d 400 (1983). The property division made by the district court in this case was in all respects fair and reasonable and should be affirmed.

The appellant's contention that the alimony award should be increased to provide for expenses for the support of her children by a former marriage is without merit.

AFFIRMED.

# IN RE PETITION OF G. KAY, INC., FOR INTERPRETATION OF AUTHORITY.
# G. KAY, INC., APPELLANT, V. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, HERMAN BROS., INC., ET AL., INTERVENORS-APPELLEES.

361 N.W.2d 182

Filed January 4, 1985. No. 84-139.

**Public Service Commission: Appeal and Error.** Where the order of the Nebraska Public Service Commission is not based on any evidence in the record before the commission, the Supreme Court, on review, will reverse such order.

Appeal from the Nebraska Public Service Commission. Affirmed in part, and in part reversed.

Lavern R. Holdeman of Nelson, Morris & Holdeman, for appellant.

No appearance for appellee.

James E. Ryan of Ryan & Williams, P.C., for intervenors-appellees.

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

GRANT, J.

This action is before the court on appeal from an order of the Nebraska Public Service Commission (hereinafter commission) entered February 7, 1984, interpreting a certificate of public convenience and necessity granted to G. Kay, Inc. (hereinafter G. Kay). The commission found that the certificate was ambiguous and that it did not authorize G. Kay to transport bulk cement, bulk asphalt, and bulk tar. G. Kay appeals, asserting that the commission had exceeded its authority and that its decision was arbitrary and capricious.

On March 29, 1983, G. Kay's certificate was extended by the commission to include "[t]ransportation of lumber, lumber products, wood products, plastic products, building and construction materials, and commodities dealt in or used by home improvement centers." Acting in the belief that it was authorized to do so by its certificate, G. Kay began to haul bulk

cement. Subsequently, however, a cement company refused to load G. Kay's trucks without an interpretation of authority. G. Kay then filed its petition for interpretation, requesting an interpretation of the words "building and construction materials" as used in its certificate, and a finding as to the scope of its authority. Herman Bros., Inc., and others intervened. The commission found that Herman Bros. was misled by the wording of the certificate and that G. Kay's authority did not authorize G. Kay to transport "tar in bulk, cement in bulk or asphalt in bulk."

We first address the jurisdictional question raised in Herman Bros.' brief. Herman Bros. asserts that Neb. Rev. Stat. § 75-118.01 (Reissue 1981) gives "original exclusive jurisdiction to determine . . . the scope or meaning of a certificate" to the commission. Admittedly, this is true. However, Herman Bros. then questions the authority of this court to review an order of the commission interpreting a certificate. This argument is wholly without merit, as Neb. Rev. Stat. § 75-136 (Reissue 1981) specifically authorizes this court to "reverse, vacate, or modify" an order with which a party is dissatisfied. This court has jurisdiction to review the commission's order interpreting a certificate of public convenience and necessity. See *Canada v. Peake, Inc.*, 184 Neb. 52, 165 N.W.2d 587 (1969).

This court may reverse the findings of the Public Service Commission only when necessary to keep the commission within its authority or when the order is arbitrary or capricious. *In re Application of Hunt Transportation*, 214 Neb. 236, 333 N.W.2d 883 (1983). As we stated in *In re Application of McCarty*, 218 Neb. 637, 642, 358 N.W.2d 203, 206-07 (1984), quoting from *Nebraska Railroads of Omaha v. Nebco, Inc.*, 194 Neb. 322, 231 N.W.2d 505 (1975):

> "As bearing upon the question of when the findings of the Commission may be held to be 'arbitrary and [sic] capricious,' it was held in Robinson v. National Trailer Convoy, Inc., 188 Neb. 474, 197 N.W.2d 633 (1972), that if there is evidence to sustain the findings of the Commission, this court may not intervene. It is only where the findings of the Commission are against all the evidence that this court may hold the Commission's findings are

> arbitrary and [sic] capricious. The test, we believe, is best summarized in In re Lincoln Traction Co., 103 Neb. 229, 171 N.W. 192 (1919), wherein this court stated the rule to be: 'This court upon appeal cannot disturb findings of the commission, unless it appears that some requirements of the law have been violated or disregarded, or that the result reached cannot reasonably be derived from the facts proved.' "

We have such a case before us and must therefore affirm in part and in part reverse.

The commission, in its opinion and findings, found that bulk cement was not included in G. Kay's authority because it is generally not hauled to or from "home improvement centers." This finding is not based on any evidence in the record. The words "home improvement centers" cannot be read to limit "building and construction materials" but, rather, must be read as limiting the word "commodities" in the following phrase, to wit, "commodities dealt in or used by home improvement centers." As stated in *Rapid Film Service, Inc. v. Bee Line Motor Freight*, 181 Neb. 1, 4-5, 146 N.W.2d 563, 565-66 (1966):

> We believe the correct interpretation of the language involved herein, in context, is that the word "and" means along with, also, or as well as. The word "and" is "A conjunction connecting words or phrases expressing the idea that the latter is to be added or taken along with the first." Black's Law Dictionary (4th Ed.), p. 112. See, Cincinnati Enquirer, Inc. v. American Sec. & Trust Co., 107 Ohio App. 526, 160 N.E.2d 392; Carter v. Keesling, 130 Va. 655, 108 S.E. 708; Porter v. Moores, 4 Heisk. (Tenn.) 16. Although there is a diversity of authority on this subject, the word "or" may be substituted for the word "and" depending upon the context of the language. See Carlsen v. State, 127 Neb. 11, 254 N.W. 744.

Here, as in *Rapid Film Service*, there are separate, specific grants of authority, the last two of which are separated by the word "and." The latter authority given is to transport commodities, but that word is limited by the words "dealt in or used by home improvement centers." "Building and construction materials" set out a specific category of items

which may be hauled.

At the hearing on the petition for interpretation, testimony was elicited from three expert witnesses called by G. Kay. These witnesses testified that asphalt in bulk and cement in bulk were "building and construction materials." There was no testimony to the contrary from either the intervenors or the commission staff. No brief was submitted in behalf of the commission. There was no evidence upon which to base a finding that "building and construction materials" did not include bulk cement, bulk asphalt, and bulk tar. As such, the findings of the commission are arbitrary and capricious, and must be reversed.

The commission found that "lumber, drywall, panelling, tar in containers, nails, fly ash in containers, cement in bags, sand in bulk, gravel in bulk, and asphalt in containers are within the scope of the commodities description granted in M-12764, Supplement 2." That finding was supported by the evidence and is affirmed. The commission further held that G. Kay's certificate, as interpreted, did not include "tar in bulk, cement in bulk, or asphalt in bulk." In so limiting G. Kay's certificate, the commission was in error, and its order is reversed and G. Kay's certificate is construed to include the right to transport the items named in the certificate, and the interpretation thereof, including bulk tar, bulk cement, and bulk asphalt.

AFFIRMED IN PART, AND IN PART REVERSED.

# VINCENT J. MALONE, JR., APPELLEE AND CROSS-APPELLANT, V. CHARLES L. BENSON, DIRECTOR, DEPARTMENT OF CORRECTIONAL SERVICES, ET AL., APPELLANTS AND CROSS-APPELLEES.

# BARRY LEE ABBOTT ET AL., APPELLEES, V. CHARLES L. BENSON, DIRECTOR, DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT.

361 N.W.2d 184

Filed January 4, 1985.

Nos. 84-193, 84-265, 84-266, 84-267, 84-268, 84-269, 84-270, 84-271, 84-272.

1. **Criminal Law: Prisoners: Probation and Parole.** Neither mandatory good time earned pursuant to Neb. Rev. Stat. § 83-1,107 (Reissue 1981) nor meritorious good time earned pursuant to Neb. Rev. Stat. § 83-1,107.01 (Reissue 1981) is automatically forfeited upon revocation of parole. Such forfeiture must occur upon either the recommendation of the chief executive officer of the facility to which the offender is entrusted or the parole administrator, depending upon who has custody at the time of revocation, subject to approval of the director of the Department of Correctional Services. Once forfeited or withheld, good time credits may be restored to the offender in like manner.
2. _____: _____: _____. Pursuant to Neb. Rev. Stat. §§ 83-1,107 and 83-1,107.01 (Reissue 1981), the Board of Parole merely has the right to make recommendation of forfeitures of good time when the offender is in the custody of the Board of Parole. The discretion referred to by statute vests solely in the chief executive officer of the facility when the offender is in the custody of the Department of Correctional Services and in the parole administrator when the offender is in the custody of the Board of Parole, in each instance subject to the approval of the director of the Department of Correctional Services.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT and DONALD E. ENDACOTT, Judges. Affirmed.

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

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, Special Deputy Public Defender, for appellees, and Vincent J. Malone, Jr., pro se.

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

KRIVOSHA, C.J.

Each of these consolidated appeals presents to the court once again questions concerning the proper interpretation of Nebraska "good time" laws. See Neb. Rev. Stat. §§ 83-1,107, 83-1,107.01, and 83-1,123 (Reissue 1981). Specifically, the questions presented are: (1) Upon revocation of an offender's parole, is all of the offender's good time automatically forfeited as a result of such revocation? and (2) If revoked, can such good time ever be restored?

The cases involved herein began in two different ways. Case No. 84-193 (*Malone*) began as a habeas corpus action but was later amended to seek declaratory relief. The remaining eight cases, Nos. 84-265 through 84-272 (*Abbott*), tried to a different district judge, were initially brought as declaratory judgment actions. In *Malone* the district judge concluded that good time earned pursuant to § 83-1,107 (mandatory good time) and § 83-1,107.01 (meritorious good time) was not automatically forfeited when an offender's parole was revoked. In *Abbott* the district judge concluded that good time forfeited upon revocation of parole could later be restored at the discretion of the chief executive officer of the facility where the offender was held, subject to the approval of the director of the Department of Correctional Services. The cases were then consolidated for briefing and argument to this court. We believe that the decision of the district judge in each case was correct, and for that reason the judgments in all cases are affirmed.

The district judge in *Malone* observed:

> It is unfortunate that there is so much uncertainty surrounding the entire area of the good time laws. Such provisions should be definite, unambiguous and easy to compute. When those trained and experienced in the law find it difficult to ascertain the true meaning of these statutes, one can understand the frustration of those to whom they apply.

Having been called upon to interpret good time laws in Nebraska with some regularity, we are in sympathy with the views expressed by the district judge. Unfortunately, the confusion arises from more than one area. In part, the statutes themselves are not as clear and concise as they might be.

Occasionally, the same words are used with an intent that they mean different things.

The confusion in these matters begins with § 83-1,123, which in pertinent part reads as follows:

> (1) A parolee whose parole is revoked shall: (a) Be recommitted for the remainder of his maximum prison term, deducting the period served on parole prior to the violation; and (b) be treated as an escaped prisoner until apprehended and returned to the Department of Correctional Services.

The Attorney General, at the request of the director of the Department of Correctional Services, interpreted § 83-1,123(1) to mean that when a parole was revoked, all of the parolee's "good time" earned to that date was automatically forfeited, that once forfeited it could not be restored, and that the parolee was required to serve the remainder of his *maximum prison term* without regard to any good time earned prior to the date of revocation pursuant to either § 83-1,107 or § 83-1,107.01. The Attorney General understandably reached that conclusion because of language contained in the case of *Lytle v. Vitek*, 203 Neb. 825, 280 N.W.2d 654 (1979). In *Lytle, supra* at 828, 280 N.W.2d at 656, we said:

> That statute [§ 83-1,123] specifically deals with a parolee whose parole is revoked. It requires that such a prisoner be recommitted for the remainder of his maximum prison term, deducting *only* the period served on parole prior to the violation. The statute by its terms establishes a new prison term, *wiping out any previous credits except for discretionary reparole.*

(Emphasis supplied.) That language in the opinion was dicta.

On further reflection, as we read § 83-1,123, we find it to mean that absent any other statute, specifically §§ 83-1,107 and 83-1,107.01, and absent any other action which may be imposed, one whose parole is revoked is to be recommitted for the balance of his maximum term. Section 83-1,123, however, does not exist in a vacuum. While the term "maximum term" is earlier defined in the act, see Neb. Rev. Stat. § 83-170(4) (Reissue 1981), it is obvious that the use of the phrase "maximum prison term" is merely a starting point from which

the time that an offender must be in custody, either by incarceration or by parole, is computed. While the *Lytle* opinion indicated that "a prisoner [must] be recommitted for the remainder of his maximum prison term, deducting only the period served on parole prior to the violation," § 83-1,123 does not contain the word "only." "Only" was supplied by the court, and not by the statute.

Furthermore, it is apparent that the term "maximum term" as defined by § 83-170(4) does not absolutely define the time when an offender must be released from custody. Section 83-170(4) reads as follows: "Maximum term shall mean the maximum sentence provided by law or the maximum sentence imposed by a court, whichever is shorter." While that seems fairly clear on its face, anyone familiar with the laws regarding prison terms knows that neither a judge nor an offender can know with certainty the day upon which the offender will be released from custody when he is sentenced, notwithstanding the fact that the judge has imposed a "maximum term." The reason for this is that there are other statutes which impact upon that term. Those statutes must be read in connection with § 83-1,123. " 'It is the duty of the court, as far as practicable, to give effect to the language of a statute and to reconcile the different provisions of it so they are consistent, harmonious, and sensible.' " *State v. Black*, 195 Neb. 366, 367-68, 238 N.W.2d 231, 233 (1976). See, also, *Van Patten v. City of Omaha*, 167 Neb. 741, 94 N.W.2d 664 (1959). Further, the fundamental rule in construing statutes is that they shall be construed in pari materia and from their language as a whole to determine the intent of the Legislature. All subordinate rules are mere aids in reaching this fundamental determination. *Imus v. Bead Mountain Ranch, Inc.*, 183 Neb. 343, 160 N.W.2d 171 (1968).

Sections 83-1,107 and 83-1,107.01 are two statutes which must be read with § 83-1,123. Section 83-1,107 imposes upon the chief executive officer of a facility the obligation to reduce all sentences for good behavior in accordance with the schedule set out therein. The total of the reductions are then credited in two ways: (1) against the offender's minimum term, to determine the date of the offender's eligibility for release on

parole; and (2) against the offender's maximum term, to determine the date when the offender's discharge from the custody of the State becomes mandatory.

Section 83-1,107.01 provides that "[i]n addition to the reductions provided in section 83-1,107 [mandatory good time], an offender shall receive, for faithful performance of his assigned duties, a further reduction . . . ." This is what is oftentimes referred to as "meritorious good time." Unlike mandatory good time, which is deducted from both the minimum and the maximum terms, meritorious good time is only deducted from the maximum term, thereby further advancing the date of the offender's ultimate date of discharge from custody, even though the maximum term imposed by the court remains the same.

Both §§ 83-1,107 and 83-1,107.01 grant to the chief executive officer of the facility, subject to the approval of the director of the Department of Correctional Services, the right to forfeit, withhold, and restore either mandatory good time or meritorious good time.

If, then, § 83-1,123 is read together with the provisions of §§ 83-1,107 and 83-1,107.01, as it must be, we believe that one must reach the conclusion that the revocation of parole and recommitment to a facility does nothing more than return the offender to a facility to serve "his maximum prison term," however that is ultimately computed. The offender is required to return to the facility to serve the balance of his maximum term in the same manner as he was initially ordered to the facility by the trial court to serve his maximum term. Both terms are subject to statutory credits. It might have been better if a phrase other than "maximum prison term" had been used in § 83-1,123. That, however, does not change either the meaning or the effect of § 83-1,123 as it relates to § 83-1,107 or § 83-1,107.01.

Section 83-1,123 further provides that in addition to receiving credit for the time the offender has already served prior to parole while in the facility, he is to receive credit toward ultimate discharge for time on parole prior to revocation. In neither instance, when the offender is initially sentenced or when his parole is revoked, is any mention made of § 83-1,107

or § 83-1,107.01. By the same token, however, nothing in § 83-1,107 or § 83-1,107.01 gives any indication that the statutes are not to apply in the case of a parole revocation. If that was the intention of the Legislature, it was not so provided, and it is not the province of this court to read into the statutes words which are not there in order to fill alleged gaps. See *State v. Havorka*, 218 Neb. 367, 355 N.W.2d 343 (1984).

Sections 83-1,107 and 83-1,107.01 are clear and unambiguous. They provide that in *every* instance an offender is subject to the forfeiture, withholding, and restoration provisions of §§ 83-1,107 and 83-1,107.01 without regard to whether the offender is in a facility or on parole. They likewise unequivocally and without ambiguity grant to the chief executive officer of the facility, when the offender is in a facility, or the parole administrator, when the offender is on parole, the initial authority to forfeit, withhold, and restore both mandatory good time and meritorious good time. Nothing is said anywhere about automatic revocation. To the extent that our decision in *Lytle v. Vitek*, 203 Neb. 825, 280 N.W.2d 654 (1979), is to the contrary, it is overruled. Neither mandatory good time earned pursuant to § 83-1,107 nor meritorious good time earned pursuant to § 83-1,107.01 is automatically forfeited upon revocation of parole. Such forfeiture must occur upon either the recommendation of the chief executive officer of the facility to which the offender is entrusted or the parole administrator, depending upon who has custody at the time of revocation, subject to approval of the director of the Department of Correctional Services. Once forfeited or withheld, good time credits may be restored to the offender in like manner. The decisions of both district judges were correct in that regard.

One further point is deserving of comment as we attempt to set out the manner in which good time laws are to be administered. In the case of *Riker v. Vitek*, 203 Neb. 719, 279 N.W.2d 876 (1979), we correctly observed that the Board of Parole may *recommend* to the Director of Correctional Services that good time be forfeited. This was in connection with an offender who was in the custody of the Board of Parole. That statement was correct and reflected the language of §§ 83-1,107(3) and 83-1,107.01(3). In concluding the opinion

we said: "The statutes of the State of Nebraska grant the Board of Parole absolute discretion with regard to forfeiting, withdrawing [sic], or restoring good time when it is determined that misconduct has occurred." *Riker v. Vitek, supra* at 726, 279 N.W.2d at 880. That statement is not correct and should be disregarded. The Board of Parole merely has the right to make *recommendation* when the offender is in the custody of the Board of Parole. The discretion referred to by statute vests solely in the chief executive officer of the facility when the offender is in the custody of the Department of Correctional Services and in the parole administrator when the offender is in the custody of the Board of Parole, in each instance subject to the approval of the director of the Department of Correctional Services.

Appellee Malone has filed a cross-appeal raising issues involving equal protection. In view of our disposition of the case, we need not consider the cross-appeal. The decision of each of the district courts is in all respects affirmed.

AFFIRMED.

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IN RE CONTEMPT OF EVERETT SILEVEN.
STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS ET AL., APPELLEES, V. FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, ET AL., APPELLANTS.

361 N.W.2d 189

Filed January 4, 1985. No. 84-375.

1. **Contempt: Final Orders.** A coercive sanction arises out of a civil contempt, is not final in nature, and is not appealable.
2. _____: _____. A sentence in a contempt case which is limited to imprisonment for a definite period operates not as a remedy coercive in its nature but solely as punishment for the completed act of disobedience, and is appealable.
3. **Contempt.** A sentence in a prosecution for contempt, except that committed in open court, which is wholly punitive, may properly be imposed only in proceedings instituted and tried as for criminal contempt.
4. **Contempt: Constitutional Law.** In criminal contempt proceedings the accused is entitled to due process of law and is presumed to be innocent, cannot be

compelled to testify against himself or herself, and must be advised of the nature of the charges.

5. **Contempt.** A criminal sanction is invalid if imposed in a proceeding that is instituted and tried as a civil contempt.
6. **Contempt: Statutes: Words and Phrases.** In Neb. Rev. Stat. § 25-2121 (Reissue 1979), when referring to the willful disobedience of any lawful order of the court, the word "willful" means the violation was committed intentionally, with knowledge that the act was in violation of the court order.

Appeal from the District Court for Cass County: RONALD E. REAGAN, Judge. Reversed and remanded for further proceedings.

Charles E. Craze of Gibbs & Craze Co., and Owen Giles, for contemner Sileven.

Ronald D. Moravec, Cass County Attorney, for appellee.

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

HASTINGS, J.

On September 11, 1979, the district court for Cass County enjoined the defendants from operating a private school until such time as they complied with the Nebraska statutes and rules and regulations of the State Department of Education governing the approval of schools. That injunction order was affirmed by this court. *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.

Ronald D. Moravec, the county attorney of Cass County and one of the parties in this action, filed a motion on October 27, 1983, seeking a citation of Everett Sileven for willful contempt of court for violation of the order of injunction. A bench warrant was issued for the arrest of Sileven to appear and answer a charge of civil contempt. The contemner finally did appear, and, following various hearings which were concluded on April 26, 1984, the court found the contemner to be in "willful contempt" of the court. It then ordered him to be confined in the Cass County jail for a period of 8 months. In doing so the court stated: "The previous sanction in this case is a punitive sanction and was four months. The sanction I impose today is eight months."

The only suggestion by the court of any conditions attached to the jail sentence was that if Sileven furnished proof in the next week or so that all of the children of the Faith Christian School were to be enrolled in an approved school, and if he furnished a $10,000 bond, he would be released from jail until September 1, at which time he would be required to reenter jail to serve the balance of his term. Additionally, if the Faith Christian School was then in compliance with the laws and regulations, the court would approve a work release program. However, at a later date during the hearing on a motion for a new trial, the court, in referring to those conditions, stated: "[B]ut it was in no means meant to purge Mr. Sileven of the punitive sanctions."

In his appeal Sileven assigns as error that his constitutional right to notice was violated in that he was informed that he was to answer a charge of civil contempt, whereas he was adjudged guilty of criminal contempt, and that the court incorrectly found that he was guilty of willful disobedience when in fact his sincerely held religious beliefs made it impossible to comply with the injunctive order.

At the outset it is necessary that we deal with the appellee's challenge to the jurisdiction of the court. He insists that the contempt was civil in nature because the sanction imposed was coercive in nature. A coercive sanction arises out of a civil contempt, is not final in nature, and is not appealable. A punitive sanction takes on the nature of a final order. It stems from a criminal contempt and is appealable. *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984).

However, we disagree with the appellee's characterization of these proceedings. The "sentence" imposed was final and absolute and without conditions.

> In the coercive sanction . . . the contemner holds the keys to his jail cell, in that the sentence is conditioned upon his continued noncompliance. The punitive sanction is much like the sentence in a criminal case, in that it is absolute and not subject to mitigation if the contemner alters his future conduct toward the court . . . .

*Liles, supra* at 534, 344 N.W.2d at 628-29.

If the sentence is limited to imprisonment for a definite

> period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.

*Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442-43, 31 S. Ct. 492, 55 L. Ed. 797 (1911).

> Criminal contempt . . . is punitive . . . serves to vindicate the authority of the court, and cannot be ended by any act of the contemnor. . . . [W]e conclude that the order before us is criminal. The order imposes an unconditional fine . . . . It does not permit appellant to purge itself and remove the sanction by compliance with the court's . . . order. The contemnor does not "carr[y] the keys of his prison in his own pocket," and therefore the fine "operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience."

(Citations omitted.) *Southern Railway Company v. Lanham*, 403 F.2d 119, 124-25 (5th Cir. 1968).

We conclude that although the contempt proceedings were noticed as a civil contempt, may very well have been intended as a civil contempt, and were conducted as a civil contempt, in that the contemner was not advised of his rights against self-incrimination, the sanction imposed was very definitely criminal in nature. It was a final, appealable order. This disposes of the jurisdictional challenge and we can move on to the contemner's initial assignment of error.

A sentence in a prosecution for contempt, except that committed in open court, which is wholly punitive, may properly be imposed only in proceedings instituted and tried as for criminal contempt. In such proceedings the accused is entitled to due process of law and is presumed to be innocent, cannot be compelled to testify against himself or herself, and must be advised of the nature of the charges. *Cooke v. United States*, 267 U.S. 517, 45 S. Ct. 390, 86 L. Ed. 767 (1925); *Gompers v. Bucks Stove & Range Co., supra.* A criminal sanction is invalid if imposed in a proceeding that is instituted and tried as a civil contempt. *Southern Railway Company v. Lanham, supra.*

Although our conclusions set forth above require a reversal of this case, we will address briefly the contemner's second assignment of error.

Neb. Rev. Stat. § 25-2121 (Reissue 1979) authorizes the prosecution for criminal contempt of any person guilty of willful disobedience of any lawful order of a court. Although this court has not ruled on the meaning of willfulness as used in that statute, it has said the word "willful" as used in Neb. Rev. Stat. § 83-184 (Reissue 1981), making a willful failure to return to custody a crime, meant only intentional, not accidental or involuntary. *State v. Gascoigen*, 191 Neb. 15, 213 N.W.2d 452 (1973). And in *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983), we held that the term "intentional" was synonymous with willful in proving the defendant was intentionally possessing marijuana. "Intentionally means 'willfully' or 'purposely,' and not accidentally or involuntarily." *Id.* at 81, 341 N.W.2d at 610.

Similarly, in other jurisdictions where willfulness is an essential element of contempt, the courts have defined it to mean a deliberate or intimidating violation, as opposed to accidental or inadvertent, *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770 (9th Cir. 1983), or a volitional act done by one who knows or should have known that his conduct is wrongful. *United States v. Baker*, 641 F.2d 1311 (9th Cir. 1981).

Taken together, it appears "willful" means the violation was committed intentionally, with knowledge that the act was in violation of the court order. The record fully supports the conclusion that Sileven knew he was violating the court's order and that he chose to intentionally violate it. The fact that he felt he found a reason in the form of his conscience does not detract from the fact that he acted "willfully."

Further, as this court pointed out in *Sileven v. Tesch*, 212 Neb. 880, 326 N.W.2d 850 (1982), sincerely held beliefs are insufficient to justify continually flouting the law.

> It is Sileven's choice to continue violating the lawful orders of the court which has resulted in his being held in contempt of court. We specifically found that the state's right to regulate schools, including the Faith Baptist

> Church school, was a reasonable regulation and did not impose an unreasonable burden upon Sileven's religious beliefs, nor violate his first or ninth amendment rights. Sileven is simply wrong if he believes that he may consistently and continually flout the law by merely declaring that it is contrary to his religious beliefs, no matter how sincerely held. The extent to which the state must set aside its laws in order to accommodate religious beliefs is not to be determined, under our form of government, by the individual but, rather, by the court; and once this is determined by the court, as it has been in this matter, it may not be ignored or rejected by the individual without subjecting the individual to appropriate penalties.

*Id.* at 886, 326 N.W.2d at 853-54.

The contemner's second assignment of error is without merit.

However, for the reasons set forth above, it is necessary to reverse the judgment of the district court.

> Consequently, a criminal sanction is invalid if imposed in proceedings that are instituted and tried as a civil contempt. . . . The usual procedure is to reverse the citation for contempt and remand it to the trial court in order that a proper civil penalty can be imposed or in order that a criminal proceeding can be conducted.

*Southern Railway Company v. Lanham*, 403 F.2d 119, 125 (5th Cir. 1968). This is the procedure which we order to be followed here.

The judgment of the district court is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# TATANKA SAPANAJIN, APPELLANT, V. DARRELL JOHNSON, SHERIFF, ET AL., APPELLEES.

360 N.W.2d 500

Filed January 4, 1985. No. 84-535.

1. **Sentences.** The good time provisions of 1975 Neb. Laws, L.B. 567, were not applicable to persons who started their sentences prior to the effective date of the act, absent approval of the Board of Pardons.
2. **Speedy Trial.** The unexplained delay between arrest and arraignment or preliminary hearing does not demonstrate a violation of the right of speedy trial in the absence of prejudice.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Affirmed.

Thomas M. Sonntag of John Peetz, P.C., for appellant.

William C. Luben, Deputy Cheyenne County Attorney, for appellees.

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

WHITE, J.

Tatanka SapaNajin appeals to this court from the denial by the district court for Cheyenne County of his habeas corpus application for release from custody of the Cheyenne County sheriff and various other persons, including a state parole officer. Essentially, two assignments of error are urged. First, that the trial court erred in determining that the state parole authorities' hold was valid and, second, that a delay of 6 days from the time of the arrest to the arraignment in the county court entitles appellant to be released from custody and the underlying charges dismissed.

Appellant, SapaNajin, was arrested at approximately 1 a.m. on May 15, 1984, in a business establishment in Sidney, Nebraska. The business was not open, and SapaNajin was found hiding in an alcove in the building by several Sidney police officers.

SapaNajin was taken into custody and questioned, and as a result of the questioning was determined to be the same person as Jessee Travis Rouse, a parolee from the Nebraska Penal and

Correctional Complex. He was delivered to the custody of the Cheyenne County sheriff at approximately 4:15 a.m. The preliminary charges were suspected burglary and possession of a controlled substance. A complaint was filed by the Cheyenne County attorney on May 18, 1984, and the accused was first brought before a magistrate on May 21.

On May 15, 1984, the Cheyenne County authorities received a telex message at approximately 2 p.m. from the parole administrator in North Platte instructing the sheriff as follows: "HOLD SUBJECT WITHOUT BOND FOR PAROLE VIOLATION."

Sometime thereafter, a formal "Apprehension-Detention Request" was received by the Sidney police from the Department of Correctional Services. The document was dated May 15, 1984.

Appellant does not question the right of the Sidney police to arrest him and to deliver him to the sheriff. As to the first assignment, he claims that he was not subject to the lawful control of the state parole authorities on the date of his arrest. Appellant had been previously sentenced to a term of from 16 to 20 years' imprisonment effective from May 29, 1971, and paroled in January of 1982.

The appellant contends the provisions of 1975 Neb. Laws, L.B. 567, should be applied retrospectively and therefore his mandatory release date from incarceration had passed on the date of the arrest and the detention based on a parole hold was unlawful. Each party concedes that if L.B. 567 is not applied retrospectively, the appellant was subject to the control of the parole authorities. In *Boston v. Black*, 215 Neb. 701, 340 N.W.2d 401 (1983), we decided that the good time provisions of L.B. 567 were not applicable to persons who started their sentences prior to the effective date of the act, absent approval of the Board of Pardons, which the appellant has not obtained. Appellant was at all times lawfully confined and was not entitled to habeas corpus relief.

Since the relief requested cannot be granted, it is not necessary to discuss the second assignment, except to note that while not condoning an excessive delay between arrest and arraignment before a magistrate, that unexplained delay

between arrest and arraignment or preliminary hearing does not demonstrate a violation of the right of speedy trial in the absence of prejudice. See *State v. Ellis*, 184 Neb. 523, 169 N.W.2d 267 (1969). No showing of prejudice was made in the habeas corpus hearing.

The decision of the trial court is affirmed.

AFFIRMED.

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RICHARD BOHATY AND IRENE BOHATY, APPELLEES, V. LLOYD A. BRIARD AND WAYNE E. BRIARD, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLANTS AND CROSS-APPELLEES, LUMIR ADRIAN JEDLICKA, CONNIE JEDLICKA, DOROTHY C. JEDLICKA, AND LUMIR JEDLICKA, THIRD-PARTY DEFENDANTS, APPELLEES AND CROSS-APPELLANTS, GRACE R. JEDLICKA ET AL., THIRD-PARTY DEFENDANTS, APPELLEES, VERNON BRIARD AND STELLA BRIARD, THIRD-PARTY DEFENDANTS, APPELLANTS AND CROSS-APPELLEES.

361 N.W.2d 502

Filed January 11, 1985. No. 82-553.

1. **Waters.** 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. Diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, in the absence of negligence.
2. _____. Alteration of natural drainage is acceptable only where the interests of good husbandry are served, circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances present.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Affirmed in part, and in part reversed with directions.

Edward Asche, for appellants.

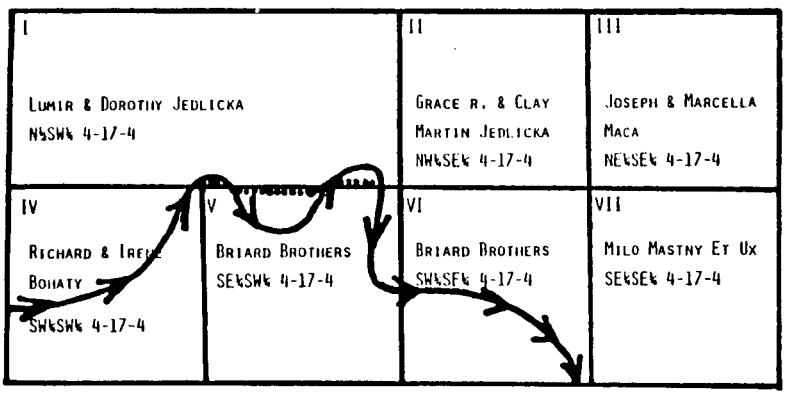
Larry J. Karel, for appellees Lumir Adrian Jedlicka et al. and Grace R. Jedlicka et al.

George E. McNally, for appellees Bohaty.

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

SHANAHAN, J.

Due to the complex nature of events surrounding the serpentine Bohaty-Briard ditch, the following map should be examined in conjunction with the factual recitation and claims of the parties regarding tracts in Section 4, Township 17 North, Range 4 East of the 6th P.M., Colfax County, Nebraska.




Initially, Richard and Irene Bohaty, owners of tract IV, sued for an injunction to require Lloyd A. (now deceased) and Wayne E. Briard, owners of tracts V and VI, to remove an earthen dam obstructing the flow of water in the Bohaty-Briard ditch, a natural watercourse.

Briards impleaded 11 parties alleged to have an interest in the litigation, including Lumir A. and Dorothy Jedlicka (tract I), Grace and Clay Jedlicka (tract II), and Joseph and Marcella Maca (tract III), and sought an injunction prohibiting discharge of waste irrigation water.

Bohatys stipulated with Briards and Jedlickas that the ditch east of Bohatys' and through Briards' and Jedlickas' will be deepened and widened to carry the necessary flow of water and the obstruction removed, and so maintained. Consequently, Bohatys did not participate in the trial. Additionally, Macas

were dismissed from the lawsuit and no appeal taken.

The pleadings of the parties admit that the obstruction initially placed in the Bohaty-Briard ditch had been constructed in a natural watercourse. See Neb. Rev. Stat. § 31-202 (Reissue 1984) ("Any 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.").

As indicated on the map, the Bohaty-Briard ditch entered tract IV from the west, crossed northeasterly into tract I, looped southward and entered tract V, turned and reentered tract I, and crossed back into tract V, thence southward to the Platte River.

For more efficient farming Lumir Jedlicka and Briards eliminated the horseshoe curves from the Bohaty-Briard ditch. Removal of the horseshoes caused a new drain course roughly following the boundary between tracts I and V. Jedlicka also leveled tract I to permit irrigation with a fall from west to east and constructed a reuse pit in the southeast corner of tract I to collect waste irrigation water. Water from the reuse pit flowed onto Briards (tract V) in the Bohaty-Briard ditch. Tract II was, likewise, leveled for irrigation with a west-to-east fall. Leveling tract II slightly elevated the west side of this tract. Tract II naturally drains onto tract III and eventually into a ditch located at some point beyond tract III. However, no water from tract II presently enters the Bohaty-Briard ditch.

Briards complain that the irrigation leveling north of their land on tracts I and II has diverted onto their land surface water which normally drained eastward across tracts II and III.

Lumir Jedlicka (tract I) contends that no water, surface or irrigation, would ever reach tract III from tract I; rather, the entire flow from tract I entered the Bohaty-Briard ditch at points within tract I or at points within tract VI, where water flowed through a low-lying area crossing tracts I, II, and VI.

James McMeekin, a licensed engineer for Briards, testified that approximately 60 of the 80 acres in tract I drained into the Bohaty-Briard ditch at points within tract I. Water from the remaining 20 acres located in the northeast quadrant of tract I drained easterly across tract II and entered a ditch on tract III as a conduit to another ditch on the east boundary of tract III,

thence into the Platte River.

Tract I was leveled to allow irrigation in a west-to-east direction, but also to eliminate a number of low areas or potholes where water had collected and stood.

On the east side of tract I there is a depression caused by the elevation of the west side of tract II. Such elevation obstructs eastward flow from tract I so that water collects on the east side of tract I and eventually drains into the reuse pit in the southeast corner of the tract.

Jim Coen, a licensed engineer, testified that drainage from the entire 80 acres in tract I entered the Bohaty-Briard ditch. Part of the drainage entered the ditch by way of a swale at points in tract VI, while part entered at points within tract I. Thus, drainage from tract I entered tract VI through a low-lying area traversing tracts I, II, and VI in a southeasterly direction. The relative contour lines of the tracts, as well as interpolative data, indicate that at least 50 to 60 of the 80 acres in tract I drain through this gently sloping swale. Lumir Jedlicka testified that he has had problems farming, when his tractor occasionally became stuck in the aforementioned soggy, low-lying area. The location where Jedlicka encountered such difficulty coincides with the area designated by Coen as the swale traversing tracts I, II, and VI. Aerial photographs depict heavier and greener foliage along the fence line between tracts I and II, where water naturally flowed prior to the leveling in tract II. Such dense foliage is attributable to water collecting in the swale along the boundary of tracts I and II. This swale or low-lying area does not meet the statutory definition of a watercourse set forth in § 31-202.

The district court found that 60 acres of the 80 acres in tract I normally drained into the Bohaty-Briard ditch. Based on that finding, the district court issued a mandatory injunction requiring Briards to remove any obstruction from the Bohaty-Briard ditch and enjoined the Jedlickas (tract I) from discharging waste irrigation water upon Briards.

Briards contend there has been error (1) in issuance of the mandatory injunction for removal of obstruction in the Bohaty-Briard ditch, because any obstruction had been removed at the time of trial in accordance with the parties'

stipulation; (2) in finding that approximately 60 of the 80 acres in tract I normally drained into the Bohaty-Briard ditch; (3) in allowing Jedlickas (tract II) to drain water on Briards', because there is no evidence of such drainage and, therefore, no issue in the proceedings; (4) in not ordering removal of the obstruction on tract II so that drainage continued to flow easterly across tract II; and (5) in taxing costs against the appellants.

Jedlickas (tract I) cross-appeal and assign as error the district court's (1) finding that only 60 of the 80 acres of tract I drained into the Bohaty-Briard ditch; (2) failing to recognize that an owner may drain land into any natural watercourse; (3) enjoining discharge of waste irrigation water on Briards' property, because the source of some waste irrigation water was land owned by persons who are not parties to the lawsuit; and (4) taxing costs to Jedlickas.

We dispose of several assignments of error by noting that the briefs do not contain argument on certain errors assigned by the parties. *Argument* is "[a]n effort to establish belief by a course of reasoning." Black's Law Dictionary 98 (5th ed. 1979). Because the assignments of error are not supported by accompanying argument in the briefs, but are mere statements of general dissatisfaction with conclusions reached by the trial court, we will not speculate about the reasoning behind dissatisfaction of the parties. Without argument and authority in support of an advocated position, speculation is unavoidable. Consequently, we need not respond to Briards' assignments of error concerning absolution of the owners of tract II from liability for irrigation water. Likewise, we do not address the question of costs taxed to the parties. See, Neb. Ct. R. 9D(1)(d) (Rev. 1983); *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983). In a similar manner we have disposed of Briards' and Jedlickas' remaining but unargued assignments of error.

Apart from the rules of practice, Briards' assignment of error with regard to the mandatory injunction requiring removal of the dam-obstruction from the Bohaty-Briard ditch is without merit. The mandatory injunction is simply judicial recognition of the stipulation entered by the parties and prepared with their participation and consent. Briards cannot

complain about entry of an order which is the consequence of their own efforts. It has long been settled in the State of Nebraska that a party cannot complain of error which he has invited. *Langenheim v. City of Seward*, 200 Neb. 740, 265 N.W.2d 446 (1978).

Briards' complaint about the finding that 60 of the 80 acres in tract I drained into the Bohaty-Briard ditch is resolved by the presence of evidence sufficient to sustain a finding by the district court and now made by this court.

Concerning drainage from tract I across tract II into tract III, the water moved in a diffused state across the boundaries.

> 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.
>
> . . . .
>
> . . . Diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, in the absence of negligence.

*Kuta v. Flynn*, 182 Neb. 479, 481, 483, 155 N.W.2d 795, 797-98 (1968). See, also, *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962).

> [W]hen diffused surface waters are concentrated in volume and velocity and flow into a natural depression, draw, swale, or other drainway, the rule as to diffused surface waters does not apply. . . . "[A] natural drainway must be kept open to carry the water into the streams, and as against the rights of the upper proprietor, the lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression. . . ."

*Nichol v. Yocum, supra* at 306, 113 N.W.2d at 200. See, also, *Paasch v. Brown*, 190 Neb. 421, 208 N.W.2d 695 (1973).

Coen, Jedlickas' expert witness, presented the only testimony about the low-lying area through which water flowed eastward across tracts I and II. There was absolutely no testimony that there was any flow of water concentrated in volume and velocity to the extent that drainage lost its character as surface water. Therefore, Briards have failed to show that the owners of tract II could not repel surface water draining onto

tract II.

Regarding the drainage dispute about the 20 acres in tract I, Coen concluded that all water from tract I eventually entered the Bohaty-Briard ditch after coursing southeastward into tract II and then southward into tract VI. Briards have failed to meet the burden of factually establishing a watercourse or natural drain from tract I to tract II and, therefore, are not entitled to injunctive relief. See *Grint v. Hart*, 216 Neb. 406, 409, 343 N.W.2d 921, 924 (1984) ("[A] party seeking an injunction must establish by competent evidence every controverted fact necessary to entitle him to relief.").

The experts testified that the reuse pit constructed in the southeast corner of tract I is sufficient to hold all irrigation runoff incidental to the cultivation on tract I. There is no claim that Jedlickas were negligent and no evidence that Briards sustained damage as a result of irrigation waters. The primary dispute exists with respect to additional surface waters resulting from the land leveling. There is no question that the reuse pit is adequate to accommodate waste irrigation water.

> "An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence."

*Nickman v. Kirschner*, 202 Neb. 78, 82, 273 N.W.2d 675, 678 (1979). According to Briards' expert witness, leveling tract I added to the area presently drained into the Bohaty-Briard ditch across Briards' property. The additional volume of water which resulted from the collection of surface waters in an artificial drain constructed for the purpose of draining temporary ponds or basins is a burden which a subservient estate (Briards) must accept. See *Nickman v. Kirschner, supra*.

Neb. Rev. Stat. § 31-201 (Reissue 1984) provides:

> Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation.

If Jedlickas, owners of tract I, had not leveled their land to drain in a southerly direction, the elevation of the west side of tract II would have rendered the east part of tract I unfarmable. The question is whether the alteration of drainage on tract I is in the "general course of natural drainage" as used in § 31-201.

This appears to be a question of first impression in Nebraska inasmuch as this court has never interpreted the phrase "in the general course of natural drainage." It is uncontroverted that the reuse pit drains into a natural watercourse that reaches the Platte River. The remainder of Section 17 also drains in the same general direction to the Platte River. Although conflicting testimony was presented with regard to the direction of the drainage in question, we find that the testimony of the Jedlickas' expert is particularly persuasive when taken in conjunction with the testimony of Lumir Jedlicka that a low-lying area or draw exists and runs in a southeasterly direction on tract I through which diffused surface waters eventually reached the Bohaty-Briard ditch in tract VI.

If we accept that 20 acres of tract I did drain southeasterly directly through the low-lying area and eventually reached the Bohaty-Briard ditch in tract VI, we conclude that Jedlickas' altering the drainage pattern on tract I provided an earlier entry of water from the 20 acres in the northeast quadrant of tract I. Such altered drainage was within the general course of drainage within the meaning of § 31-201. The only effect of the altered drainage was entry of water from 20 acres at a point upstream from the area where drainage would have eventually entered the Bohaty-Briard ditch had such upstream entry not been constructed. It is clear that the natural watercourse (Bohaty-Briard ditch) into which waters from tract I are drained is the only drain reasonably available to Jedlickas. The

drainage along the eastern part of tract I is consistent with the general course of drainage throughout the area involved. Jedlickas were entitled to drain the property as they did.

By our holding we do not state or imply that the alteration of natural drainage patterns pursuant to § 31-201 will be legally acceptable in every case. Alteration of natural drainage is acceptable only where the interests of good husbandry are served, circumstances are such that alteration is necessary, and the particular alteration is reasonable under all the circumstances present. As expressed in *Templeton v. Huss*, 57 Ill. 2d 134, 141, 311 N.E.2d 141, 145-46 (1974):

> [I]t is sufficient to say that our cases do not support the defendants' contention that they had an unlimited right to increase the rate or amount of surface-water runoff flowing onto plaintiff's land, regardless of the cause or extent of the increase.
>
> Interference with natural drainage has been limited to that which was incidental to the reasonable development of the dominant estate for agricultural purposes. . . .
>
> The question which must be confronted is whether the increased flow of surface waters from the land of the defendants to that of the plaintiff . . . was beyond a range consistent with the policy of reasonableness of use which led initially to the good-husbandry exception.

Further, in *Delano v. Collins*, 49 Ill. App. 3d 791, 795, 364 N.E.2d 716, 720 (1977), relying on *Templeton*, the court held: "Both the text of the opinion [*Templeton*] and the general rules of law would place upon plaintiffs a burden of proof that the acts of the defendants were beyond a range consistent with the policy of reasonable use." The holding in *Delano* is consistent with our rule set forth in *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984).

We reverse the district court's judgment regarding the injunction placed upon the Jedlickas' drainage of their 20 acres in tract I and hold that the Jedlickas may properly drain surface waters from tract I into the Bohaty-Briard ditch. Further, the injunction against Jedlickas regarding waste irrigation water is incorrect and must be dissolved inasmuch as there has been no showing that Briards have sustained injury caused by waste

irrigation water. See *Peters v. Langrehr*, 188 Neb. 480, 197 N.W.2d 698 (1972). Consequently, the district court's injunctions regarding drainage of the 20 acres in tract I and waste irrigation water from tract I shall be dissolved in accordance with this opinion. In all other respects the judgment of the district court is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED WITH DIRECTIONS.

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CRAIG CHRISTOPHER ET AL., APPELLEES, V. THEODORE EVANS ET AL., APPELLANTS.

361 N.W.2d 193

Filed January 11, 1985. No. 83-663.

1. **Contracts: Fraud.** A party who has been induced to enter into a contract by a material misrepresentation has, upon discovery of such misrepresentation, an election of remedies: either to affirm the contract and sue for damages or to disaffirm the contract and be reinstated to the induced party's position which existed before entry into the contract.
2. **Words and Phrases.** *Conceal* means to hide, secrete, or withhold from the knowledge of others; to withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight; or to prevent discovery. The word *conceal* pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact and has reference to some advantage to the concealing party or a disadvantage to some interested party from whom the fact is withheld.

Appeal from the District Court for Johnson County: RONALD E. REAGAN, Judge. Reversed and remanded with directions.

Thomas L. Morrissey of Morrissey & Morrissey, for appellants.

Michael L. Munch of Hascall, Jungers & Garvey, for appellees.

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

SHANAHAN, J.

Theodore and Betty Evans appeal the judgment of the district court for Johnson County rescinding a contract for the purchase of a residence by Craig and Kimberly Christopher. The trial court found that Evanses had unintentionally concealed a latent condition of the premises, set aside the real estate contract, and ordered Evanses to return Christophers' downpayment made pursuant to the contract. We reverse and remand with directions.

In 1970 the Evanses purchased a home at 630 North 3d Street in Tecumseh, Nebraska. Between 1970 and 1973 the Evanses had a local masonry contractor, Keith Weber, work on the house's foundation on account of a water problem. Rain from the house's downspouts would collect in a gap adjacent to the foundation and leak into the house through the north basement wall. Part of Weber's work consisted of installing vertical "I-beams" parallel with the basement walls. Three-inch I-beams to support the north basement wall were anchored in the floor and ceiling joists.

Although Weber completed the described work, Evanses periodically placed dirt in the recurring depression next to the foundation. If the fill was not adequately maintained, a gully or trough formed along the north wall of the foundation and collected rainwater. Evanses maintained such fill, sloped away from their house.

Two of the Evanses' children had a bedroom in the basement after 1976. In the winter of 1979 Evanses decided to build a new home and listed the house in question for sale. After nearly 2 years' unsuccessful offering for sale, Evanses listed their house with another realtor, Dan Sullivan, and told Sullivan about the "water problem." Sullivan showed the house to two prospective purchasers, Lee Hartwell and Bob Creighton. Hartwell observed the "supports" along the basement walls and detected a basement odor he attributed to a water problem. Creighton looked at the house in August 1980, saw cracks in the basement walls and the supports along the basement walls, and noticed a musty odor in the basement.

Sullivan told Evanses that "something was going to have to be done to these basement walls" or Evanses would have to

make "one heck of a concession in the selling price." Theodore Evans contacted Weber to "dress up the north wall." In August 1981 Weber proceeded to backplaster the north wall, which had a bow or bulge in it. When Weber finished plastering, the north wall was unpainted and a light color. Other basement walls were painted green. The I-beams remained in place and uncovered.

In early September 1981 the Christophers, along with the wife of Craig Christopher's employer, were shown the house by Sullivan. Craig Christopher testified he saw no cracks or water spots in the plastered area of the basement or on the floors. Sullivan told the Christophers "that they [Evanses] had evidently had problems, but as far as he knew, that they had been repaired and the walls were stable." According to Craig Christopher, the presence of the "reinforcement beams" indicated "there had been a problem in the past," because the I-beams were placed to prevent "bowing" of the walls.

According to Christophers and Evanses, there were several discussions about the continual necessity of hauling dirt as fill along the house's foundation to "prevent possible damage or leakage" in the basement. The last such conversation about fill and the foundation occurred at the office of Evanses' attorney just before Christophers and Evanses signed an installment sale contract regarding the house. The contract called for a purchase price of $49,500, with a downpayment of $9,900.

Craig Christopher never placed any fill along the house's foundation. During late spring of 1982, Christophers encountered severe water problems in the basement, especially along the north wall. Unable to reach an agreement with the Evanses, Christophers filed their petition on September 27, 1982, and moved out of the house on November 9, 1982.

In their petition Christophers alleged that Evanses had attempted to conceal evidence of the house's water leakage by painting and replastering one wall and that the "failure of the [Evanses] to disclose the structional [sic] deficiencies of the premises also are [sic] tantamount to fraud." Christophers' petition concluded with a prayer for rescission of the contract with Evanses and return of payments made under the contract.

Evanses filed a counterclaim seeking judgment against Christophers for amounts due under the contract of sale.

The district court found "the concealment of the condition of the north wall, albeit unintentional, raised a duty on the part of Evans' [sic] and their agents to affirmatively advise prospective purchasers of the latent condition." As a result of its finding, the district court held the Christopher-Evans contract to be rescinded and ordered that Evanses return the downpayment by Christophers.

Evanses contend there was no concealment of the "water problem" in connection with the sale of their house to Christophers.

The law of misrepresentation is well settled in Nebraska. A party who has been induced to enter into a contract by a material misrepresentation has, upon discovery of such misrepresentation, an election of remedies: either to affirm the contract and sue for damages or to disaffirm the contract and be reinstated to the induced party's position which existed before entry into the contract. See, *Gitschel v. Sauer*, 212 Neb. 454, 323 N.W.2d 93 (1982); *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955). Christophers have elected rescission and restitution. Because an action to rescind a contract is equitable in character, we review the record de novo, which means we will reach an independent conclusion without reference to the findings of the trial court. *Russo v. Williams, supra.*

Christophers rely on the rule stated in *Hauck v. Samus*, 212 Neb. 25, 28, 321 N.W.2d 68, 70 (1982):

> Although a vendor of real property is not guilty of fraud for failure to disclose material, latent defects which are unknown to him, where the evidence shows he was aware of circumstances from which a reasonable inference could be drawn that he either knew or should have been aware of the fact that latent, defective conditions existed, he is liable to the purchaser.

The applicable rule is found in *Linton v. Sheldon*, 98 Neb. 834, 839, 154 N.W. 724, 725-26 (1915):

> "If, with the intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation

> that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

See, also, *Wolford v. Freeman*, 150 Neb. 537, 35 N.W.2d 98 (1948).

There is no doubt that in Nebraska

> "[a]s between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud; but where such facts are known by the vendor and he knows them to be not within reach of the reasonably diligent attention, observation and judgment of the purchaser, and they are such as would readily mislead the purchaser as to the true conditions of the property, the vendor is bound to disclose such facts."

(Citation omitted.) *Wolford v. Freeman, supra* at 545, 35 N.W.2d at 102-03. See, also, *Dargue v. Chaput*, 166 Neb. 69, 88 N.W.2d 148 (1958). If defects are concealed, they are latent. *Dargue v. Chaput, supra*.

The question raised in the present case is whether Evanses concealed facts they were bound to disclose. Christophers argue that Evanses' plastering the basement wall concealed the true condition behind the wall—the existence of a water problem. On the other hand, Evanses argue that Christophers were at all times aware that there was a water problem involving the basement.

*Conceal* means "To hide, secrete, or withhold from the knowledge of others. To withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight. To hide or withdraw from observation, cover or keep from sight, or prevent discovery of." Black's Law Dictionary 261 (5th ed. 1979).

In *Mitchell v. Locurto*, 79 Cal. App. 2d 507, 514, 179 P.2d

848, 851-52 (1947), the court defined *conceal* as follows:

> The word "conceal" pertains to affirmative action likely to prevent or intended to prevent knowledge of a fact. (Restatement of the Law, Contracts, § 471, p. 891 et seq.; Restatement of the Law, Restitution, § 8, p. 32 et seq.; 8 Words and Phrases, Perm. Ed., 328-341.) It has reference to some advantage to the concealing party or a disadvantage to some interested party from whom the fact is withheld.

Although much attention is directed to plastering a leaky, cracked basement wall, the water problem actually originated outside the house along the foundation. Evanses made no representation regarding the extent of the water problem or damage. The cause of the basement water problem was collection of rain in a depression outside and along the foundation of the house. More serious consequences of the water problem—for example, the bulge or bow in the north basement wall and placement of the I-beams to alleviate the problem—were actually observed by Christophers.

Having seen the effects of the "water problem," Christophers possessed material information about existence of the problem. Existence of the water problem, therefore, was not concealed. Christophers admit Theodore Evans suggested placing fill along the foundation of the house "to prevent possible damage or leakage." " 'Where one is put upon inquiry, he is charged with notice of all of such facts as he would have learned by reasonable inquiry.' " *Nathan v. McKernan*, 170 Neb. 1, 17-18, 101 N.W.2d 756, 767 (1960). Evans' suggestion concerning fill along the foundation and the possibility of damage or leakage can hardly be characterized as a maneuver designed to prevent knowledge or discovery of a water problem. On the contrary, Evans' suggestion informed and alerted Christophers to the fact that the problem persisted even at the day the contract of sale was signed—a fact not only within the reach of the Christophers but actually grasped by them. Moreover, the suggestion by Evans negates intent to deceive, a necessary element for fraud by concealment. Under the circumstances, one who is aware of a potential problem with the subject matter of a contract cannot enter the contract

and later complain when the potential problem becomes a reality. For Christophers, there could be no misrepresentation of a material fact already known to them.

The judgment of the district court is incorrect and is reversed. These proceedings are remanded to the district court with directions to dismiss the petition of the Christophers.

REVERSED AND REMANDED WITH DIRECTIONS.

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## HAVELOCK BANK OF LINCOLN, A CORPORATION, APPELLANT, V. F. PACE WOODS II AND F. PACE WOODS II, DOING BUSINESS AS WOODS BROS. REALTY, APPELLEES.

361 N.W.2d 197

Filed January 11, 1985. No. 83-693.

1. **Fraud.** The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage.
2. _____. Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory evidence.
3. _____. The fraud involved in the misrepresentation must relate to a present or preexisting fact, and generally may not be predicated on an inference concerning any event in the future or acts to be done in the future unless such representations as to future acts are falsely and fraudulently made with an intent to deceive.
4. **Trial: Judgments.** Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law. Neb. Rev. Stat. § 25-1127 (Reissue 1979).
5. **Judgments.** A general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts.
6. **Judgments: Appeal and Error.** The findings of the court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong.
7. _____: _____. In a law action tried without a jury, it is not within our province to resolve evidentiary conflicts or to weigh evidence; rather, it is our obligation

> to review the judgment entered in light of the evidence and to consider the evidence in that light most favorable to the successful party, resolving all conflicts in his favor and granting him the benefit of every inference which is reasonably deducible therefrom.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Edward F. Carter, Jr., and Dana Baker of Barney, Carter & Johnson, P.C., for appellant.

Terry R. Wittler of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

BOSLAUGH, WHITE, and GRANT, JJ., and MCCOWN, J., Retired, and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a law action by Havelock Bank of Lincoln, plaintiff-appellant (hereafter Bank), against F. Pace Woods II and F. Pace Woods II, doing business as Woods Bros. Realty (hereafter Woods), for false representations concerning ownership of land inducing the Bank to loan $10,000 to Tartan Construction Company (hereafter Tartan) and its president, Duane R. Stewart (hereafter Stewart), secured by Tartan's assignment of proceeds from the sale of the real estate as thereafter received by Woods, the closing agent. Tartan is a bankrupt. Jury trial was waived. Judgment was entered for "defendant." The Bank appeals, assigning two errors that we consider together: (1) The trial court's failure to apply the correct measure of damages, and (2) The trial court's finding that the plaintiff failed to prove its damages with reasonable certainty.

The essential elements required to sustain an action for fraudulent misrepresentation are, generally speaking, that a representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage. Fraud is never presumed, but must be established by the party alleging it by clear and satisfactory

evidence. *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982).

Although not directly addressed by either party, we first examine the status and effect of the judgment entered, as taken from the judge's trial docket and later recorded in the court's journal as follows:

> The "assignment" in this case was of money consisting of the "proceeds" of the purchase price of this sale of certain property. The plaintiff having failed to prove what that amount was and therefore with research [sic] certainty its damages, judgment should be and hereby is entered in favor of the defendant and against the plaintiff. Costs taxed to plaintiff.

No formal journal entry or judgment was prepared and filed. Neither party requested the court to make specific findings of fact and conclusions of law as provided in Neb. Rev. Stat. § 25-1127 (Reissue 1979):

> Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it, with a view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law.

From the assigned errors and supporting argument, it appears that appellant Bank assumes that the trial court made a finding for the Bank on all elements and issues of liability, overlooking the possibility that the judgment, as entered, was a general finding in favor of Woods on all issues, as is discussed in *Burgess v. Curly Olney's, Inc.*, 198 Neb. 153, 156, 251 N.W.2d 888, 890 (1977):

> "It shall not be necessary for the court to state its finding, except, generally, for the plaintiff or defendant, unless one of the parties request it. § 25-1127, R.R.S. 1943.
>
> "Where no section 25-1127, R.R.S. 1943, request has been made, the correct rule is: If there is a conflict in the evidence, this court in reviewing the judgment rendered

> will presume that controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed unless clearly wrong.
>
> "A general finding that the judgment should be for a certain party warrants the conclusion that the trial court found in his favor on all issuable facts.
>
> "The rules stated in the three immediately preceding syllabi are not made inapplicable merely because in addition to the general finding the trial court also mentioned certain matters specifically."

"The sufficiency of a writing claimed to be a judgment is to be tested by its substance rather than its form." 46 Am. Jur. 2d *Judgments* § 64 at 359 (1969).

As a judicial practice, a specific finding for the prevailing party is desirable; however, such is not required and, in the absence of a request for such findings, we examine this judgment as recorded. We conclude that the recitation therein, "judgment should be and hereby is entered in favor of the defendant and against the plaintiff," was a final order and a general finding for judgment in favor of Woods on all issuable facts, and the other findings concerning damages do not affect or change that general finding for Woods.

The findings of the court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong. *South Sioux City Star v. Edwards*, 218 Neb. 487, 357 N.W.2d 178 (1984). See, also, *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984).

> In a law action tried without a jury, it is not within our province to resolve evidentiary conflicts or to weigh evidence; rather, it is our obligation to review the judgment entered in light of the evidence and to consider the evidence in that light most favorable to the successful party, resolving all conflicts in his favor and granting him the benefit of every inference which is reasonably deducible therefrom.

(Syllabus of the court.) *Grubbs v. Kula*, 212 Neb. 735, 325 N.W.2d 835 (1982).

The conflict in the evidence generally relates to the

conclusions and intent of the parties. The court could find these facts. During the period 1976-79, Tartan, acting through Stewart, built several homes in the Skyline Rolling Hills Second Addition (hereafter Skyline Addition) to Lincoln, Nebraska, owned and developed by Woods Investment Company (hereafter WIC), solely owned by F. Pace Woods II, who also did business as Woods Bros. Realty. Tartan often financed its building expenses through the commercial department of plaintiff Bank, generally in this manner: Stewart personally purchased building lots from WIC; Tartan obtained a construction loan from another lender, secured a buyer, and contracted for the sale of the lot and a home to be built. Tartan then arranged the building expense financing with the Bank and delivered a copy of the sales contract to the Bank along with Tartan's assignment of sales proceeds as security in an amount equal to the loan. The amount of the loan generally was about half of the difference between the contract sales price and the construction loan. Woods Bros. Realty was the exclusive listing agent for Tartan in the Skyline Addition; Woods would endorse his consent to the assignment as an accommodation to the borrower and as required by the Bank.

On June 12, 1979, Sharon Aden, an agent for Woods Bros. Realty, and her husband bought a lot in the Skyline Addition directly from WIC; they arranged for a loan covering the cost of the lot and the construction of a home to be built by Tartan. As a supporting loan document, they executed an offer to purchase the house and lot for $83,500. For reasons not clear in the evidence the offer to purchase shows Stewart as seller; Woods Bros. Realty is designated as the escrow holder to close the sale. On June 25, 1979, Tartan arranged a $10,000 building expense loan with the Bank and delivered a copy of the offer to purchase along with an assignment of proceeds bearing Woods' consent endorsement. The assignment with consent endorsement was on a form prepared by the Bank for its use and convenience; its relevant parts are as follows:

ASSIGNMENT

> WHEREAS, the undersigned TARTAN CONSTRUCTION COMPANY, hereinafter referred to as party of the first part, has applied for a certain loan from

HAVELOCK BANK, Lincoln, Nebraska, hereinafter referred to as second party; and

WHEREAS, said party of the first part is the owner of a certain real estate property known as 1509 Trelawney Drive, situated in Lincoln, Lancaster County, Nebraska, which said property first party has contracted to sell through its agent, Woods Bros. Realty.

NOW THEREFORE, in consideration for the granting of said loan by party of the second part to party of the first part, and as collaterial [sic] security for said loan, party of the first part desires to and does herewith assign, transfer and convey to the second party the sum of Ten Thousand and No/100ths----------($10,000.00) DOLLARS of the proceeds of the purchase price of the sale of the above described real estate, and Woods Bros. Realty, agent for first party, does hereby consent and agree to said Assignment.

THIS ASSIGNMENT is executed by party of the first part this 25th day of June, 1979.

TARTAN CONSTRUCTION COMPANY

By: /s/ Duane R. Stewart
(Duane R. Stewart, President)

Woods Bros. Realty, agent for party of the first part, hereby consents to the above Assignment of the sum of Ten Thousand and No/100ths----------($10,000.00) DOLLARS, of the proceeds of the purchase price of the sale of the above described real estate to Havelock Bank, Lincoln, Nebraska, in accordance with the terms of the Assignment herein.

WOODS BROS REALTY

By: /s/ F Pace Woods II

Tartan did not complete the Adens' house; the Adens had paid Woods $500, part of which was returned to them. Woods received no other funds related to either the assignment or the Aden contract.

The Bank contends that the recitation in the assignment that Tartan was the owner of the property at 1509 Trelawney Drive

was a false representation of title, knowingly made by Woods with the intent to deceive the Bank, and that the Bank relied upon that false statement in making the loan to Tartan to its damage. Both parties agree that the assignment was a security assignment of the proceeds from the sale of the property; this is included as a finding in the court's judgment. Woods argues that his consent to the assignment was nothing more than that, that any representations or recitations in the assignment proper were not attributable to him, and that he made no representation of title to the Bank.

Concerning the element of a false statement, Woods testified that he had executed at least 12 other consents to assignment of proceeds forms for Tartan; that he understood his duty under the consent was to honor the assignment of proceeds in favor of the Bank upon closing the sale; that when Stewart presented the consent forms, Woods routinely executed them as an accommodation to Stewart for his bank loan application; and that he did not examine the contents of the assignments. Woods further testified this procedure was followed in this case. He stated that at that time he did not know who owned the property described in the form and that he did not intend to make any representation to the Bank as to the ownership of the described property. The president of the Bank testified that he had no reason to think that Woods intended to defraud the Bank. The Bank produced no evidence meeting the test of clear and convincing, other than the written instruments, that Woods represented to the Bank that Tartan was the owner of the property, that Woods knew that Tartan was not the owner, and that he intended to deceive the Bank. The evidence shows that any representation of title in the assignment was made by Tartan; that Woods' responsibility was fiduciary in nature, related to the future closing of the sale and distribution of sale proceeds, including the assigned interest in favor of the Bank; that all this was known by the Bank; and that it relied upon Woods' faithful performance of that trust.

> The fraud involved in the misrepresentation must relate to a present or preexisting fact, and generally may not be predicated on an inference concerning any event in the future or acts to be done in the future unless such

> representations as to future acts are falsely and fraudulently made with an intent to deceive.

*Smith v. Wrehe*, 199 Neb. 753, 758, 261 N.W.2d 620, 624 (1978).

Plaintiff Bank failed to prove that Woods knowingly made any statement or representation of a present or preexisting fact that Tartan was the owner of the property at Trelawney Drive or that Woods' execution of the consent to assignment of proceeds was either untrue or made with the intent to deceive the Bank. It is not necessary to discuss the other elements of the Bank's cause of action.

The evidence supports the judgment.

AFFIRMED.

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ROSEMARIE G. COOPER, APPELLEE, V. GEORGE D. COOPER, APPELLANT.

361 N.W.2d 202

Filed January 11, 1985. No. 83-727.

1. **Modification of Decree: Alimony: Appeal and Error.** In dissolution of marriage cases, actions for the modification of alimony will, on appeal, be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where the evidence is in conflict, this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.
2. **Modification of Decree: Alimony.** Good cause for altering alimony provisions in a divorce decree is demonstrated by a material and substantial change of circumstances.
3. _____: _____. An alimony recipient's obtaining employment after the date of the decree is a circumstance that permits the situation of the parties to be reexamined.
4. **Divorce.** In dissolution of marriage cases one may in good faith make an occupational change even though that may reduce his ability to meet his financial obligation.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Reversed and remanded with directions.

John A. Gale of Girard and Gale, for appellant.

Baskins & Rowlands, for appellee.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired.

BRODKEY, J., Retired.

This is a proceeding to modify a judgment for alimony. Following a hearing, the district court for Lincoln County dismissed the motion.

In this appeal the appellant, Dr. George D. Cooper, argues that his change in employment and concurrent decrease in income and the appellee's, Rosemarie G. Cooper's, return to work constitute a substantial and material change in circumstances sufficient to warrant a modification of the alimony award.

The parties were married on August 8, 1954. They have four children, all of whom have reached majority. On September 7, 1978, the parties were divorced pursuant to a final decree which incorporated the terms of a child custody, child support, property settlement, and alimony agreement entered into by the parties. As is relevant here, the appellant was to pay the appellee $268,700 in periodic alimony payments over a period of 10 years and 2 months. As of the date of the trial in July of 1983, appellant has paid a total of $127,900 and is obligated to pay $2,200 per month through October 1, 1988.

The appellant, a physician, is 53 years old. At the time the parties were divorced, he was engaged in the general practice of medicine in North Platte, Nebraska. His gross income in 1976 from that practice was $127,000. Additionally, as a supplement to his income, appellant received $7,000 from other physicians with whom he contracted to cover emergency room work.

In 1982 appellant quit his general practice to become a full-time emergency room specialist, at which he works approximately three weekends a month from 6 p.m. Friday until 6 a.m. Monday. As a full-time emergency room specialist, the appellant earned $55,000 last year. Appellant contends that he sought emergency room contract work to "augment" his income, that he found such work gave him far greater satisfaction than his general practice, that he became concerned about his competence in general practice, and that his career

goal is to ultimately become board certified as an emergency room physician.

Since the time of their divorce, appellee, who is 58, has become employed as a histology technician and earns in excess of $18,000 per year. Appellee, who had not worked in that field for over 19 years, testified that at the time of the divorce she was not working, nor did she consider herself employable, because she suffered from migraine headaches, a condition which has since lessened.

Appellee testified that it is only with this additional income that she has been able to save for her retirement and for when appellant's alimony payments cease. In fact, she has accumulated substantial savings over the years. Along with supporting herself, two of the parties' children currently live with her.

We have previously held that issues dealing with the division of property, awarding of alimony, and awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. However, where the evidence is in conflict, this court will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another. *Reuter v. Reuter*, 218 Neb. 732, 359 N.W.2d 78 (1984); *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). We now hold that the same standard of review applies in actions for the modification of alimony awards.

Neb. Rev. Stat. § 42-365 (Reissue 1984) provides that "orders for alimony may be modified or revoked for good cause shown . . . ." Generally, this court has held that good cause for altering alimony provisions in a divorce decree is demonstrated by a material and substantial change of circumstances. *Sloss v. Sloss*, 212 Neb. 610, 324 N.W.2d 663 (1982). Any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not arise to the level to justify a change or modification of the order. *Albers v. Albers*, 213 Neb. 471, 329 N.W.2d 567 (1983). It is further

noted at the outset that this court's power to modify the alimony award is not affected by the fact that the decree is based on an agreement of the parties. *Id.; Williams v. Williams*, 119 Neb. 8, 226 N.W. 798 (1929). Our task in this de novo review, then, is to determine whether the trial judge abused his discretion in determining that good cause did not exist such as to warrant a modification of the alimony previously awarded.

Appellant remarried in 1979. However, it is acknowledged that appellant does not rely on his remarriage as a change in circumstances. However, it is a fact which seemingly underlies this litigation, and his testimony indicates that it constitutes at least a motivational factor for his seeking a modification. Remarriage is not of itself sufficient to justify a modification—"The first wife and children have first consideration." *Thuman v. Thuman*, 144 Neb. 177, 182, 13 N.W.2d 117, 120 (1944). "It is a circumstance that may be considered, however, in weighing the equities of the situation, where other facts are present sufficient to warrant the court, in its sound discretion, to modify the decree." *Morris v. Morris*, 137 Neb. 660, 662, 290 N.W. 720, 722 (1940).

The issues before this court, then, concern the parties' changes in income. Considering appellee's gainful employment first, this court has previously found that an alimony recipient's obtaining employment after the date of the decree "is a circumstance that permits the situation of the parties to be reexamined and some adjustment to be made in the equities between them." *Morris v. Morris, supra* at 663-64, 290 N.W. at 722. However, as was stated previously herein and emphasized in *Chamberlin v. Chamberlin*, 206 Neb. 808, 295 N.W.2d 391 (1980), a modification is only warranted when a change of circumstances is of a material and substantial nature. In *Chamberlin* the husband sought a reduction in the $600 per month alimony awarded to his former wife. The wife, who was not employed at the time of the decree, subsequently became employed. Her monthly income, including alimony payments, was $1,748.35. This court said:

> He had further contended that Helen has shown ability and initiative in her pursuit of employment. It is likewise true that, because of her good stewardship, she has

> accumulated a considerable amount of assets which will produce income after her impending retirement. However, we do not believe that she should be penalized for using such ability and initiative. The record reveals that, even with such initiative and ability, Helen's monthly income, including alimony payments, was $1,748.35 and her monthly expenses were $1,119. Moreover, it is undisputed that Helen has a frugal and conservative lifestyle, saving whatever and wherever she can. While a change in circumstances has occurred, we do not believe that the change was so substantial as to justify the termination of alimony. On the contrary, Helen contends that the alimony award should be increased due to the effects of high inflation rates on the award and its relative purchasing power, which we will address later. We do not mean to advocate that spouses should not attempt to become self-supporting; in fact, we encourage such practice. We state only that the evidence presented herein does not indicate a substantial change in Helen's ability to support herself financially which would justify modification of the alimony award; Helen should not be penalized because of her efforts to supplement the alimony award.

*Id.* at 815, 295 N.W.2d at 395-96.

Another factor which must be considered by this court, however, is that the appellant's income has decreased significantly. In *Fogel v. Fogel*, 184 Neb. 425, 168 N.W.2d 275 (1969), the husband, alleging that he was attempting to establish himself in a new field with a better future, petitioned for a reduction in the amount of child support because of reduced earnings. Affirming the lower court's modification of the decree, this court said:

> A divorce decree does not freeze a father in his employment. One may in good faith make an occupational change even though that change may reduce his ability to meet his financial obligation to his children. Appellant ignores the fact that the judgment of what is fair includes not only a consideration of the circumstances of the children but of the father as well. Ordinarily, a man

> makes a change in his occupation with the hope of improving his prospects for the future. When parents are living together the standard of living of the children rises or falls with the changes in the father's fortunes. Should this readjustment be any different because divorce has separated them physically? We think not, unless the move is made to avoid responsibility or made in bad faith.

*Id.* at 428, 168 N.W.2d at 277.

As was concluded in *Fogel*, it does not appear here that appellant left his former employment for the purpose of evading his responsibility to his former wife. Rather, if believed, appellant is making serious efforts to establish himself in employment with better prospects for the future. Indeed, appellant states in his reply brief at 3 that becoming board certified in his new specialty has "the obvious prospects of greater financial returns."

This court finds that the combined effects of appellant's lower income from his change in employment and appellee's newfound capacity to work are a material and substantial change of circumstances sufficient to warrant a modification in the decree so as to afford appellant temporary relief. This court finds, however, that a reduction in the total award would seriously impair appellee's ability to plan for her retirement. Therefore, this court modifies the alimony previously awarded to appellee as follows: Appellant shall pay to appellee the sum of $1,650 per month beginning January 1, 1985, and pay a like amount on the first day of each successive month through April 1, 1990.

The cause is remanded with directions that the district court enter an order accordingly.

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., concurs in the result.

# STATE OF NEBRASKA, APPELLEE V. CALVIN L. CRAIG, APPELLANT.

361 N.W.2d 206

Filed January 11, 1985. No. 84-168.

1. **Speedy Trial.** An accused cannot generally take advantage of a delay in being brought to trial where he is responsible for the delay either by action or inaction.
2. **Sexual Assault: Evidence: Other Acts.** Sexual crimes have consistently been classified as those in which evidence of other, similar sexual conduct has been recognized as having independent relevancy, and courts generally hold that evidence of other sex offenses by the defendant may be admissible.
3. **Rules of Evidence: Other Acts.** Rule 404(2) of the Nebraska Evidence Rules is an inclusionary rule, permitting as evidence the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character.
4. _____ : _____. The purposes set forth in Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)) are illustrative only and not intended to be exhaustive or mutually exclusive.
5. **Criminal Law: Words and Phrases.** *Modus operandi* is a characteristic method employed by a defendant in the performance of repeated criminal acts, and means, literally, "method of working," and refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer.
6. **Rules of Evidence: Words and Phrases.** As used in Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)), *intent* is the state of mind operative at the time of an action.
7. **Trial: Evidence: Witnesses.** In a bench trial of a criminal case, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the defendant, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses is corroborated; and the reasonableness or unreasonableness of the statements of the witnesses.

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

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

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for appellee.

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

SHANAHAN, J.

Calvin L. Craig appeals his conviction and sentence from a bench trial in Lancaster County for first degree sexual assault on a child under 16 years of age, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979). Craig was sentenced to a term of imprisonment of not less than 1 year nor more than 2 years. We affirm.

The information charging Craig with first degree sexual assault was filed on August 27, 1982. Names of 14 witnesses for the State were endorsed on the information. On September 29, 1982, Craig filed two motions. The first motion sought depositions from the State's witnesses and alleged that prospective testimony of the deponents was "material or relevant" and would be of "assistance" in preparing Craig's case. Craig's second motion was directed to discovery of any statement given by Craig, his prior criminal record, reports (mental or physical examinations and scientific tests or experiments), documents, and photographs. See Neb. Rev. Stat. § 29-1912(1) (Reissue 1979). Without further action by Craig the district court, on January 6, 1983, granted Craig's motions for discovery and depositions. The district court ordered depositions to be taken within 30 days from the hearing. (The record does not reflect that the requested depositions were actually taken.) On March 3 Craig filed a motion to dismiss the proceedings, claiming that the State had failed to bring Craig to trial within 6 months from the date on which the information was filed. On March 29, 1983, the district court found that the time involved in the discovery process initiated by Craig constituted a delay "for good cause" under Neb. Rev. Stat. § 29-1207(4)(f) (Reissue 1979), excluded such time in computing the last day permissible for commencement of Craig's trial, and overruled the motion for dismissal. On April 19 Craig filed a motion for continuance, containing, among other reasons, "The defendant needs additional time to prepare for trial . . . ." Trial commenced on June 6, 1983.

Although the obvious thrust of his contention concerning a right to a speedy trial relates to Nebraska's "6-month rule" (§ 29-1207(1)), Craig does refer to his right to a speedy trial

under the sixth amendment to the U.S. Constitution and *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). In *State v. Brown*, 214 Neb. 665, 670-71, 335 N.W.2d 542, 546 (1983), we stated:

> *Barker* recites a "balancing test" which requires courts to approach each case on an ad hoc basis. This "balancing test" involves four factors bearing upon questions of speedy trial, namely, "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker* at 530. As further stated in *Barker* at 533: "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." According to *Barker*, at 531, prejudice may result from prolonged incarceration or from an inability to prepare for trial.

Applying the "balancing test" of *Barker* to the present case, Craig has not been denied his constitutionally protected right to a speedy trial. Craig was brought to trial a little over 9 months after the information was filed. A substantial part of that time was used for Craig's pretrial motions and his pursuit of discovery. Therefore, any delay was neither inordinate nor unreasonable. Craig has not been denied his constitutional right to a speedy trial.

The last day permissible under Nebraska statute for commencement of Craig's trial was February 27, 1983, unless any time between August 27, 1982, and February 27, 1983, is excludable in computing the last day for trial in accordance with the "6-month rule" prescribed by § 29-1207(1).

An accused cannot generally take advantage of a delay in being brought to trial, where he is responsible for the delay either by action or inaction. *State v. Fatica*, 214 Neb. 776, 336 N.W.2d 101 (1983); *State v. Searles*, 214 Neb. 849, 336 N.W.2d 571 (1983). Craig's motions for discovery and depositions are pretrial motions, and, as such, "the time from filing until final

disposition" must be excluded in computing the last day permissible for trial. See, § 29-1207(4)(a); *State v. Brown, supra*. Under the circumstances Craig must accept a reasonable delay as a consequence of invoking the discovery process in preparation for trial. *State v. Fatica, supra*. From September 29, 1982, when Craig filed his motions for discovery and depositions, until January 6, 1983, when the district court sustained Craig's motions, there are 100 days. Charging Craig with those 100 days and adding such excluded time to the date of February 27, the last day on which Craig's trial could have been commenced under the "6-month rule" is June 7, 1983. Trial commenced on June 6, and, therefore, Craig was brought to trial within the time prescribed by the "6-month rule," § 29-1207(1). Any delay in trial was attributable to Craig's request for discovery and depositions, and such delay was for "good cause" under § 29-1207(4)(f). Lest it appear that the State waited until virtually the last day before commencing the trial, the last permissible date to start Craig's trial would have been extended beyond June 7 by the time consumed in obtaining the depositions requested by Craig, assuming no impermissible conduct by the State delaying the depositions. See *State v. Fatica, supra*. Because we do not have the date when Craig took the last deposition, the question concerning the "6-month rule" is disposed of on the basis of Craig's pretrial motions. The district court correctly denied Craig's motion for dismissal on the basis of a denial of a speedy trial under Nebraska's "6-month rule."

We are reluctant to recount many of the events relative to the offense charged. However, the nature of the offense and Craig's defense render a detailed description indispensable.

The alleged offense occurred on Christmas morning, 1981. The Craig household included the victim—Craig's adopted 13-year-old daughter; the victim's mother; the victim's 5-year-old sister; and Craig, 31 years of age.

The victim, wearing panties and a knee-length nighty, was seated on a couch in the living room of the family residence. Craig sat down next to the victim and asked whether she wanted a "Christmas goose." There being no response, Craig asked if the victim would like to know what a Christmas goose was.

Present in the living room at this time were the victim's mother and younger sister.

According to the victim, after the unanswered question about the "Christmas goose," Craig began to wrestle with the victim. As he crouched on the couch over the struggling victim, Craig pushed the victim down on the couch, pulled up her nighty, pulled down her panties, fondled the victim's genitalia, inserted two of his fingers into the victim's vagina, and manipulated his inserted fingers. After his digital penetration of the victim for 2 or 3 minutes, Craig removed his fingers. The victim went upstairs to change clothes.

The victim's mother testified that the mother was standing approximately 5 to 6 feet from the couch when Craig started wrestling with the victim. The mother observed Craig push the victim down on the couch, saw Craig lift the victim's nighty as she lay on the couch, and noticed Craig's hand fondling the victim's vulva, including two of Craig's fingers between the victim's labia. At that point the mother felt "very uncomfortable" and left the room. Upon her return a few minutes later the mother observed the victim with tears on her face as the victim picked up her panties from the floor.

In his testimony Craig explained that the pajama-clad victim was in a sour mood Christmas morning and that he attempted to improve the victim's mood by pinching her buttocks. In trying to grab the victim about the waist, and while the victim was pushing him away, Craig unintentionally pulled down the victim's pajama bottoms and panties, thereby exposing the victim's genital area. With the victim in such condition Craig admitted attempting to pinch the victim's buttocks but denied fondling the genitalia of the victim, and further denied that any contact with the victim was sexually motivated. Craig, therefore, characterized the Christmas disrobing incident as unintentional, innocent, and without sexual motive or intent.

Craig was arrested in the summer of 1982, and at his trial in 1983 Craig objected to testimony about other events involving Craig and the victim. The other acts or events fell into three categories.

The first incident occurred in the fall of 1980 when the victim, then 12 years old, was alone with Craig in their

residence. The victim had just taken a bath and returned to her bedroom when Craig entered the bedroom, told the victim to lie down on a towel on her bed, and inserted his finger into the victim's vagina.

The second incident occurred in the fall of 1981 at the Craig residence. Again, the victim and Craig were alone. Craig slipped up behind the victim, placed his hand in the back of her jeans and under her panties, and inserted his fingers into her vagina.

The third aspect of other acts related to a series of "wrestling matches" involving Craig and the victim. The series of wrestling matches commenced sometime in the fall of 1980 and included at least 15 separate incidents in which Craig would commence wrestling with the victim in their home, remove her jeans or nighty and panties, and then fondle the victim's "genital area, vaginal area."

On July 29, 1982, Dr. David Rutz, a physician certified in family practice and called as a witness on behalf on Craig, performed a pelvic examination of the victim and examined her external genitalia. Although Dr. Rutz observed no bruises, contusions, or lacerations regarding the victim's external genitalia and found no evidence of vaginal penetration, Dr. Rutz acknowledged it was possible that Craig inserted two fingers into the victim's vagina without breaking her hymenal ring. Dr. Rutz concluded there was no evidence to indicate that the incidents involving Craig and the victim had not happened, or as expressed by Dr. Rutz, "I cannot say either way."

"Sexual crimes have consistently been classified as those in which evidence of other similar sexual conduct has been recognized as having independent relevancy, and courts generally hold that evidence of other sex offenses by the defendant may be admissible . . . ." *State v. Hitt*, 207 Neb. 746, 749, 301 N.W.2d 96, 99 (1981). See, also, *State v. Plymate*, 216 Neb. 722, 345 N.W.2d 327 (1984); *State v. Baker*, 218 Neb. 207, 352 N.W.2d 894 (1984); *State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984).

We intuitively conclude (1) incidents such as the subject of prosecution in this case do not frequently happen in Nebraska households, and (2) society still rejects and disbelieves such

incidents as commonplace occurrences. Consequently, separated from the past, the victim's account of the incident in this case would appear unbelievable. If the Christmas incident were examined as an isolated episode unconnected with any background or antecedent events, incredibility engendered by the very improbability of the episode would cause the mind to boggle and recoil in disbelief. "[E]xhibited alone, many real occurrences would appear under the guise of falsehood, and truth itself would be made to lie." *The People v. Jenness*, 5 Mich. 305, 323 (1858). See, also, *People v. DerMartzex*, 390 Mich. 410, 213 N.W.2d 97 (1973); *Burke v. State*, 624 P.2d 1240 (Alaska 1980).

When all antecedent acts and events preceding the Christmas incident are considered collectively, reasonable deduction compels probability of Craig's commission of the crime charged. Although the crime charged in the present case involves a teenager, we believe evidence of repeated incidents may be especially relevant in proving sexual crimes committed against persons otherwise defenseless due to age—either the very young or the elderly. Without proof by other acts of a defendant, sexual offenses against the defenseless, except in cases of the fortuitous presence of an eyewitness, would likely go unpunished. Cf. *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973) (other acts to prove infanticide); cf., also, *State v. Morosin*, 200 Neb. 62, 262 N.W.2d 194 (1978) (other acts to prove child abuse, where injuries were claimed to be accidental or unintentional). The incidents before Christmas 1981 had independent relevance under the circumstances and, therefore, were admissible.

This is not to say that evidence of Craig's prior acts was inadmissible under Rule 404(2) of the Nebraska Evidence Rules. See Neb. Rev. Stat. § 27-404(2) (Reissue 1979).

Rule 404(2) states:

> 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.

Rule 404(2) of the Nebraska Evidence Rules, as well as its pattern-counterpart, Rule 404(b) of the Federal Rules of Evidence, is an "inclusionary rule," permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. See, *United States v. Williams*, 577 F.2d 188 (2d Cir. 1978); *United States v. Diggs*, 649 F.2d 731 (9th Cir. 1981); *United States v. Wesevich*, 666 F.2d 984 (5th Cir. 1982); *United States v. Moccia*, 681 F.2d 61 (1st Cir. 1982). See, also, Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 Iowa L. Rev. 777 (1981).

Thus, under Rule 404(2) as an inclusionary rule, evidence of other acts may be admissible if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged. However, Rule 404(2) is subject to the overriding protection of Rule 403 of the Nebraska Evidence Rules (exclusion, if probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, misleading the jury, causing undue delay, wasting time, or needlessly presenting cumulative evidence). See, *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981); *State v. Scott*, 211 Neb. 237, 318 N.W.2d 94 (1982); *United States v. Moccia, supra*.

The "purposes" set forth in Rule 404(2) are illustrative only and not intended to be exhaustive or mutually exclusive. For instance, McCormick notes categories of permissible purposes beyond those designated in Rule 404(2) such as proof of passion, malice, or perspective (placing an event in the context of nearby and nearly contemporaneous happenings). See McCormick on Evidence § 190 (E. Cleary 3d ed. 1984).

"Modus operandi" is " 'a characteristic method employed by a defendant in the performance of repeated criminal acts.' " *People v. Sheets*, 251 Cal. App. 2d 759, 764, 59 Cal. Rptr. 777, 781 (1967). "*Modus operandi* means, literally, 'method of working,' and refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer." *People v. Barbour*, 106 Ill. App. 3d 993, 999-1000, 436 N.E.2d 667, 672 (1982). Although

modus operandi is often useful in showing that an accused is the perpetrator of a particular crime, the evidentiary function of modus operandi is not restricted to establishing identity. As expressed in McCormick on Evidence, *supra* at 560-61:

> The permissible purposes [of other acts] include: . . . (3) To prove other crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused. Much more is demanded than the mere repeated commission of crimes of the same class, such as repeated murders, robberies or rapes. The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.

Consequently, if there is a distinctive pattern or procedure utilized in separate crimes, the separate act or acts may have probative value in determining the guilt of the defendant. See, *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983); *State v. Dandridge*, 209 Neb. 885, 312 N.W.2d 286 (1981).

Craig admitted there were at least 15 separate occasions on which he removed the victim's panties. Each of these occasions commenced with a "wrestling match" in the family residence in the presence of the victim's mother, during which the victim's jeans or nighty and panties were removed and the victim's genitalia fondled. These various "wrestling matches" demonstrated a definite pattern utilized by Craig to disrobe his victim and gain access to her genitalia. Each such event was a link in a specific chain, not isolated occurrences but a history of unusual and distinctive misconduct tending to prove Craig's guilt of the offense charged.

Craig claims that his disrobing the victim on Christmas resulted when the victim attempted to extricate herself from Craig's playful, well-intentioned grasp. Thus, while admitting that he accidentally or unintentionally disrobed the victim on the date of the alleged offense, Craig simultaneously denies the elements of criminal intent and sexual penetration. The antecedent incidents of disrobing the victim tend to negate any plausible theory of statistical probability that Craig's disrobing the victim on Christmas was an accident. Moreover, the several occasions involving Craig's digital penetration of the victim have probative value that such intrusion likewise occurred as a

part of Craig's Christmas contact with the victim. Finally, *intent* is "the state of mind operative at the time of an action." The American Heritage Dictionary of the English Language 682 (1981); *State v. Evans*, 219 Kan. 515, 548 P.2d 772 (1976). The evidence of other acts was relevant in prosecuting Craig, because those incidents showed a pattern of deliberate acts, sexually motivated or intended and culminating in digital penetration of the victim. Consequently, such other acts were not offered to show any propensity or disposition on Craig's part to commit the crime charged. Although the "other acts" were relevant in Craig's bench trial, under the circumstances such other acts would have been admissible in a jury trial as well.

Craig contends that the victim's testimony was not sufficiently corroborated.

The general rule is that testimony of the victim of a sexual assault must be corroborated as to material facts and circumstances which tend to support the victim's testimony and from which, together with the victim's testimony as to the principal fact, an inference of guilt may be drawn. Corroboration of the principal act constituting the offense is not required. *State v. Davis*, 214 Neb. 474, 334 N.W.2d 450 (1983).

Under Neb. Rev. Stat. § 28-318(5) (Reissue 1979), "Sexual penetration shall mean . . . any intrusion, however slight, of any part of the actor's body . . . into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes." If established by evidence beyond a reasonable doubt, any penetration or intrusion of a victim's genital opening, no matter how slight such penetration or intrusion may be, is sufficient to constitute the necessary element of penetration for a conviction of first degree sexual assault. Such element of penetration may be proved either by direct or circumstantial evidence. *State v. Tatum*, 206 Neb. 625, 294 N.W.2d 354 (1980); *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976). "It is not necessary that the vagina be entered or that the hymen be ruptured; the entry of the vulva or labium is sufficient." *State v. Atkinson*, 190 Neb. 473, 475, 209 N.W.2d 154, 157 (1973).

In the final analysis the testimony of Dr. Rutz regarding his examinations is inconclusive and at best neutral on the issue of Craig's digital penetration of the victim. Direct testimony from the victim and the victim's mother established penetration or intrusion into the vulva and the vagina itself. There was sufficient evidence to sustain a finding that Craig sexually penetrated or intruded into the victim.

The remainder of Craig's contention about corroboration is more appropriately characterized as an attack on the credibility of the victim and her mother. "In a criminal case tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong . . . ." *State v. Kanger*, 215 Neb. 128, 132, 337 N.W.2d 422, 424 (1983). In a bench trial of a criminal case, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given to their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the defendant, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses is corroborated; and the reasonableness or unreasonableness of statements of the witnesses. Cf. *Gregory v. Davis*, 214 Neb. 408, 334 N.W.2d 1 (1983) (bench trial in filiation proceedings); cf., also, NJI 1.41. In any bench trial it is the role of the judge, as the trier of fact, to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, and weigh the evidence. Cf. *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). It is the province of the Supreme Court, on appeal from a conviction, to refrain from resolving conflicts in the evidence and to sustain the judgment of conviction if, taking the view most favorable to the State, there is sufficient evidence to support the conviction. *State v. Rowe, supra.* There is sufficient evidence to sustain Craig's conviction.

Finally, Craig asserts that the district court abused its discretion in sentencing Craig to imprisonment for a period of not less than 1 nor more than 2 years. The crime committed by Craig is a Class II felony punishable by imprisonment for a

term not less than 1 year nor more than 50 years. Craig contends that he should have been placed on probation rather than incarcerated. In determining an appropriate sentence a court must consider protection for the public and deterrence—to Craig and to those similarly inclined. See *State v. Alexander*, 215 Neb. 478, 339 N.W.2d 297 (1983). The sentence imposed by the district court is within the statutory limits as punishment for the crime of which Craig has been convicted. Under the circumstances there was no abuse of discretion by the district court regarding the sentence imposed on Craig. Therefore, the sentence imposed is affirmed. See, *State v. Sims*, 213 Neb. 708, 331 N.W.2d 255 (1983); *State v. Schmidt*, 213 Neb. 126, 327 N.W.2d 624 (1982).

The judgment of the district court is correct in all respects and, therefore, is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, DEPARTMENT OF PUBLIC WELFARE, APPELLEE, V. GLADYS L. SAVILLE ET AL., APPELLEES, LISA M. OLDFIELD, LILLIAN E. MULLINEX, CAROLYN PENNEY, AND COMMISSIONER OF LABOR, STATE OF NEBRASKA, DEPARTMENT OF LABOR, APPELLANTS.

361 N.W.2d 215

Filed January 11, 1985. No. 84-340.

**Employer and Employee: Independent Contractor.** Individuals who provide services for welfare recipients at the request of the Nebraska Department of Public Welfare, now Department of Social Services, pursuant to 42 U.S.C. § 1397 (1982) are independent contractors and not employees of the Department of Public Welfare.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed in part, and in part reversed with directions to dismiss.

Noel S. DeKalb, for appellants Oldfield and Mullinex.

Diane B. Metz, for appellant Penney.

Pamela A. Mattson, for appellant Commissioner of Labor.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellee Department of Public Welfare.

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

KRIVOSHA, C.J.

This appeal involves the question of whether persons retained by the former Nebraska Department of Public Welfare (Welfare), now the Department of Social Services, pursuant to a service provider program administered by Welfare in accordance with 42 U.S.C. § 1397 (1982), are "employees" within the meaning of Neb. Rev. Stat. § 48-604 (Reissue 1984). If the individuals are employees, Welfare is required to make contributions for unemployment insurance benefits on behalf of them. If they are independent contractors, however, they are exempt from the coverage of the Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1984). The district court found the individuals to be independent contractors, and the state Department of Labor (Labor) and various individual claimants appeal. For reasons more specifically set out hereinafter, we believe the district court's determination is correct.

However, before proceeding to address the specific issue, there are two preliminary questions which must be addressed. The first question is whether the district court for Lancaster County had jurisdiction to hear these appeals. The dispute arose when Labor informed Welfare that individuals working as service providers were performing services considered to be covered employment, thereby requiring Welfare to make contributions on behalf of such "employees." While initially there were 33 such decisions rendered by Labor, the matters were ultimately consolidated into two groups for the purpose of hearing before the Nebraska Appeal Tribunal.

In two decisions mailed July 21, 1982, the Nebraska Appeal Tribunal affirmed the determinations made by Labor. Welfare then appealed each of the 33 cases in 16 judicial districts, including the district court for Lancaster County, Nebraska.

After the time for appeal had expired, Welfare filed motions for change of venue in each court other than the district court for Lancaster County, Nebraska, and all cases were transferred to the district court for Lancaster County. All of the cases involved issues of contribution and not of benefits. Therefore, our decision in *Whitehouse Energy Savers v. Hanlon*, 214 Neb. 572, 334 N.W.2d 802 (1983), which held that appeals involving issues of contribution must be brought in the district court for Lancaster County controls, and we are compelled to dismiss all of the cases other than the Lisa M. Oldfield case, which was filed initially in the district court for Lancaster County, Nebraska. See, also, *Northern Messenger v. Sorensen*, 218 Neb. 846, 359 N.W.2d 787 (1984). Labor argues that the *Whitehouse Energy Savers* decision should not apply in the instant case because the transfers in these cases were made prior to our decision in *Whitehouse*. However, a reading of *Whitehouse* discloses that we did not declare any new rule of law, but only recited what was already the law. In dismissing the case in *Whitehouse, supra* at 576, 334 N.W.2d at 805, we said:

> The right of appeal is statutory and the requirements of the statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of the action. *Bd. of Ed. of Keya Paha County v. State Board of Education*, 212 Neb. 448, 323 N.W.2d 89 (1982). The plaintiff, in the first instance, failed to comply with the provisions of § 48-650, as it was required to do.

Whether the transfers in the instant cases were made before or after our decision in *Whitehouse* is of no moment. The statutes which prescribe jurisdiction in benefit cases and jurisdiction in contribution cases existed before our decision in *Whitehouse*. All the cases filed herein, except that involving Lisa Oldfield, are therefore dismissed for want of jurisdiction.

A second issue which is presented to us is whether an amendment to § 48-604, which became effective after the hearing in Oldfield was conducted but before the decision was rendered, should be applied. The amendment was apparently enacted by the Legislature in response to our earlier decision in *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333

N.W.2d 646 (1983), wherein we held that the test set out in § 48-604(5) was merely a codification of the common-law rules applicable in determining the employer-employee relationship. The amendment provides as follows: "The provisions of this subdivision [§ 48-604(5)] are not intended to be a codification of the common law and shall be considered complete as written."

Labor urges us to apply the amendment to this case and decide the issue solely on the basis of the "ABC test." Welfare, on the other hand, argues that the amendment does not apply and that we should utilize the common-law standards set out in *Erspamer*. We believe that even limiting our examination to the narrower so-called ABC test set out in § 48-604(5), as urged by Labor, the determination of the district court was correct. For that reason we need not address the specific question regarding the applicability of the amendment to this appeal, and examine the record in light of the ABC test.

The record discloses that Oldfield was a provider of services pursuant to the service provider program administered by Welfare in accordance with § 1397. As a general rule, there are two categories of service providers: (1) those who provide services in a welfare client's home, such as housekeeping, child care, yard work, and repair work; and (2) those who provide services outside a welfare client's home, such as transportation and escort services. Lisa Oldfield provided in-home services for the welfare recipients to whom she was assigned.

In obtaining service providers neither the State Merit System nor the State Personnel System is utilized. In seeking work, prospective service providers may contact either Welfare or its agents. Additionally, Welfare clients may refer prospective providers to Welfare. Further, want ads may be utilized or volunteer bureaus may refer providers to Welfare. Each service provider is required to enter into a provider agreement before becoming eligible to provide services. This agreement, entered into by the provider and Welfare, is printed on forms furnished by Welfare and recites that the provider is self-employed or, in the alternative, an employee of the individual client for whom services are performed. Once a provider has been approved by Welfare, the provider becomes eligible to be assigned to a

welfare recipient if both the welfare recipient and the provider approve such assignment. Providers are compensated in accordance with limits established by Welfare.

It is clear that Welfare is not in the business of cleaning houses, cutting yards, or transporting persons to doctors or stores. Welfare is in the business of distributing funds, part of which come from the federal government and part of which are matching funds provided by the state, in order to permit welfare recipients to obtain needed services for which they could not otherwise pay. There are federal and state guidelines which govern the maximum compensation and hours available to any one provider for services performed for any one welfare recipient, regardless of the number of actual hours which may be required to perform the tasks. The record discloses that if a provider takes more time to provide the services than that authorized for payment by Welfare, no additional compensation may be received. The service provider is responsible for keeping track of the provider's own hours and submitting billings to Welfare, on forms supplied by Welfare, within 90 days of the providing of the services. The payments for services made by Welfare are without deductions except for FICA taxes. Additionally, providers are not entitled to any other state employee benefits, such as payment for holidays, sick leave, or vacation. A provider who fails to file a claim for payment as required is not entitled to payment for the services rendered.

When a service provider is requested by a welfare recipient, a caseworker-manager from the county welfare office conducts an investigation into the recipient's need for a service provider. Based upon that investigation, the county welfare office determines what the needs of the recipient are and authorizes the maximum services to be provided by the service provider. The county welfare office also attempts to match a service provider with an eligible recipient based upon the recipient's needs and the provider's experience. Once a match is found, the provider and the caseworker meet at the recipient's home to discuss the services to be provided. If all parties are agreeable, a provision of services begins. However, if the service provider is not acceptable to the recipient, another provider is sought by

the county welfare office.

All equipment and supplies are furnished by either the provider or the recipient, including, in the case of out-of-home services, the means of transportation. The provider agreement is terminable at the will of either party without future obligation, though, of course, Welfare has a duty to pay for services provided to date. Each provider is prohibited from subcontracting the services which the provider has agreed to perform, and Welfare has the right to determine what services are to be provided to the recipient. Each provider, however, is free to perform services for any other entity the provider may wish as long as the other work does not conflict with the delivery of services to the individual welfare recipient.

A local social service agency makes home visits to assess the provision of the services to the recipients. If it is determined that a recipient's needs have changed prior to the expiration of the authorization, the local service agency will notify the provider of the change in services. At this point the provider may determine whether he or she wishes to continue performing the services or wishes to terminate the relationship. Furthermore, a provider may refuse to provide services for a particular recipient if the provider chooses not to do so. While it is the responsibility of Welfare or the county welfare office to give the service provider instructions regarding the services to be provided to any welfare recipient, the supervision of the day-to-day performance of those services is largely conducted by the welfare recipient, who must determine whether he or she is satisfied with the services being provided. The recipient may determine whether he or she wishes a particular service provider to continue performing services in the recipient's home.

As we have indicated, we believe that applying only the ABC test to the facts of this case results in the inescapable conclusion that this individual is an independent contractor and exempt from the provisions of § 48-604. Part A of the ABC test requires that "such individual has been and will continue to be free from control or direction over the performance of such services, both under his or her contract of service and in fact." While under part A it may often be difficult to determine where the specific line regarding control falls, it appears to us that the

evidence in the Oldfield case is clear that the provider was free from control or direction by Welfare. Once the individual has been assigned to a particular recipient, Welfare exerts no further control by supervising how the services are performed. The provider is at liberty to provide the services at such time and in such manner as the provider may determine, subject only to objection by the recipient. Welfare does not require the provider to perform the services at a particular time or in a particular manner. The fact that Welfare may insist, as a condition of payment, that services be performed and that they be performed in a workmanlike manner, does not provide control as that term is understood within employment security laws. The evidence in this case satisfies part A.

Part B requires that "such service is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed." As we have already noted, Welfare is not in the business of providing such services but is, rather, in the business of paying for the services pursuant to welfare programs. This is no different than the situation where Welfare pays a doctor for medical services for a welfare recipient or pays a licensed taxi to periodically transport a recipient from home to doctor. Welfare makes no profit by reason of having these services performed outside of its "places of business," and, therefore, the requirements of part B are likewise met.

And, finally, part C provides that "such individual is customarily engaged in an independently established trade, occupation, profession, or business." Oldfield may work exclusively for welfare recipients or may work in part for welfare recipients and in part for others. But with the simple restriction that Oldfield may not subcontract the work, there are no other restrictions as to how many "employers" she may have. Moreover, we are impressed by the fact that Welfare provides nothing to this individual, either by way of equipment or benefits, except the payment for services billed to Welfare, much in the same way as Welfare pays all other vendors of goods and services. It is argued to us that domestic help cannot be an independent trade. We know of no rule of law to that

effect and have recently held to the contrary. See *Gregg v. Challburg*, 217 Neb. 143, 347 N.W.2d 559 (1984). Nor do we find any distinction between providers based upon the service they perform on a given day. Shall they be considered to be employees of Welfare when cleaning in the house, but not employees of Welfare when cutting the lawn or removing snow, solely on the basis that housecleaning is not generally considered to be an independent occupation while lawn cutting and snow removal are? We believe that we must examine the entire nature of the program. Part C is met. Therefore, even limiting our examination to the ABC test, we can reach no other conclusion than that reached by the district court. Oldfield was an independent contractor and not an employee of Welfare. For that reason the determination made by the district court, as it applied to Lisa Oldfield, was correct.

AFFIRMED IN PART, AND IN PART REVERSED WITH DIRECTIONS TO DISMISS.

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## STATE OF NEBRASKA, BOARD OF EDUCATIONAL LANDS AND FUNDS, APPELLANT, V. LYDIA JARCHOW AND WAYNE JARCHOW ET AL., APPELLEES.

362 N.W.2d 19

Filed January 25, 1985. No. 83-615.

1. **Boundaries: Statutes.** Neb. Rev. Stat. § 34-301 (Reissue 1984) provides that whenever one or more owners of land, the corners and boundaries of which are lost, destroyed, or in dispute, desire to have the same established, they may bring an action in the district court to have them ascertained and permanently established.
2. _____: _____. Neb. Rev. Stat. § 23-1908 (Reissue 1983) provides that the restoration of lines and corners of original government surveys shall be in accordance with the laws of the United States and the circular of instructions of the U.S. Department of the Interior, Bureau of Land Management.
3. **Boundaries.** The circular of instructions of the U.S. Department of the Interior provides that in restoring lines of a survey the purpose is not to correct the original survey, but to determine where the corner was established in the beginning; that an existent corner is one whose position can be located by an acceptable survey record, including testimony of witnesses who have a

dependable knowledge of the original location; and that an obliterated corner's location may be recovered if proved beyond a reasonable doubt by unquestionable testimony.

4. _____. A survey corner is not considered lost if its position can be recovered satisfactorily by means of the testimony of witnesses having positive knowledge of the precise location.
5. _____. A lost corner is a point of a survey that cannot be determined beyond a reasonable doubt from acceptable evidence.
6. _____. The rules for restoration of lost corners should not be employed until all original and collateral evidence has been developed.
7. _____. In restoring lost corners a surveyor must utilize proportionate measurement unless outweighed by conclusive evidence of the original survey.
8. _____. Proportionate measurement requires that any excess or deficiency between two existent corners shall be distributed equally among the intervals existing between such existent corners.
9. _____. As a general rule, testimony of witnesses employed by a surveyor to recover an obliterated corner should be reduced to writing and be given under oath.
10. **Laches.** As a general rule, the doctrine of laches cannot be applied against public rights. In other words, laches is not available against the government or state in a suit by it to enforce a public right or to protect a public interest.
11. **Public Lands: Trusts.** The school lands were received and are held in trust by the State of Nebraska for educational purposes. The state as trustee of the lands and of the income therefrom is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity.
12. **Laches: Equity.** The objection of laches is not tenable to defeat an equity cause where there has been no material change in the position of the party seeking to employ that doctrine.

Appeal from the District Court for Garden County: JOHN D. KNAPP, Judge. Reversed and remanded with directions.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter, and, on brief, Frank J. Hutfless, for appellant.

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees Jarchow.

No appearance for appellees C. LeRoy Irey et al.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, and SHANAHAN, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

This was an action brought by the plaintiff under the provisions of Neb. Rev. Stat. § 34-301 (Reissue 1984) to

ascertain and establish boundary corners common to Sections 15, 16, 17, 20, 21, and 22, Township 16 North, Range 45 West of the 6th P.M., Garden County, Nebraska.

From a finding and order generally against the plaintiff, the plaintiff has appealed. It assigns as error that the "findings and verdict by the district court are contrary to law and the evidence."

For the purpose of this appeal we need concern ourselves only with Section 16, record title to which is in the plaintiff, and the north half of Section 21, which is owned by the Jarchows. Section 16, of course, lies immediately north of Section 21.

A dispute arose as to the location of the boundary common to Sections 16 and 21. Section 34-301 provides generally that whenever one or more owners of land, the corners and boundaries of which are lost, destroyed, or in dispute, desire to have the same established, they may bring an action in the district court to have them ascertained and permanently established. The case is tried as an equity case and reviewed here de novo on the record.

Two land surveys directly relating to these properties were received in evidence. One was an August 8, 1975, survey executed by Willis L. Brown, a state surveyor acting under instructions of the Board of Educational Lands and Funds of the State of Nebraska. The other was one prepared on July 13, 1976, by William E. Keefover, a former Garden County surveyor, at the request of John Jarchow, now deceased. Two other somewhat related surveys appear in the record, which will be referred to later on in this opinion.

None of the original government survey corners were found for Sections 16 and 21. Neb. Rev. Stat. § 23-1908 (Reissue 1983) provides in pertinent part as follows:

> The boundaries of the public lands established by the duly appointed government surveyors, when approved by the Surveyor General and accepted by the government, are . . . held and considered as the true corners . . . and the restoration of lines and corners of said surveys and the division of sections into their legal subdivisions shall be in accordance with the laws of the United States, [and] the circular of instructions of the United States Department

> of the Interior, Bureau of Land Management, on the restoration of lost and obliterated section corners and quarter corners . . . .

Both parties agree that exhibit 6, which is Chapter V: *Restoration of Lost or Obliterated Corners*, of the Manual of Instructions for the Survey of the Public Lands of the United States 1973, contains the instructions which must be followed in a case such as this.

At this point it is necessary to set forth several applicable rules, which have been paraphrased from the manual.

5-1

In restoring the lines of a survey, the purpose is not to correct the original survey, but to determine where the corner was established in the beginning.

5-5

An existent corner is one whose position can be located by an acceptable supplemental survey record, physical evidence, or *testimony* of one or more witnesses who have a dependable knowledge of the original location.

5-9

An obliterated corner's location may be recovered if proven beyond a reasonable doubt by acts and testimony of interested landowners. A position that depends upon the use of collateral evidence can be accepted only as duly supported through relation to known corners, natural objects, or *unquestionable testimony*.

5-10

A corner is not considered lost if its position can be recovered satisfactorily by means of the testimony and acts of witnesses having *positive knowledge* of the *precise* location of the original monument.

5-11

Where the testimony of individuals is utilized, such evidence must be tested by relating it to known original corners and other calls of the original field notes. The surveyor must show in the report of survey the weight given testimonial evidence, demonstrating that the witness was duly qualified and had firsthand knowledge and whose testimony was not based on hearsay or personal opinion. The testimony should stand an

appropriate test of its bona fide character, and it must be sufficiently accurate for what is required in normal surveying practice.

5-13

The surveyor's work is technical in character, and such surveyor is not qualified to act judicially upon the equities or inequities that may appear.

THE RESTORATION OF LOST CORNERS

5-20

A lost corner is a point of a survey that cannot be determined *beyond a reasonable doubt* from *acceptable* evidence or testimony concerning the original position, and whose location can be restored only by reference to one or more interdependent corners.

5-21

The rules for restoration of lost corners should not be employed until all original and collateral evidence has been developed. The surveyor will then turn to proportionate measurement, which is always employed to relocate a lost corner unless outweighed by *conclusive* evidence of the original survey.

5-24

Proportionate measurement is one that gives equal weight to all parts of the line. The excess or deficiency between two existent corners is so distributed that the amount given to each interval bears the same proportion to the whole difference as the record length of the interval bears to the whole record distance. After the proportionate difference is added to or subtracted from the record length of each interval, the sum of the several parts will equal the new measurement of the whole distance.

At the outset it should be pointed out that this particular township, as reflected by the original government plat, contained short sections along both the north and west boundaries. For our purposes it is important to note that the north "80s" of Section 4, on a line north of Sections 16 and 21, contained but 69.66 and 70.87 acres. This, of course, would translate into a north-south township dimension of something

less than a full 31,680 feet (6 miles).

According to the field notes of the Brown survey, the corners involved were originally marked with pits and mounds. Some of these corners had been perpetuated by county surveyors using materials other than that used by the original surveyor. Where no evidence of the original position of a corner could be found, it was considered to be a lost corner and was reestablished by proportionate measurement based upon the original plat and field notes. There was no recitation of the efforts made to find the original corner markers.

The Brown survey utilized five perpetuated corners, indicated by permanent monuments or markers. Two of those corners were located along the south line of the township, 4 miles apart; two located along the north line, 6 miles apart; and one located along the midline, 3 miles to the east of the east line of Section 16. These five "found" permanent markers were located within 3 to 5 miles of the nearest border of Section 16.

From those permanent markers 15 intermediate section corners and quarter corners were established, including the 8 surrounding Section 16. Checks were made on the established markers by closing on each other or on the permanent markers, as shown by the original government plat. The Brown survey employed but one piece of collateral evidence, that being a previous survey of Section 15, performed in August of 1941 by W.F. Chaloupka, the then deputy county surveyor of Garden County.

The Brown survey verified the location of Chaloupka's northwest corner of Section 15 as being within 2 feet east to west. However, the north-south positioning was rejected because "[h]e has set the corners at record distance from the south boundary. This would make a deficiency of 203 feet in the north half-mile along the north tier of sections. We have given each mile its proportionate share of deficiency. (2,621.52 ft. resurvey = 2,640 ft. original)" This would result in an assigned deficiency of 36.96 feet for each section.

The entire north-south dimension of the township was actually measured by Brown to be 31,341 feet and by Chaloupka to be 31,351 feet. This is an average of 31,346 feet, and when compared to the standard dimension of a full

township would amount to a deficiency of 334 feet. Considering the fact that the northern tier of sections, with their 70-acre "80s," would be approximately 150 feet short, there is still a discrepancy of 184 feet to be accounted for. Brown assigned that shortage to the lower five tiers of sections, in the amount of approximately 37 feet each. Chaloupka arbitrarily relegated the entire shortage to the upper tier of sections. This would more or less verify the position taken by Brown that the corner common to Sections 9, 10, 15, and 16 established by Chaloupka was some 198 feet too far north.

Both surveys were accomplished by utilizing the same five perpetuated corners. However, Chaloupka apparently made no effort to close those corners on each other or to otherwise verify his measurements. On the other hand, Brown's checks, previously mentioned, together with the calculated verification above, would seem to lend credulity to the latter survey.

Both Brown and Chaloupka ran lines from one common point. This was the perpetuated corner of Sections 13, 18, 19, and 24, Township 16 North, Ranges 44 and 45 West, set by Chaloupka in 1941. This point may otherwise be described as the midline of the township, 3 miles east of the east line of Section 16. This point, according to the field notes of Brown and as seems to appear from the plat of Chaloupka, should be on a line with the south boundary of Sections 15 and 16. However, this line actually appears in the Chaloupka survey to be considerably north of the line established by Brown, which latter line we have concluded to be more reliable.

Another survey considered and rejected by Brown was a 1970 survey of Sections 22 and 27. The northwest corner of Section 22 is common to the southeast corner of Section 16. This survey was conducted by Keefover, with the owners apparently *agreeing* as to the location of a road, and with the use of local evidence. Because there is no such agreement or desire indicated here by the owners of Sections 16 and 21, that survey was disregarded, and properly so.

Finally, we consider the 1976 Keefover survey which was relied on by the trial court in entering judgment. A portion of the certification statement from that survey fairly characterizes its conclusions.

> Having previously surveyed in this general area . . . and talked to several early residents, and County grader operator, who knew some of the area before road grading, and while more fences were in place, it is my conclusion that local evidence of the old corners, (proportioning intervals of a couple of miles or so), is the only method that will fit anything that exists. While it seems evident that there was some carelessness with the lines when the roads were graded, most of the early residents think that for the most part the roads are about where they belong, have been graded along old fences, or just graded about where the old trails had been traveled. Proportioning long distances, (clear across the township, and between proportionally re-established corners on the Township and Range lines, will put corners and lines in confusion, and where about everyone knows the old corners had not been.

There are no field notes in the record, and from what can be concluded or from the plat of survey, no attempt was made to close measurements and the established corners with any perpetuated corners. There is a note on the plat at the northwest corner of Section 16, as established by the survey, that John Jarchow reports being with W.F. Chaloupka when he found brick and charcoal by a fence some distance north of the fence corner, and a recollection that a trail existed south of a fence. The plat also discloses a 1/2-inch rod found at a fence corner which the Chaloupka survey apparently assumed to be the northwest corner of what would be Section 9. Reference is also made to a portion of an old, buried fence which is located near the south line of Section 16 as established by Keefover.

Keefover's testimony sheds little additional light on the problem. He said he was present when an attempt was made with a road grader to uncover the alleged brick and charcoal at the claimed northwest corner of Section 16. It was not found.

The procedure for locating the northwest corner of Section 21 was interesting. Keefover testified that "well, what I marked for the northwest corner of 21 and then, of course, measuring on through the school section taking into account conversations with several different people, that is, you know, you can hear

testimony and people tell you what they remember." When asked if that was a standard practice in surveying, he replied:

> Oh, yes, if you have an old timer but sometimes you get a conflicting information, not that they are lying about it, it is just the way they see it and so the surveyor in judgment has to take what he heard and relate it to what he can otherwise find and see what is in the record.

The 1/2-inch rod previously referred to as located at the northwest corner of Section 9 was explained by Keefover as follows:

> Well, after a lot of work and measuring, I accepted fence corners as the best evidence of the original corner and you can see from the map that we went until we found a half inch rebar *which I don't know how it got there* but it was at a fence corner two miles north and working clear on down to a corner power pole which is also a fence corner at the south side of what is being used as the south side of Section 21 and relating those measurements to what I consider very reasonable inconsistent variance that I find all the time between what is on the ground and what the original survey calls for.

(Emphasis supplied.)

One of the problems with that explanation is that there is no showing of what measurements were related to what other established points in order to verify the same. Interestingly enough, his testimony, and the plat of survey as well, reveals that Section 16 was measured as 5,139.5 feet on the west side and 5,363.2 feet on the east side. On the other hand, the Chaloupka survey apparently arbitrarily assigned distances of 5,280 feet to each side, whereas Brown measured these distances as 5,243.04 and 5,245.68 feet respectively.

It was asserted by Keefover that his points fit the roads and trail roads and fences, which he concluded conformed to accepted surveying standards. However, Keefover admitted that almost everyone to whom he talked told him that the roads were way off. These apparently included the witnesses who furnished him his local evidence, and they were not placed under oath. Keefover did not know most of the people to whom he talked, but he *thought* they lived in the area.

In support of the Keefover survey there was testimony by Ernest Irey, a resident of the area, that he had seen a limestone rock that had been uncovered by Chaloupka. It was located on the extended trail road along what he considered to be the line between Sections 16 and 21, at a point in the road between Sections 14 and 15. This point would be at the southeast corner of Section 15. He said he understood that Chaloupka had reburied the stone and driven an iron rod next to it. Jarchows apparently would have us draw the inference that this was a permanent marker *found* by Chaloupka when he surveyed Section 15. However, reference to Chaloupka's plat would indicate a rock and pipe *placed* by Chaloupka to establish the southeast corner of Section 15. In any event, Keefover had previously testified that he did not use nor look for Chaloupka's corners. He also apparently failed to find any of the corners which he himself had placed in his survey of Section 22, previously referred to in this opinion.

With reference as to what use he made of his own 1970 survey of Section 22, Keefover's testimony was equivocal. At one point it would suggest that he did not find any of those corners. At another point reference was made to a gear top axle that had been found and accepted as the northeast corner of Section 22. Keefover utilized that corner to set the other three corners of that section. In the survey of Sections 16 and 21, Keefover used the northwest corner of Section 22 to establish the southeast corner of Section 16. Therefore, any error in the location of the "gear top axle" corner would manifest itself in locating these other corners.

That 1970 survey had been rejected by Brown as being without a sound basis. Additionally, in the portion of the 1970 survey containing the certification, Keefover recited: "Gear top shaft was found for the NE corner, and used, although appears maybe *too far North*. North line distance checks shorter, did not find further markers, but owners desired to use the roads." (Emphasis supplied.)

The basic issue in this case is whether to accept the Brown survey or the Keefover survey. Preliminarily, then, we must decide whether we are dealing with an obliterated corner or with a lost corner.

An obliterated corner's location may be recovered by reference to acceptable supplemental survey records, physical evidence, or testimony of witnesses having a dependable knowledge of such corner's location. However, that location must be proven beyond a reasonable doubt, and, if based on testimony, it must come from witnesses having positive knowledge of the precise location of the original monument. Testimonial evidence must be tested by relating it to known original corners or other calls of the original field notes.

We believe that it is apparent from our rather laborious discussion of the facts that the Keefover survey falls far short of those standards. The so-called existent or established points utilized by Keefover were all discredited. Chaloupka's north-south positioning of the corners around Section 15 was set at record distances from the south boundary of the township. This placed the north-south boundaries too far north. The gear top axle at the northeast corner of Section 22 was, according to Keefover's own admission, too far north. Keefover made no attempt to tie his corners into any known perpetuated corners from the original government survey, the integrity of which was unquestioned.

The testimony of witnesses upon which Keefover relied could hardly be classified as testimony. Neb. Rev. Stat. § 23-1903 (Reissue 1983) suggests that a county surveyor, in the performance of his official duties, may compel the attendance of witnesses, whose testimony must be reduced to writing and subscribed by such witnesses. According to the manual, the testimony of any witnesses shall be based on firsthand knowledge, not hearsay, and it should not be merely personal opinion.

In Keefover's own certification he concludes that proportionment will put corners and lines in confusion and where about everyone knows the old corners had not been. However, we must again refer to the manual, wherein it is stated that a surveyor is not a referee as to the justice or injustice of a situation, nor is he qualified to act upon the equities or inequities that may appear to be involved.

Having concluded that there is no conclusive evidence of the original survey regarding the boundaries of Sections 16 and 21,

the manual requires the employment of proportionate measurement. As our previous review of the facts revealed, the Brown survey was conducted in that manner, and his established corners were correlated completely with the five perpetuated markers of the original government survey. In our opinion, that survey properly establishes the boundaries of the affected sections as required by law, and is adopted as the basis for our judgment.

One other issue remains. Jarchows contend that the decision of the trial court must be affirmed for the reason that the State of Nebraska is estopped by laches to determine the correct boundary between Sections 16 and 21. However, we believe that question has been answered by *State v. Platte Valley Public Power and Irrigation District*, 143 Neb. 661, 664, 10 N.W.2d 631, 633 (1943):

> Also we have held that the state as trustee is without power through legislative means or otherwise to bestow a special benefit upon any person or corporation, public or private, at the expense of the *cestui que trust*, the public school system of the state.
>
> . . . .
>
> The general rule is that the doctrine of laches cannot be applied against public rights. In other words laches is not available against the government or state, in a suit by it to enforce a public right, or to protect a public interest.

As stated in *State v. Cooley*, 156 Neb. 330, 337, 56 N.W.2d 129, 133 (1952): " 'The school lands were received and are held in trust by the State of Nebraska for educational purposes. The state as trustee . . . is required to administer the trust estate under the rules of law applicable to trustees acting in a fiduciary capacity. . . .' "

Quite apart from the doctrine of governmental immunity, the " ' "objection of laches is not tenable to defeat an equity cause, where there has been no material change in defendant's position . . . ." ' " *Fulk v. School District*, 155 Neb. 630, 645, 53 N.W.2d 56, 64 (1952). There is no evidence in this case of such a material change.

The judgment of the district court is reversed, and the cause is remanded with directions to establish the boundaries of

Sections 16 and 21 in accordance with the Brown survey.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., not participating.

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ROBERT H. BURGESS ET AL., APPELLANTS, V. OMAHAWKS RADIO CONTROL ORGANIZATION, A NONPROFIT NEBRASKA CORPORATION, ET AL., APPELLEES.

362 N.W.2d 27

Filed January 25, 1985. No. 83-684.

1. **Equity: Appeal and Error.** Equity actions on appeal to this court are triable de novo on the record, subject to the rules that where credible evidence on material issues is in conflict, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another, and where the trial court has viewed the premises, this court is required to consider any competent and relevant facts revealed by the view and any findings made by the court, provided that the record contains competent evidence to support the findings.
2. **Nuisances.** Generally, noise is not a nuisance per se, but it may be of such a character as to constitute a nuisance in fact, which may serve as the basis of an action at law or in equity, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation.
3. _____. Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary, reasonable man, that is, a normal person of ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and relief must be based upon an objective standard of reasonableness.
4. **Nuisances: Presumptions.** To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities.
5. **Actions: Zoning: Ordinances: Injunction: Standing.** A private individual, with standing, may bring suit in district court to enjoin an alleged violation of the zoning laws or ordinances.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Gregory R. Abboud and, on brief, Robert H. Burgess, for appellants.

Raymond M. Crossman, Jr., of Crossman, Norris & Hosford, for appellees.

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

WHITE, J.

Plaintiffs-appellants, Robert H. Burgess and Maria Burgess, filed this action seeking to permanently enjoin the defendants-appellees, Omahawks Radio Control Organization (Omahawks), a nonprofit Nebraska corporation, and Louise Field Prugh, from operating a radio-controlled model aircraft flying site at 172d and Ida Streets in western Douglas County, Nebraska. Plaintiffs occupy a neighboring property and allege that the defendants' activities constitute both a private noise nuisance and a violation of the zoning ordinances of the city of Omaha. After a trial the lower court dismissed plaintiffs' petition. The plaintiffs then perfected this appeal, in which they contend that the trial court erred in failing to find that the Omahawks' activities constitute a nuisance and in failing to find that the Omahawks' activities violated the zoning ordinances of the city of Omaha.

This matter, being equitable in nature, is reviewed by this court de novo on the record, subject to the rules that (1) where credible evidence on material issues is in conflict, this court will consider that the trial court observed the witnesses and accepted one version of the facts over another, and (2) where the trial court has viewed the premises, this court is required to consider any competent and relevant facts revealed by the view and any findings made by the court, provided that the record contains competent evidence to support the findings. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Darsaklis v. Schildt*, 218 Neb. 605, 358 N.W.2d 186 (1984). We note that the trial judge viewed the premises and that the record does not contain any findings which are specifically based on that view.

Generally, an owner of property has a right to make any use of it he sees fit. It is only where his use prevents his neighbors from the enjoyment of their property that an owner's use may be restricted. The burden rests on the one complaining to establish that the use being made of the property must

necessarily create a nuisance. *Prauner v. Battle Creek Coop. Creamery*, 173 Neb. 412, 113 N.W.2d 518 (1962). It is generally recognized that under certain circumstances noise may constitute a nuisance and be enjoined. Generally, noise is not a nuisance per se, but it may be of such a character as to constitute a nuisance in fact, which may serve as the basis of an action at law or in equity, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation. Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary, reasonable man, that is, a normal person of ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and must be based upon an objective standard of reasonableness. To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. It is presumed, in the absence of evidence to the contrary, that a plaintiff has ordinary sensibilities. *Daugherty v. Ashton Feed and Grain Co., Inc.*, 208 Neb. 159, 303 N.W.2d 64 (1981).

With these legal principles in mind, the record reveals the following facts. Omahawks is a nonprofit Nebraska corporation with approximately 150 members. It has a lease with Louise Prugh to 160 acres of land on which members fly their model aircraft. The land is located at 172d and Ida Streets, in rural surroundings. According to the plaintiffs, the flying activities begin in early spring and continue, weather permitting, until late fall. Members can commence flying at 9 a.m. and must cease at dark except on Mondays, when they must cease at 6 p.m. Each aircraft flown at the field must be evaluated and certified by the Omahawks' noise abatement committee as being in compliance with the noise abatement criteria established by the Federation Aeronautique Internationale and the current standards presently enforced by the Occupational Safety and Health Administration. The field rules and noise abatement regulations have been disseminated to all members of the club, and these rules and regulations are strictly enforced.

In August of 1981 the plaintiffs purchased their residence at

178th and Ida Streets. The model aircraft flight pattern takes the planes no closer than four to six blocks from the plaintiffs' property. It is the contention of the plaintiffs that the sound, best described as a high-frequency humming which emanates from these model aircraft, constitutes a noise nuisance. Robert Burgess testified that as a direct result of this sound he suffers physical and mental difficulties such as depression, nausea, anxiety, insomnia, emotional distress, psychic pain, and idiopathic atrial fibrillation. Maria Burgess testified that as a result of the sound she suffers from insomnia, loss of appetite, and weight loss. Both plaintiffs testified that the noise disrupts their entire social life, destroys all enjoyment of their residence, and adversely affects their marital relations. The plaintiffs also adduced testimony from relatives and acquaintances that the sound is annoying.

Preceding the trial, Omahawks invoked the services of David Cyr, an audiologist, to conduct a noise study, which entailed the measurement of the noise produced by the aircraft. Two studies were conducted with the use of a sound-level meter. During the first study, Cyr took noise measurements on the loudest of seven airplanes. This plane was not equipped with a muffler, and at full throttle and downwind the following readings were registered: at 3 feet, 104 decibels; at 36 feet, 84 decibels; at 72 feet, 76 decibels. Cyr also checked the remaining airplanes, which were considerably quieter, and they ranged from 78 to 82 decibels at 36 feet and from 68 to 70 decibels at 72 feet. During the second noise study, Cyr conducted tests at three various sites with three airplanes at full throttle, both while the planes were stationary and while they were in the air. At a site just east of the plaintiffs' residence and between their residence and the aircraft flight pattern, the sound level was approximately 30 decibels both while the planes were in the air and on the ground. Cyr then walked due west from the airstrip, where the 40-decibel level was reached at 350 feet; walking north, the 40-decibel level was reached at 460 feet; and walking northeast, which was downwind, the 40-decibel level was reached at 600 feet. Cyr next drove to a farm northwest of the airstrip, where a 130-horsepower tractor was in operation. With full throttle and inside the cab, the noise was 80 decibels. Outside the cab, 3 feet

from the engine, it was 96 decibels. Six hundred feet northeast, and downwind from the tractor, the noise level was 60 decibels. Cyr concluded that the tractor was running about 35 percent louder than the airplanes. Cyr also testified that the noise level of the airplanes does not pose a hazard to hearing. These measurements can be compared with a normal conversational speech level at a 3-foot distance of approximately 60 to 70 decibels, whispered speech at about 30 decibels, typical traffic noise at about 85 decibels, and a power saw, which registers between 115 and 120 decibels.

Vernon Reed, who resides approximately one-fourth of a mile from the center of the aircraft flight pattern, and closer to the flying activity than the plaintiffs, testified that although he can hear the model aircraft, they do not bother him any more because they are less noisy since the institution of the Omahawks' noise abatement rules and because the aircraft fly less frequently. Dr. Robert Holcombe, who resides at a point further from the Omahawks' flying activity than do the plaintiffs, but downwind from the prevailing southwesterly winds, testified that he can occasionally hear the airplanes at his home, but the sound does not bother him. He testified that other sounds are more bothersome and annoying than the model aircraft, such as those of motorcycles and trucks, and tractors that plow at night.

Our diligent review of the record, taking into consideration such circumstances of this case as the character, volume, frequency, duration, time, and locality of the noise, leads us to the conclusion, also reached by the trial court, that the activities of the Omahawks, although annoying to the plaintiffs, do not rise to a level of private noise nuisance.

Concerning the alleged violation of the zoning ordinances, it is uncontested that the land in question is subject to S-2 Second Suburban District zoning restrictions of the city of Omaha, which in pertinent part provide: "A building or premises shall be used for only the following purposes: (1) The use regulations for this district are the same as those for the First Suburban District, except that: (a) Outdoor theaters, trailer camps, trailer parks, tourist camps, tourist parks, and motorized cart tracks shall not be permitted in this district." Omaha Municipal Code

§ 55-352 (1980). The use regulations for First Suburban District allow premises to be used for motorized cart, minibike, motor scooter, and motorcycle tracks, provided that a permit is obtained after a public hearing by the city council. Omaha Municipal Code § 55-332(14) (1980).

It is the plaintiffs' contention that the Omahawks' activities constitute a violation of the S-2 zoning restrictions, and as such the activities should be enjoined. The trial court, ostensibly under the erroneous belief that this cause of action stemmed from a prior zoning board of appeals decision in which an appeal to the district court was not properly perfected, declined to hear much of the evidence and arguments concerning the alleged violation. The trial court dismissed this cause of action without making any findings as to whether the Omahawks' activities violated the zoning ordinances.

Under Nebraska case law a private individual, with standing, may bring suit in the district court to enjoin an alleged violation of the zoning laws or ordinances. See, *Witzel v. Village of Brainard*, 208 Neb. 231, 302 N.W.2d 723 (1981); *Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc.*, 208 Neb. 110, 302 N.W.2d 379 (1981).

The lower court should have but did not decide whether the Omahawks' activities violate the zoning ordinances, and as such this cause must be reversed and remanded for such a determination.

Should the district court, upon remand, find that the Omahawks' activities do in fact violate the zoning ordinances, defendants are then free to seek a variance. See Neb. Rev. Stat. §§ 14-401 et seq. (Reissue 1983).

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# BOBBY CUMMINGS, APPELLANT, V. BRUCE CURTISS, APPELLEE.

361 N.W.2d 508

Filed January 25, 1985. No. 83-736.

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. **Fraud.** Fraudulent misrepresentation requires the plaintiff to prove (1) that a representation was made, (2) that the representation was false, (3) that when the representation was made it was known to be false or made recklessly without knowledge of its truth and as a positive assertion, (4) that it was made with the intention that the plaintiff should rely upon it, (5) that the plaintiff did rely upon it, and (6) that he suffered damage as a result.

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

Bobby Cummings, pro se.

Jewell, Otte, Gatz & Collins, for appellee.

BOSLAUGH, WHITE, and GRANT, JJ., and MCCOWN, J., Retired, and COLWELL, D.J., Retired.

MCCOWN, J., Retired.

This is an appeal from an order of the district court for Pierce County, Nebraska, granting summary judgment for the defendant. This action involved allegations that the defendant, a lawyer, had made fraudulent misrepresentations to the plaintiff client in connection with the settling of an estate. We affirm the judgment of the district court.

The testator, Ren J. Kroupa, died on March 24, 1979, leaving a will which he had made on a printed form. The plaintiff, who was not related to the decedent, and the decedent's brother, Frank E. Kroupa, engaged the defendant, an attorney, to probate the will which named them as sole beneficiaries of the estate.

After the will was filed for probate, other relatives of the decedent filed objections to the petition for probate. They

alleged that the will was not properly signed, executed, or attested; that the deceased lacked testamentary intent; and that the decedent was the victim of undue influence. The contestants subsequently offered a "stipulation" under which both plaintiff and Kroupa would disclaim their one-half share each under the will and accept a one-fifth share each in exchange for the withdrawal of objections to probate. The contestants were to receive the remaining three-fifths of the estate.

The defendant encouraged the plaintiff to accept the proffered settlement and expressed reservations about the validity of the decedent's will. The plaintiff alleged that defendant told him the will was not properly signed by two witnesses, thus making it invalid. Plaintiff further alleged that defendant also stated that the will would not hold up in any court in Nebraska and that if the plaintiff, a nonrelative, hoped to receive anything from the estate, he should sign the stipulation, since "A fifth of something is better than nothing, isn't it?"

The defendant alleged that he had informed the plaintiff on several occasions that the will was of questionable validity. He stated that the will may not be valid as either a formal or a holographic will, and warned plaintiff that there might be a will contest. After informing the plaintiff of this, defendant suggested that plaintiff consider a settlement with the contestants, the terms of which are contained in the stipulation, and the plaintiff accepted them in order to avoid the uncertain outcome of litigation.

The will was admitted to probate in May of 1979, subject to the terms of the stipulation, and the estate was divided in accordance with the settlement agreement.

In December of 1982 the plaintiff "discovered" Neb. Rev. Stat. § 30-2328 (Reissue 1979) concerning holographic wills, and subsequently filed this action for fraudulent misrepresentation. Both parties moved for summary judgment, and the district court granted defendant's motion and entered judgment accordingly. Plaintiff assigns as error the district court's failure to find that defendant's representations were false, that he used artifice to fraudulently conceal the truth, and contends that, under the circumstances, knowledge

of the misrepresentation must be imputed to the defendant.

> 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. . . . 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.

*Strong v. K & K Investments*, 216 Neb. 370, 373, 343 N.W.2d 912, 915 (1984).

Fraudulent misrepresentation requires the plaintiff to prove:

> (1) That a representation was made; (2) That the representation was false; (3) That when the representation was made it was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) That it was made with the intention that the plaintiff should rely upon it; (5) That the plaintiff did rely upon it; and (6) That he suffered damage as a result. *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980).

*Gitschel v. Sauer*, 212 Neb. 454, 461, 323 N.W.2d 93, 97 (1982).

In the present case plaintiff alleged that the defendant stated:

> Our real problem is that Ren's will is not legal under Nebraska law because it did not have the two witnesses it must have to be legal and entitled to Probate in Nebraska and because of that Ren's will would not hold up in any court in Nebraska and that if I hoped to get any of Ren's estate I had better sign the Stipulation otherwise not being a blood relative I would not receive anything at all and a fifth of something is better than nothing, isn't it?

This statement was not false and known to be false. Neb. Rev. Stat. § 30-2327 (Reissue 1979) requires that all wills other than holographic wills be signed by at least two witnesses. In this instance, the decedent's will was signed only by the decedent and one witness, thus making it invalid unless proven to be a holographic will.

At the times involved here § 30-2328 (Reissue 1979) was in

effect. It provided: "A will which does not comply with section 30-2327 is valid as a holographic will, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator." The statute does not specifically address the problem of printed will forms, and there is no Nebraska case law interpreting the statute. However, the comment to the statute does address the issue. "A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will."

Available case law based on similar statutes in other states indicates that only the portion of the will actually in the handwriting of the testator is to be considered. All other language is simply to be disregarded. *Watkins v. Boykin*, 536 S.W.2d 400 (Tex. Civ. App. 1976); *Succession of Burke*, 365 So. 2d 858 (La. App. 1978); *Matter of Estate of Johnson*, 129 Ariz. 307, 630 P.2d 1039 (1981). The important determination is whether "the handwritten portion clearly express[es] a *testamentary* intent." *Matter of Estate of Johnson, supra* at 309, 630 P.2d at 1041. See, also, *Estate of Christian*, 60 Cal. App. 3d 975, 131 Cal. Rptr. 841 (1976).

The handwritten portion of the document reads:

"Nebraska
Pierce
Ren J Kroupa
For helping me and taking care of me
Frank Kroupa Jr. and Bobby Cummings
w.r.o.s.
the court
who the courts decides
Pierce Pierce
Nebraska 29 Jan 79
Witness is chief of police Gordon Halbmayer [sic]
who i gave this to keep safe for me.
Ren J Kroupa."

Based on this language alone, it is doubtful that the requisite testamentary intent was demonstrated and that all material portions of a will were present.

Resolving all reasonable doubts in plaintiff's favor, the

record fails to establish any false representation. The defendant's statement, while not complete or thorough, did in fact reflect the general state of the law. The judgment of the district court was correct and is affirmed.

AFFIRMED.

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STANLEY G. QUIGLEY, APPELLANT, V. PHYLLIS LEBSACK, RED WILLOW COUNTY CLERK AND ELECTION COMMISSIONER, ET AL., APPELLEES.

362 N.W.2d 31

Filed February 1, 1985. No. 83-504.

1. **Public Officers and Employees: Recall Petitions: Statutes.** A recall statute, or any other kind of election statute, must be liberally construed to effectuate the purpose for which the statute is intended. However, liberal construction of statutes governing recall of public, elected officials does not constitute a license to totally ignore the express requirements of recall statutes.
2. **Public Officers and Employees: Recall Petitions.** Indication of residence address specified in Neb. Rev. Stat. § 23-2010.02 (Cum. Supp. 1982) impliedly assures that only registered voters will participate in removal of an elected official by recall petition and supplies a convenient method of checking whether a signatory is ostensibly a qualified elector.
3. _____: _____. Neb. Rev. Stat. § 23-2010.02 (Cum. Supp. 1982) requires that the residence address of a signatory be placed on a recall petition by the signatory personally or with the signatory's authorization.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Reversed.

John J. Battershell of Cunningham, Battershell & Bergin, P.C., for appellant.

Mike Freeman, Red Willow County Attorney, for appellees.

Vernon Tweedie, for amicus curiae Committee of Concerned Users of R.E.A.

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

SHANAHAN, J.

Stanley G. Quigley appeals the dismissal of his action in the district court for Red Willow County, namely, Quigley's suit to enjoin a recall election.

Quigley, director of the McCook Public Power District, subdivision No. 3, filed a petition seeking to enjoin Phyllis Lebsack, county clerk and election commissioner of Red Willow County, and the Red Willow County commissioners from holding a recall election to relieve Quigley of his directorship. To achieve the recall election, the recall petition required signatures of 139 registered voters. Lebsack determined that there were 160 valid signatures on the recall petitions and found the petitions sufficient for the recall election. At a hearing before the district court the uncontradicted evidence disclosed that 49 of the 160 signatories did not personally indicate their residence addresses on the recall petitions. Rather, based on information contained in the county's voter registration lists and without request from the petitioning signatory, either the circulators of the recall petitions or spouses of the circulators inserted the 49 signatories' addresses on the petitions previously signed. There was no evidence offered to show that the signatories in question resided or had any actual address in subdivision No. 3 of McCook Public Power District.

At the time the petitions were circulated, Neb. Rev. Stat. § 32-102 (Reissue 1978) provided:

> Elector shall mean every person of the constitutionally prescribed age or upwards, and who shall have the right to vote for all officers to be elected to public office, and upon all questions and propositions lawfully submitted to the voters at any and all elections authorized or provided for by the Constitution or laws of the State of Nebraska; *Provided*, no person shall be qualified to vote at any election unless such person shall be a resident of the state, county, precinct, township, or ward on or before election day, and shall have been properly registered with the county clerk or election commissioner, and shall be a citizen of the United States.

Regarding a recall petition, Neb. Rev. Stat. § 23-2010.02

(Cum. Supp. 1982) in part provides: "Each signer of a recall petition shall sign his or her name in ink or indelible pencil and shall place thereon after his or her name his or her place of residence by street and number." Neb. Rev. Stat. § 23-2010.08 (Cum. Supp. 1982) provides:

> Should a majority of the votes cast thereon at a recall election be against the removal of the officer named on the ballot, such officer shall continue in office for the remainder of his or her term, subject to recall as before. If a majority of the votes cast thereon, at a recall election, shall be for the removal of the officer named on the ballot, he or she shall, regardless of any technical defects in the recall petition, be deemed removed from office.

The district court refused to enjoin the recall election involving Quigley. The election was held and Quigley was recalled.

Quigley contends that an injunction should have been issued because 49 of the signatories did not personally place their residence addresses on the recall petitions. Lebsack claims that the statutory provision for inclusion of the signatory's residence address is "merely informational in nature to assist the county clerk in her verification of signatures." Brief for Appellees at 2. Hence, according to Lebsack, any failure to comply with the statute is a technical deficiency only.

A recall statute, or any other kind of election statute, must be liberally construed to effectuate the purpose for which the statute is intended. *Shaw v. Stewart*, 115 Neb. 315, 212 N.W. 760 (1927). See, also, *Stone et al. v. Wyckoff, et al.*, 102 N.J. Super. 26, 245 A.2d 215 (1968); *In re Petition for Removal of Rice*, 35 Ill. App. 2d 79, 181 N.E.2d 742 (1962); *Whitman v. Moore*, 59 Ariz. 211, 125 P.2d 445 (1942); *Schumacher v. Byrne*, 61 N.D. 220, 237 N.W. 741 (1931). However, liberal construction of statutes governing recall of public, elected officials does not constitute a license to totally ignore the express requirements of recall statutes. *State ex rel. Palmer v. Hart*, ____ Mont. ____, 655 P.2d 965 (1982); *Hazelwood v. Saul*, 619 P.2d 499 (Colo. 1980).

Section 32-102 expresses and impresses the importance and necessity of residence in reference to the electoral process in

Nebraska. Indication of residence address specified in § 23-2010.02 impliedly assures that only registered voters will participate in the political process envisioned in removal of an elected official by recall. See *Cleland v. District Court*, 92 Nev. 454, 552 P.2d 488 (1976). The obvious purpose for requiring the address of a signatory is to supply a convenient method of checking whether a signatory is ostensibly a qualified elector. *Whitman v. Moore, supra*. Additionally, another aim of the statute requiring a signatory's actual address is to enable a protestant to trace the signatory for the purpose of determining qualification to sign the petition. *In re Referendum Petition No. 31*, 68 Okla. 147, 172 P. 639 (1918).

Therefore, § 23-2010.02 imposes a requirement that a signatory indicate a residence address to provide prima facie qualification of the signatory as an elector entitled to sign a recall petition.

We do not suggest that all persons signing a recall petition must personally place their respective addresses on the petition. Courts have interpreted statutory provisions similar to § 23-2010.02 in such a manner as to allow the circulator or some third person to insert the signatory's address pursuant to authorization from the signatory. See, *In re Petition for Removal of Rice, supra; Schumacher v. Byrne, supra; In re State Question No. 137, etc.*, 114 Okla. 132, 244 P. 806 (1926).

Further, we do not suggest that qualified voters without street or number addresses cannot sign a recall petition. We have previously addressed this problem in *Bartling v. Wait*, 96 Neb. 532, 148 N.W. 507 (1914). In that case we held at 536, 148 N.W. at 508:

> It is claimed that the petition is defective because 1,852 signers of the petition did not give their complete post office address; that the address is shown only by the city or village in which the signer purports to live, but neither the county nor state in which they live appears on the face of the petition, except that each appears on the other side of each petition. Taking the Antelope county petition as an example, there is a certificate to each sheet to the effect that each of the persons signed his name in the presence of affiant, and that he believes each has signed his name and

> post office address correctly, and that each signer is a voter of the state of Nebraska and county of Antelope. The post office address of the respective signers are given "Elgin," "Petersburg," and "Oakdale." The argument is that "John Smith, writing merely 'Aurora' after his name, does not give his post office address." The implication is that each signer must give his street and number and his state. Even without the proof upon the back of the petition, it is a fact of which the court will take judicial notice that there are cities and villages of the names appended, in this state; that the free delivery system is not in force in all the cities and villages in the state, and that in such case a street address is unnecessary and unusual. Furthermore, it is a well-known fact that even in cities and towns the usual post office address of many is merely the name of the city without addition. The petition, therefore, is not vulnerable to these objections.

Cf. *State ex rel. Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968) ("ample evidence" that the signatories resided in Sarpy County, although signatories' addresses appearing on the initiative petition indicated a Douglas County address).

Having ascertained the reason for the residence address provision in § 23-2010.02, we must now determine whether noncompliance with such provision is a "technical" deficiency in the recall petition within § 23-2010.08.

*Technical* means "Immaterial, not affecting substantial rights, without substance." Black's Law Dictionary 1312 (5th ed. 1979).

In characterizing a technical defect the Supreme Court of Rhode Island stated in *Brereton v. Board of Canvassers*, 55 R.I. 23, 35, 177 A. 147, 154 (1934):

> A technical error is a deviation from the right course or standard in the performance of any act requiring some skill or technique. It includes an act of volition which erroneously, yet none the less intentionally, departs from a prescribed standard, but which does not go to the very substance or merits of the matter.

Validation of the process to recall a public official from elective office can hardly be characterized as involvement of

insubstantial rights. A requirement which is a fundamental safeguard for an officeholder and petitioner alike, namely, assistance in determining the required number of qualified signatories for a recall petition, must be respected and protected as an integral part of the process for recall of an elected official. On the one hand, the residence requirement protects the elected official from a recall election springing from a petition signed by ineligible voters. On the other hand, the requirement regarding residence address alerts circulators of a recall petition to the possibility that the threshold number of qualified signatories may not have been satisfied. See *Spence v. Terry*, 215 Neb. 810, 340 N.W.2d 884 (1983) (minimum number of signatories is required for a recall petition before verification of signatures is required under Neb. Rev. Stat. § 23-2010 (Cum. Supp. 1982)).

Under the circumstances presented in this case, there is no information concerning the actual addresses of the signatories in question when they signed the recall petitions. A requirement that the residence address of a signatory be placed on a recall petition by the signatory personally or with the signatory's authorization neither hinders nor prevents the recall of an elected official. Whether a signatory is at least an ostensibly (prima facie) qualified voter with respect to the recall petition or whether a signatory may have moved or otherwise changed voting districts with resultant cancellation of registration before signing the petition are preliminary but fundamental questions that cannot be resolved without reference to the signatory's claimed address at signing the recall petition. See Neb. Rev. Stat. § 32-216 (Reissue 1984) (change of residence causing cancellation of voter registration). Were we to accept Lebsack's theory of technical deficiency, then qualification to participate in the recall petition would be established by incorporating into the petition the very voter registration list used to validate voter eligibility, a self-authenticating process impeding inquiry into a signatory's eligibility to sign a recall petition. See Neb. Rev. Stat. § 23-2010.04 (Cum. Supp. 1982) (county clerk or election commissioner shall ascertain whether the requisite number of registered voters have signed the recall petition). Requirements for a recall petition must be accorded the same stature as the

standards applicable to the ballot box. Consequently, failure to fulfill the residence address requirement of § 23-2010.02 was a material and substantial defect in the recall petition involving Quigley.

We hold that the residence address of a signatory must be placed on a recall petition by the signatory personally or with the signatory's authorization. The trial court was incorrect in holding that the 49 questioned signatures were valid for the purpose of the recall petition. Therefore, the recall election should have been enjoined as requested by Quigley.

REVERSED.

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

While I believe that the decision reached by the majority in this case, under the facts as presented, is correct, I write separately because I believe that the language of the majority opinion may be read more broadly than I believe we intend it to be read. In the instant case there was *no* evidence offered to show that the signatories in question resided or had any actual address in subdivision No. 3 of McCook Public Power District. Absent such evidence, the court had no way of knowing whether the appellee Lebsack did in fact verify whether the signatories to the recall petition were qualified to sign. Standing alone, the majority opinion may be read to the effect that failing to include addresses on a recall petition *automatically invalidates* the petition, even though other evidence is provided to establish without question that the signatories are qualified voters with respect to the recall petition. I do not believe such to be the law, nor do I believe the majority to intend that result. What we are concerned about here is not who places the addresses upon the petition or who directs that they be placed on the petition, but whether we are satisfied that the manner in which the verification takes place has credibility. Obviously, it is self-serving to go to the election list in order to obtain the signatory's address, in order to determine whether the signatory still resides at the address shown on the petition on the day when the petition was signed, in order to establish that the signatory is a registered voter qualified to sign the petition. It is conceivable, however, that affidavits might be provided to establish the truth of the matter, or the area might be small enough that the

addresses of the signatories are general in nature and can otherwise be established. I believe that the declaration set out in the majority opinion must therefore be closely read in light of the evidence in this case, including the fact that there was no evidence as to the correct actual addresses of the signatories.

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D.J. WITHERSPOON, APPELLANT, V. SIDES CONSTRUCTION CO., INC., A CORPORATION, ET AL., APPELLEES.

362 N.W.2d 35

Filed February 1, 1985. No. 83-661.

1. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law.
2. _____. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence.
3. _____. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
4. **Products Liability: Limitations of Actions.** The statute of repose applicable to the manufacturer of an allegedly defective product is contained in Neb. Rev. Stat. § 25-224 (Cum. Supp. 1984) and begins to run when possession of the product is first relinquished for ultimate use or consumption, not when it is first placed into the stream of commerce by the manufacturer.
5. **Actions: Construction Contracts: Breach of Contract: Contractors and Subcontractors.** An owner's action for a general contractor's failure to erect a structure in a workmanlike manner is one for breach of contract.
6. **Limitations of Actions: Construction Contracts: Contractors and Subcontractors.** The period of repose applicable to a general contractor is found in Neb. Rev. Stat. § 25-223 (Reissue 1979) and begins to run when construction of the structure is completed.
7. **Limitations of Actions.** A statute of repose is a type of a statute of limitations.
8. _____. A period of limitations begins to run upon the violation of a legal right,

that is, when the aggrieved party has the right to institute and maintain suit, even though the nature and extent of the damages may not be known.

9. **Words and Phrases.** A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.
10. **Limitations of Actions: Words and Phrases.** Architects and engineers are professionals for purposes of Neb. Rev. Stat. § 25-222 (Reissue 1979).
11. **Limitations of Actions: Construction Contracts.** The period of repose applicable to an architect who has a duty to inspect throughout construction is contained in Neb. Rev. Stat. § 25-222 (Reissue 1979) and begins to run when construction is completed.
12. _____: _____. The period of repose applicable to an engineer who has no duty other than to provide a design to an architect is contained in Neb. Rev. Stat. § 25-222 (Reissue 1979) and begins to run when the design is delivered to the architect.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Cynthia G. Irmer of Matthews & Cannon, P.C., for appellant.

Lyman L. Larsen and John D. Hartigan, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellee Sides Construction.

Eugene P. Welch and John W. Iliff of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee Stanley J. How & Associates.

Judith A. Schweikart of Kutak Rock & Huie, for appellee McWane Cast Iron Pipe.

Dean F. Suing and Moira B. White of Katskee & Henatsch, for appellee Raymond G. Alvine & Associates.

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

CAPORALE, J.

Plaintiff-appellant, D.J. Witherspoon, suffered damages when the pipe supplying water to his house broke. As a consequence, he brought suit against the manufacturer of the pipe, McWane Cast Iron Pipe Co., Inc.; the general contractor,

Sides Construction Co., Inc.; the architect, Stanley J. How & Associates, Inc.; the engineer, Raymond G. Alvine & Associates; and the plumbing subcontractor, J.H. Martig, Inc., together with its trustee in bankruptcy, James J. Stumpf. The defendants-appellees McWane, Sides, How, and Alvine each moved for summary judgment on the ground that Witherspoon's action was time barred. The district court sustained each of those motions and dismissed the action as to all the movants. We affirm as to Alvine, and we reverse and remand for further proceedings as to McWane, Sides, and How.

## Facts and Posture of Case

The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979); *Cummings v. Curtiss, ante* p. 106, 361 N.W.2d 508 (1985); *Gilbreath v. Ridgeway*, 218 Neb. 822, 360 N.W.2d 474 (1984); *Stromsburg Bank v. Nuttelman*, 218 Neb. 687, 358 N.W.2d 746 (1984); *Straub v. American Bowling Congress*, 218 Neb. 241, 353 N.W.2d 11 (1984); *Galyen Petroleum Co. v. Hixson*, 213 Neb. 683, 331 N.W.2d 1 (1983); *Mutual Benefit Life Ins. Co. v. Chisholm*, 213 Neb. 301, 329 N.W.2d 103 (1983). In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence. *McHenry v. First Nat. Bank*, 216 Neb. 580, 344 N.W.2d 652 (1984); *Strong v. K & K Investments*, 216 Neb. 370, 343 N.W.2d 912 (1984). Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which

the burden of producing contrary evidence shifts to the party opposing the motion. *Bailey v. City of North Platte*, 218 Neb. 810, 359 N.W.2d 766 (1984); *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982), *appeal after remand* 216 Neb. 575, 344 N.W.2d 649 (1984).

The evidence, viewed in accordance with the applicable rule, establishes that in 1968 or 1969 Witherspoon retained How to design a house to be constructed on land Witherspoon owned. How then selected Alvine to be the engineer for the project. Witherspoon next contracted with Sides to build the house according to the plans and specifications provided by How and Alvine. Sides engaged Martig to install the plumbing, including a 3-inch water supply pipe required by the plans and specifications. The water utility required that a ductile iron pipe be used; however, a cast iron pipe fabricated by McWane was installed. Burial of the pipe on Witherspoon's land was completed in September of 1969, and the pipe provided water for construction purposes from October 1, 1969. Construction of the house was completed around Christmas of 1970. Because the cast iron pipe had been installed without sufficient thrust restraint at the point where it entered the house, it broke on December 31, 1979. As a consequence, a foundation wall collapsed and the basement flooded, resulting in damages of $353,753.84.

Witherspoon commenced this suit on December 9, 1980. He bases his action against McWane on strict liability in tort, and against Sides, How, and Alvine on negligence.

## Manufacturer's Motion

The operative allegation against the manufacturer McWane is that it "is strictly liable in tort for manufacturing and placing into the stream of commerce a defective product," in that the pipe was of inadequate quality.

The applicable period of repose is contained in Neb. Rev. Stat. § 25-224 (Cum. Supp. 1984), which in relevant part reads:

> [A]ny product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section, 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.

The statute does not define the meaning of the phrase "first sold . . . for use or consumption," nor does it have an independent, clear meaning of its own. Does the phrase mean when the product is first placed into the stream of commerce by the manufacturer or when possession of the product is relinquished for ultimate use or consumption?

Neb. U.C.C. § 2-106(1) (Reissue 1980) defines sale as the "passing of title from the seller to the buyer for a price (Section 2-401)." Under Neb. U.C.C. § 2-401(2) (Reissue 1980), title, unless the parties agree otherwise, "passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery . . . ." One difficulty with attempting to apply § 2-401 to product liability cases is that it is not clear who is the seller and who is the buyer. On the state of the record in this case, either Sides, Martig, or Witherspoon could be considered to be the buyer, just as either McWane, Sides, or Martig could be considered to be the seller. The Uniform Commercial Code definition of sale, then, does not help us define "sold" in this context.

When statutory language is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of the lawmakers. *Worley v. City of Omaha*, 217 Neb. 77, 348 N.W.2d 123 (1984).

During a legislative committee hearing, Senator DeCamp, a sponsor of the bill, in response to a concern as to when the period would begin to run on a piece of equipment manufactured by one but installed by another, stated, "The date for use or construction." Banking, Commerce and Insurance Committee Hearing, L.B. 665, 85th Leg., 2d Sess. 71 (Jan. 23, 1978). Senator Bereuter said the following:

> I think when a bulldozer is sold to Lincoln Equipment the statute of repose does not begin unless they would be using it as a part of their own operation, not as a wholesaler, or not as a retailer. However, when that bulldozer is sold to an ultimate consumer, that is a contractor who uses the bulldozer repeatedly for his own business, then the statute of repose begins. The fact that that contractor may sell the

> bulldozer to another contractor doesn't mean that the eight year period starts over, because it has been in the hands of an ultimate consumer, a contractor who uses a bulldozer to construct dams. The fact that he may sell it does not start it over. The eight year period runs from the time that it is sold to the first contractor, right up until the eight year period [later amended to 10 years], no matter whether or not it has changed ownership. When you're dealing with a product that goes to a wholesaler and consumer...excuse me, wholesaler or retailer the statute of repose has not begun. It does not begin until the ultimate consumer takes hold of it, and at that time the minutes begin ticking off on that eight year period. That is my understanding.

Floor Debate, L.B. 665, 85th Leg., 2d Sess. 6861 (Feb. 27, 1978). See, also, Floor Debate, *supra* at 6853-59, for expressions of similar understandings of the phrase.

*Winters v. Sears, Roebuck and Co.*, 554 S.W.2d 565 (Mo. App. 1977), held that "sold," as used in Restatement (Second) of Torts § 402 A(1)(b) (1965), which deals with the liability of a seller of a defective product, "does not have the technical meaning but indicates the time at which defendant relinquished control or possession of the product." 554 S.W.2d at 572. *Shoppers World v. Villarreal*, 518 S.W.2d 913 (Tex. Civ. App. 1975), interpreted "sold," for the purposes of Restatement § 402 A, *supra*, to mean when a shopper in a self-service store picks up an item from the seller's shelf.

Webster's Third New International Dictionary, Unabridged 2523 (1968), defines "use" as "the act or practice of using something" and "the fact or state of being used (a lamp in daily [use] for over 50 years)." It defines "consumption" as "the act or action of consuming or destroying (the [consumption] of organic matter by fire)." *Id.* at 490. Black's Law Dictionary 1381 (5th ed. 1979) defines "use" as "[t]o make use of, to convert to one's service." It defines "consumption" as the "[a]ct or process of consuming; . . . destruction." *Id.* at 287.

*South Texas Irr. Systems, Inc. v. Lockwood Corp.*, 489 F. Supp. 256 (W.D. Tex. 1980), decided that tangible chattels purchased for resale are not purchased "for use." Other cases

have defined "use" as something done customarily or habitually, a practice of doing a certain act. *Revzan v. Nudelman*, 370 Ill. 180, 18 N.E.2d 219 (1938); *Bradley Supply Co. v. Ames*, 359 Ill. 162, 194 N.E. 272 (1934); *Estate of Shaff v. Stein*, 171 Misc. 376, 14 N.Y.S.2d 117 (1939). Courts have defined the word "consumption" as meaning to destroy the substance of, to use up, expend, or waste. *Material Service Corp. v. McKibbin*, 380 Ill. 226, 43 N.E.2d 939 (1942); *Berry-Kofron Dental Lab. Co. v. Smith*, 345 Mo. 922, 137 S.W.2d 452 (1940); *Revzan v. Nudelman, supra.*

The foregoing legislative history and analysis convince us that the pipe was first sold for use when its possession was first surrendered to Witherspoon, that is, when he took possession of the house of which the pipe was a part. Although the record does not tell us when that event occurred, it must be inferred, in the absence of proof to the contrary, to have taken place not earlier than when construction of the house was completed. Therefore, the pipe was not relinquished to Witherspoon's possession until late December of 1970.

Having been filed within the 10-year period thereafter, the suit is not barred by the statute of repose embodied in § 25-224.

## General Contractor's Motion

Witherspoon alleges the general contractor, Sides, was engaged by him to construct the house described in the plans and specifications and to erect it "in a good and workmanlike manner." He further alleges Sides was negligent in permitting the installation of a cast iron rather than a ductile iron pipe, in not noting the discrepancy between the pipe installed and that specified, in not calling the discrepancy to the attention of the architect and engineer, and in all the respects in which the plumbing subcontractor was negligent. Witherspoon alleges the plumbing subcontractor was negligent by installing the wrong pipe, by improperly backfilling, and by failing to install adequate stress protection for the pipe.

Although cast as a tort, the true nature of the action against Sides is for breach of contract. See, *Bussell v. Western Diesel Power*, 216 Neb. 822, 346 N.W.2d 394 (1984); *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984).

However, we dispose of the case on the theory on which it was presented to the district court. *Lincoln Grain v. Coopers & Lybrand, supra.*

Whether pled in tort or contract, the applicable period of repose is found in Neb. Rev. Stat. § 25-223 (Reissue 1979). See *Kearney Clinic Bldg. Corp. v. Weaver*, 211 Neb. 499, 319 N.W.2d 95 (1982), applying the statute in the context of a contract action. The statute provides in relevant part:

> In no event may any action be commenced to recover damages for an alleged breach of warranty on improvements to real property or deficiency in the design, planning, supervision, or observation of construction, or construction of an improvement to real property more than ten years beyond the time of the act giving rise to the cause of action.

A statute of repose is a type of a statute of limitations. *Stock v. Meissner*, 217 Neb. 56, 348 N.W.2d 426 (1984). It is clear beyond any doubt that a period of limitations begins to run in this state upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit, even though the nature and extent of the damages may not be known. *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984); *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

The operative phrase in § 25-223 is "the act giving rise to the cause of action." Sides argues that each act of negligence attributed to it, either directly or vicariously, occurred more than 10 years prior to the filing of suit. That argument overlooks, however, the allegation that Sides was engaged to erect the house in a good and workmanlike manner. Implicit in Witherspoon's cause of action against Sides is the claim that Sides erected the house in other than a workmanlike manner by allowing the use of an inadequately supported cast iron pipe. The failure to erect the structure in a workmanlike manner was the "act giving rise to the cause of action," and it occurred when construction of the house was completed. See *Cacace v. Morcaldi*, 37 Conn. Supp. 735, 435 A.2d 1035 (1981), holding completion of construction to be the operative date under a

statute barring suit after 3 years from "act or omission complained of." See, also, *Oja & Associates v. Park Towers*, 89 Wash. 2d 72, 569 P.2d 1141 (1977); *Shockley v. Public Service Company of Colorado*, 525 P.2d 1183 (Colo. App. 1974).

Since the suit was filed within 10 years from the completion of construction, it is not barred by the period of repose contained in § 25-223.

Architect's Motion

Witherspoon alleges he engaged the architect, How, to design the house and to "inspect the construction thereof as it progressed." He further alleges How was negligent in failing to specify ductile pipe, in accepting the engineer's description of cast iron pipe, in failing to inspect the pipe installation, and in accepting the use of a cast iron pipe; and having accepted a cast iron pipe, in failing to cause the design of adequate stress protection; and in designing an inadequate water system.

The foregoing discussion as to the nature of the action against the general contractor applies as well to the true nature of the action against the architect.

Again, however, whether pled in tort or contract, there can be no question that the period of professional repose contained in Neb. Rev. Stat. § 25-222 (Reissue 1979) applies. A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. *Marx v. Hartford Acc. & Ind. Co.*, 183 Neb. 12, 157 N.W.2d 870 (1968). Accordingly, in addition to the traditional professions of law, *Rosnick v. Marks, supra*, and medicine, *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983), we have applied professional periods of limitations to an accountant, *Lincoln Grain v. Coopers & Lybrand*, 215 Neb. 289, 338 N.W.2d 594 (1983); a medical technician, *Swassing v. Baum*, 195 Neb. 651, 240 N.W.2d 24 (1976); and to one giving investment advice, *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974). The relevant period of repose is stated in § 25-222 as follows:

[I]n no event may any action be commenced to recover

> damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

Witherspoon argues that the continuing nature of his relationship with How means the period of repose did not begin to run until construction of the house was completed. On the other hand, How argues our prior cases hold that the period of repose began to run when he allegedly performed, or failed to perform, the specific acts about which complaint is made. How cites us to *Lincoln Grain v. Coopers & Lybrand, supra*, which discusses the continuing relationship concept but finds none existed, and applied the 2-year period of limitation to an act of alleged accountant malpractice; *Smith v. Dewey, supra*, which holds that in medical malpractice the period of repose begins to run when the treatment about which complaint is made ceases, irrespective of whether the physician-patient relationship continues; and *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941), which applies the same rule. Although not cited, *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982), another medical malpractice case, rests on the same rationale. Additionally, in *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983), we ruled the cause of action against an attorney who allegedly negligently subjected private lands to corporate debts accrued when the alleged negligent act took place, notwithstanding the fact that the attorney continued to represent the clients.

As we noted in *Interholzinger*, the point at which a period of limitations begins to run must be determined from the facts of each case. The feature which distinguishes How's situation from the basis of the holdings in the legal and medical malpractice cases discussed above is that, here, all the acts or omissions about which complaint is made are related to How's alleged duty to "inspect the construction [of the house] as it progressed." Under these circumstances the failure "which provides the basis for the cause of action" ended when construction of the house was completed. The action is therefore not barred by the professional period of repose. See

*Cacace v. Morcaldi*, 37 Conn. Supp. 735, 435 A.2d 1035 (1981).

Engineer's Motion

Alvine was selected by How to "provide engineering design services." Witherspoon alleges Alvine was negligent in specifying cast iron rather than ductile iron pipe and in failing, in view of the use of a cast iron pipe, to design adequate stress protection.

The same rationale which leads to the conclusion that the professional period of repose does not bar the action against the architect, How, requires a conclusion that the action against the engineer, Alvine, is barred. There is no claim that the alleged acts and omissions of Alvine occurred beyond whatever date it delivered its "engineering design services" to How. Although the record does not tell us what that date was, it must be inferred to have been no later than when the pipe was installed in September of 1969, more than 10 years prior to the filing of suit.

We recognize that in so holding, the result may at times be that one whose design is alleged to have caused or contributed to the failure of a structure becomes, by the passage of time, insulated from liability, while others involved in the construction process may remain subject to liability. Such, however, is the nature of periods of repose.

Decision

The trial court correctly dismissed Witherspoon's action against the engineer, Alvine, but erred in dismissing the action as against the manufacturer, McWane, the general contractor, Sides, and the architect, How. We therefore affirm the judgment of dismissal as to Alvine but reverse the judgments of dismissal as to McWane, Sides, and How and remand the cause for further proceedings as to the latter three movants for summary judgment.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., dissenting in part.

So far as the defendant McWane Cast Iron Pipe Co., Inc., is concerned, it seems to me that the pipe had been devoted to its

ultimate use or consumption when it was placed in the ground, connected to the main, and used to convey water to the premises commencing on or before October 1, 1969.

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ROBERT ARMSTRONG, APPELLEE, V. HARTFORD LIFE INSURANCE COMPANY, A CORPORATION, APPELLANT.

361 N.W.2d 511

Filed February 1, 1985. No. 83-699.

1. **Judgments: Appeal and Error.** In reviewing an appeal from a judgment in a law action, this court does not reweigh the facts. Instead, it examines the evidence to determine whether, under a view most favorable to the prevailing party, the facts support the trial court's judgment.
2. **Brokers: Contracts.** It is an elementary principle of law that when a broker produces a purchaser ready, willing, and able to enter into the subject transaction, the broker is entitled to the promised commission.
3. _____: _____. An agreement to pay a commission is binding on the principal despite the refusal or default on the part of the principal to complete the transaction based on the terms agreed to.
4. **Pleadings: Trial: Appeal and Error.** Issues not properly raised in the pleadings nor litigated at trial will not generally be considered for the first time on appeal.
5. **Pleadings.** The answer shall contain a statement of any new matter constituting a defense, in ordinary and concise language. Neb. Rev. Stat. § 25-811 (Reissue 1979).

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

Clark G. Nichols of Winner, Nichols, Douglas and Kelly, for appellant.

Howard P. Olsen, Jr., of Raymond, Olsen, Ediger & Ballew, P.C., for appellee.

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

WHITE, J.

Defendant, Hartford Life Insurance Company, appeals from a judgment of the district court for Scotts Bluff County in

favor of plaintiff, Robert Armstrong. A jury was waived and trial was had to the court.

Hartford assigns nine errors, but they may be appropriately placed in two categories. First, the evidence fails to factually support the trial court's judgment, and second, the trial court erred in failing to find that any repudiation of an offer by Hartford was retracted, thus clearing any breach.

In reviewing an appeal from a judgment in a law action, this court does not reweigh the facts. Instead, it examines the evidence to determine whether, under a view most favorable to the prevailing party, the facts support the trial court's judgment. *Morfeld v. Bernstrauch*, 216 Neb. 234, 343 N.W.2d 880 (1984).

Stated in a manner most favorable to Armstrong's position, the following is established by the evidence.

Armstrong, at all times pertinent to this case, was engaged in the business of an independent insurance agent and broker in Scottsbluff, Nebraska. The Masek company was a customer of Armstrong. In 1982 Masek representatives contacted Armstrong with reference to Masek's employees profit-sharing and pension funds. At that time the funds supplied by Masek were on deposit in a Casper, Wyoming, bank and supervised by the bank's employees. The Masek representatives were not satisfied with the rate of return on the invested funds. As Armstrong was not familiar with pension fund management, he spoke with Gary Hohnholt, an independent agent in Omaha, Nebraska. Hohnholt suggested that Armstrong contact Bill Andria, an employee of Hartford at Shawnee Mission, Kansas.

On September 1, 1982, Hartford sent a proposal to Armstrong for presentation to Masek. The proposal was presented to Masek, and extended discussions and correspondence took place between Andria (Hartford), Armstrong, and Masek, culminating in a letter of September 15, 1982, further explaining Hartford's proposal. The language that gives rise to the dispute is contained in the third to the last paragraph of the letter.

> I must suggest that you secure a signed application and a binder check of $1,000. With regard to transferred assets, I have permission from my Home Office to offer your

> client on a special arrangement basis, the above mentioned transferred asset guarantees if they are able to move their assets to The Hartford within 60 days of signing the application. Should they not be able to do so, the guarantee would drop by 50 basis points to 14.5% for 1983 through '86.

On October 22, 1982, a completed application and Masek's check for $1,000 were received by Hartford.

A representative of Masek called on the bank at Casper to discuss arrangements for the transfer of the pension funds. The bank informed the Masek representative that 30 days were required to transfer the funds.

Thereafter, on October 29, 1982, Hartford contacted Armstrong and informed him that Hartford was imposing a deadline of November 15 on the transfer of the funds. On November 1, 1982, Armstrong was informed in a telephone conversation with another Hartford representative that the deadline would be lowered to November 8. However, on November 4, 1982, still another Hartford representative informed Armstrong and Masek that Hartford had reconsidered and reinstated the 60-day term. Fred Masek, acting for the company, refused, considering the transaction to have been terminated by reason of Hartford's change of terms. This action for commission payment followed.

The parties do not dispute that a commission was promised by Hartford to Armstrong, nor do they dispute the amount ordered to be paid by the trial court.

In its answer to Armstrong's petition Hartford admitted that Armstrong was a resident of Scotts Bluff County, Nebraska, and that Hartford was a foreign corporation doing business in Nebraska. Hartford denied all other allegations of the petition, which alleged facts substantially similar to those stated above.

It is an elementary principle of law that when a broker produces a purchaser ready, willing, and able to enter into the subject transaction, the broker is entitled to the promised commission. *Cornett v. Nathan*, 196 Neb. 277, 242 N.W.2d 855 (1976); *Fleming Realty & Ins., Inc. v. Evans*, 199 Neb. 440, 259 N.W.2d 604 (1977). An agreement to pay a commission is binding on the principal despite the refusal or default on the

part of the principal to complete the transaction based on the terms agreed to. *Dworak v. Michals*, 211 Neb. 716, 320 N.W.2d 485 (1982).

Hartford argues here, however, that the rule does not pertain when before the promisee has acted to its detriment the promisor withdraws the repudiation and reinstates the offer. Restatement (Second) of Contracts § 256(1) (1981).

We will not consider Hartford's contention for the first time here. Issues not properly raised in the pleadings nor litigated at trial will not generally be considered for the first time on appeal. *Columbus Bank & Trust Co. v. High Country Stable*, 202 Neb. 724, 277 N.W.2d 81 (1979); *Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co.*, 195 Neb. 658, 240 N.W.2d 28 (1976).

Neb. Rev. Stat. § 25-811 (Reissue 1979) provides: "The answer shall contain . . . (2) a statement of any new matter constituting a defense . . . in ordinary and concise language . . . ."

Hartford cannot be permitted to deny the existence of a contract for a commission, the existence of a proposed offer and its acceptance, and the repudiation of the offer, and then be permitted to excuse itself by urging reinstatement of an offer it denies existed.

The assignments of error are meritless. The judgment of the district court is affirmed.

AFFIRMED.

SECURITY STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT, V. MARIAN E. MCCOY AND RAYMOND L. GUGELMAN, A PARTNERSHIP AND INDIVIDUALLY, APPELLEES.
SECURITY STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT, V. RAYMOND L. GUGELMAN, APPELLEE

361 N.W.2d 514

Filed February 1, 1985. Nos. 83-789, 83-790.

**Actions: Pleadings: Judgments: Partnerships.** If the plaintiff, in any judgment so rendered against any company or partnership, shall seek to charge the individual property of the persons composing such company or firm, it shall be lawful for him to file a bill in equity against the several members thereof, setting forth his judgment and the insufficiency of the partnership property to satisfy the same, and to have a decree for the debt, and an award of execution against all such persons, or any of them, as may appear to have been members of such company, association, or firm.

Appeal from the District Court for Furnas County: JACK H. HENDRIX, Judge. Affirmed.

James E. Doyle of Cook & Kopf, P.C., for appellant, and, on brief, Knudsen, Berkheimer, Richardson & Endacott.

Charles J. Cuypers of Sherwood & Cuypers, for appellee Gugelman.

BOSLAUGH, WHITE, and CAPORALE, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

WHITE, J.

The appellant, Security State Bank, brought suit in the district court against the defendants, who were doing business as Antiques Etc., a partnership, and against the individual partners on a series of promissory notes signed on behalf of the partnership by one of the partners, Marian E. McCoy, in favor of appellant. The two cases were consolidated for trial. A summary judgment was granted in favor of the bank against Antiques Etc., and following a trial to the court, a judgment was rendered against the bank and in favor of partner and appellee Raymond L. Gugelman on each of the notes. Marian McCoy filed bankruptcy, and no further proceedings were had against her.

Security State Bank appeals. We affirm, though on grounds

different from those relied on by the trial court.

In its suit against the partnership and the partners individually, appellant apparently overlooked Neb. Rev. Stat. § 25-316 (Reissue 1979), which states:

> If the plaintiff, in any judgment so rendered against any company or partnership, shall seek to charge the individual property of the persons composing such company or firm, it shall be lawful for him to file a bill in equity against the several members thereof, setting forth his judgment and the insufficiency of the partnership property to satisfy the same, and to have a decree for the debt, and an award of execution against all such persons, or any of them as may appear to have been members of such company, association or firm.

This statute has been the law in Nebraska since 1867.

In an early case, *Ruth v. Lowrey*, 10 Neb. 260, 262, 4 N.W. 977, 978 (1880), interpreting this statute, the court in refusing to enforce a Wyoming judgment against certain Nebraska partners commented: "There is no allegation in the petition that the partnership property in Wyoming is insufficient to satisfy the judgments, nor is there any proof tending to show that such is the case."

Although in this case there is a suggestion that the inventory was sold to partially satisfy partnership debts, there was no prior judgment against the partnership, which the statute contemplates as a condition precedent to the bringing of an action against individual partners. See, also, *Leach v. Milburn Wagon Co.*, 14 Neb. 106, 15 N.W. 232 (1883).

AFFIRMED.

# RICHARD BENTON, APPELLANT, V. BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 17 OF WINNEBAGO, THURSTON COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

361 N.W.2d 515

Filed February 1, 1985. No. 83-797.

1. **Schools and School Districts: Teacher Contracts: Due Process.** In the contested termination of a tenured teacher or tenured administrator, minimum procedural due process requires that the employee (1) be advised of the cause or causes for the termination in sufficient detail to fairly enable the employee to prepare a defense, (2) be advised of the names and the nature of the testimony of witnesses who are to testify against the employee, and (3) be accorded a timely and meaningful opportunity to be heard in his or her own defense, and (4) that the hearing be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.
2. **Due Process: Notice.** One who has obtained a property interest in his or her employment is entitled to notice which accords constitutional due process.
3. _____: _____. Constitutional due process requires notice which relates to the matter to be presented and which is suitable and fair in view of the circumstances and conditions existent at the time.

Appeal from the District Court for Thurston County: DARVID D. QUIST, Judge. Reversed and remanded with directions.

Clarence E. Mock of Johnson and Mock, for appellant.

Rodney R. Smith of Smith, Smith and Boyd, for appellee.

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

CAPORALE, J.

Richard Benton undertook error proceedings to the district court from the termination of his employment as a tenured principal by the board of education of school district No. 17 of Winnebago, Thurston County, Nebraska. Benton's assignments of error to the district court's affirmance of the board's action include that the court erred in finding he had received legally sufficient notice of the grounds for termination. The record sustains that assignment of error, and we accordingly reverse the judgment of the district court and remand with directions.

Benton had served as principal of the senior high school, an administrative position, Neb. Rev. Stat. § 79-101(11) (Reissue 1981), in the Winnebago school system for approximately 4 years. In the spring of 1982 he accepted a written contract renewing that employment for the ensuing 1982-83 school year.

The board's written policy provided, among other things, that after a 2-year probationary period a contract of employment between the board and an administrator was to be deemed renewed and was to remain in full force and effect until terminated in accordance with specified procedures.

Notice was delivered to Benton on February 22, 1983, advising him that the board had voted to consider terminating his contract of employment and that the "just cause" reasons for considering nonrenewal were "Incompetency, Neglect of Duty, unprofessional conduct, and other conduct which interferes substantially with the continued performance of your duties." Benton then requested a description of the evidence and a list of witnesses who would testify against him.

He was next served with notice of the scheduled hearing, to which was attached a list of 20 witnesses who would testify for the board and copies of 14 documents to be used as evidence against him. No comment was made as to the nature of the testimony expected to be elicited from any of the witnesses.

At the hearing a female federal worker formerly assigned to the Winnebago High School as a teacher's aide, and whose name was included on the witness list, testified that some 2½ years earlier Benton asked her if she "fooled around," and commented favorably on her perfume and clothes. The record does not reflect that this worker complained to school authorities about the remarks. There was evidence that she had experienced difficulty carrying out her assignments and had disputes with Benton concerning her duties.

One teacher testified that Benton tape-recorded a grievance conference between Benton and the teacher, unbeknownst to the latter. The record reflects, however, that although Benton did not specifically tell the teacher the conference was being recorded, the recorder was on the table in plain view and Benton made comments such as "let the record reflect." The record does not establish that there exists a policy against

recording grievance conferences.

Although no earlier complaint had been made to Benton, a special education teacher testified about Benton's alleged improper suspension of certain special education students. During this teacher's testimony, an exhibit was introduced which contained a list of initials purportedly representing special education students who had been suspended improperly. That exhibit had not been provided to Benton prior to the hearing.

Conflicting evidence was adduced concerning whether Benton had attempted to buy a computer for himself but caused the purchase to be charged to the school district. When Benton paid for the computer, he took advantage of a discount accorded schools. The record does not reflect a policy against school personnel taking advantage of such discounts.

The record also contains vague testimony from teachers at the Winnebago High School, whose names were on the witness list, about Benton's poor relationships with teachers and students at the high school.

The documents supplied to Benton with regard to the computer purchase were adequate to put him on notice as to that issue. Such, however, was not the case with respect to the other areas which became the focus of the hearing, areas upon which various board members said they relied in reaching their determinations. There was nothing in the documents supplied to Benton which would put him on notice that comments made to a worker 2 years earlier were to be a subject of the hearing, nor that tape recording a grievance hearing, suspending special education students, and teacher-student relationships were at issue. From what was provided him Benton could well conclude that the computer purchase was the only matter he was called upon to defend. Particularly is this so when, on February 9, 1983, 13 days before the notice that the termination of his employment was being considered, Benton had been scored as not less than satisfactory in all areas rated in the annual evaluation prepared by the school superintendent. Indeed, Benton received high ratings in teacher and student relationships.

*Irwin v. Board of Ed. of Sch. Dist. No. 25*, 215 Neb. 794, 340

N.W.2d 877 (1983), disposes of this case adversely to the board. In *Irwin* a tenured teacher received a letter which stated his "neglect of duty, insubordination, and conduct which interferes substantially with the continued performance of [his] duties" were reasons for considering the termination of his employment. *Id.* at 795, 340 N.W.2d at 879. The teacher then requested that the board of education set forth the alleged conditions of unsatisfactory performance which would be the basis for the board's decision, and asked for the names of persons whose testimony would be used at the hearing. The teacher also requested that he be allowed to examine and copy documents or materials that would be used to support the allegations. The board allowed him access to his personnel file at the school. Two days before the hearing, the teacher's attorney contacted the board of education's attorney, who told him that there would be two witnesses testifying against the teacher. The teacher received no other information, and following the hearing his employment was terminated.

We held that the notice was not sufficient to satisfy minimum due process requirements, stating:

> "Within the matrix of the particular circumstances present when a teacher who is to be terminated for cause opposes his termination, minimum procedural due process requires that: (a) he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist, (b) he be advised of the names and the nature of the testimony of witnesses against him, (c) at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense, (d) that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges."

*Id.* at 796-97, 340 N.W.2d at 879, quoting *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970).

In the present case Benton's notice described the "just cause" reasons for considering the nonrenewal or termination of his employment in the broad, conclusory language of Neb. Rev. Stat. § 79-12,107(4) (Cum. Supp. 1982), but did not tell him the

factual allegations underlying the charges against him. Neither did the list of witnesses nor the copies of the documents given Benton enable him to adequately prepare a defense to the charges. As we said in *Irwin v. Board of Ed. of Sch. Dist. No. 25, supra* at 797-98, 340 N.W.2d at 880: "[I]t is not an undue burden upon the board of education to attach to the letter of notice, or otherwise divulge, the allegations underlying its action in sufficient detail, as to afford the accused party a reasonable opportunity to prepare a defense." See *Hill v. Gerber*, 217 Neb. 670, 350 N.W.2d 545 (1984), holding that one who has obtained a property interest in his employment is entitled to notice which both is in accordance with the employment rules and affords him constitutional due process. Thus, we held therein that a Department of Public Welfare employee charged with supplying a controlled substance to children he was supervising, and using it with them, could not be discharged for the unauthorized taking of the children to a park. See, also, *State ex rel. Douglas v. Schroeder*, 212 Neb. 562, 324 N.W.2d 391 (1982), ruling that notice such as is suitable and fair in view of the circumstances and conditions existent at the time and with reference to the matter to be presented is an element of due process. Thus, we held, one who appeared in court on motions to dismiss and for summary judgment could not be compelled to proceed to hearing on the need to produce documents.

Since the notice given Benton was not sufficient to afford him constitutional due process, the termination proceeding and the decision of the board were a nullity. Benton was not lawfully discharged as a principal of school district No. 17 of Winnebago, Thurston County, Nebraska.

In view of that determination we need not consider the remaining issues presented by Benton's other assignments of error: whether the termination proceeding was a nullity because the board failed to follow the discharge procedures specified by its personnel policy and those contained in its contract with Benton, and whether the evidence is sufficient to support the termination of his employment.

We reverse the judgment of the district court, remand the cause, and direct that the district court order a reversal of the

board's termination of Benton's employment.

REVERSED AND REMANDED WITH DIRECTIONS.

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THOMAS D. HARROLD ET AL., APPELLEES, V. SPAGHETTI TREE, INC., ET AL., APPELLEES, GARTH ADAMS, APPELLANT.

362 N.W.2d 44

Filed February 1, 1985. No. 83-859.

**Summary Judgment.** Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law.

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

Dwight Griffiths, for appellant.

James H. Cain, for appellees Harrold et al.

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

BOSLAUGH, J.

The defendant Garth Adams appeals from the order of the trial court sustaining the motion of the plaintiffs for a summary judgment in a proceeding for registration of a foreign judgment.

The petition alleged that the plaintiffs had recovered a judgment against the defendant and others in the common pleas court, Stark County, State of Ohio, on April 29, 1981. An authenticated transcript of the judgment was attached to the petition and incorporated in the petition by reference. The petition alleged that there had been no subsequent entries affecting the judgment other than as "contained herein." The transcript of the judgment disclosed no further entries.

The defendant Adams filed an answer on July 1, 1983, alleging that the Ohio judgment was null and void, but made no factual allegation as to why the judgment was invalid. The

answer also alleged that the judgment had been paid or partly paid.

On July 1, 1983, the defendant served interrogatories upon the plaintiffs. Answers to the interrogatories were served upon the defendant on July 25 and August 29, 1983. The answers admitted that $524.70 had been paid upon the judgment and that three real estate foreclosure actions and an action to attach a partnership interest were pending in Ohio.

The plaintiffs' motion for summary judgment was filed on September 30, 1983, and was heard on October 13. At this hearing the authenticated transcript of the judgment was received in evidence, together with certified copies of records of the court of appeals for Stark County, Ohio, Fifth Appellate District, and the Supreme Court of Ohio. These records showed that the judgment had been affirmed upon appeal and that a motion to certify the record to the Ohio Supreme Court had been overruled by that court on March 16, 1983.

The evidence in resistance to the motion consisted of the answers to the interrogatories and of affidavits of the defendant and his counsel. This evidence failed to show that there was a genuine issue as to a material fact which would prevent the plaintiffs from obtaining registration of the Ohio judgment in this state.

> Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law. *First National Bank v. Rose, post* p. 611, 330 N.W.2d 894 (1983); *Mutual Benefit Life Ins. Co. v. Chisholm, ante* p. 301, 329 N.W.2d 103 (1983); *Stolte v. Blackstone, ante* p. 113, 328 N.W.2d 462 (1982); *Oehlrich v. Gateway Realty of Columbus, Inc.*, 209 Neb. 417, 308 N.W.2d 327 (1981); *Metro. Tech. Community College v. South Omaha Industrial Park*, 207 Neb. 472, 299 N.W.2d 535 (1980).

*Snyder v. Nelson*, 213 Neb. 605, 606, 331 N.W.2d 252, 253 (1983).

Since the trial court obtained jurisdiction over the person of the defendant Adams, the registered Ohio judgment became a

final personal judgment against Adams. Neb. Rev. Stat. § 25-1593 (Reissue 1979). In the event the plaintiffs attempt to enforce the judgment, the defendant will be entitled to credit for any amounts which the plaintiffs have obtained in satisfaction of the judgment in Ohio or any other state. Neb. Rev. Stat. § 25-15,101 (Reissue 1979).

The judgment of the district court is affirmed.

AFFIRMED.

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BEATRICE MANOR, INC., APPELLEE, V. DEPARTMENT OF HEALTH, STATE OF NEBRASKA, ET AL., APPELLANTS.

362 N.W.2d 45

Filed February 1, 1985. No. 83-869.

1. **Administrative Law: Parties: Appeal and Error.** An administrative agency which is charged with the responsibility of protecting the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is a necessary or indispensable party in a judicial review of an order of an administrative agency.
2. **Actions: States.** Generally speaking, a suit against an agency of the state is a suit against the state itself.
3. **Actions: Statutes: Service of Process: Case Overruled.** In cases where the Legislature has authorized suits against the State of Nebraska and has required that summons shall be served as in other cases, without detailed specification, the method of serving summons specified for use in any other type of action against the state constitutes service "as in other cases." To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), is in conflict with this rule, it is overruled.
4. **Administrative Law: Statutes: Appeal and Error.** In conducting a judicial review of an administrative agency's decision under Neb. Rev. Stat. § 84-917 (Reissue 1981), the reviewing court may reverse or modify such decision which may have prejudiced the substantial rights of a party because it was in excess of the statutory authority or jurisdiction of the agency. In such cases, in order to assess the validity of the agency's decision, the reviewing court is authorized to consider the validity of the criterion employed by the agency.
5. **Administrative Law: Statutes.** An administrative agency may not employ its rule-making power to modify, alter, or enlarge the decision-making criteria provided for in the enabling legislation, such as Neb. Rev. Stat. §§ 71-5851 et seq. (Reissue 1981).
6. **Administrative Law: Evidence: Appeal and Error.** On appeal from the review

conducted by the district court, the Supreme Court's de novo review is limited to considering whether the agency decision was supported by substantial evidence and whether the proper rules of law, i.e., criteria, have been applied.

7. _____: _____: _____. The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did.
8. _____: _____: _____. In applying the substantial evidence standard, the reviewing court is not free to substitute its judgment for that of the administrative agency.
9. **Statutes.** The rules of statutory construction require that all parts of a statute relating to the same subject should be construed together.
10. **Administrative Law: Statutes: Public Health and Welfare.** In construing Neb. Rev. Stat. § 71-5857 (Reissue 1981), which requires the Department of Health to distinguish between rural and urban areas, the remainder of the section, which declares that such distinction must be made only to the extent that variable standards between the two areas will benefit the development of the most appropriate health care system for the particular area, must also be considered.
11. **Public Health and Welfare: Words and Phrases.** "Need" for nursing beds as defined by the Nebraska Health Care Certificate of Need Act, Neb. Rev. Stat. §§ 71-5801 et seq. (Reissue 1981), is not synonymous with "demand." "Need" focuses on long-range plans to provide required services to an entire population. It is a quantitative analysis. "Demand" connotes an immediate preference on the part of an individual to live in a particular nursing facility.
12. **Public Health and Welfare.** Under the enabling legislation and rules of the Department of Health promulgated thereunder, the implementation of alternate forms of care for the elderly, such as home nursing, day care, or "Meals on Wheels," are legitimate long-range efforts to minimize the need for nursing homes, so they are not to be considered the only method for caring for the elderly.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded with directions.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellants.

John R. Holdenried of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

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

HASTINGS, J.

This appeal involves a February 13, 1980, application by the

plaintiff seeking permission from the Department of Health to build a 23-bed addition to a health care center facility for the elderly in Beatrice. The application was filed pursuant to the Nebraska Health Care Certificate of Need Act, Neb. Rev. Stat. §§ 71-5801 to 71-5872 (Reissue 1981).

This application was denied by the department by letter dated August 5, 1980, primarily because at that time there were 82 beds per 1,000 persons aged 65 years or older in Gage County, which greatly exceeded the then current Nebraska Health Systems Plan optimum of 68.6 beds. That decision was appealed by Beatrice Manor to the Nebraska Health Care Certificate of Need Appeal Panel created by §§ 71-5859 to 71-5866, which panel affirmed the original decision. That decision then constituted the determinations of the Department of Health, as provided for in § 71-5866.

Finally, Beatrice Manor filed a petition for judicial review in the district court for Lancaster County, as authorized by Neb. Rev. Stat. §§ 84-917 et seq. (Reissue 1981). The petition named as defendants the Department of Health of the State of Nebraska, the Nebraska Certificate of Need Appeal Panel, and the State of Nebraska. The district court reversed the previous orders and remanded the case to the Department of Health with directions to grant the application.

On appeal to this court the defendants assign as error: (1) The district court erroneously found that it had personal jurisdiction over the defendants; (2) The district court exceeded its scope of review; and (3) The district court incorrectly failed to find that the decision of the administrative agency was not supported by the evidence, was not arbitrary or capricious, and was not outside the scope of such agency's authority.

We deal first with the question of jurisdiction. Beatrice Manor was a "person aggrieved by a final decision in a contested case" within the meaning of § 84-917. It filed its petition for review as provided for in subsection (2) of that section. It perceived the named defendants as having been "parties of record" and made them parties to these proceedings for review. That subsection requires that "[s]ummons shall be served as in other actions . . . ." In an effort to comply with those requirements, the plaintiff caused summons to be served

on the director of the Department of Health, the chairman of the Certificate of Need Appeal Panel, and the Governor and Attorney General of the State of Nebraska. Special appearances were filed by each defendant and were overruled.

The defendants contend that the state is a necessary party to these proceedings. We have held that an agency which is charged with the responsibility of protecting the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is a necessary or indispensable party in a judicial review of a proceeding such as this. *Leach v. Dept. of Motor Vehicles*, 213 Neb. 103, 327 N.W.2d 615 (1982).

It is also insisted by the defendants that a suit against an agency of the state is a suit against the state. *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939). They argue that because § 84-917(2) provides that "[s]ummons shall be served as in other actions," and we held in *Leach* that the procedure for service of summons on the Governor and Attorney General in certain types of actions is provided for in Neb. Rev. Stat. § 24-321 (Reissue 1979), there is therefore no provision for serving the State of Nebraska in judicial reviews of administrative orders. This, of course, would be an intolerable situation, although we agree that such a position finds some support in *Anstine*.

However, we point out that in *Leach* the state and other defendants objected because service was not had on the State of Nebraska, as provided for in § 24-321. What we did say was that because the director of the Department of Motor Vehicles as a person is charged with a statutory duty of protecting the public interest, and was served with summons, that did not make the review proceeding an action against the State of Nebraska within the meaning of Neb. Rev. Stat. § 24-319 (Reissue 1979).

Except for a decision in this case, the question is now moot because of the passage of 1983 Neb. Laws, L.B. 447, now Neb. Rev. Stat. § 25-510.02 (Cum. Supp. 1984), which provides for service of summons on the Attorney General in all cases in which the state may be made a party. However, for the purpose of this appeal we hold that the phrase "summons shall be served

as in other actions" means, as to the State of Nebraska, any statutory provision for such service on the state, regardless of the type of case, and including the method dictated by § 24-321. To the extent that *Anstine v. State, supra*, is in conflict with this holding, it is overruled.

The question remaining is whether the district court erred in reversing the decision of the Certificate of Need Appeal Panel. Subsidiary to this issue is whether the district court exceeded its scope of review by ruling on the validity of the criteria used by the Department of Health in reaching its decision on the plaintiff's application.

Answering the second question first, the district court did not exceed the scope of its review. Section 84-917(6) and subsection (b) thereof provide that in an appeal of a contested case the district court may reverse or modify an agency's decision if the substantial rights of the petitioner have been prejudiced by a decision which is in excess of the statutory authority or jurisdiction of the agency.

In order to assess the validity of an agency decision, the district court may need to consider the validity of the agency's criterion. In *County of Dodge v. Department of Health*, 218 Neb. 346, 355 N.W.2d 775 (1984), this court considered the validity of the agency's criterion in upholding the district court's reversal of the Nebraska Health Care Certificate of Need Appeal Panel's decision. The appeal panel granted a certificate of need to Memorial Hospital to purchase rather than lease nuclear medical equipment. We found that the appeal panel had adopted a criterion in assessing the cost effectiveness of leasing such equipment which was not required under the enabling statute or the rules of the department. This was impermissible.

> [T]he Department of Health, by its interpretation of § 71-5853, has undertaken to incorporate into the Nebraska Health Care Certificate of Need Act a criterion not found in the statutory framework of the act itself. An administrative agency cannot use its rule-making power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *Cray v. Kennedy*, 230 Kan. 663, 640 P.2d 1219 (1982). As a corollary to the foregoing, an administrative agency cannot interpret its rules and

> regulations in such a manner so that self-interpreted rules and regulations contravene the statute which the agency is obliged to administer.

*Id.* at 354, 355 N.W.2d at 780.

We also found that where the criterion exceeded the agency's statutory grant of power, the reviewing court was free to discard it in considering the outcome of the case. See, also, *School Dist. No. 8 v. State Bd. of Education*, 176 Neb. 722, 127 N.W.2d 458 (1964). This power to review criteria in a contested case predates the acceptance of the Administrative Procedures Act. See *Board of Regents v. County of Lancaster*, 154 Neb. 398, 48 N.W.2d 221 (1951).

The state asserts that all questions of criterion validity must be brought as a declaratory judgment action under Neb. Rev. Stat. § 84-911 (Reissue 1981). This section provides in part:

> (1) The validity of any rule may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County if it appears that the rule or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

However, both the wording of this statute and its interpretation in case law indicate such a declaratory ruling is discretionary with the court. *Millard School District v. State Department of Education*, 202 Neb. 707, 277 N.W.2d 71 (1979). A court may refuse to enter a declaratory judgment where it would not terminate or resolve the controversy. *Millard, supra.*

In the present case a declaratory judgment as to the validity of the 68.6 ratio would not settle the controversy. Beatrice Manor would still need to pursue other litigation in order to have its application accepted. As in *Millard, supra*, the court need not aid such piecemeal adjudication.

Since the district court had the right to consider the validity of the agency's criterion, the greater question is, Were the findings of the appeal panel, based on that criterion, rightfully rejected by the district court in determining whether there was

substantial evidence to support the decision? We think not.

On appeal this court's de novo review is limited to considering whether the agency decision was supported by substantial evidence and whether the district court applied the proper criteria. *McChesney v. City of No. Platte*, 216 Neb. 416, 343 N.W.2d 925 (1984); *The 20's Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 212 N.W.2d 344 (1973); *County of Dodge v. Department of Health*, 218 Neb. 346, 355 N.W.2d 775 (1984); *Lambert v. Nebraska Cr. Vict. Rep. Bd.*, 214 Neb. 817, 336 N.W.2d 320 (1983).

> " '[S]ubstantial evidence' for purposes of administrative review, must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury, and this is something less than the weight of evidence; and the possibility of drawing two inconsistent conclusions from evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

*Weiner v. State ex rel. State Real Estate Comm.*, 214 Neb. 404, 406, 333 N.W.2d 915, 917 (1983); *Wright v. State ex rel. State Real Estate Comm.*, 208 Neb. 467, 304 N.W.2d 39 (1981).

> The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did.

*Simonds v. Board of Examiners*, 213 Neb. 259, 263, 329 N.W.2d 92, 95 (1983).

In applying the substantial evidence standard, the reviewing court is not free to substitute its judgment for that of the appeal panel. See, *McChesney, supra; Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 244 N.W.2d 683 (1976).

The district court found that the criteria used by the agency was in violation of § 71-5857, which provides:

> All criteria established by the department shall distinguish between rural and urban areas as defined by population density to the extent that variable standards will benefit the development of the most appropriate health care system for the health service area.

The district court found that the 68.6-bed ratio made no distinction between rural and urban areas, and therefore the decision based on that criterion could not stand. As such, the decision went beyond the agency's statutory grant of authority and was not supported by substantial evidence. Upon closer examination this conclusion cannot be upheld.

The rules of statutory construction require that all parts of a statute relating to the same subject should be construed together. *State v. Jennings*, 195 Neb. 434, 238 N.W.2d 477 (1976). Looking at § 71-5857 in its entirety, the requirement of different standards in urban and rural areas is qualified. Different standards are required when doing so will benefit the health services of a given area. Agency rules then in force allowed for different standards, as necessary.

Both by rule and practice, the 68.6 ratio is not an absolute. As established in testimony, each area of the state has the option to adjust this figure to its own needs. The Southeast Nebraska Health Systems Agency (SeNHSA), which serves the area including Beatrice Manor, adopted 68.6 only after public discussion of its applicability to southeastern Nebraska.

Neb. Dept. of Health R. 33(5)(a)ii.B. (1980) allowed for individual exceptions even after adoption of the 68.6 ratio, where convincing evidence is shown that the criterion does not accurately reflect the needs of the population to be served.

Exceptions include a showing that the elderly population in a given area varies significantly from other areas; that there has been a population change in an area; that an area has a higher or lower morbidity or mortality rate; or that travel time and distance pose a problem in reaching nursing home facilities.

Viewing the evidence as a whole, there was no convincing showing that an exception to the 68.6-bed ratio should be granted.

The evidence disclosed that as of November 20, 1980, there were 20 residents in the Beatrice Manor service area (30 minutes' traveling distance) waiting for placement in the facility. However, none of these individuals was certified by a physician as needing placement, as required by the department. Only 2 of the 20 were the same names as appeared on a waiting list for the preceding summer months. Further, there was no

showing that these names did not also appear on the waiting lists of the other facilities in the area.

While the evidence showed that the nursing homes in the service area were operating close to capacity, that is as it should be. The state requires that a nursing home must operate at 90 percent of its capacity to maintain its license. Additionally, Beatrice Manor, as well as any other licensed home in the area, is free to expand its capacity either by 10 beds or 10 percent of its existing beds, whichever is less, without state approval. Here, Beatrice Manor is free to add six beds without official sanction.

The evidence presented by Beatrice Manor confused "need" and "demand" for nursing beds. Under the department's guidelines they are not synonymous. "Need" focuses on long-range plans to provide required services to an entire population. It is a quantitative analysis. "Demand" connotes an immediate preference on the part of an individual to live in a particular nursing facility.

An application which only demonstrates a demand without a need cannot be granted. Here, there was no showing by Beatrice Manor that the people on its waiting list required nursing home care or could not be serviced by alternate forms of care such as home nursing, day care, or "Meals on Wheels." Implementing alternate forms of care are part of the department's long-range effort to minimize the need for nursing homes so that they are not considered the only method for caring for the elderly.

Finally, Beatrice Manor urged in its application that a methodology other than the one used by the department be adopted in establishing the proper bed ratio. However, this court will not sit as a super administrative agency and substitute the methodology of an applicant over that developed after considered research by the department. Such would amount to a violation of separation of power. See *Scott v. State ex rel. Board of Nursing*, 196 Neb. 681, 244 N.W.2d 683 (1976).

As Beatrice Manor was not entitled to an exception from the 68.6-bed ratio, the findings based on that ratio should have been considered by the district court.

This court, in considering the findings, determines they are based on substantial evidence sufficient to uphold the decision of the appeal panel.

Under Department of Health rule 33 each application for a certificate of need is analyzed, using 10 criteria. Beatrice Manor's application failed to meet five of these.

Specifically, the application did not meet the needs in the community. The evidence demonstrated that, based on 1980 population projections, there was a need of 2,015 long-term care beds in the six-county area serviced by Beatrice Manor. However, 2,378 beds existed, with an apparent excess of 363 beds. In Gage County alone, where 284 beds were needed, 339 existed, leaving an excess of 55 beds. Most of the excess beds are intermediate-care beds. If the area needed more skilled nursing beds, any number of the excess could be relicensed as such.

Additionally, the service area would not benefit greatly from the addition. At the time the appeal panel met, the evidence indicated that only eight of the residents at Beatrice Manor came from outside Gage County. The new addition would cater primarily to Gage County.

Second, the beds requested exceed the projected number of beds needed to meet the need in the service area. The 68.6-bed ratio established by the state and adopted by SeNHSA was discarded by the applicant as inappropriate. However, other than showing a waiting list of individuals interested in using the facility, there was no convincing evidence of need to the extent that the 68.6 ratio should be disregarded. While Nebraska does have a higher percentage of elderly than most other states, the 68.6-bed ratio reflects that increase. This ratio is consistent with other states having a similar percentage of elderly in rural areas.

Further, the population in Gage County has decreased in the last 10 years. In fact, the migration trends for Gage County show a net loss of elderly needing a nursing home for the years preceding the application. Nothing in the evidence indicates that the present system could not adequately care for the needs of the present population.

Third, the proposed project does not satisfy an identified need for intermediate-care beds in the service area, for the reasons already set forth.

Fourth, there was insufficient evidence to establish that the applicant's plan was the best alternative to solve any existing demand for health care services. There was no information

about the individuals on the waiting list to demonstrate they required nursing beds rather than in-home services.

Finally, the cost factors weighed against implementing the project. The capital cost of $296,331 would be reasonable if there was a need. However, no need was established. Further, in order for Beatrice Manor not to lose its reimbursement funds, it must maintain an 85-percent occupancy rate. In order to do that it would have to keep 11 or 12 of the new beds filled at all times. This would be difficult, considering demand is so much lower in the summer months than in the winter.

In conclusion, the district court erred in rejecting the findings of the appeal panel based on the 68.6-bed ratio criterion. Had the findings been considered, there was substantial evidence to support the panel's decision not to grant Beatrice Manor's application.

The decision of the district court is reversed, and the cause is remanded with directions to affirm the decision of the appeal panel.

REVERSED AND REMANDED WITH DIRECTIONS.

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JUNE MARIE ROBBINS, APPELLEE, V. BRUCE EDWARD ROBBINS, APPELLANT.

361 N.W.2d 519

Filed February 1, 1985. No. 83-901.

1. **Divorce: Child Support: Jurisdiction.** Under Neb. Rev. Stat. § 42-351 (Reissue 1984), where dissolution of a marriage is sought, general jurisdiction over the marital relationship and all related matters, including child custody and support, is vested in the district court in which a petition for dissolution of marriage is properly filed.
2. **Child Support.** Child support orders entered under Neb. Rev. Stat. ch. 42 (Reissue 1984) must recognize and give effect to prior child support orders properly entered under Neb. Rev. Stat. § 43-512.04 (Reissue 1984), so long as such § 43-512.04 orders remain in effect.

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

Herbert M. Sampson III of Sampson, Forney & Dobrovolny, for appellant.

Andrew J. McMullen of McMullen and Lowe, for appellee.

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

PER CURIAM.

June Marie Robbins (petitioner) and Bruce Edward Robbins (respondent) were married on December 7, 1979, in Box Butte County, Nebraska. A child was born to the parties on July 22, 1981. Sometime after the marriage, the parties separated and each established a separate residence in Alliance, Box Butte County, Nebraska. On August 6, 1982, petitioner filed an action against respondent, seeking child support only, under the provisions of Neb. Rev. Stat. § 43-512.04 (Reissue 1984). This petition alleged that petitioner was receiving public welfare assistance. It apparently was prepared by the office of the county attorney in Box Butte County. On August 6, 1982, an agreement was filed in the case, signed by petitioner, respondent, and a deputy county attorney. This document stated in part, "The parties agree that the sum of $100.00 per month is to be paid to the Clerk of the District Court . . . for the support and maintenance of" the parties' child. On the same day, pursuant to a motion of the deputy county attorney, the district court for Box Butte County entered a judgment directing payment of $100 per month child support by respondent to petitioner. This order remains in effect and apparently has been complied with by respondent. It is undisputed that petitioner received public assistance payments for only 1 month and that all child support payments have gone directly to her.

Petitioner moved to Buffalo County sometime later. Respondent remained in Box Butte County. On June 22, 1983, petitioner filed an action in the district court for Buffalo County seeking dissolution of her marriage to respondent, division of property and debts, custody of the child, and child support. Respondent filed an answer generally admitting that the marriage of the parties was irretrievably broken and that the

petitioner was a proper person to have custody of the parties' child, but alleging that the matter of child support had been settled by agreement as reflected in a judgment of the district court for Box Butte County. On August 9, 1983, the district court for Buffalo County ordered temporary support payments of $150 per month and found that respondent should receive credit for any payments made thereafter in the Box Butte County case.

The action for dissolution was tried in Buffalo County. Respondent introduced into evidence, without objection, the record of the file of the proceedings in Box Butte County and took the position that the district court for Buffalo County was bound by the child support judgment in Box Butte County.

On October 26, 1983, the district court for Buffalo County filed its decree of dissolution of the marriage of the parties and provided therein for disposition of the parties' assets, gave custody of the child to petitioner, and ordered respondent to pay $150 per month child support beginning November 1, 1983.

Respondent filed a motion for new trial specifically raising the question that the amount of child support for the child of the parties had been set at $100 per month by the district court for Box Butte County and that the district court for Buffalo County was bound by that determination, which, respondent alleged, was res judicata of that issue between the parties so long as the Box Butte County order remained in effect; and that, in any event, the district court for Buffalo County could not raise the level of child support without a showing of changed circumstances. The motion for new trial was overruled, and this appeal was timely taken. On appeal respondent assigns as error the same issues raised in his motion for new trial. For reasons hereinafter stated we generally affirm the order of the trial court but modify the order for the payment of child support.

Upon the filing of petitioner's petition for dissolution of her marriage to respondent in the district court for Buffalo County, and upon the proper service of process on respondent, the Buffalo County District Court obtained full jurisdiction over the parties and over the subject matter of that litigation. That subject matter is the marriage between the parties and the

requested dissolution of that marriage. The Buffalo County dissolution action was brought under the provisions of Neb. Rev. Stat. §§ 42-347 to 42-379 (Reissue 1984). Section 42-351(1) provides:

> In proceedings under sections 42-347 to 42-379, the court shall have jurisdiction to inquire into such matters, make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children, the support of either party, the settlement of the property rights of the parties, and the award of costs and attorneys' fees.

It is clear that by this statute full and complete general jurisdiction over the entire marital relationship and all related matters, including child custody and support, is vested in the district court in which a petition for dissolution of a marriage is properly filed.

Accordingly, the district court for Buffalo County may make an independent evaluation as to child support, and the need for and amount of such support. This order, however, must take into account and give effect to the earlier child support allowance entered by the Box Butte County District Court. The amount of child support entered in this Buffalo County case is $150 per month. We have reviewed the record de novo and determine that the trial court did not abuse its discretion in setting the child support amount at that figure. See *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). In paying that amount, however, respondent is entitled to credit on such judgment for all amounts paid pursuant to the Box Butte County District Court judgment, so long as that judgment remains in effect. In other words, respondent is to pay a total of $150 per month in child support, and so long as he does so he will satisfy the Box Butte County support order and the Buffalo County support order.

The remainder of the order and judgment of the Buffalo County District Court is affirmed. Costs are taxed to petitioner. Each party shall pay his or her own attorney fees in this court.

AFFIRMED AS MODIFIED.

GRANT, J., dissenting.

I respectfully dissent.

By taking advantage of available Nebraska statutes, petitioner has obtained two judgments against respondent—one in Box Butte County for $100 per month child support and one in Buffalo County for $150 per month child support. The record shows that although respondent is apparently now current on his Box Butte County judgment, he has in the past been cited for contempt of court in both counties for failure to pay child support. This result is obviously not just or equitable, and is not in conformity with Nebraska law.

Petitioner had the Box Butte County judgment in full force and effect when she sought further equitable relief from the district court for Buffalo County by seeking dissolution of her marriage to respondent. The petitioner could have satisfied and obtained a release of the Box Butte County child support judgment, but did not. The respondent could have applied for relief in the Box Butte County District Court, but did not. The district court for Box Butte County could not (except at the request of a party) afford any relief. The district court for Buffalo County could not in any way change the Box Butte County judgment. In this situation I would hold that, while the district court for Buffalo County has jurisdiction over all aspects of the dissolution of marriage case between these litigants, the district court for Buffalo County must give full force and effect to the child support judgment of the district court for Box Butte County as determined by that court pursuant to Neb. Rev. Stat. § 43-512.04 (Reissue 1984).

The Box Butte County District Court had full jurisdiction over the parties, both of whom resided in that county and both of whom subjected themselves to the jurisdiction of the Box Butte County District Court. The Box Butte County District Court also had jurisdiction over the subject matter under § 43-512.04. It is clear that § 43-512.04 is a statute included in article 5 of chapter 43 and that this chapter deals primarily with problems connected with aid to dependent children. Article 5, however, is entitled "Assistance for Certain Children," and expressly covers the situation presented in this case, where a parent has engaged the services of the local county attorney to obtain child support from a parent against whom no

dissolution action is pending. Petitioner received the child support payments under the Box Butte judgment and has not received any further welfare payments. This procedure is specifically referred to in Neb. Rev. Stat. § 43-512.01 (Reissue 1984), which directs the county attorney to file a civil petition against a nonsupporting parent in certain instances, and in Neb. Rev. Stat. § 43-512.02(1) (Reissue 1984), which requires that "the same child support collection . . . services as are provided to dependent children" be made available to "[a]ny child, or any relative of such a child."

Venue in Box Butte County was proper. The Box Butte County judgment is in effect and binding on these parties until such time as it is fully satisfied or otherwise disposed of. While it is in full force and effect, it is a bar to further litigation of the child support issue except as that child support judgment may be modified pursuant to appropriate Nebraska statutes.

It is clear that a child support judgment, whether based on an agreement of the parties or a judgment rendered after trial, may be modified. See, *Gray v. Gray*, 192 Neb. 392, 220 N.W.2d 542 (1974); *Pfeiffer v. Pfeiffer*, 201 Neb. 56, 266 N.W.2d 82 (1978). It is also settled that an application to modify a child support award cannot be heard in a county other than the county in which the child support proceeding is pending, except that the parties may stipulate that a case may be heard in any county pursuant to Neb. Rev. Stat. § 24-734(1)(a) (Cum. Supp. 1984). *Hanson v. Hanson*, 195 Neb. 836, 241 N.W.2d 131 (1976).

I can see no reason to treat a child support judgment rendered under § 43-512.04 any differently than a child support judgment rendered pursuant to Neb. Rev. Stat. § 42-364 (Reissue 1984), or, for that matter, differently than any other judgment. With apologies to Gertrude Stein, "A judgment is a judgment is a judgment." The Legislature has provided two separate procedures through which a child support judgment may be obtained, and the binding effect of child support judgments obtained in either way is conclusive on any later proceedings on the same issue between the same parties. Accordingly, the child support judgment rendered in Box Butte County is res judicata on the child support issue in the later proceedings between the same parties, so long as the Box Butte

County judgment remains in effect. If that judgment is terminated, of course, a different case is presented. So long as the Box Butte County judgment remains prospectively effective, that judgment may be modified only through appropriate procedures in Box Butte County.

I would affirm the judgment of the district court for Buffalo County in all respects, except that I would vacate the portion of the judgment providing for child support. I would tax all costs and attorney fees in this court to petitioner, since it has been the voluntary choice of petitioner to present this problem to two district courts and this court.

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

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STEVEN D. ZALESKI, APPELLANT, V. FARMLAND FOODS, INC., APPELLEE.

361 N.W.2d 523

Filed February 1, 1985. No. 84-137.

1. **Workmen's Compensation: Appeal and Error.** Where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Nebraska Workmen's Compensation Court.
2. **Expert Witnesses.** A conflict or contradiction of expert opinions may arise in the course of testimony given by the same expert witness. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Herbert J. Friedman of Friedman Law Offices, for appellant.

Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

SHANAHAN, J.

Steven D. Zaleski appeals an award on rehearing entered by a

three-judge panel of the Nebraska Workmen's Compensation Court. We affirm.

Zaleski, 27 years old at the time of the rehearing, had worked as a meatcutter since he was 12 years old and went to work for Farmland Foods in April 1978. Shortly after entering employment by Farmland, Zaleski became a hog "gutter," a job lasting 3 or 4 months and consuming 8 to 10 hours each workday. As a gutter, Zaleski used both hands to remove the intestine from incised hog carcasses (apparently elevated but not so indicated in the record). This process required Zaleski to grasp the hog's intestine with his left hand, pull the intestine downward away from the hog's backbone, and use his right hand to loosen the intestine for completion of evisceration with a knife. On an average Zaleski gutted 9 hogs per minute.

While working as a gutter, Zaleski experienced some back problem and transferred to "de-hide," another job with Farmland. As a dehider, Zaleski used a pneumatic knife to skin hog carcasses. Sometime during 1979, Zaleski "got tendinitis" in his right arm and transferred to "the kill floor as a head dropper," where he worked until 1982 when he experienced pain in both hands. All these jobs in varying degree involved some twisting of Zaleski's hands and rotation of arms and shoulders as he manipulated a knife in working on hog carcasses.

On account of the pain in his hands, Zaleski saw an orthopedic surgeon, Dr. Schwab, on February 8, 1982. Dr. Schwab diagnosed Zaleski's problem as a "carpal tunnel syndrome" and performed "carpal tunnel release procedures" on Zaleski's hands on August 9. After surgery for the carpal tunnels Zaleski returned to work in September 1982, but continued occasional treatment with Dr. Schwab, who was concerned about "possible systemic arthritic disease" in Zaleski's hands. At the request of Dr. Schwab a rheumatologist examined Zaleski in November and ruled out any systemic arthritic disease.

On December 1, as a result of "Adson's maneuver" performed by Dr. Schwab, there was an orthopedic diagnosis of a possible thoracic outlet syndrome involving Zaleski's left arm. Adson's maneuver consists of abduction of the arm with a

noticeable absence or disappearance of arterial pulsation as one looks toward the raised arm. A thoracic outlet syndrome is a compression of the "neurovascular bundle between the collarbone, the first rib and the muscles of the neck" and is located in the "hollow space between the collarbone and the large muscle that comes down across the back of the neck and onto the shoulder." Dr. Schwab referred Zaleski to Dr. Collicott, thoracic surgeon.

On December 15 Zaleski was examined by Dr. Collicott, who prescribed physical therapy as an alternative to the "last resort," surgery. After Zaleski failed to respond to physical therapy, Dr. Collicott performed a first rib resection on Zaleski on July 8, 1983. A first rib resection is a total removal of the first rib and division of the muscles attached to the first rib in order to enlarge "the space that the neurovascular bundle traverses." As a part of his surgical record concerning Zaleski, Dr. Collicott noted "an anomalous anterior scalene muscle." According to Dr. Collicott, an anomalous muscle was "an anatomical structure that is not normal and would have the connotation of being congenital."

After surgery on Zaleski to alleviate the thoracic syndrome, Dr. Collicott evaluated Zaleski's permanent disability as 5 percent to the body as a whole. On account of such permanent disability Zaleski was unable to return to his meatcutting job at Farmland and requested rehabilitation.

Farmland conceded that all aspects of care, treatment, and disability pertaining to Zaleski's carpal tunnels are compensable under the Nebraska Workmen's Compensation Act, but has denied compensability of any aspect of Zaleski's thoracic outlet syndrome.

As a result of the hearing before a solitary judge of the Nebraska Workmen's Compensation Court, Zaleski received an award for, among other items, permanent disability, medical expenses, and rehabilitation on account of his thoracic outlet syndrome. On rehearing, the three-judge panel of the Nebraska Workmen's Compensation Court modified the one-judge award by disallowing any recovery or rehabilitation in connection with the thoracic outlet syndrome. The three-judge panel held: "We necessarily find that the plaintiff has failed to

establish by a preponderance of the evidence that his thoracic outlet syndrome resulted from an accident arising out of and in the course of his employment."

As errors, Zaleski claims that an award in his favor should include a recovery of medical expenses for the first rib resection necessitated by the thoracic outlet syndrome, as well as an order for rehabilitation and benefits due on account of Zaleski's alleged loss of earning power.

In his deposition offered at the rehearing, Dr. Collicott acknowledged that Zaleski's anterior scalene muscle and subclavian muscle were attached in an abnormal position to Zaleski's first rib, indicative of a congenital situation, and that such muscles were being used "in a different manner than . . . was accustomed to being used in a normal individual." Dr. Collicott concluded that the congenital problem, taken with Zaleski's occupation, "certainly could contribute" to the cause of Zaleski's thoracic outlet syndrome. In addition to the anomalous condition involving muscle attachment to the rib, Dr. Collicott also noted an enlargement of the scalene muscles in Zaleski's neck. The enlarged muscle produced compression of the neurovascular bundle. In Dr. Collicott's opinion, the cause of muscle enlargement was the occupational movements of Zaleski, or, simply, Zaleski's job enlarged the scalene muscle. Dr. Collicott's testimony also included the following:

> Q Well, is the muscle large because it is congenitally large or is it large because of his occupation?
>
> A I cannot say.
>
> Q So is it true that you really can't say what caused the anomalous muscle situation in regard to Mr. Zaleski?
>
> A The anomalous muscle situation, that is to say, their position, was there at the time of birth.
>
> Q So that wouldn't have anything to do with twisting or lifting or stretching or anything?
>
> A No.
>
> . . . .
>
> Q So is it true that you really can't say with a reasonable degree of certainty which of these two causes [anomalous attachment of muscle or enlarged muscle] is the main contributory cause to the thoracic outlet

syndrome?

A No, not really.

Therefore, although Dr. Collicott, at one point in his testimony, expressed an opinion that Zaleski's thoracic outlet syndrome was the result of work-related enlargment of muscle, Dr. Collicott also acknowledged that he could not state whether the muscle enlargement was caused by Zaleski's occupation. In such posture Dr. Collicott's testimony contained a contradiction or conflict about the cause of the muscle enlargement as a component in Zaleski's thoracic outlet syndrome.

We have repeatedly held that where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court. See *Doty v. Aetna Life & Casualty*, 217 Neb. 428, 350 N.W.2d 7 (1984).

A conflict or contradiction regarding an expert's opinion need not result from opinions expressed by different experts. A conflict or contradiction of opinions may arise in the course of testimony given by the same expert witness. A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact. "Where the testimony of the same expert witness given at different times is conflicting, it rests with the trier of fact to resolve the conflict, at least where the conflict does not arise out of bad faith motives." *Doggett v. Brunswick Corp.*, 217 Neb. 166, 169, 347 N.W.2d 877, 880 (1984). Consequently, it was the function of the compensation court, as the trier of fact, to resolve any conflict pertaining to Dr. Collicott's opinions about causation of Zaleski's condition. The compensation court resolved the conflict by deciding that testimony from Zaleski's medical expert failed to establish causation of the claimed injury. 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. See, Neb. Rev. Stat. § 48-185 (Reissue 1984); *Tranmer v. Mass Merchandisers*, 218 Neb. 151, 352 N.W.2d 610 (1984).

Under the circumstances the finding of the compensation court, namely, that Zaleski failed to prove a work-related cause

of his injury, is binding on this court. The award upon rehearing in the Nebraska Workmen's Compensation Court is in all respects affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. JAY D. JOST, APPELLANT.

361 N.W.2d 526

Filed February 1, 1985. No. 84-144.

1. **Motor Vehicles: Licenses and Permits: Revocation.** The gravamen of or the misconduct prohibited by Neb. Rev. Stat. §§ 60-418 and 39-669.30 (Reissue 1984) is operation of a motor vehicle after judicial or administrative deprivation of the operator's privilege or license to operate a motor vehicle on the public highways of the State of Nebraska.
2. **Constitutional Law: Criminal Law: Right to Counsel: Waiver.** An accused is entitled to be represented by counsel in all critical stages of a criminal proceedings against him, but the right to counsel may be waived, if such waiver is made intelligently and understandingly with the knowledge of an accused's right to counsel.
3. _____: _____: _____: _____. A defendant has a constitutional right of self-representation and may proceed to defend himself without counsel, when he voluntarily, understandingly, and intelligently elects to do so.
4. **Pleas: Appeal and Error.** Mere failure to comply with precise ceremonial or verbal formality in arraignment and entry of a plea is not so prejudicial as to require setting aside a defendant's guilty plea which is otherwise entered in accordance with statutory and constitutional requirements.

Appeal from the District Court for Keya Paha County: EDWARD E. HANNON, Judge. Affirmed.

Rodney J. Palmer of Palmer & Kozisek, for appellant.

Paul L. Douglas, Attorney General, and Henry M. Grether III, for appellee.

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

SHANAHAN, J.

In the county court for Keya Paha County, Jay D. Jost was convicted of the offense of operating a motor vehicle during a

period when the operator's license of Jost was suspended. See Neb. Rev. Stat. §§ 60-418 and 60-430.01 (Reissue 1984). On appeal to the district court Jost's conviction was affirmed. We affirm.

Jost assigns as error the county court's (1) failure to obtain from Jost and expressly find a voluntary, understood, and intelligent waiver of the right to counsel; (2) failure to provide an attorney for Jost; and (3) acceptance of a plea of guilty to an act not committed, namely, Jost's guilty plea to the charge of operating a motor vehicle during a period of his suspended operator's license, whereas the driver's license of Jost had been revoked, not suspended.

Jost was initially charged with driving under suspension and driving under the influence of alcohol (Neb. Rev. Stat. § 39-669.07 (Reissue 1984)). Both counts arose as a result of one driving incident in which the Keya Paha County sheriff arrested Jost on May 16, 1982. The facts set forth were elicited when the county court sought a factual basis for Jost's "guilty" plea.

On October 22, 1980, and pursuant to the "point system" authorized by Neb. Rev. Stat. §§ 39-669.26 and 39-669.27 (Reissue 1984), the director of the Department of Motor Vehicles of the State of Nebraska revoked Jost's operator's license on account of a proscribed accumulation of points for traffic offenses.

In the early hours of May 16, 1982, and while the revocation of the Department of Motor Vehicles was still effective, Jost was seated in the right front seat of an automobile in the middle of the main street of Springview, Nebraska. The person who drove the auto to such location was not in the car with Jost at this time. Upon observing a car's headlights approaching from the rear, Jost slid behind the steering wheel and drove the car to the side of the street. The car approaching from the rear was driven by the sheriff, who saw Jost operating the automobile. Because he was not in uniform at this time, the sheriff returned to his home, changed into his uniform, and set out to find Jost. Jost and his driver-companion had traveled south out of Springview for several miles, where the driver stopped the car when its headlights failed. Approximately one-half hour after his initial contact with Jost, the sheriff arrived at the unlighted

and parked vehicle containing Jost and his companion. The sheriff then issued a "Uniform Citation and Complaint" charging Jost with two offenses, namely, "Driving under Suspension § 60-430.01," and "Driving under Influence of Alcohol 2nd offense § 39-669.07."

Jost's attorney arranged a plea bargain with the county attorney, that is, dismissal of the charge of driving while under the influence of alcoholic liquor in exchange for Jost's plea of guilty to the charge of driving under suspension. After obtaining the plea agreement but before Jost's arraignment, the attorney for Jost withdrew. Jost was arraigned on December 17, 1982, in the county court. At the arraignment the court reminded Jost that his attorney had withdrawn and told Jost that if Jost wanted to be represented by an attorney, such wish should be indicated to the court. The court also informed Jost about the availability of court-appointed counsel, if Jost was "unable to afford [his] own attorney." The court then elaborated the rights accorded Jost, including the right to a jury trial, confrontation of witnesses, and the privilege against self-incrimination. Next, the court explained the consequences of the various pleas which Jost could enter and the penalty which could be imposed on conviction. See § 60-430.01 and Neb. Rev. Stat. § 28-106 (Reissue 1979) (Class III misdemeanor). The county judge informed Jost that he was charged with "driving under suspension" and that the State was required to prove by evidence beyond a reasonable doubt that Jost was "driving an automobile on May 16, 1982, after your license was suspended." After the court's inquiry about the nature of his plea to the charge of driving under suspension, Jost entered a plea of guilty. When the court asked the county attorney about the factual basis for the charge against Jost, the county attorney recited the previously described events of May 16 and referred to an abstract of Jost's driving record reflecting revocation of Jost's driver's license "for points" on October 22, 1980, with no reinstatement of Jost's operator's privileges at the time the sheriff saw Jost drive the car on the Springview street. The court then inquired of Jost: "Is it all correct what he [the county attorney] said, basically?" Jost responded: "Yeah. What he says is correct." The court deferred sentencing until April 15,

1983. At the sentence hearing Jost was asked by the judge whether he had decided to have an attorney present. Jost responded: "Yes, I don't need one present." The county judge then imposed sentence on Jost, who appealed to the district court and ultimately to this court.

At the time Jost operated the auto on the public street in Springview, pertinent statutes of Nebraska provided:

> Any resident or nonresident whose operator's license or right or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this act, shall not operate a motor vehicle in this state under a license, permit or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained when and if permitted under this act, except that such persons shall be eligible to operate a motor vehicle under an employment driving permit as provided by section 39-669.34.

§ 60-418.

> Whoever violates the provisions of sections 60-401 to 60-430 shall be deemed guilty of a Class III misdemeanor, unless the act committed is by law declared to be a felony. Any person convicted of operating a motor vehicle in violation of any order of suspension or revocation of his license or privilege to operate a motor vehicle by either any court or the Director of Motor Vehicles, or after such suspension or revocation and before reinstatement of the license or issuance of a new one, shall be guilty of a Class III misdemeanor.

Neb. Rev. Stat. § 60-430 (Reissue 1984).

> Any person who shall be convicted of operating a motor vehicle during any period that his or her motor vehicle operator's license has been suspended or revoked pursuant to any law of this state, or after such suspension or revocation but before reinstatement of his or her license or issuance of a new license shall: (1) For a first such offense, be guilty of a Class III misdemeanor, and the court shall, as a part of the judgment of conviction, order such person not to operate any motor vehicle for any

> purpose for a period of one year from the date of final discharge from the county jail, or the date of payment or satisfaction of any fine imposed, whichever is later; . . . .

§ 60-430.01.

> It shall be unlawful to operate a motor vehicle on the public highways after revocation of an operator's license or privilege revoked under the provisions of sections 39-669.26 to 39-669.30, except that a motor vehicle may be operated under an employment driving permit as provided by section 39-669.34. Any person who violates the provisions of this section shall be guilty of a Class III misdemeanor.

Neb. Rev. Stat. § 39-669.30 (Reissue 1984).

> Revocation of operator's license shall mean the termination by a court of competent jurisdiction or by formal action of the department of a person's license or privilege to operate a motor vehicle on the public highways, which termination shall not be subject to renewal or restoration except that an employment driving permit may be issued as provided by this act. Application for a new license may be presented and acted upon by the department after the expiration of the applicable period of time prescribed in the statute providing for revocation.

Neb. Rev. Stat. § 39-602(80) (Cum. Supp. 1982).

> Suspension of operator's license shall mean the temporary withdrawal by a court of competent jurisdiction or by formal action of the department of a person's license or privilege to operate a motor vehicle on the public highways for a period specifically designated by the court or department. An employment driving permit shall be issued following suspension as provided in this act.

§ 39-602(102).

The gravamen of or the misconduct prohibited by § 60-418 and § 39-669.30 is operation of a motor vehicle after judicial or administrative deprivation of the operator's privilege or license to operate a motor vehicle on the public highways of the State of Nebraska. See *Middleton v. State*, 214 Miss. 697, 59 So. 2d 320 (1952).

In *State v. Ruggiere*, 180 Neb. 869, 146 N.W.2d 373 (1966),

this court held that amendment of a questioned complaint by substitution of "revocation" for "suspension" was permissible, and noted at 872, 146 N.W.2d at 375: "Distinctions between suspension and revocation in *other* contexts are often crucial." (Emphasis supplied.) One difference between "revocation" (§ 39-602(80)) and "suspension" (§ 39-602(102)) lies in the potential duration of deprivation of a driver's license or operator's privilege. In the case of suspension there is deprivation for a definite time, while in the case of revocation the deprivation endures for an undefined time. Also, revocation contemplates the necessity of a new license at expiration of the revocation. Any distinction in the statutes is not based upon the prohibited misconduct, which in essence is identical and equally offensive under the statutes discussed.

In *State v. Kotz*, 337 N.W.2d 530 (Iowa 1983), the Supreme Court of Iowa held that a defendant can be prosecuted and convicted on a charge of driving under license suspension, although such defendant's license had been revoked, not suspended. In *Kotz* the court found every pertinent point in the Iowa statute prohibiting driving during a suspended license was also included in the statute prohibiting driving during revocation of a license. The same situation exists with respect to the corresponding Nebraska statutes involved in Jost's case. In agreeing with the conclusion reached in *Kotz*, we find the observations and comments by the Iowa Supreme Court most appropriate: "While law enforcement should use these terms accurately, there is no indication that the defendant was prejudiced in any way. Further, the two terms function similarly here." *Id.* at 532.

> In criminal proceedings the complaint, information, or indictment is constitutionally sufficient (1) if there is a correct statement of the elements of the offense charged so that a defendant knows the charge against which he must defend, and (2) if the formal, written accusation (complaint, information, or indictment) enables the defendant to plead an acquittal or conviction in bar of any future prosecution for the same offense.

*State v. Turner*, 218 Neb. 125, 129-30, 354 N.W.2d 617, 621 (1984).

The sheriff's citation-complaint accused Jost of operating a motor vehicle after and while Jost's driver's license or operator's privilege had been withdrawn by proper authority. The State was required to prove by evidence beyond a reasonable doubt the elements of the offense, namely, that Jost did operate a motor vehicle on a public highway when Jost's driver's license or operator's privileges had been taken away by some lawful authority. Consequently, there was nothing prejudicially deceptive about the form or content of the citation concerning Jost. Although the terms "suspension" and "revocation" were used interchangeably in this case, such misuse did not rise to the stature of sufficient prejudice to warrant reversal of the judgment entered in the county court.

Although an accused is entitled to be represented by counsel in all critical stages of a criminal proceedings against him, including sentencing, *State v. Harig*, 192 Neb. 49, 218 N.W.2d 884 (1974), it has long been the rule in the State of Nebraska that the right to counsel may be waived if such waiver is made intelligently and understandingly with the knowledge of an accused's right to counsel. *State v. Morford*, 192 Neb. 412, 222 N.W.2d 117 (1974). A defendant has a constitutional right of self-representation and may proceed to defend himself without counsel, when he voluntarily, understandingly, and intelligently elects to do so. In *Faretta v. California*, 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975), the U.S. Supreme Court held:

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law." *Illinois v. Allen*, 397 U.S. 337, 350-351 [90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)] (Brennan, J., concurring).

The record in its entirety discloses that the waiver by Jost regarding his right to counsel was voluntarily, understandingly, and intelligently made. See, *State v. Tweedy*, 209 Neb. 649, 309

N.W.2d 94 (1981); *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984).

Concerning a determination or finding that there was a factual basis for Jost's "guilty" plea, it is true that the county judge never expressly stated that he found a factual basis for the plea. In the present state of the criminal justice system, one would have thought that all approved requirements for valid entry of a guilty plea would be carried out almost as a matter of second nature. Apparently, such is not the case, as reflected by the appeal before us. Determination whether a factual basis exists benefits defendant and the criminal justice system alike. First, such determination insures that a defendant actually committed an offense at least as serious as the one to which he is willing to plead guilty. Second, judicial inquiry into a factual basis for a plea provides a more adequate record of the conviction process, minimizing the necessity of overturning a conviction due to impermissible irregularities in entry of a plea. Third, inquiry provides a court with a sound basis to evaluate a defendant's competency, willingness to plead guilty, and understanding of the accusation or charge against the defendant. Cf., *State v. Hyslop*, 189 Neb. 331, 202 N.W.2d 595 (1972); *State v. Hill*, 204 Neb. 743, 285 N.W.2d 229 (1979); ABA Standards Relating to Pleas of Guilty § 1.6 (1982). In any event, the necessary elements constituting a factual basis for Jost's guilty plea do appear in the record. Implicit in imposition of sentence on Jost was the county judge's determination that a factual basis existed for the plea precedent to imposition of sentence. We reiterate that any arraignment and entry of plea should contain an express statement by the court that a factual basis does exist for disposition of the accusation pursuant to a defendant's plea. However, mere failure to comply with precise ceremonial or verbal formality in arraignment and entry of a plea is not so prejudicial as to require setting aside a defendant's guilty plea which is otherwise entered in accordance with statutory and constitutional requirements. Cf., *State v. Jones*, 218 Neb. 382, 355 N.W.2d 227 (1984) (a defendant's failure to specifically state "I plead guilty" does not vitiate a proper entry of plea to the charge); *Mayes v. United States*, 177 F.2d 505 (8th Cir. 1949).

Upon a review of the entire record of the proceedings against Jost, we find that no substantial miscarriage of justice has occurred regarding the proceedings and judgment resulting in Jost's conviction in the county court. Cf. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) ("harmless beyond a reasonable doubt").

The judgment of the district court is affirmed.

AFFIRMED.

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MARY LAINSON, APPELLEE AND CROSS-APPELLANT, V. ROGER LAINSON, APPELLANT AND CROSS-APPELLEE.

362 N.W.2d 53

Filed February 1, 1985. No. 84-260.

1. **Child Support.** In determining the amount of child support to be ordered, the trial court must take into consideration the status, character, and situation of the parties and attendant circumstances, including the financial condition of the party making the payments and estimated costs of support of the children.
2. **Child Support: Appeal and Error.** The amount of child support ordered in a dissolution of marriage action is initially left to the sound discretion of the trial judge and is reviewed de novo on the record in this court and affirmed in the absence of an abuse of discretion.

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

Jay L. Welch of Rickerson & Welch, for appellant.

Peter C. Bataillon of Sodoro, Daly and Sodoro, for appellee.

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

GRANT, J.

This appeal is from an order modifying an earlier modification of a dissolution of marriage decree. The record shows that petitioner-appellee, Mary Lainson, and respondent-appellant, Roger Lainson, were married on April 30, 1966, and a boy was born of that marriage on February 20,

1967. The parties were divorced by decree entered by the district court for Douglas County, Nebraska, on August 26, 1971. At that time the court deferred the decision as to permanent custody of the child and awarded possession of the child to Mary. The court also ordered "that if any social security benefits are due to [the child], as a result of defendant's physical condition, defendant [Roger] is ordered to pay the same to plaintiff [Mary] as child support."

By application filed January 19, 1979, Roger sought permanent custody and possession of the child. Roger alleged in that application that there had been a change of circumstances in that he had remarried and owns his own home and can give said "minor a stable and rewarding home life." After hearing, the court modified the divorce decree by order entered March 11, 1980. This modification granted custody and possession of the minor child to Roger, and further ordered that "the defendant [Roger] shall hereafter have no duty to make any child support payments for the support of [the minor child] and defendant shall be entitled to any Social Security benefits payable hereafter for the benefit of the Minor."

On May 16, 1983, Mary filed an application for modification of the decree, seeking to change custody of the minor from Roger to herself and asking for child support. Mary alleged the circumstances had again changed in that the minor child, then age 16, had voluntarily moved from Roger's residence to Mary's residence and desired to stay with Mary. Mary also requested child support. Roger resisted this application, alleging that the minor child should stay with him for the child's best interests, notwithstanding the minor's desires, and further requesting that Mary's visitation privileges be terminated.

After hearing, the trial court, on December 23, 1983, entered an order granting Mary custody of the minor and reserving decision on the issue of child support, fees, and costs, including the cost of an expert witness at the hearing. By amendment (filed with the permission of the court) to his response to Mary's application, Roger alleged that he was without any earning capacity whatsoever because he was "a permanently totally disabled quadraplegic [sic] and that the Court is without

authority to order the Respondent to pay support for the parties' minor child from the income or assets of the Respondent." Roger further alleged that Mary was entitled only to Social Security benefits payable for the benefit of the parties' minor child.

On January 13, 1984, the trial court entered its order finding

> that while the Respondent is not capable of earning a wage, he does have such earning capacity as is contemplated by Neb. Rev. Stat. §42-264(3) (1982 Cum. Supp.).
>
> As to the claim of credit or offset by virtue of the Social Security payments, the sole consideration provided by the statute quoted above is the earning capacity of each parent. The income of the child or payments to him from a source other than from the parents is not a factor I may consider under the statute in determining the amount of child support to be paid by a parent.

This appeal is from the trial court's order of January 13, 1984. Roger alleges that the court erred (1) in determining that a permanently, totally disabled person has earning capacity as defined in Neb. Rev. Stat. § 42-364(3) (Reissue 1984); (2) in determining that Social Security benefits paid for the support of a minor child because of the present disability of the child's parent are not a substitute for the earning capacity of the disabled parent; and (3) in determining that

> Social Security disability payments made for the specific benefit of a child as a result of the disability of a parent were a collateral source and could not be either a) considered in determining the amount of child support to be paid by the disabled parent, or b) credited against any child support obligation or judgment.

For the reasons hereinafter set out we affirm the trial court's order but alter the trial court's findings.

The evidence adduced at the hearing on Mary's application showed that Roger is a totally disabled quadriplegic. The date of Roger's injury is not shown in the record, but the record indicates that he was injured at the time of the dissolution of the marriage between the parties in 1971 and that at some time between the divorce in 1971 and Roger's application to change

custody of the child in 1979, Roger received a sum of money because of the serious injuries resulting in his present condition. At the time of the hearing Roger was remarried and had two children of that marriage.

Evidence adduced further showed that at the time of the hearing on Mary's application, Roger had capital assets of $205,000, principally invested in stocks and bonds. He also had a home, subject to a mortgage in some amount less than $14,000, and a van and an automobile equipped for him to operate. The evidence showed that Roger received $12,117 gross income from his investments in 1980, $15,759 in 1981, and $5,550 in 1982. Roger also received $989 each month from Social Security benefits, which amount included $252 for the two children living with him. Roger submitted an exhibit predicated on his monthly Social Security benefits plus his investment income (which he estimated at $500 per month) showing he spent approximately $50 more each month than he received. He projected that in 1986 when, the evidence showed, the child of Roger and Mary would complete high school, Roger's capital balance would have been reduced to $187,000.

The evidence also shows that Mary remarried about 4 years after her divorce from Roger and that she had one child of that second marriage. The record indicates that her second marriage ended in divorce and that Mary receives $200 per month as child support for her second child. Mary also receives $126 per month as support for the child of Mary and Roger in Social Security benefits as a result of Roger's physical condition. Mary also has take-home earnings from two jobs as a waitress, and from telephoning work in her home. She also rents a room in her home to a young woman, on the average of 6 months a year. Mary testified she had available funds each month from all sources of $886 and that her monthly expenses were $967.

The trial court's determination that Roger should pay $125 per month child support, in addition to the monthly Social Security benefits of $126 for the minor, was based on the foregoing evidence.

We turn first to the issue of whether Roger had earning capacity within the meaning of § 42-364(3). The trial court found that earning capacity was the only factor it could

consider in determining the amount of child support to be paid. The court also found that while Roger "is not capable of earning a wage," his investments constituted an "earning capacity." The trial court also determined that payments to a child "from a source other than from the parents is not a factor [which the court could] consider under the statute in determining the amount of child support to be paid by a parent." Based on this reasoning, the trial court ordered Roger to pay $125 per month child support. While the court's expressed reasoning is not correct, we determine, for the reasons set out below, that the court reached a correct determination. This court will not reverse a proper result because it was based on incorrect reasoning. *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983).

We agree with the trial court that, under the evidence presented at the hearing, Roger is not at this time capable of earning a wage but that he does have earning capacity within the meaning of § 42-364(3). Obviously, different cases may present different facts with regard to the wage-earning capacity of a person disabled as Roger is. The statute in question, however, does not limit child support payments to be paid only from wages. Section 42-364(3) states in part that "[i]n determining the amount of child support to be paid by a parent, the court shall consider the earning capacity of each parent." It has been the law of this state for many years that, as stated in *Brus v. Brus*, 203 Neb. 161, 164-65, 277 N.W.2d 683, 686 (1979), "[i]n determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account . . . ." That statement should be broadened to include that the circumstances referred to should be consideration of the financial condition of the parent making the child support payments. See, also, *Lockwood v. Lockwood*, 205 Neb. 818, 290 N.W.2d 636 (1980); *Lynch v. Lynch*, 195 Neb. 804, 241 N.W.2d 123 (1976); *Hermance v. Hermance*, 194 Neb. 720, 235 N.W.2d 231 (1975). "Earning capacity" as used in § 42-364(3) means the overall capability of a parent to make child support payments based on

the overall situation of the parent making such payments. That overall situation includes moneys available to the parent from all sources, including investment income. The trial court properly determined the amount of child support by taking into consideration the status, character, and situation of the parties and attendant circumstances, including the financial condition of the party making the payments and estimated costs of support of the children.

With regard to Roger's other two assignments of error, that is, the effect of Social Security benefits on court-ordered child support payments, the same rationale applies. When the court considers the earning capacity of each parent, it must consider the factors set out above. The "situation of the parties" and the "attendant circumstances" of the parties include the admitted fact that Mary is receiving $126 per month for the parties' minor child from Social Security benefits. In the absence of that amount the court may well have ordered higher monthly support payments, or if the benefit payments were higher, the court might well have ordered lower support payments from the father of the child.

Roger urges that the trial court erred in refusing to credit the Social Security payments received by Mary on the child's behalf against his support obligations, and relies on *Schulze v. Jensen*, 191 Neb. 253, 214 N.W.2d 591 (1974). Mary argues that *Schulze* differs from the case at hand. We agree that the *Schulze* case differs from this case.

In *Schulze* the parties were divorced and the father was ordered to pay child support in the amount of $260 per month. Sometime after the divorce decree, the father was disabled in an auto accident. When he fell behind in support payments, his former wife brought an action to recover them. He claimed that he was entitled to a credit of over $8,000 for Social Security payments made to the children on account of his accident. The trial court agreed and we affirmed.

*Schulze*, however, differs from the instant case. In *Schulze* the father was injured after child support amounts had been set by the court. The court there decided that "in the context of this case" the payments were a substitute for the father's support obligation. *Id.* at 257, 214 N.W.2d at 594. Here, Roger was

injured prior to the court's determination of support obligation. The court was fully cognizant of Roger's disability and of the Social Security payments being made on the child's behalf. Knowing this, it ordered support in addition to the benefit payments. In so doing the trial court was considering the overall situation of both parents and the child. The amount of child support ordered in a dissolution of marriage action is initially left to the sound discretion of the trial judge and is reviewed de novo on the record in this court and affirmed in the absence of an abuse of discretion, even though the judge used incorrect reasoning in reaching his determination. The trial court did not abuse discretion. See *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984).

Finally, we turn to the claim on cross-appeal, that the trial court's award of $650 for an attorney fee was clearly inadequate. This claim is without merit. That amount was awarded for a hearing of less than 3 hours, and preparation therefor. The awarding of attorney fees in a hearing on modification of a dissolution decree is a matter within the trial court's initial discretion and, while reviewed de novo in this court, will be affirmed in the absence of an abuse of the trial court's discretion. *Guggenmos v. Guggenmos, supra.* There was no abuse of discretion here.

Appellee is awarded $400 for attorney fees in this court.

AFFIRMED.

SHANAHAN, J., concurs in the result.

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STATE OF NEBRASKA, APPELLEE, V. LORAY S. SMITH, ALSO KNOWN AS LARIE JOHNS, ALSO KNOWN AS MARLA WILSON, APPELLANT.

361 N.W.2d 532

Filed February 1, 1985. No. 84-493.

1. **Directed Verdict.** In a criminal case the trial court may properly direct a verdict of not guilty only where there is a total failure of competent proof to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be

sustained.

2. **Convictions: Appeal and Error.** In reviewing the sufficiency of the evidence supporting a finding of guilt, this court neither determines the plausibility of explanations nor weighs the evidence, such matters being for the trier of fact; the conviction must be sustained if, viewing the evidence most favorably to the State, there is sufficient evidence to support it.
3. **Verdicts: Appeal and Error.** A jury verdict of guilty will not be overturned on appeal unless it is so lacking in probative force that it can be said as a matter of law that the evidence was insufficient to support it.
4. **Homicide: Proof: Intent.** Proof of a purpose to kill is not required to establish felony murder because it is not an element of the crime. The only intent required is the intent to do the act which constitutes the felony during which the killing occurred.
5. **Criminal Law: Jury Instructions: Witnesses: Convictions.** Where the jury has been properly instructed that the testimony of an accomplice should be scrutinized closely for possible motives of falsification, the uncorroborated testimony of an accomplice who has given false testimony concerning a material matter may be sufficient to sustain a conviction.

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

Anthony S. Troia, for appellant.

Paul L. Douglas, Attorney General, and Bernard L. Packett, for appellee.

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

CAPORALE, J.

Loray S. Smith, also known as Larie Johns and Marla Wilson, appeals her conviction, following a trial by jury, of the first degree felony murder of Laura LaPointe. Smith assigns as error the trial court's failure to dismiss the charge against her or, in the alternative, to direct a verdict in her favor. We affirm the conviction which resulted in a sentence of imprisonment for life.

The victim's mutilated corpse was found by a passer-by beside the Canyon Road in the Hummel Park area of Douglas County on Monday morning, April 11, 1983. The death was caused by injuries resulting from multiple blows from a blunt instrument to the head and to many other parts of the body. The victim had been a prostitute in Omaha, and after an

investigation by the police, suspicion was focused on four other Omaha prostitutes.

On June 28, 1983, the police began arresting the four suspects. One of these suspects, Geraldine Carr, became the State's primary witness against Smith. Carr's testimony revealed to the jury that she was a prostitute and had also been charged with first degree murder as a result of the same incident. She was awaiting sentence and testified that "no promises of leniency" had been given to her. She then described how she, Smith, and two other prostitutes, Carol Joy and Jo Helen Robertson, first robbed the victim and then beat her to death. Joy's conviction was overturned and the cause remanded for further proceedings in *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984).

More specifically, Carr testified that at about 10 p.m. on April 10, 1983, a Sunday, she drove to the downtown area of Omaha in order to ply her trade. Smith joined Carr in the latter's automobile and the two sat and talked, being joined a short time later by Joy and Robertson. The four then went to a liquor store, purchased a bottle of brandy to share, and returned to the downtown area. According to Carr, while sitting in her automobile and drinking the brandy, they all decided to "rob us a trick." While this discussion was going on, the victim walked by. Smith then called the victim over to the automobile and asked how business had been. When the victim replied that she had had "four or five dates," the four looked at one another, from which Carr "assumed that we could rob" the victim. Smith then invited the victim into the automobile. The victim entered and sat in the back seat between Joy and Robertson.

After Carr drove away from the downtown area, Robertson told the victim that she was being robbed. When the victim replied she had no money, Robertson made her take off her coat and jeans and proceeded to look through them. Joy then checked the victim's clothes, followed by Carr and Smith. During this search, Joy found $25, which Carr snatched, giving Joy $5 and keeping $20 for herself. Robertson took a necklace from the victim, obtained a razor from Joy, and began cutting the victim's hair.

Carr further testified that after the victim told Robertson she had some more money in her hotel room, Joy and Smith got out of the automobile to search the room, but they became frightened and returned to the vehicle before they had made any search. Following this unsuccessful attempt to obtain more money, Robertson began hitting the victim, who then told Robertson if the hitting stopped she would "turn a trick" and give the money to Robertson. Robertson left the car but was unsuccessful in locating a "trick."

Carr further testified that Robertson made the victim perform an act of oral sex on Joy while Carr, Smith, and Robertson watched from the front seat. While this activity was in progress, Robertson hit the victim on the head with Joy's razor, causing the victim to bleed. Carr slapped the victim across the face for bleeding in her car and then gave the victim a blanket to stop the bleeding.

On the way to Hummel Park another bottle of brandy was purchased, but Carr could not remember who went into the liquor store to buy it. They reached Hummel Park after 1 a.m. Once at the park, all five got out of the automobile. Robertson then began hitting the victim, grabbing from Carr the stick which Carr had planned to use for that purpose. Carr also testified that Smith was holding the brandy bottle and said she was going to hit the victim with it. Smith never did this, however, since at Carr's suggestion Carr and Smith got back into the car. Joy then began kicking the victim.

Carr testified that while sitting in the car she asked Smith whether she should leave Robertson, Joy, and the victim. Smith replied that it was Carr's automobile and, therefore, it was up to Carr. Carr did not leave, and Robertson and Joy later got back into the vehicle, leaving the victim in the ditch. Once in the automobile, Robertson and Joy decided they might just as well kill the victim. This time Robertson, armed with a baseball bat, and Joy got out of the car. Robertson beat the victim with the bat, and Joy used the stick. After Joy also beat the victim with the bat, Robertson and Joy got back into the automobile and the four perpetrators started to drive off. They went back, however, so that Robertson could check to see if the victim was dead.

Carr also testified that Smith had thrown out the victim's shoes, jeans, coat, and purse. However, everything but the shoes was retrieved and later disposed of by Smith and the others in a trash dumpster behind a restaurant. The shoes were later found by police near the scene. The perpetrators agreed not to say anything about the incident to anyone.

Smith's testimony was basically similar to Carr's concerning the group's movements, but Smith said that there was no talk of any robbery while she was in the automobile, that she did not assist in any robbery, that she did not view any sexual activity, that she did not attempt to strike the victim with any bottle, that she never got out of the automobile after it became evident that the victim was going to be robbed, and that she never threw out any of the victim's clothing or personal effects.

More specifically, Smith testified that Joy was the one who invited the victim into the automobile, that Smith never got out of the automobile to go into the victim's hotel room, that the reason Smith did not assist the victim was because she was afraid Robertson would harm her, and that Smith did not see much of what went on because after Robertson cut the victim's hair and cut her with the razor, Smith turned around and looked straight ahead. Further, Smith testified that she never searched the victim's clothes and that she never saw Carr get any money.

Obviously, the outcome of the trial depended upon whether the jury believed Carr's testimony or that of Smith.

*State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984), quoting *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981), is very clear as to when a trial court may properly direct a verdict of not guilty:

> "It is only where there is a total failure of competent proof in a criminal case to support a material allegation in the information, or where the testimony adduced is of so weak or doubtful a character that a conviction based thereon could not be sustained, that the trial court will be justified in directing a verdict of not guilty."

*State v. Piskorski* at 550, 357 N.W.2d at 212.

Such was not the status of the proof at the close of the State's case. The trial court therefore properly overruled Smith's motions to dismiss the charge against her or, in the alternative,

to direct a verdict in her favor.

*State v. Brennen*, 218 Neb. 454, 356 N.W.2d 861 (1984), reiterates the scope of our review concerning the sufficiency of the evidence. "In reviewing this question we neither determine the plausibility of explanations nor weigh the evidence, such matters being for the trier of fact. The conviction must be sustained if, viewing the evidence most favorably to the State, there is sufficient evidence to support it." *Id.* at 458, 356 N.W.2d at 864-65. *State v. Meis*, 217 Neb. 770, 351 N.W.2d 79 (1984), again teaches that we will not pass on the credibility of witnesses in determining whether there is sufficient evidence to sustain a conviction. "In other words, it is well established that a jury verdict of guilty will not be overturned on appeal unless it is so lacking in probative force that it can be said as a matter of law that the evidence was insufficient to support it." *Id.* at 772, 351 N.W.2d at 82. See, also, *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984).

Neb. Rev. Stat. § 28-303 (Reissue 1979) is the statute under which Smith was convicted. In pertinent part this section states: "A person commits murder in the first degree if he kills another person . . . (2) *in the perpetration of* or attempt to perpetrate any sexual assault in the first degree, arson, *robbery*, kidnapping, hijacking of any public or private means of transportation, or burglary . . . ." (Emphasis supplied.)

Neb. Rev. Stat. § 28-206 (Reissue 1979) reads: "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender."

Neb. Rev. Stat. § 28-324 (Reissue 1979) provides in part: "A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever."

Applying these statutory standards to Carr's testimony, it follows that if she was believed by the jury, there was sufficient evidence to convict Smith of first degree felony murder. Carr testified that Smith helped plan the robbery and that Smith looked through the victim's clothes. Further, Carr testified that Smith had a brandy bottle in hand ready to strike the victim and

that Smith threw out the victim's clothes at the murder scene, and later, after the clothes were retrieved, helped hide them in a trash dumpster.

*State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982), holds that it was the intent to commit robbery, not the intent to commit murder, which the State was required to prove in order to convict Smith of felony murder. *Bradley* dealt with a robbery in which the victim was fatally wounded. Bradley, an accomplice who did not do the shooting, was nonetheless convicted of felony murder. We stated that "proof of a purpose to kill is not required because it is not an element of the crime of felony murder. The only intent required is the intent to do the act which constitutes the felony during which the killing occurred." *Id.* at 884, 317 N.W.2d at 101.

To avoid this conclusion Smith argues that the testimony of Carr was insufficient as a matter of law to convict Smith. It is undisputed that Carr's testimony is necessary to sustain Smith's conviction, since Carr is the only witness to indicate that Smith was a participant in the robbery.

Smith contends that Carr gave false testimony, since Carr did not testify either at Smith's preliminary hearing or at a subsequent deposition that Smith had searched through the victim's clothes. Carr's explanation was that on these two previous occasions she was not asked to go into details and was merely giving an outline of what had happened.

Smith cites *Ruzicka v. State*, 137 Neb. 473, 289 N.W. 852 (1940), for the proposition that the uncorroborated testimony of an accomplice who has given false testimony concerning a material matter is, as a matter of law, insufficient to sustain a conviction. See, also, *Jahnke v. State*, 68 Neb. 154, 94 N.W. 158 (1903), *rev'd on rehearing* 68 Neb. 181, 104 N.W. 154 (1905).

This argument fails for two reasons. First, it has not been shown that Carr gave false testimony. From what can be ascertained from the record, the prior statements and the statement given at trial are not contradictory. Carr apparently never testified that Smith had *not* searched the victim's clothes; rather, it appears that that particular detail was first elicited at trial in response to more thorough questioning.

Secondly, even if the statements are viewed as contradictory

and that, therefore, Carr necessarily gave false testimony, the *Jahnke-Ruzicka* rule was specifically reformed in *Millslagle v. State*, 137 Neb. 664, 668, 290 N.W. 725, 727 (1940), *vacated in another respect on rehearing* 138 Neb. 778, 295 N.W. 394, in the following language:

> The fact that an accomplice has been guilty of wilful false swearing on a material matter is a circumstance that may possibly, in a particular instance and situation, make his testimony unworthy of belief on its face, if it lacks corroboration. If such testimony appears on its face to be baldly perjurious or preposterous, and there is no independent evidence upon which a conviction can rest, the trial court should not hesitate to direct a verdict of acquittal. It is not every case, however, that requires this degree of protection. In the ordinary case, even though the accomplice may have been guilty of a conscious falsehood on a material matter, and even though his testimony is lacking in corroboration, it may not be utterly unworthy of belief on its face, and in such a situation the rights of an accused will be adequately protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a material matter they should be hesitant to convict upon his testimony, without corroboration, and that in no case should they convict unless they are satisfied from the evidence, beyond a reasonable doubt, of the guilt of the accused.

See *State v. Eskew*, 192 Neb. 76, 218 N.W.2d 898 (1974); *State v. Bittner*, 188 Neb. 298, 196 N.W.2d 186 (1972), *cert. denied* 409 U.S. 875, 93 S. Ct. 123, 34 L. Ed. 2d 127; *Rains v. State*, 173 Neb. 586, 114 N.W.2d 399 (1962), *cert. denied* 371 U.S. 967, 83 S. Ct. 549, 9 L. Ed. 2d 538 (1963); and *Smith v. State*, 169 Neb. 199, 99 N.W.2d 8 (1959), for later applications of the *Millslagle* rule.

The trial court here properly instructed the jury that the testimony of an accomplice should be closely scrutinized.

The evidence was sufficient at the close of all the evidence to support the jury's finding of guilt, and the trial court therefore

again properly overruled Smith's renewed motions for a dismissal or directed verdict in her favor.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. ROBERT V. JONES, APPELLANT.

362 N.W.2d 58

Filed February 1, 1985. No. 84-506.

1. **Prior Convictions: Right to Counsel: Waiver.** A transcript of conviction which fails to show on its face that counsel was afforded or the right waived cannot be used for enhancement purposes.
2. **Judgments: Right to Counsel: Waiver: Appeal and Error.** Objections to the validity of the judgment, other than those pertaining to inadequate waiver of counsel, must be raised by direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.
3. **Prior Convictions: Constitutional Law: Waiver.** The record of a prior conviction used for enhancement purposes is not required to show a complete waiver of constitutional rights as required by *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).

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

Dana M. London, for appellant.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for appellee.

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

PER CURIAM.

This is an appeal from the order of the district court affirming the judgment of the municipal court sentencing the defendant, Robert V. Jones, for driving while intoxicated, third offense. The defendant's contentions all relate to the issue of whether a prior conviction of the defendant could be used for enhancement purposes.

The defendant contends that the record of his conviction in the county court on November 20, 1980, could not be used for

enhancement purposes because the record fails to show that the defendant was advised of his rights as required by our decision in *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). The record shows, and it is not disputed, that the defendant was represented by counsel, who was present at the arraignment when the defendant's plea of guilty was entered and accepted and the finding of guilt made.

This case is controlled by our recent decision in *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984). There, as here, the State offered records of prior convictions in which the defendant was represented by counsel. The defendant argued that the convictions were constitutionally infirm for failure to show a waiver of all rights prior to accepting the defendant's guilty pleas. We rejected that argument and held that a record of a prior conviction used for enhancement purposes need not show a complete waiver of constitutional rights as required by *State v. Tweedy, supra*. We said:

> The *Smith* case [213 Neb. 446, 329 N.W.2d 564 (1983)] held that a transcript of conviction which fails to show on its face that counsel was afforded or the right waived cannot be used for enhancement purposes. Other objections to the validity of the judgment must be raised by direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.

*State v. Baxter, supra* at 416, 355 N.W.2d at 515-16.

The record of the conviction in the county court on November 20, 1980, was sufficient for enhancement purposes. The judgment of the district court is affirmed.

AFFIRMED.

DOUGLAS KEITH KERWOOD, APPELLEE, V. DENISE JOANN KERWOOD, APPELLANT.

361 N.W.2d 537

Filed February 1, 1985. No. 84-531.

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

David L. Kimble of Souchek & Kimble, for appellant.

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

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

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. BEN GOODON, APPELLANT.

361 N.W.2d 537

Filed February 1, 1985. No. 84-546.

**Convictions: Appeal and Error.** In determining the sufficiency of evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a verdict made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

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

Earl D. Ahlschwede of Ahlschwede & Truell, for appellant.

Paul L. Douglas, Attorney General, and Timothy E. Divis, for appellee.

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

KRIVOSHA, C.J.

The appellant, Ben Goodon, was charged in the county court for Hall County, Nebraska, with assault in the third degree in violation of Neb. Rev. Stat. § 28-310(1) (Reissue 1979). After trial to the court Goodon was found guilty as charged and was fined $100. On appeal to the district court for Hall County, the conviction and fine were affirmed. It is from that conviction and fine that Goodon now appeals to this court. Goodon's assignment of error is essentially that the evidence was insufficient to sustain the conviction. We believe that the assignment is without merit and that the conviction and fine should be affirmed.

Section 28-310(1) provides as follows: "A person commits the offense of assault in the third degree if he: (a) Intentionally, knowingly, or recklessly causes bodily injury to another person; *or* (b) Threatens another in a menacing manner." (Emphasis supplied.) Either act is sufficient to constitute a violation of the statute, and no degree of bodily injury is required under subpart (a).

The evidence discloses that Goodon and the complainant apparently lived together until approximately August of 1983, when they separated. Complainant testified that on the night of February 11, 1984, Goodon came to her apartment, initiated an argument, and, during the course of the argument, pushed her onto her bed. He further threatened to kill her if he caught her with another man.

The complainant further testified that sometime after this argument, while she was crossing the street, Goodon drove his car so close to her that he barely hit the back of her leg. The complainant then started running across a parking lot; Goodon drove his car between her and the lounge where she was heading, got out of his vehicle, grabbed her by her collar, shook her, and again said that he would kill her if he caught her with another man or if she went into the lounge. Goodon denied any contact with the complainant. That matter, of course, was a question of fact to be determined by the trial court, and will not

be reconsidered by us on appeal. We have frequently and regularly held that in determining the sufficiency of evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a verdict made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. See, *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984); *State v. Jones*, 217 Neb. 435, 350 N.W.2d 11 (1984); *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984); *State v. Johnsen*, 197 Neb. 216, 247 N.W.2d 638 (1976); *State v. Brown*, 195 Neb. 321, 237 N.W.2d 861 (1976); *State v. Spidell*, 194 Neb. 494, 233 N.W.2d 900 (1975).

The question, then, is not whether this court should believe the testimony of the complainant but whether, if the testimony of the complainant is believed, it is sufficient to constitute a violation of § 28-310. We believe it is.

To begin with, there is no question that Goodon threatened the complainant in a menacing manner in violation of subpart (b) of the statute. Goodon argues that while that all may be true, he was not charged with violating subpart (b) of the statute. We do not believe that to be the case. The complaint specifically alleges that Goodon "intentionally, knowingly, or recklessly caused bodily injury to [complainant] in that he did grab [complainant], shake her *and* threaten to kill her; contrary to the form of the Statutes in such cases made and provided . . . ." (Emphasis supplied.) There can be no question that Goodon was advised that he was being charged with both subpart (a) and subpart (b) of § 28-310. This alone would be sufficient to sustain the conviction.

Furthermore, the evidence is sufficient to establish that Goodon did cause bodily injury by pushing and hitting the complainant. While, admittedly, the acts did not cause any serious bodily injury, the statute does not require serious bodily injury, but only bodily injury. It seems clear beyond question that if one is struck in the leg with an automobile, no matter how minor that may be, that such striking causes some bodily injury. Bodies are simply not designed to be struck intentionally

by automobiles. On either ground, that he threatened to kill the complainant or cause bodily injury to her, the evidence was sufficient to sustain the conviction. The judgment is affirmed.

AFFIRMED.

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RICHARD L. BROWN, APPELLEE AND CROSS-APPELLANT, V. KENNETH B. KNOX AND MARILYN M. KNOX, HUSBAND AND WIFE, ET AL., APPELLANTS AND CROSS-APPELLEES.

361 N.W.2d 540

Filed February 8, 1985. No. 83-587.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed as modified.

John R. Hall of Anderson, Vipperman, Hinman, Hall & Kovanda, for appellants.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellee.

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

PER CURIAM.

Richard Brown brought suit in the district court for Hall County against Kenneth and Marilyn Knox for specific performance of an oral contract for Brown's acquisition of 50 percent of the shares of First Holiday Tour and Travel, Inc. We modify and affirm the judgment of the district court.

An action for specific performance of a contract is equitable in nature. *Matthews v. Matthews*, 215 Neb. 744, 341 N.W.2d 584 (1983). In its appellate review of suits in equity, the Supreme Court reviews the record de novo and reaches an independent conclusion irrespective of the decision reached in the trial court. See Neb. Rev. Stat. § 25-1925 (Reissue 1979). However, this standard of review is subject to the well-established rule that where credible evidence is in conflict on a material issue of fact,

the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Ryan v. Kolterman*, 215 Neb. 355, 338 N.W.2d 747 (1983); *Burton v. Annett*, 215 Neb. 788, 341 N.W.2d 318 (1983).

In the summer of 1979 Brown was transferred from Grand Island to Omaha as manager of Roberts Dairy. Sometime in January 1980 and as a result of a change in Roberts' ownership, Brown was discharged by Roberts. Ken Knox, a Grand Island acquaintance of Brown, contacted Brown about the possibility of a business relationship involving the two. Knox owned shares in Knox Construction Company. After a couple of meetings between the parties, Brown went to work for Knox Construction at a salary of $500 a week, with the understood objective that Brown would seek businesses as joint opportunities for Brown and Knox. In March 1980 Brown moved his family to Grand Island.

Brown looked over several possible business opportunities for Knox and himself. One such business was First Holiday Tour and Travel, Inc., in Grand Island. In April 1980 Knox and his wife, Marilyn, with Brown explored a possible purchase of First Holiday. A preliminary draft of an agreement for purchase of First Holiday stock designated Knoxes and Brown as the purchasers, who would ultimately form a corporation and substitute the newly formed corporation as purchaser in the transaction for acquisition of First Holiday stock. However, an accountant advised Knoxes and Brown that it would be better for tax purposes that an existing corporation rather than a new corporation purchase First Holiday. At this time Knoxes owned Marilyn's Figurama, Inc. (Figurama), that is, each of the Knoxes owned one-half of the shares of Figurama and were directors of that corporation. Concerning Figurama, Knoxes and Brown decided to "shell it out" (liquidate all corporate assets) and then use Figurama as a holding company in the acquisition of First Holiday.

Knox Construction Company would assist in financing the acquisition of First Holiday by making a loan to Figurama, namely, $50,000 for a downpayment on the First Holiday purchase price, with interest at an annual rate of 10 percent, a

favorable rate at the time. Further, according to Brown, as soon as Figurama liquidated its assets after acquiring all the shares of First Holiday, Figurama would then transfer to Brown one-half of the purchased shares of First Holiday. The balance of the purchase price for First Holiday stock, according to Knoxes and Brown, would be paid from income produced by the operations of First Holiday.

On May 30 Figurama signed an agreement for purchase of all issued and outstanding shares of First Holiday (200 shares), made a downpayment on the purchase price, and delivered its corporate promissory note to pay the balance of the purchase price for the First Holiday shares. The contract called for a purchase price of $120,000, of which $65,000 was allocated for First Holiday shareholders' covenant not to compete. Knoxes and Brown signed their "personal guarantee" for Figurama's performance of all obligations imposed on Figurama under the agreement regarding First Holiday.

Figurama acquired all shares of First Holiday. Marilyn Knox and Brown conducted the daily business of First Holiday. Brown became vice president and general operating officer of First Holiday at an annual salary of approximately $26,000. First Holiday paid Marilyn Knox an annual salary of $12,800 in 1981 and $14,650 in 1982. Ken Knox had no active role in the everyday operations of First Holiday.

In August 1980 the parties considered but did not sign a document regarding their previous oral agreement for acquisition of the shares of First Holiday. However, Knoxes and Brown, on August 1, did sign a "STOCK OPTION CONTRACT," which in part provided:

> NOW THEREFORE, for the above reasons and in consideration of a mutual covenant herein contained, it is agreed as follows:
>
> 1. Ken Knox and Marilyn Knox, hereinafter referred to as Grantors, hereby grant to Richard L. Brown, hereinafter referred to as Grantee, the right, option and privilege, of purchasing 50% of the voting shares at a price to be determined upon exercise of option of the stock of Marilyn's Figurama, Inc.
>
> 2. Said option shall be effective immediately upon the

signing hereof and shall continue until such time as the option is exercised or until mutual termination by the parties hereto.

3. Said option shall be exercised no later than thirty days after receipt of notice by Grantee from Grantor of the liquidation of assets and liabilities associated with the business operation known as Marilyn's Figurama located as [sic] 208 North Wheeler Avenue, Grand Island, Nebraska. Said notice shall be sent by Grantor to Grantee at the above address by certified mail.

4. With respect to operations of Marilyn's Figurama, Inc., as related to First Holiday Tour and Travel, Inc., Grantee shall be liable for any related losses, loans or indebtedness of both companies as well as be the benefactor of any rewards or incomes. This shall be in direct proportion to Grantees [sic] percentage of optioned ownership in Marilyn's Figurama, Inc.

5. Failure to exercise this option within thirty days of receipt of said notice shall terminate this agreement for stock option but shall not affect Grantee's position in respect to earnings or liabilities as previously mentioned in part 4 of this agreement, as in effect as at the date that Grantee fails to exercise his option.

Brown testified that the option was intended to "cement" his previous agreement with Knoxes for his acquisition of an interest in First Holiday without any further "cost" to Brown. Knoxes suggested at trial that the option negatived any agreement for Brown's acquisition of First Holiday stock and that the option was the only means by which Brown could acquire stock in any corporation in which Knoxes were interested.

Marilyn Knox and Brown operated First Holiday profitably over the next 2 years so that Figurama received payments from First Holiday sufficient to repay Knox Construction Company the principal of the $50,000 loan and made additional payments of approximately $28,000 toward Figurama's promissory note given for the acquired shares of First Holiday. Throughout this time Knoxes and Brown held themselves out to the public as coowners of First Holiday.

Friction developed between Marilyn and Brown. On June 24, 1982, Ken Knox gave written notice to Brown that all assets of Marilyn's Figurama, exclusive of First Holiday shares, had been liquidated and that Brown had 30 days to exercise the stock option entered in August 1980. On August 20, without request from Brown, Knoxes sought and obtained the release of Brown from his guaranty of Figurama's obligations to the former shareholders of First Holiday. Brown demanded that Knoxes transfer to him 50 percent of the shares of Figurama as evidence of Brown's 50-percent ownership in the First Holiday shares acquired by Figurama. Knoxes refused to transfer any shares of Figurama unless Brown paid $77,000 for 50 percent of the First Holiday stock owned by Figurama.

Brown filed suit and sought specific performance of the agreement for his acquisition of 50 percent of the First Holiday stock. Knoxes filed a general denial. After trial the district court found:

> That the agreement between the Plaintiff [Brown] and the Defendants, Knox, was that the Plaintiff and Defendants, Knox, would purchase First Holiday Tour and Travel, Inc., a Nebraska Corporation, with Plaintiff owning fifty (50) percent and Defendant, Knox, together owning fifty (50) percent . . . [and] [t]hat Plaintiff and Defendants, Knox, agreed to use an existing corporation of the Defendants, Marilyn's Figurama, Inc., as a vehicle for convenience sake for the purchase of First Holiday Tour and Travel.

The district court made no finding that a joint venture existed between Knoxes and Brown. The district court then entered the following order: "Plaintiff is a 50 percent owner of First Holiday Tour and Travel and is entitled to be issued proof of such ownership in the form of shares of Marilyn's Figurama, Inc."

Knoxes contend that the district court erred in finding that a joint venture existed and in not finding the stock option binding on the parties. Brown cross-appeals and contends the district court should have ordered Figurama and Knoxes to transfer 50 percent of the First Holiday shares acquired by Figurama.

Brown's basic cause of action relates to the existence and

specific enforcement of a contract for acquisition of corporate shares. The district court found the existence of such contract and, further, found Brown to be a "50 percent owner of First Holiday Tour and Travel," who was entitled to receive the shares of Figurama in order to achieve the intended ownership in First Holiday, that is, acquisition of shares of First Holiday.

The evidence is conflicting about the manner in which Brown's acquisition of an interest in First Holiday was to be accomplished. Brown asserts an agreement by which he was entitled to 50 percent of the shares of First Holiday as soon as all assets of Figurama, exclusive of First Holiday stock, were liquidated. Such liquidation of Figurama assets has occurred. Knoxes contend that the only arrangement with Brown regarding corporate shares is contained in the stock option of August 1980, which Brown did not exercise. The district court found, as do we, that the evidence supports the existence of the agreement claimed by Brown. The only assets of Figurama are the shares of First Holiday, 50 percent of which belong to Brown as a result of his agreement with Knoxes.

Generally, before a court will order specific performance, there must be an inadequate remedy at law. See *Reese v. Hatfield*, 201 Neb. 540, 270 N.W.2d 898 (1978). In the case before us there is no dispute that First Holiday is a closely held corporation whose issued and outstanding shares are, likewise, owned entirely by a closely held corporation, Figurama. As this court has noted, contracts for acquisition of shares of a closely held family corporation, which stock is not obtainable in the open market, are proper subjects for specific performance. See *Reese v. Hatfield, supra*. "A contract for the sale of securities which are not procurable upon the market and have no market value may be specifically enforced." *Goodall v. Stanosheck*, 131 Neb. 720, 723-24, 269 N.W. 814, 816 (1936). Specific performance to transfer First Holiday shares to Brown is proper under the circumstances.

We agree that Brown, by his agreement with Knoxes, is entitled to 50 percent of the First Holiday shares purchased by Figurama. In other words, Brown is entitled to 50 percent of the issued and outstanding shares of First Holiday. Obviously, Figurama was nothing more than a conduit for acquisition of

First Holiday stock and ultimate transfer of 50 percent of the acquired First Holiday stock to Brown. Although the district court ordered that shares of Figurama be delivered to Brown, such action is circuitous under the circumstances. Our judgment, namely, that Brown is entitled to 50 percent of the shares acquired by Figurama as a result of the purchase from the First Holiday shareholders on May 30, 1980, is more direct and consistent with our determination of the agreement of the parties. Since there has been no evidence of any change in ownership of the First Holiday shares acquired by Figurama, we find and order that Knoxes, as shareholders and directors of Figurama, shall cause Figurama to transfer, and Figurama shall transfer, to Brown 50 percent of the First Holiday shares acquired by Figurama.

AFFIRMED AS MODIFIED.

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VIRGINIA L. KOCH, APPELLANT, V. DENNIS E. KOCH, APPELLEE.

361 N.W.2d 548

Filed February 8, 1985. No. 83-601.

1. **Visitation: Appeal and Error.** In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to the evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is an abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record.
2. **Visitation.** The right of access to one's children should not be denied unless the court is convinced such visitations are detrimental to the best interests of the child. In the absence of extraordinary circumstances, a parent should not be denied the right of visitation.
3. **Child Custody: Appeal and Error.** In evaluating the general concept of the best interests and welfare of the child, it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at the trial.

Appeal from the District Court for Webster County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Sidwell & Shofstall, for appellant.

Nancy S. Freburg, for appellee.

KRIVOSHA, C.J., WHITE, and SHANAHAN, JJ., and MCCOWN, J., Retired, and BUCKLEY, D.J.

BUCKLEY, D.J.

The parties to this action were divorced by decree entered September 10, 1980. The appellant, Virginia Koch, now remarried and known as Virginia Heinrich, was awarded custody of the two children of the marriage, Stephanie L. Koch, now 15 years old, and Jered E. Koch, now 10 years old, subject to reasonable rights of visitation by appellee, Dennis Koch, also now remarried.

About 2 years after the decree of dissolution, Virginia petitioned to modify the decree to terminate any right of visitation, having already in fact denied Dennis any visitation. Dennis in turn petitioned to modify the decree to change custody of the children from Virginia to him, and have Virginia adjudged in contempt for her denial of his visitation rights.

On September 30, 1982, the trial court by a temporary order granted Dennis specific visitation to have the children from noon Saturday until 6 p.m. on Sunday every weekend.

Following trial of all issues together, the trial court denied all petitions of both parties but did modify the decree to set out specific visitation rights of Dennis and other conditions designed to foster the relationship of the parties with their children as custodial and noncustodial parents.

Only Virginia filed a motion for new trial, which was overruled; therefore, the only issue raised on appeal is whether the trial court should have modified the decree to terminate Dennis' rights of visitation.

In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to the evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is an abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record. *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980); *Casper v. Casper*, 198 Neb. 615, 254 N.W.2d 407 (1977).

The right of access to one's children should not be denied

unless the court is convinced such visitations are detrimental to the best interests of the child. In the absence of extraordinary circumstances, a parent should not be denied the right of visitation. *Deacon v. Deacon, supra; Syas v. Syas*, 150 Neb. 533, 34 N.W.2d 884 (1948).

At the time of the decree the relationship of the parties was, to say the least, very strained—epitomized by Virginia's testimony that after the final hearing and as they were preparing to leave the courtroom, Dennis threatened her life. Their relationship deteriorated from there.

In January 1981 Virginia began living with Richard Heinrich, which lasted until they married in July 1982. The animosity between Heinrich and Dennis was obvious from the plethora of accusations and corresponding denials between Heinrich and his brother and Dennis and his father, respectively. It would serve no purpose to detail the multitude of events. Suffice it to say that it involved verbal and physical confrontations between the opposing sides that continued to the time of trial.

All of this gradually had its effect on the children and their visitation with their father. Initially, the children were with their father at least every other weekend, but a pattern developed where more and more of Dennis' requests for visitation were refused for a variety of reasons until it was denied altogether before being restored by the temporary order.

Virginia's evidence was that Dennis harassed her and Heinrich and the children to enforce visitation to the point where the children no longer wanted to see their father, especially Stephanie. In June 1982 Jered began to have nightmares and to sleepwalk after visitation with Dennis. A clinical psychologist called by Virginia testified that continuing visitation under the existing circumstances would be detrimental to the children.

Dennis' evidence generally denied any responsibility for any confrontations with Heinrich or that anything he said or did had any adverse effect on the children. His psychologist felt that the children were well adjusted and that contact with both parents was necessary.

Both Stephanie and Jered testified in open court that they

did not want to visit with their father. At the end of the trial, the trial judge talked with each of the children privately in chambers.

It is obvious that these children are caught up in the ongoing battle between the Heinrichs and the Kochs. What is important is that there is ample evidence that Dennis, though guilty of some bad behavior in the presence of the children, is generally a fit, concerned, and caring father who wants a healthy relationship with Stephanie and Jered as a noncustodial parent.

The situation here is not unlike that in *Deacon v. Deacon, supra*, and what we said there is very apropos here:

> The main stumbling block appears to be the attitude of the parties. While the children have shown no present desire to visit the appellant, this is not an irreversible situation that could not be corrected by the proper attitude of the parents. The parties apparently have gone through some difficult times and their bitterness toward each other is understandable. However, visitation or the denial thereof should not be made to appease one parent or punish the other. Such right to visitation should be allowed or denied according to what is best for the children.

207 Neb. at 199, 297 N.W.2d at 761.

The desires of the children must be considered but are not controlling. The opportunity and motive of Virginia and Heinrich for influencing the children is obvious, especially considering that Heinrich wants to adopt them. In evaluating the general concept of the best interests and welfare of the child, it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at the trial. *Koch v. Koch*, 209 Neb. 896, 312 N.W.2d 294 (1981).

The trial court in establishing specific visitation also imposed certain collateral requirements obviously designed to lessen the opportunity for further confrontation and harassment. Its decision cannot control the attitudes of all involved here—unfortunately, courts do not have that power—but it does give Stephanie and Jered a chance to establish a good and proper relationship with their father. This is in their best interests.

There was no abuse of discretion in the trial court's order and, therefore, it is affirmed.

AFFIRMED.

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OBSTETRICIANS-GYNECOLOGISTS, P.C., A NEBRASKA PROFESSIONAL CORPORATION, INDIVIDUALLY AND ON BEHALF OF SIMILARLY SITUATED NEBRASKA PHYSICIANS, APPELLANT, V. BLUE CROSS AND BLUE SHIELD OF NEBRASKA, A NONPROFIT HOSPITAL SERVICE CORPORATION, APPELLEE.

361 N.W.2d 550

Filed February 8, 1985. No. 83-646.

**Insurance: Public Policy.** Provisions in Blue Cross and Blue Shield of Nebraska medical insurance policies forbidding assignment of benefits are not void or unenforceable as a matter of public policy in Nebraska.

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

Edward D. Hotz of Hotz, Kizer & Jahn, P.C., for appellant.

John E. North and John F. Thomas of McGrath, North, O'Malley & Kratz, P.C., for appellee.

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

GRANT, J.

This is an appeal by the plaintiff, Obstetricians-Gynecologists, P.C., a Nebraska professional corporation (hereinafter OB-GYN), from the district court's denial of OB-GYN's petition for a declaratory judgment and the court's denial of certification of the "class" of physicians which OB-GYN sought to represent in this action.

The action was brought by OB-GYN under the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1979), seeking to determine the validity of a nonassignment provision in health care contracts issued by

defendant-appellee, Blue Cross and Blue Shield of Nebraska, a nonprofit hospital service corporation (hereinafter Blue Shield).

After trial the court denied the relief sought by OB-GYN. OB-GYN appeals, alleging three assignments of error. The first two assignments may be combined in that they allege generally that the trial court erred in not holding Blue Shield's nonassignment provisions void as a matter of public policy. The third assignment of error alleged by OB-GYN is that the trial court erred "in finding that the plaintiff did not meet the requirements of a class action." For the reasons hereinafter set out we affirm the action of the trial court.

OB-GYN is a corporation of physicians providing health care services to patients. Blue Shield is in the business of writing health care insurance, including insurance for prepaid medical, surgical, hospital, nursing home, dental, and similar services. Its existence is authorized under the hospital service corporations statutes, Neb. Rev. Stat. §§ 21-1509 et seq. (Reissue 1983).

Blue Shield provides health care insurance to its members, who are known as "subscribers," and to certain members of subscribers' families if agreed upon. Subscribers are individuals—most of them belonging to groups such as employee groups, labor unions, or governmental or professional associations. These individuals, either alone or through their groups, enter into contracts with Blue Shield whereby, upon payment of a periodic subscription premium by the subscriber or on his behalf, Blue Shield agrees to pay a certain amount for described health care services contracted for by the subscriber. The amount to be paid is determined by the terms of the insurance contract between Blue Shield and the subscriber.

The hospitals, physicians, and others who provide health care services to the subscribers are known as "providers." Following its "Physician's Voluntary Cost Effectiveness" program, instituted in 1978, Blue Shield entered into separate contracts with providers who wish to participate in Blue Shield's program. The providers who enter into these contracts with Blue Shield are called "participating" providers. Each of

the contracts between Blue Shield and the participating providers requires the providers to accept agreed-upon payments for specified services as payment in full, and requires Blue Shield to pay each participating provider directly.

Providers who have not entered into contracts with Blue Shield to accept agreed-upon payments as payment in full are called "nonparticipating" providers. OB-GYN is a nonparticipating provider.

The amount of benefits paid by Blue Shield does not depend on whether services are provided by a participating or nonparticipating provider. The payment is the same in either case. However, where services are rendered by a participating provider, payment is made directly to the provider by Blue Shield on behalf of the subscriber—as provided in the Blue Shield-subscriber insurance contract. When the services are performed by a nonparticipating provider, on the other hand, payment is made by Blue Shield directly to the subscriber—also as provided in the Blue Shield-subscriber insurance contract. These payment provisions are included in all Blue Shield-subscriber contracts.

It is provided in the Blue Shield-subscriber insurance contract that benefits payable to a subscriber may not be assigned by the subscriber. The nonassignment provision in the Blue Shield-subscriber contract states: "No assignments of any amounts payable under this Contract shall be recognized or accepted by, or binding upon, the Company." Blue Shield's president testified as to the reason that Blue Shield inserted the nonassignment provisions in its contracts with its subscribers. That reason was stated to be that Blue Shield wished to have nonparticipating providers join the Blue Shield program so that they would accept the Blue Shield payment under the policy as payment in full for the medical services rendered, and thus help to keep down the costs of medical services to the subscribers. The only inducement that Blue Shield could offer to any provider was payment directly to the provider.

Prompt payment by Blue Shield directly to participating providers lessens the financial burden of debt collection for those providers, and ensures payment to the participating providers for health care services rendered. In an effort to

collect payment directly from Blue Shield for services it provides to Blue Shield subscribers, OB-GYN (although it is a nonparticipating provider) has taken assignments of Blue Shield subscribers' benefits and submitted them to Blue Shield for payment. Blue Shield, relying on the nonassignment clause in its contracts with its subscribers, refuses to pay OB-GYN directly, but instead sends the payment to the subscriber. It is OB-GYN's attack on the validity of this nonassignment clause that forms the basis for this suit.

With regard to the three assignments of error as a whole, we first note that a declaratory judgment action is sui generis and may involve questions of both law and equity. *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983). Insofar as fact questions are concerned in a declaratory judgment action, those issues may be tried and determined as in other civil actions. § 25-21,157. All declaratory judgment decrees may be reviewed as other decrees. § 25-21,155. Pursuant to Neb. Rev. Stat. § 25-1925 (Reissue 1979), insofar as the appeal is one in equity, we review the trial court's finding of fact de novo on the record. With regard to questions of law, we have the obligation to reach independent conclusions with respect to those questions. *Ranger Division v. Bayne*, 214 Neb. 251, 333 N.W.2d 891 (1983); *In re Estate of Corrigan*, 218 Neb. 723, 358 N.W.2d 501 (1984). Also, in our review of this case on the questions of public policy, while our review is de novo, we note that in *Beaver Lake Assn. v. Beaver Lake Corp.*, 200 Neb. 685, 691, 264 N.W.2d 871, 875 (1978), we said, "Courts should be cautious in holding contracts void on ground of public policy and before they do so prejudice to the public interest should clearly appear."

The first two assignments of error may be considered together, since each of those assignments are based on Blue Shield's alleged violation of "public policy" in its nonassignment contractual provisions. In its brief, OB-GYN makes numerous references to public policy, but nowhere is that policy defined, except that OB-GYN alleges in the amended petition that "[p]laintiff [OB-GYN] claims the provision in defendant's [Blue Shield's] policies prohibiting benefit assignments after covered medical services are incurred are [sic]

null and void as being contrary to public policy."

Nor is any proof offered by OB-GYN that such allegation correctly states the public policy of Nebraska, except in the form of a citation of one 1892 Nebraska case.

From this case OB-GYN concludes that the public policy of Nebraska is that there must be free alienation of choses in action and that Blue Shield's nonassignment provisions in its contracts are invalid solely because such provisions are against that public policy. In order to determine if Blue Shield's conduct violates a public policy of this state, it is necessary to determine if OB-GYN has proved what that policy is, and if that policy controls this case.

As stated in *United Seeds, Inc. v. Hoyt*, 168 Neb. 527, 531, 96 N.W.2d 404, 407 (1959):

> Public policy has been defined in varying terms but a definition which has been accepted in numerous jurisdictions is as follows: "That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. * * * The principles under which the freedom of contract or private dealings is restricted by law for the good of the community." Black's Law Dictionary (3d Ed.), p. 1374.

OB-GYN called four witnesses at the trial and defendant called one witness. No witness testified as to what the public policy of this state is on this matter. The trial court was not asked to take judicial notice of any constitutional provision, any statutory enactment, any legislative intent shown in legislative history in enacting any statutes, any specific declaration of public purpose in any enactment, or any case law aiding a determination of the meaning of the terms in this case. Nor was any evidence adduced, if such evidence would be admissible or relevant, as to any custom or public course of conduct that would indicate what the "public policy" might be as to health care contracts. In short, we, as the reviewing court, are asked to determine the public policy in this area of the law with no guidance as to how that determination should be made.

We are aware of the general statement in 31 C.J.S. *Evidence* § 34 at 960 (1964): "Courts take notice of the public policy of a

state." Such general statements abound in the law, but it is seldom that the evidentiary problem of how to prove what that public policy is is discussed.

The court in *United Seeds, Inc. v. Hoyt, supra*, was faced with a similar problem in determing public policy in connection with a legislative act. The court in the *United Seeds* case was directed to the specific legislative act, and in considering that act, including the title thereof, found nothing that would give the court any guidance. The court so determined, and stated at 531, 96 N.W.2d at 407: "It is therefore impossible to find a source from which it could be said that there was a declaration of public policy which would permit or require the defendants [to do a certain act]."

In this case neither the trial court nor this court has been directed to any statement or declaration as to the public policy applicable in this case. In that situation we note the cautionary language of this court in *E. K. Buck Retail Stores v. Harkert*, 157 Neb. 867, 887, 62 N.W.2d 288, 301 (1954), wherein we stated:

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

As stated above, we must be careful in our determination whether Blue Shield is, or is not, violating the public policy of this state. In order to decide this issue we examine OB-GYN's contention, in effect, that the public policy of Nebraska is set forth in *Star Union Lumber Co. v. Finney*, 35 Neb. 214, 52 N.W. 1113 (1892). In the *Star Union* case we upheld the assignment of a claim for a loss by fire after the loss occurred, even though the insurance policy expressly prohibited it.

A fuller explanation of the theory underlying the *Star Union* holding was set out in *Maryland Casualty Co. v. Omaha Electric L. & P. Co.*, 157 F. 514 (8th Cir. 1907), where the Eighth

Circuit Court of Appeals, in interpreting Nebraska law, held that the nonassignment provision in an employer's insurance policy had no application to the assignment of a cause of action when the cause of action had already arisen under the contract and the contract had expired.

The *Star Union* opinion deals with the nonassignment issue in two sentences at 223, 52 N.W. at 1116, and gives no reasoning for such a holding. The *Star Union* case has never been cited in Nebraska on the nonassignment point. How this fleeting reference in 1892 regarding a fire insurance policy sets out the public policy of Nebraska in 1982 with regard to a medical insurance policy is not argued.

*Maryland Casualty* notes that the "recognized reasons" for prohibition of the assignment had ceased, that the insurance company's liability had become fixed, and that, in that situation, the free alienability of a chose in action ought to be upheld. Generally, commentators and courts, like the eighth circuit in *Maryland Casualty*, have given three theories for upholding an assignment in the face of a nonassignment provision: (1) The parties did not intend the nonassignment provision to apply to rights to receive payments, but only to the duties under the personal contract; (2) The reason for the prohibition ceased because the insurer's risks and liabilities under the contract became fixed when the insured event occurred; and (3) The public policy supported free alienability of a chose in action.

The first two theories are clearly inapplicable in this case. Concerning the first theory, Blue Shield obviously intends the nonassignment provision to apply after the subscriber has attained the right to benefits. It is through this clause that Blue Shield refuses to pay nonparticipating health care providers directly, and thus to encourage the nonparticipating providers to participate in the Blue Shield program. Although its insured risk may not increase by such an assignment, its negotiating power for lower health costs is seriously affected. Furthermore, reading *Star Union* and *Maryland Casualty* in light of the public policy and equity questions before those courts, it is important to distinguish the insurance contracts in those cases from that of Blue Shield in another way. Both the insurance

contracts in *Star Union* and *Maryland Casualty* required the avoidance of the entire contract on assignment. The Blue Shield contract does not avoid payment on assignment, it simply claims the contracted right to pay the subscriber with whom it contracted. Many contracts commentators have recognized the negative weight of an avoidance penalty in the public policy balance; that weight is not present here. See 3 S. Williston, A Treatise on the Law of Contracts § 422 (3d ed. 1960).

Because the first two theories of avoidance of nonassignment clauses are simply inapplicable, the basic theory on which OB-GYN must rest its position is the policy favoring free alienability of a chose in action. While this policy is significant and may reflect a public policy, it is not paramount and must be balanced against a very strong policy, recognized in many cases in Nebraska and in authoritative texts, favoring the freedom to contract. In *Murphy v. City of Plattsmouth*, 78 Neb. 163, 165-66, 110 N.W. 749, 750 (1907), we said:

> The contract in express terms provides that "the second party (Fanning) shall not assign or transfer this contract or sublet any of the work embraced in it." The terms and conditions of a contract have the force of law as to those who are parties thereto. *Lowry v. Inman*, 46 N.Y. 129. In *City of Omaha v. Standard Oil Co.*, 55 Neb. 337, the plaintiff claimed as assignee under a contract containing a stipulation of this character, and this court held that the contract was nonassignable. Counsel there advanced the proposition that the stipulation was merely directed against the assignment of the obligation resting upon the assignor by virtue of the contract, and was not intended to prevent an assignment of the money to be earned thereunder. But this court refused to adopt that view, and disposed of the matter in these words: "But it is needless for us to speculate on the motives for the city's action. It is enough for us to know—whatever its reasons may have been—that it has, in plain language, stipulated against an assignment of the contract. That stipulation is valid and must be enforced. To hold that it covers some, but not all, of the rights and obligations arising out of the contract would be, it seems to us, an inexcusable perversion of its

terms."

As stated in 14 S. Williston, A Treatise on the Law of Contracts § 1630 at 11-12 (3d ed. 1972):

> Although the power of courts to invalidate bargains of parties on grounds of public policy is unquestioned and is clearly necessary, the impropriety of a transaction should be convincingly established in order to justify the exercise of the power.
>
> "If there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice."

See, also, 4 A. Corbin, Corbin on Contracts § 872 (1951); 3 S. Williston, *supra*.

While the policy of free alienability of a chose in action is important, the right to contract as narrowly or broadly as the parties desire is also important. OB-GYN recognizes this right to freedom of contract and uses that right to support its contention that subscribers should be free to contract with OB-GYN in any way they want and thus assign their benefits. What OB-GYN will not recognize is that the subscribers and Blue Shield have previously freely contracted not to assign benefits under the policies.

Further, Blue Shield has presented evidence to show its nonassignment clause is a valuable tool in persuading health care providers to participate in its physician's voluntary cost effectiveness program and accept set fees for health services, keeping health care costs down and passing that savings on to its subscribers, who number 450,000 in Nebraska. Such evidence indicates a far stronger public policy than that relied on by OB-GYN.

In *Kent General Hospital v. Blue Cross, etc.*, 442 A.2d 1368 (Del. 1982), and *Augusta Medical Complex, Inc. v. Blue Cross*, 230 Kan. 361, 634 P.2d 1123 (1981), the Delaware and Kansas Supreme Courts had a chance to address the problem that is before us, and upheld the nonassignment clauses. The Delaware and Kansas courts noted, among other policy

considerations, the authorizing statutes under which Blue Shield's corporations in their respective states were formed. In Kansas the statutes specifically authorized a cost containment purpose and in Delaware specifically exempted Blue Cross and Blue Shield from all other provisions in insurance laws. In Nebraska the hospital service corporations statutes, §§ 21-1509 et seq., under which Blue Shield is set up, are charged with "the primary purpose of operating a nonprofit hospital service corporation to provide for hospital care on a service, prepayment, or other basis as provided in contracts or subscription agreements issued thereby." Only insurance laws not conflicting with the act apply.

Although the Nebraska statute under which Blue Shield is organized is more general than those under which the Kansas and Delaware Blue Cross and Blue Shield corporations were formed, the policy we can glean from the statute also weighs on the side of Blue Shield. The uniqueness of the health service corporation is recognized by exempting them from insurance provisions which conflict with their enabling legislation, by the requirement that they be nonprofit, and by the 1951 amendment designed to increase their contracting powers. In short, to the limited extent our statute speaks, it favors the position of Blue Shield.

For the foregoing reasons we conclude that appellant, OB-GYN, has failed to show that the nonassignment provision in Blue Shield should be called void for public policy reasons.

OB-GYN's third assignment of error is that the trial court erred in failing to certify this as a class action. The trial court held that OB-GYN failed to prove that there were other members of the class which OB-GYN sought to represent and which satisfied the requirements of Neb. Rev. Stat. § 25-319 (Reissue 1979): "Class actions; representation. When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

The trial court was correct, for, although Nebraska's class action statute is broad, something more than the suggestion of a class is necessary to fulfill the parties requirement.

The judgment of the trial court is affirmed in all respects.

AFFIRMED.

CAPORALE, J., not participating.

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SCHMODE'S, INC., A NEBRASKA CORPORATION, APPELLEE, V. RONALD R. WILKINSON AND MARY WILKINSON, A COPARTNERSHIP, DOING BUSINESS AS M & R TRUCKING, APPELLANTS.

361 N.W.2d 557

Filed February 8, 1985. No. 83-762.

1. **Judgments: Appeal and Error.** In a law action tried without a jury, the findings and disposition of the trial court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
2. **Uniform Commercial Code: Secured Transactions.** The use of collateral by a secured party for a period of nearly 3 years manifests an election under Neb. U.C.C. § 9-505(2) (Reissue 1980) to retain the collateral in satisfaction of the obligation.

Appeal from the District Court for Antelope County: MERRITT C. WARREN, Judge. Reversed and remanded with directions to dismiss.

Thomas H. DeLay of Mueting, DeLay & Stoffer, for appellants.

Michael T. Brogan of Brogan & Stafford, P.C., for appellee.

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

CAPORALE, J.

Defendants-appellants, Mary and Ronald Wilkinson, doing business as M & R Trucking, challenge the deficiency judgment entered against them, jointly and severally, under Neb. U.C.C. art. 9 (Reissue 1980), in favor of the plaintiff-appellee, Schmode's, Inc., a Nebraska corporation. Among the Wilkinsons' assignments of error is the failure of the trial court to find that Schmode's elected to retain the collateral in

satisfaction of the Wilkinsons' obligation. The record sustains that assignment, making it unnecessary that we address the remaining assignments. We reverse, remand, and direct that the cause be dismissed.

We note at the outset that this is an action at law. *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983); *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981). The findings and disposition of the trial court therefore, the cause having been tried without a jury, have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Security State Bank v. McCoy, ante* p. 132, 361 N.W.2d 514 (1985); *South Sioux City Star v. Edwards*, 218 Neb. 487, 357 N.W.2d 178 (1984); *Koperski v. Husker Dodge, Inc., supra.*

Reviewed in accordance with that standard, the relevant facts are as follows.

Schmode's entered into a business transaction with Harco Leasing Company, Inc., whereby Schmode's sold to Harco a 1978 International tractor truck and a 1978 Hobbs trailer. Harco and the Wilkinsons then, on April 27, 1978, executed a conditional sales agreement, entitled "LEASING AGREEMENT," with respect to the truck, which obligated the Wilkinsons to pay Harco a principal amount, plus amortized interest and other charges, in 60 equal monthly installments and a larger 61st payment representing the truck's "residual value." On May 19, 1978, Harco and the Wilkinsons entered into a similar agreement with respect to the trailer, obligating the Wilkinsons to pay Harco a principal amount, plus amortized interest and other charges, in 60 equal monthly installments and a larger 61st payment representing the trailer's "residual value." Schmode's guaranteed Harco that if the Wilkinsons defaulted on their obligation such as to result in Harco's reclaiming the truck and trailer from the Wilkinsons, Schmode's would repurchase them from Harco.

The Wilkinsons defaulted, and on December 19, 1979, they delivered possession of the truck and trailer, collectively the collateral, to Schmode's.

The collateral was in need of repair and Schmode's restored it to sound mechanical condition, the restoration work being

completed by May 3, 1980. The collateral was then placed on Schmode's lot in an attempt to sell it. As the collateral did not sell, Schmode's used it by leasing it to others through about mid-April of 1983, during which time it was operated a minimum of 204,000 miles.

Schmode's honored its agreement with Harco and paid the sums due Harco from the Wilkinsons. The parties do not dispute that Schmode's had a security interest in the collateral.

The collateral was publicly sold on April 28, 1983, pursuant to the trial judge's order. At the trial on the merits the trial judge found that the April 28 sale had not been commercially reasonable "because of the lapse of nearly three years and the use of said vehicles before the sale." The trial judge accordingly ruled that the Wilkinsons were entitled to setoffs for the damages they suffered due to the commercially unreasonable sale.

The Wilkinsons argue that Schmode's elected to retain the collateral in satisfaction of the obligation by keeping and leasing it for a period of almost 3 years after restoration and causing it to be operated for at least 204,000 miles, and therefore cannot obtain a deficiency judgment.

Neb. U.C.C. § 9-505(2) (Reissue 1980) provides in relevant part:

> In any other case involving consumer goods or any other collateral a secured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be sent to the debtor if he has not signed after default a statement renouncing or modifying his rights under this subsection.

Although we have not had occasion to deal with whether acts by a secured party other than the sending of notice may result in a § 9-505(2) election, other states with statutes virtually identical to ours have. There appear to be three different approaches.

One approach holds that an election under § 9-505(2) is impossible absent the service of notice on the debtor of the secured party's intent to retain the collateral in payment of the debt. *Flickinger v. Genesee Corp*, 71 A.D.2d 382, 423 N.Y.S.2d

73 (1979), typifies this view which seems to be premised on the notion that since the code provides a specific method for indicating that the secured party has elected to retain the collateral to satisfy the obligation, such an election cannot be implied from conduct not specified by the code. We reject this view on the ground that a secured party ought not be allowed to penalize a debtor by asserting the secured party's own failure to give the notice contemplated by § 9-505(2).

A second approach is that an election can be implied from an unreasonably prolonged retention of the collateral by the secured party and that the determination of what constitutes an unreasonable period of time is a question for the trier of fact. *Service Chevrolet v. Sparks*, 99 Wash. 2d 199, 660 P.2d 760 (1983); *Shultz v. Delaware Trust Company*, 360 A.2d 576 (Del. Super. 1976). This view appears to rest on the theory that to allow the secured party to retain the collateral for an unreasonably long time and then elect to sue the debtor on the underlying obligation would be unfair to the debtor.

The third approach requires that the secured party manifest an intent to accept the collateral in satisfaction of the obligation by some conduct other than an undue delay in disposing of the collateral. *Nelson v. Armstrong*, 99 Idaho 422, 582 P.2d 1100 (1978) (retaining farm equipment for 4½ months did not constitute an election); *Jones v Morgan*, 58 Mich. App. 455, 228 N.W.2d 419 (1975) (keeping automobile for almost 2 years did not constitute an election); *Tanenbaum v. Economics Laboratory, Inc.*, 628 S.W.2d 769 (Tex. 1982) (taking back collateral at request of debtor that such be done in satisfaction of debt constituted election). This view rests, at least in part, on the notion that since the debtor is protected by other provisions in the code and because, at common law, the analogous concept of accord and satisfaction requires proof of the creditor's assent, in the absence of notice a clear manifestation of an election on the part of the creditor is required.

Under the circumstances of this case we need not choose at this time between the second and third approaches. Although we consider the question to be one of fact, we hold that in this case there is but one reasonable conclusion, and, therefore, as a matter of law, Schmode's, by using the collateral for a period of

nearly 3 years after restoration by leasing and causing it to be operated for at least 204,000 miles, elected to retain the collateral in satisfaction of the Wilkinsons' obligation. The trial court was clearly wrong in not so holding.

We leave to another day and another case the question of whether under some circumstances the mere retention of collateral for an unreasonably long time may in and of itself imply a § 9-505(2) election.

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

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

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RICHARD SHOTKOSKI, APPELLEE, V. THEODORE PROSOSKI, APPELLANT.

362 N.W.2d 59

Filed February 8, 1985. No. 83-841.

1. **Waters.** Diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. But when diffused surface waters are concentrated in volume and velocity and flow into a natural depression, draw, swale, or other drainageway, the rule as to diffused surface waters does not apply.
2. **Waters: Words and Phrases.** Under the law of this state, surface water is defined as water which appears upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily results from rainfall or melting snow.
3. **Waters.** 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.
4. _____. Disregarding the statutory requirements for a watercourse, so as to prevent a lower landowner from diverting surface waters, it still must be established that the surface waters are running through a natural depression, draw, swale, or drainageway.
5. **Injunction.** One seeking an injunction has the burden to establish by competent evidence every fact necessary to entitle that person to injunctive relief.

Appeal from the District Court for Nance County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions to dismiss.

John Morgan of Morgan & Morgan, for appellant.

Donald R. Treadway of Treadway, Bird & Albin, P.C., for appellee.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired.

HASTINGS, J.

The defendant, who has a contractual interest in and is in possession of the southeast quarter of Section 14, Township 16 North, Range 5 West of the 6th P.M., Nance County, Nebraska, has appealed an order of the district court which enjoined him from obstructing the flow of water through a drainageway across that property.

He assigns as error that the trial court incorrectly determined that the drainageway mentioned in fact existed and that the court failed to find that the statute of limitations barred the action. However, he failed to argue the statute of limitations issue either in his brief or during oral argument and, in fact, stated in open court that he was abandoning such assignment. Therefore, we need not consider it.

This action was originally brought by four different landowners owning land to the west and north of the defendant's property, all of whom claimed that the action of the defendant in blocking this drainageway caused runoff waters to back up and pond on their property, to their damage. However, the district court found that no damage occurred as to any of the plaintiffs excepting Richard Shotkoski, and he is the only other party to this appeal.

The plaintiff Richard Shotkoski owns the east half of the southwest quarter of this same section, and of course his eastern boundary is the same line that constitutes the defendant's western boundary.

Several witnesses testified, including Ronald Rystrom, a professional engineer and land surveyor, and a number of detailed exhibits were received in evidence, including photographs, aerial photo maps, and contour and soil maps. However, it cannot be left unsaid that the manner in which the witnesses were allowed to testify made many of these exhibits

practically unintelligible and useless for the purpose of our review. For example, when asked where the break in the so-called dike appeared, the witness answered, "It's in this area right here," and when quizzed as to the lowest elevation in the quarter section, the reply was "Right in this area right here."

Of particular note is exhibit 51, a U.S. Soil Conservation Service detailed contour map, which could have been of immeasurable help in deciding this case. However, the testimony of the witness Rystrom, when asked to locate the breach in the fence line, stated, "It's in this area right here." When inquiry was made of him as to whether there appeared to be a lower area clear across the quarter section, he replied, "Yes . . . it shows it is in this area here and back over." It should be readily apparent to counsel and the trial court that this court, reviewing only the record, has no idea where the witnesses were pointing when making these observations.

Be that as it may, we will attempt to set forth the pertinent facts as accurately as the record will permit. There is a three-strand barbed wire fence which runs along the common border between the plaintiff's and the defendant's land. Sometime in April of 1983, a rainstorm of unspecified proportions caused water to pond and back up to the west from the fence line. Eventually, a washout occurred in a portion of the area between two fenceposts, allowing the ponded water to run as a stream from the plaintiff's property onto and across the defendant's field. It is obvious from the photographs in evidence that this created a gully of some depth across a portion of the defendant's land.

Although the photographs, the testimony of engineer Rystrom, and an elevation drawing prepared by him would demonstrate that the fence line itself ranges from a foot to a foot and a half higher than the natural ground level immediately to the west, the defendant denies that the fence line was a constructed dike or even a natural buildup caused by blowing dirt and debris. He insists that the fence line has been in existence for 50 to 60 years without change and that land leveling done by owners to the west, including the plaintiff, has placed water into the area immediately west of his fence line

that was not there before.

Defendant does concede that before this court action was instituted he planned to fill in this breach and the gullies in order to allow movement of his trucks and machinery. As a matter of fact, the record of a subsequent contempt hearing, which is included with the bill of exceptions, demonstrates that the defendant did in fact fill in this gully and inserted a tube or culvert to allow whatever water was wont to flow to proceed to the east. Defendant denies that this was ever a natural watercourse. Another witness, Mary Koza, testified that she and her husband had farmed in this area starting in 1927 and there had never been any water running through the area of the breach.

Lucion Shotkoski, a brother of the plaintiff, testified that in 1948 or 1949 he observed dirt-moving equipment "moving north and south on the west boundary of the Southeast Quarter 14-16-5, moving dirt to the area of the depression."

Dennis Shotkoski, another brother of the plaintiff, testified that he owned and had farmed land immediately west and north of plaintiff's property since 1945, and had lived and farmed in the area for some years prior to that time. In answer to a question as to how the water flowed in that area, he stated:

> A. It comes here west to my brother's house — Richard — and goes north and cuts across here, and it goes on down through the depression.
>
> . . . .
>
> Q. [By Mr. Treadway] Well, it comes out of the southwest, goes into the southeast, and then moves out of the Southeast Quarter onto some other land?
>
> . . . .
>
> A. Well . . . and it comes through the field, goes through the depression in the Prososki land at the fence line, and goes through his land and goes out through Prososki's and on down to the east.

This witness went on to explain how the water flowed across the plaintiff's land, through the break in the fence line, and on across the defendant's property through culverts located on the east side of defendant's land. According to his testimony, the water flowed in this manner in the years previous to 1983 and as

far back as 1948 or 1949. However, he also agreed that many years ago his father had placed a dike on the fence line between some property now owned by Ronald Shotkoski and a piece of land owned by Richard Shotkoski, apparently along the boundary line between the southeast and southwest quarters of Section 15. Richard Shotkoski testified that *for the first time in his memory*, the water had broken over this dike in the spring of 1983. This allowed a considerable amount of water to flow toward the east from this quarter and onto Section 14.

The testimony of Ronald Rystrom, the engineer, particularly as it related to a drawing of profiles or elevations which he had run, exhibit 52, and a comprehensive map prepared by the U.S. Geological Survey, Department of the Interior, exhibit 49, is particularly instructive.

The profile drawings disclose what he describes as a depression, commencing with elevations of 1,612.9 feet at a point 415 feet west of the fence line, to 1,612.8, at a point 20 feet west of the fence, then a jump to 1,613.6 at the fence line, disregarding the breach, and then on down to 1,604.4 feet 300 feet east of the fence line. However, the profile drawing also shows a marked rise in elevation at the fence line, which Rystrom explains as being from a foot to a foot and a half higher than the natural ground level immediately to the west of the fence. Removing the buildup from the fence line would bring that elevation down lower than the 1,612.8 feet immediately west of that line.

Perhaps what the trial court may have felt was most persuasive of the various exhibits was the U.S. Geological Survey map, which shows scattered elevations and stream lines. The blue "dash-dotted" lines, according to Rystrom, represent flow lines or streambeds.

Although, incredibly, no witness was ever asked to locate either by measurements or markings on a map the north-south location of the breach in the fence line, there does very definitely appear on the USGS map a blue line originating toward the northern end of the center of the southwest corner which crosses into the southeast quarter at a point approximately 1,000 feet north of the south boundary line. This line then meanders across the southeast quarter section,

through Section 13 and down into Section 24, where it enlarges into what appear to be two lakes or ponds. The line then continues for approximately another 4 miles, enlarging into a rather obvious, well-defined stream, which finally empties into Prairie Creek.

Examination of a series of aerial photo maps, appearing as exhibits 47 and 48, even more graphically reveals the flow line, particularly in the southeast quarter of the southeast quarter, where a well-defined pond appears on an aerial photo being a part of exhibit 47.

Rystrom also relied on exhibit 50, a comprehensive soil survey of Nance County prepared by the U.S. Department of Agriculture, Soil Conservation Service. This also shows the "dash-dotted" line which the witness declared was a drainageway. However, the source or beginning of this line is within approximately 400 feet of the east boundary of the southeast corner. This in turn would show its origin as some 900 feet east of the fence line and breach under consideration. Additionally, exhibit 47, an overhead aerial photo, shows a well-defined drainageway which does not originate until some point well into the southeast quarter of the southeast quarter, again, at least a quarter of a mile east of the controversial fence line.

Also appearing in the record are a series of aerial photos taken by a spray-plane pilot on June 14, 1983. Exhibits 30 and 31 are supposed to depict the area of defendant's land where the water passes under the road and on to the east to Section 13. Something remarkable about those photos is that they show intermittent ponds of water scattered throughout both Sections 14 and 13. Additionally, the water, which would appear as a stream consistent with the exhibits previously mentioned, would seem to commence at a point within perhaps 400 feet or so of the east line of Section 14.

Exhibits 32 and 33 are said to disclose water flowing or ponding up on the extreme east side of defendant's land. Additionally, they would show innumerable patches of standing water east, south, and north of the area in question, onto other sections.

Shown on exhibits 34 and 35 is the fence line and breach, with

water ponding on the defendant's side of the fence, and what appears to be thoroughly soaked cropland on the plaintiff's side, but no standing water. Exhibits 36 and 37 supposedly show the break in the fence line, with water flowing from the west to the east. Again, there appear to be any number of isolated ponds of water standing without reference to any drainageway.

Dennis Shotkoski described exhibit 39, showing water ponded all over a large portion of his 80 acres lying west of the plaintiff's. He says this shows the break in the township road to the west, with water ponded up on the west side.

This same witness went on to describe exhibits 42, 43, 44, and 45 as showing water going onto his brother Richard's farm, over the township road; water coming from Ronald Shotkoski's farm, on farther east onto Richard's farm, and onto the witness' farm; and also water ponding in many areas of what he calls his brother's farm, although without reference to which farm.

The testimony established generally that "dikes," or built-up fence rows, had been in existence in this area for a number of years. Also, land had been leveled, apparently diverting the natural flow from one direction to another, and several culverts existed to carry surface waters to natural drainageways. Some of these culverts had become blocked, which may in part have been the cause for the alteration of waterflow.

The great number of areas of ponded water disclosed by the various photographs, together with this testimony, would seem to substantiate the fact that most of the farmers in this area had been taking steps to protect their land from spreading surface water.

An examination of the many photographs, particularly exhibits 1, 2, 3, 4, 5, and 7, as well as the other evidence set forth above, does not convince us that there is any "waterway," or "drainageway," as previously defined by this court, existing at or west of the fence line in question, other than the short gully created at the fence line by the receding waters.

The general rule is that

> diffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. But when diffused surface waters are

> concentrated in volume and velocity and flow into a natural depression, draw, swale, or other drainway, the rule as to diffused surface waters does not apply.

*Nichol v. Yocum*, 173 Neb. 298, 306, 113 N.W.2d 195, 200 (1962). See, also, *Hiegel Farms Corp. v. Casselman*, 217 Neb. 506, 349 N.W.2d 382 (1984); *Krafka v. Brase*, 218 Neb. 335, 353 N.W.2d 276 (1984).

"In Nebraska surface water is defined as water which appears upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily results from rainfall or melting snow." *LaPuzza v. Sedlacek*, 218 Neb. 285, 286-87, 353 N.W.2d 17, 18 (1984).

In the instant case it appears, to say the least, that the waters traversing through the fence line never lost their character as surface water.

In *Barry v. Wittmersehouse*, 212 Neb. 909, 912, 327 N.W.2d 33, 35 (1982), this court stated: "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."

Neb. Rev. Stat. § 31-202 (Reissue 1984) provides: "Any 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."

Case law has further refined the requirements for the existence of a watercourse.

> " ' "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." ' "

*Grint v. Hart*, 216 Neb. 406, 410, 343 N.W.2d 921, 924 (1984). *Barry v. Wittmersehouse, supra; Mader v. Mettenbrink*, 159 Neb. 118, 65 N.W.2d 334 (1954). Evidence adduced at trial appears to support a finding of an "occasional and temporary outburst of water," as contemplated by the *Grint* opinion.

The evidence, in our view, and we must review this case de novo on the record, does not establish at the site of the wash through, other than on this one occasion, anything approaching a regular channel with a bed, banks, and sides. Rather, the record does support a conclusion that this was only an "occasional and temporary outburst of water" as contemplated by the *Grint* decision.

We are well aware of the fact that regardless of the requirements of § 31-202, the flow of surface water in any well-defined course, whether it be a ditch, swale, or draw in its primitive condition and whether it is 2 feet deep or not, may qualify as a watercourse or drainageway with which a landowner may not interfere to the detriment of his neighbor. *Barry v. Wittmersehouse, supra*. But as that same case goes on to say at 913, 327 N.W.2d at 35-36:

> In the instant case the de novo review of the record shows that occasionally surface water, caused by heavy rains or snows, collected in the low areas on the plaintiffs' land and flowed toward the defendants' land. When the overflow would reach the defendants' land, it would spread out and fill up the low area thereon. We do not think the overflow from these low areas ever reached the stage where it could be called a watercourse rather than merely diffused surface water.
>
> Surface water is a common enemy and the proprietor may by enbankment [sic] or dike or otherwise defend himself against its encroachment, and he will not be liable in damages . . . provided that the proprietor in making defense on his own land himself exercises ordinary care . . . .

And in *Grint v. Hart, supra* at 410-11, 343 N.W.2d at 924, we went on to say:

> 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.
>
> . . . .
>
> 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.

The plaintiff has failed to prove that a natural depression, draw, swale, or drainageway existed on these premises.

The facts in this case are not all that different from those found in *Hiegel Farms Corp. v. Casselman*, 217 Neb. 506, 349 N.W.2d 382 (1984). The plaintiff has failed to establish by competent evidence every fact necessary to entitle him to injunctive relief. *Cather & Sons Constr., Inc. v. City of Lincoln*, 200 Neb. 510, 264 N.W.2d 413 (1978). Therefore, the judgment of the district court is reversed and plaintiff's petition is ordered dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

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THOMAS H. GLOCKEL, PLAINTIFF, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A FOREIGN CORPORATION, DEFENDANT.

361 N.W.2d 559

Filed February 8, 1985. No. 84-072.

1. **Insurance: Statutes.** The method of, and reasons for, canceling an automobile liability insurance policy of the type defined in Neb. Rev. Stat. § 44-514 (Reissue 1984) is exclusively controlled by Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984).
2. _____: _____. As a general statute, Neb. Rev. Stat. § 44-358 (Reissue 1984) does not control procedures for the specific types of policies defined in Neb. Rev. Stat. § 44-514 (Reissue 1984).

Certified Questions from the U.S. District Court for the District of Nebraska. Judgment entered.

Peter J. Peters, P.C., Warren C. Schrempp and Peter J. Hoagland, and Wallace Hopkins, P.C., and Steven M. Watson of Marks, Clare, Hopkins, Rauth & Cuddigan, for plaintiff.

Joseph K. Meusey and Joseph E. Jones of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for defendant.

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

GRANT, J.

The U.S. District Court for the District of Nebraska, pursuant to Neb. Rev. Stat. § 24-219 (Cum. Supp. 1984), has submitted to us certain certified questions of law.

The facts underlying the controversy giving rise to the questions were recited to us by the district court, as follows:

Plaintiff, Thomas H. Glockel (hereinafter referred to as Glockel), applied to defendant, State Farm Mutual Automobile Insurance Company (hereinafter referred to as State Farm), for an automobile liability insurance policy on April 29, 1980. Glockel signed the application and paid $54.98 for the first 2 months' coverage. In his application Glockel listed one traffic violation, a stop sign infraction in October of 1979. State Farm's agent bound coverage on April 29, 1980, and, on or about the same day, forwarded the application to State Farm's regional office in Lincoln, Nebraska. The policy was issued to Glockel and his father.

The facts certified by the forwarding court further state:

> Four days later, on May 3, 1980, Glockel was involved in an automobile accident that caused extremely serious injuries to one Leon Skank. At some point, the Lincoln underwriting office discovered that Glockel's Nebraska motor vehicle record revealed two traffic violations instead of just one. On May 7, 1980, Glockel gave a recorded statement to a State Farm investigator admitting

that he had received "two or three" speeding tickets in Council Bluffs, Iowa between June and August of 1979. State Farm thereafter convened a "claim committee" to evaluate the status of Glockel's policy. The claim committee determined that Glockel had made a material misrepresentation concerning his driving record. In a June 9, 1980, letter addressed to plaintiff Glockel and his father, State Farm advised that, because of Thomas Glockel's misrepresentations, it was rescinding the binder of insurance and declaring it void at its inception. State Farm also returned Glockel's $54.98 premium payment.

Kandis K. Skank, as Conservator for her husband, Leon, filed suit in the District Court of Douglas County, Nebraska, against Thomas Glockel alleging negligence in the May 3, 1980 operation of his motor vehicle. Her attorneys sent written offers to Glockel's attorney to settle the lawsuit for the $15,000 limit of Glockel's policy. Glockel's attorney communicated the offers to State Farm and demanded settlement. State Farm rejected the offers and refused to settle on the basis of its June 9, 1980 letter of rescission. The jury returned a verdict against Thomas Glockel substantially in excess of the policy limits.

Glockel's complaint in the United States District Court alleges negligence and bad faith by State Farm for refusing to settle the underlying lawsuit within the $15,000 policy limit. Mr. Glockel seeks a judgment against State Farm for the $15,000 insurance coverage and the amount by which the state court judgment exceeds the policy limit, plus interest and attorneys' fees. He further requests damages for mental and emotional distress, unfavorable publicity, and injury to his credit and reputation. State Farm, by affirmative defense, alleges that Glockel misrepresented material facts regarding his driving record in his application for insurance and that, under Nebraska law, State Farm may therefore rescind the policy and declare it void *ab initio*.

In connection with these facts, as set out above, we are premising our opinion on the facts as set out by the forwarding court. Pursuant to Neb. Rev. Stat. § 24-221 (Cum. Supp. 1984),

we accept the facts as set out in the certification request.

We, of course, make no determination or inference as to any of Glockel's allegations nor State Farm's defenses, but only direct this opinion to answering the legal questions presented to us. Those questions are:

1. Whether the *exclusive* method of terminating an automobile liability insurance policy is controlled by [Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984)].
2. Whether, because of the provisions of [§ 44-515(1)(b)], an automobile liability insurance policy can only be *cancelled* for "material misrepresentations" once a policy of insurance has been issued.
3. Whether [Neb. Rev. Stat. § 44-358 (Reissue 1984)] is inapplicable to an automobile liability insurance policy.

(Emphasis in original.)

For reasons hereinafter set out, and with the qualifications hereinafter specified, (1) the first question is answered Yes, because Neb. Rev. Stat. §§ 44-515 to 44-521 (Reissue 1984) specifically provide for the cancellation of certain automobile liability insurance policies covering a specific limited class described therein; (2) the second question is answered No (possibly due to the somewhat ambiguous framing of the question, which was apparently adopted by the federal court from Glockel's motion filed in that court), because § 44-515(1)(b) also allows cancellation for other reasons; and (3) the third question is answered Yes, because Neb. Rev. Stat. § 44-358 (Reissue 1984) is inapplicable to the specific type of automobile liability insurance policies defined in Neb. Rev. Stat. § 44-514 (Reissue 1984), while § 44-358 does apply to all other types of liability policies, including automobile liability insurance policies not defined in § 44-514.

QUESTION NO. 1

With regard to the first question presented, we note that the question refers to §§ 44-515 to 44-521. Our answer herein is predicated on the fact that the question must be broadened to include § 44-514 because that section sets out, with particularity, the meaning of the word "policy" as used in

§§ 44-515 to 44-521. Pursuant to the terms of § 44-514, the word "policy" is sharply limited to mean only an automobile liability policy (1) providing all or part of coverage for "bodily injury and property damage liability, medical payments, and uninsured motorists coverage," (2) delivered or issued for delivery in Nebraska, (3) insuring a natural person or related persons resident of the same household, and (4) insuring only specified types of vehicles ("private passenger or station wagon type") not used as "a public or livery conveyance for passengers, nor rented to others," or "any other four-wheel motor vehicle of the pickup, panel, or delivery type which is not used in the occupation, profession, or business of the insured." Section 44-514 further specifically provides that §§ 44-514 to 44-521 do not apply to (1) assigned risks coverage, (2) any policy covering more than four automobiles, (3) any policy covering "garage, automobile sales agency, repair shop, service station, or public parking place operation hazards," or (4) any policy issued specifically to cover personal or premises liability of an insured even though such policy provides incidental liability coverage for certain automobile uses.

We have set out herein the details of types of "automobile liability policies" covered by §§ 44-514 to 44-521 to show how limited a class of policies these statutes were designed to cover. Glockel's counsel argue that when the Legislature enacted §§ 44-514 to 44-521, the Legislature intended that the cancellation procedure contained therein should be the sole method of terminating the specific types of automobile liability policies described therein. The provisions also set forth specific reasons for which a policy of the type described in § 44-514 can be canceled. Glockel suggests that, since insurance statutes should be construed liberally in favor of the insured, the cancellation procedure set out in §§ 44-514 to 44-521 must be viewed as the exclusive method of termination.

State Farm's position is that Neb. Rev. Stat. § 44-379.01 (Reissue 1984) also provides a specific method of cancellation of an automobile policy and that § 44-379.01 as well as § 44-358 controls the overall method of cancellation of all insurance policies, including those defined in § 44-514. From consideration of these other statutes (§§ 44-379.01 and 44-358),

State Farm argues in its brief that § 44-516 applies only to cancellation and not to rescission of an automobile liability policy, and defines cancellation as a termination of the policy, while rescission is defined as meaning the avoiding of the insurance policy ab initio. Glockel argues in his brief that an automobile liability policy can only be canceled prospectively pursuant to § 44-516(1) and that after the occurrence of a loss such a policy may not be rescinded. The terms "rescission" and "cancellation" are not defined in any statute, nor is the word rescission used in any of the named statutes.

The great difficulty in answering the certified questions is that we cannot review the matter as an appeal from a specific judgment or ruling of a trial court (in this case the U.S. District Court), but instead we are answering legal questions in the abstract, based on a particular statement of facts forwarded to us by the trial court. Therefore, while the parties brief what seems to be the real issue in the case—that is, When does a purported rescission or cancellation take place?—that question is not submitted to us for answer.

Indeed, the question whether rescission and cancellation signify the same concept or have the same or different meanings under Nebraska law is not submitted on this point. State Farm relies on the statement set forth in 17 G. Couch, Couch Cyclopedia of Insurance Law § 67:35 at 487 (rev. ed. 1983): "The cancellation of an insurance policy is not a rescission, since a rescission avoids the contract ab initio whereas a cancellation merely terminates the policy as of the time when the cancellation becomes effective." On the other hand, Webster's Third New International Dictionary, Unabridged (1968), defines "rescind" as "to take back : ANNUL, CANCEL," *id.* at 1930, and defines "cancel" as "the act of annulling or rescinding," *id.* at 325. It is suggested in 12A C.J.S. *Cancellation of Inst.* § 2 at 644 (1980) that "the terms 'cancellation' and 'rescission' are frequently regarded as being interchangeable." Various jurisdictions take differing positions on the question. Since the question is not submitted to us, we will answer the certified questions assuming that it does not make any difference in our answers which concept is applicable in Nebraska.

Sections 44-514 to 44-521 were the response of Nebraska's Legislature to a growing national concern over arbitrary policy cancellations and nonrenewals. The Legislature was concerned over policyholders' coverage being canceled without the holders being given an opportunity to procure new coverage. This intent is in conformity with the public policy of the state that "[w]hatever length of time a policy has been in effect, a policyholder is not ordinarily expecting to have his coverage canceled." *Saunders v. Mittlieder*, 195 Neb. 232, 236, 237 N.W.2d 838, 840 (1976). The thrust of the Legislature's action was to guarantee that if an insured was to become uninsured, he be apprised of that fact.

As set out above, § 44-514 provides a very narrow definition of "automobile liability policy." Basically, the statute limits the scope of its provisions to private vehicles in noncommercial use. It does not extend to all types of automobile liability insurance. The balance of automobile liability policies are covered by § 44-379.01.

It appears to us that the questions presented seek to determine if an automobile liability insurance policy can be either "canceled," "rescinded," or "terminated" *ab initio*, rather than prospectively. In answering the questions certified to us, it is really of no concern at this point whether the words "rescission" or "cancellation" mean the same or not. Indeed, if defendant's contention is that rescission is the only way to avoid a contract ab initio, then ab initio rescission is *not* available under §§ 44-515 to 44-521 because the term "rescission" is not used in any way in such sections.

We determine that the *exclusive* method of "canceling" an automobile liability policy of the type defined in § 44-514 is set out in §§ 44-515 to 44-521 and that the reasons for such a cancellation are only those set out in the same sections. By their terms, §§ 44-515 and 44-516 govern those policies to which § 44-514 applies, i.e., automobile liability insurance policies of the type defined. Sections 44-514 to 44-521 apply to a specific type of automobile liability policy. Therefore, §§ 44-515 to 44-521 set out the exclusive method or procedures for termination of an automobile liability policy of the type described in § 44-514.

Some confusion arises because § 44-515(2) seems to exclude specifically from its provisions "any policy or coverage which has been in effect less than sixty days at the time notice of cancellation is mailed or delivered by the insurer unless it is a renewal policy." We stated in *Saunders v. Mittlieder, supra* at 236, 237 N.W.2d at 840:

> We conclude the intent of subsection (2) to exclude the effect of section 44-515, R.R.S. 1943, for the first 60 days, was intended solely to give the insurance company a short period for investigation to determine whether or not other reasons might make the risk unacceptable. Subsection (2) relates to the time period provided for cancellation, not to the type of notice required.

Similarly, it is stated in *Conover v. Dairyland Ins. Co.*, 200 Neb. 715, 719, 265 N.W.2d 222, 223 (1978): "We hold that an automobile policy, to which sections 44-516 to 44-521, R.R.S. 1943, apply, issued for less than a 6-month period, is to be considered, for all purposes of said sections, as if written for a period of 6 months."

It is clear that both *Saunders v. Mittlieder, supra*, and *Conover v. Dairyland Ins. Co., supra*, have said that the 60 days referred to in § 44-515(2) sets forth an initial time within which an insurer may check out its insured and decide to cancel the policy for any reason of its own and not be limited to the reasons set out in § 44-515(1). In other words, the method of cancellation must be that set out in § 44-515 to 44-521, but for the first 60 days of the policy the reasons need not be those specified in § 44-515(1).

We therefore hold that the only way to cancel the automobile liability policy represented by Glockel's application, Glockel's premium payment, and State Farm's binder (assuming that the policy is one described in § 44-514) is to follow the procedures set out in §§ 44-515 and 44-516.

This holding is supported both by the original enactment of §§ 44-514 to 44-521 by the enactment of 1972 Neb. Laws, L.B. 1396, and by the amending of both §§ 44-379.01 and 44-516 in the same bill in 1973.

Senator Waldron, the chairman of the Insurance Interim Study Committee, which introduced L.B. 1396, now §§ 44-515

to 44-521, told the committee: "It provides that cancellation can only be made under certain circumstances when a person is insured by a company." Banking, Commerce and Insurance Committee Hearing, L.B. 1396, 82d Leg., 2d Sess. 3 (Feb. 15, 1972).

With regard to the later amending of § 44-516 in L.B. 390 in 1973, the legislative history shows that the bill, as first introduced by Senator Murphy and as read on January 31, 1973, contemplated the complete repeal of § 44-379.01 and the amending of § 44-516. As finally passed by the Legislature on March 12, 1973, and approved by the Governor on March 14, 1973, it amended § 44-379.01 to state that the period of time within which an insurer could cancel a policy for any reason was expanded to 60 days, while the methods of cancellation remained the same. L.B. 390, in § 2, as enacted, specifically amended § 44-516 and kept the two statutes separate and apart, as covering policies for different kinds of automobiles.

It is clear that the Legislature specifically recognized that different kinds of automobile liability policies were covered in the two sections amended. Since both sections refer to automobile liability insurance coverage, the only meaningful reasons for passing two amendments would be that § 44-516 is directed only to policies of the type defined in § 44-514 while § 44-379.01 is directed to all other automobile liability policies. Question 1 is answered Yes.

QUESTION NO. 2

In answering question 2 we are faced with similar difficulty. In the question the word "cancelled" is underlined, which seems to indicate that canceled means something different than some unexpressed concept. It would be a gratuitous assumption on our part to answer that the parties seek to have us differentiate between cancellation and rescission, so our answer will assume, for purposes of this answer only, that the two terms mean the same.

With that assumption the answer is No, because § 44-515(1) sets out, in part, that a policy (of the type described in § 44-514) can be canceled for "one or more of the following reasons: . . . (b) fraud or material misrepresentation affecting the policy or in the presentation of a claim thereunder, or violation of any of

the terms or conditions of the policy." In addition, an automobile liability policy of the type described in § 44-514 can also be "canceled" for specific reasons other than "material misrepresentation," which additional reasons are set out in § 44-515(1)(a) and (c).

Thus it is clear that such an automobile liability policy can be canceled for a number of reasons stated in the statute, and not only for material misrepresentation. The answer to question 2, as framed, is No.

QUESTION NO. 3

Proceeding to the third question certified to us, we first note:

> It is a well-established rule that special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict. Houser v. School Dist. of South Sioux City, 189 Neb. 323, 202 N.W.2d 621. Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication. Bass v. County of Saline, 171 Neb. 538, 106 N.W.2d 860.

*Kibbon v. School Dist. of Omaha*, 196 Neb. 293, 298-99, 242 N.W.2d 634, 637 (1976).

Section 44-358 is included in article 3 of chapter 44. Article 3 is entitled "General Provisions Relating to Insurance." It deals with misrepresentation made in application for *any* type of insurance. Section 44-358 is a general statute. Sections 44-515 to 44-521 deal specifically with automobile liability insurance of the type defined in § 44-514. Such statutes are special statutes. Thus, § 44-358, while generally applicable to all insurance policies, must yield to §§ 44-514 to 44-521 in cases in which the latter conflict with it, and those latter sections completely control both the reasons for, and the method of, cancellation of policies defined in § 44-514.

Defendant also argues that § 44-358 was not repealed by implication by the enactment of §§ 44-514 et seq. Concededly, this is true. Section 44-358 continues to apply in cases where it does not conflict with special statutes.

Therefore, the third question is answered Yes. Section 44-358 is inapplicable to automobile liability policies insofar as it conflicts with §§ 44-514 et seq.

## CONCLUSION

The submitted questions are answered as set out above, and the cause is remanded to the U.S. District Court for the District of Nebraska for further proceedings.

JUDGMENT ENTERED.

CAPORALE, J., participating on briefs.

HASTINGS, J., concurring in the result.

While I concur generally in the majority opinion, I would not wish to leave the impression that the statutes under consideration restrict or dictate the manner in which an insurance company may rescind a policy which was issued as the result of "fraud in the inception"; in other words, where a contract in fact never existed.

BOSLAUGH, J., joins in this concurrence.

CAPORALE, J., concurring in part, and in part dissenting.

I disagree with the majority's affirmative answer to the third question certified, which asks whether Neb. Rev. Stat. § 44-358 (Reissue 1984) is inapplicable to an automobile liability insurance policy.

Section 44-358 was first enacted in 1913 as part of an extensive revision of insurance statutes, and has never been amended, except for grammatical corrections. It reads:

> No oral or written misrepresentation or warranty made in the negotiation for a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty deceived the company to its injury. The breach of a warranty or condition in any contract or policy of insurance shall not avoid the policy nor avail the insurer to avoid liability, unless such breach shall exist at the time of the loss and contribute to the loss, anything in the policy or contract of insurance to the contrary notwithstanding.

In short, the "contribute to the loss" standard of the statute imposes on an insurer who wishes to defeat or avoid coverage the burden of proving not only that the risk of loss from some

potential cause was increased but also that one of those increased risks actually caused the loss.

In what appears to be the first consideration of the effect of other enactments on § 44-358, this court, in *Zimmerman v. Continental Cas. Co.*, 181 Neb. 654, 150 N.W.2d 268 (1967), held that § 44-358 was a general statute which applied to all insurance policies and must be read in pari materia with the provisions of Neb. Rev. Stat. § 44-710.14 (Reissue 1984), which was adopted in 1957 and applied only to sickness and accident insurance policies. Section 44-710.14 provides that a false statement made in an application will bar recovery only when it materially affects either acceptance of the risk or the hazard assumed. The *Zimmerman* court found no conflict between the two statutes and concluded that a sickness and accident insurer had to meet the requirements of both statutes in order to defeat recovery. *Zimmerman* further held that the older statute, § 44-358, required both that the statements be "made knowingly by the insured with the intent to deceive" and that the insurer be "deceived by them to its injury." *Id.* at 659, 150 N.W.2d at 272. *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982), applied the *Zimmerman* rule to another sickness and accident policy, and *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984), in determining that a life insurer did not have a basis for defeating coverage, again stated that § 44-358 applied to all policies.

I see nothing in Neb. Rev. Stat. §§ 44-514 through 44-521 (Reissue 1984), inclusive, which conflicts with § 44-358. Those statutes specify particular methods of accomplishing the termination of coverage once extended by certain specified policies, and in some instances further limit the bases upon which coverage may be terminated, as well as limit the effective date of the termination.

Accordingly, I would have answered the third question in the negative, No, § 44-358 is not inapplicable to the policies of automobile liability insurance which come within the purview of §§ 44-514 through 44-521, inclusive; that is to say, § 44-358 is applicable to such policies.

KRIVOSHA, C.J., joins in this concurrence and dissent.

# JACK CLINE ET AL., APPELLEES, V. FRANKLIN PORK, INC., APPELLEE, HILLSIDE HOG FEEDERS, INC., ET AL., APPELLANTS.

361 N.W.2d 566

Filed February 8, 1985. No. 84-151.

1. **Equity: Appeal and Error.** Even though this is an equity action and upon appeal is triable de novo, it is still subject to the condition that when the evidence on material questions of fact is in irreconcilable conflict, the court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Nuisances.** Ordinarily, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact. It may become such by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of operation.
3. **Nuisances: Presumptions.** To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for abatement of a nuisance has ordinary sensibilities.
4. **Property: Nuisances.** The selection of a place of business is often a matter of both private and public concern and is not in all cases left to the owner alone.
5. **Nuisances.** A business which is lawful in itself may become a nuisance, either because of the locality in which it is carried on or because it is conducted in an improper manner.
6. _____. The exercise of due care by the owners of a business in its operation is not a defense to an action to enjoin its operation as a nuisance.
7. **Injunction: Nuisances.** An injunction against a nuisance is an extraordinary remedial process which is granted not as a matter of right but in the exercise of the sound discretion of the court, to be determined on consideration of all the circumstances of each case.
8. _____: _____. A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. In the first instance, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or skill can effect a remedy where the owners cannot be induced to conduct it properly.
9. _____: _____. The operation of a legitimate business or certain aspects of the business which constitute a nuisance may be enjoined where it clearly appears there is no other complete remedy for the injury done.

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

Steven E. Achelpohl, John J. Gilroy, and Christine M. Schild of Schumacher & Gilroy, for appellants.

Thomas H. McNally and William H. Stowell, for appellees Cline et al.

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

WHITE, J.

This is a sequel to *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 313 N.W.2d 667 (1981) (*Franklin Pork I*). A factual background is necessary for a full understanding of the issues involved in this appeal.

On December 9, 1977, the plaintiffs, Jack and Ruth Cline, sued to enjoin the defendant, Franklin Pork, Inc., from operating a pig-feeding/breeding facility located adjacent to the plaintiffs' residence and farm. The plaintiffs alleged that the facility constituted a nuisance and interfered with the use and enjoyment of their home and farm.

At the conclusion of that trial the court found: "As to odor and flies, the operation of defendant's hog-raising facility . . . constituted a private nuisance interferring [sic] with the plaintiffs' use and enjoyment of their property." Rather than enjoining the operation of the facility at that time, the trial court retained jurisdiction and monitored the facility to determine whether the nuisance could be abated. On November 26 and 27, 1979, and January 7, 1980, further hearings were held to determine whether the defendant had taken appropriate action and made substantial progress in reducing the level of flies and odor to an acceptable level. At the conclusion of the hearing the trial court found that the nuisance previously found to exist had been corrected in that the defendant's operation did not materially interfere with the plaintiffs' use and enjoyment of their premises. The plaintiffs' appeal from that order constituted the grounds for our decision in *Franklin Pork I*.

In *Franklin Pork I* this court held that "[t]here appears to be sufficient evidence in the record upon which one could find that the nuisance had not, in fact, been abated." We went on to hold that "[t]he trial judge's appointment of himself as monitor was error, and the error so permeates this trial as to make it advisable to reverse this matter and return it to the trial court with directions to hold a new hearing to determine if the nuisance has, in fact, been abated." *Id.* at 246-47, 313 N.W.2d

at 672.

Additional defendants have been added since *Franklin Pork I*. Defendant Agri-Enterprises, Inc., purchased the land from Franklin Pork, Inc. Defendant Hillside Hog Feeders, Inc., owned the hogs in the facility. Defendant Burt Tribble is a stockholder and president and manager of the facility.

Upon remand the district court found that the nuisance had not been abated. The court enjoined the defendants from continued operation of the facility and ordered that the defendants move the facility off the premises within 60 days. The defendants' appeal from this order constitutes the basis for this opinion.

Three issues are raised on appeal: (1) Has the nuisance been abated? (2) If the nuisance has not been abated, what is the proper remedy? (3) Is the defendants' facility protected from being a nuisance under the Nebraska Right to Farm Act, Neb. Rev. Stat. §§ 2-4401 to 2-4404 (Reissue 1983)?

> [E]ven though this is an equity action and upon appeal it is triable de novo, it is still subject to the condition that when the evidence on material questions of fact is in irreconcilable conflict, the court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.

*Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 240, 313 N.W.2d 667, 669 (1981); *Daugherty v. Ashton Feed and Grain Co., Inc.*, 208 Neb. 159, 303 N.W.2d 64 (1981).

"Ordinarily, a legitimate business enterprise is not a nuisance per se, but it may become a nuisance in fact. It may become such by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation." *Franklin Pork, supra* at 240-41, 313 N.W.2d at 669; *Botsch v. Leigh Land Co.*, 195 Neb. 509, 239 N.W.2d 481 (1976).

"To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. There is a presumption, in the absence of evidence to the contrary, that a plaintiff in an action for

abatement of a nuisance has ordinary sensibilities." (Syllabus of the court.) *Burgess v. Omahawks Radio Control Org., ante* p. 100, 362 N.W.2d 27 (1985).

At this point we note that the record is replete with evidence that the nuisance created by the defendants has not been abated.

Concerning the odor problem, the plaintiffs and their witnesses testified that the odor emanating from the facility continues to be so rank that the plaintiffs must keep the doors and windows in the house closed. The plaintiffs cannot enjoy outdoor activities and they cannot entertain friends and relatives at their home. Jack Cline testified that in 1983 the odors were prevalent 75 to 80 percent of the time. He testified there is "still [a] nauseating type of smell" even in the winter months. Ruth Cline testified that ever since the facility has been in operation and continuing to the date of the last trial, the odor varies in intensity "from a slight hog smell to just absolutely horrid." From the time the facility commenced operation, Ruth Cline stated that the odor has gotten progressively worse.

The plaintiffs' evidence concerning the continuous noxious odors was, for the most part, uncontested by the defendants.

As was true with the odor problem, the record reveals that the fly population at the plaintiffs' home and farm has not substantially improved. From July 17 to July 24, 1983, approximately 12,976 flies were exterminated on the plaintiffs' premises. From July 24 to July 31, 1983, approximately 14,900 flies were exterminated.

The plaintiffs introduced into evidence numerous pictures which were taken shortly before the latest hearing. These pictures portray a profusion of flies both in and about the plaintiffs' residence.

Dr. Charles Pitts, a university professor and head of the department of entomology at Penn State University, testified that the "probability is pretty high that most of the flies that are at the Cline residence have originated" from the hog facility.

The plaintiffs adduced evidence from numerous other witnesses concerning the inundation of flies in and about their residence. Randy Cline testified that in the last 5 to 10 years he has visited 30 to 40 other farmhouses but had never seen

anything even approaching the number of flies present at the plaintiffs' residence.

In defense, Burt Tribble testified that when the new owners purchased the facility early in 1981, the facility was quite rundown and was improperly maintained. Although there is evidence that the facility, for the most part, is now well maintained and operated for its type, this factor in and of itself is no defense to the nuisance.

The exercise of due care by the owners of a business in its operation is not a defense to an action to enjoin its operation as a nuisance. *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 313 N.W.2d 667 (1981); *Botsch v. Leigh Land Co., supra.*

Tribble's testimony concerning future expected improvements of the facility is irrelevant. The issue at this stage of the proceedings is whether or not the nuisance has been abated, not whether the nuisance could be abated in the future.

The defendants next contend that because their facility is located in an obviously rural area with many other livestock facilities in the area, their facility cannot be a nuisance. They assert that the "odor of which the Plaintiffs complain is merely part of the atmosphere of a normal rural farming community." Brief for Appellants at 16.

While the record recites the presence of many livestock facilities in the general area, and also recognizing that in *Franklin Pork I* we held that "[t]he fact that the residence is in a rural area requires an expectation that it will be subjected to normal rural conditions," 210 Neb. at 242, 313 N.W.2d at 670, we are not persuaded by the defendants' argument.

As observed in *Franklin Pork I*, the nuisance arises not so much because of the type of facility but, rather, because of the facility's location. The facility in question is located within one-fourth of a mile of the plaintiffs' property. Even the defendants' own expert witness noted that it was impossible to operate such a facility within a half mile of a residence and not have an odor problem.

The selection of a place of business is often a matter of both private and public concern and is not in all cases left to the owner alone. *Sarraillon v. Stevenson*, 153 Neb. 182, 43 N.W.2d 509 (1950).

A business which is lawful in itself may become a nuisance, either because of the locality in which it is carried on or because it is conducted in an improper manner. See *Daugherty v. Ashton Feed and Grain Co., Inc.*, 208 Neb. 159, 303 N.W.2d 64 (1981).

The record in the instant case reveals that it is inconceivable that so many pigs could be kept in the defendants' facility in such close proximity to the plaintiffs and not be offensive.

The defendants next contend that the district court abused its discretion in enjoining the operation of the facility.

"An injunction against a nuisance is an extraordinary remedial process which is granted not as a matter of right but in the exercise of the sound discretion of the court, to be determined on consideration of all the circumstances of each case." (Syllabus of the court.) *Daugherty v. Ashton Feed and Grain Co., Inc., supra.*

> A court of equity will not usually enjoin the operation of a lawful business without regard to how serious may be the grievance caused thereby. *In the first instance*, at least, it will require the cause of the grievance to be corrected and will enjoin the conduct of the enterprise perpetually after it has been proven that no application of endeavor, science, or skill can effect a remedy where the owners cannot be induced to conduct it properly.

(Emphasis supplied.) *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 242-43, 313 N.W.2d 667, 670 (1981).

Here, the defendants had more than 20 months from the time of *Franklin Pork I* to remedy the nuisance, and more than 4 years from the time of the first trial in which to remedy the nuisance.

The plaintiffs' expert witnesses were of the opinion that due mainly to the propinquity of the defendants' facility to the plaintiffs' residence, this particular facility could not be operated without being a nuisance to the plaintiffs. At this juncture of the proceedings it is immaterial whether the defendants were unable or unwilling to abate the nuisance.

The operation of a legitimate business or certain aspects of the business which constitute a nuisance may be enjoined where it clearly appears there is no other complete remedy for the

injury done. See, *Daugherty v. Ashton Feed and Grain Co., Inc., supra; Prauner v. Battle Creek Coop. Creamery*, 173 Neb. 412, 113 N.W.2d 518 (1962).

Under the facts and circumstances of the instant case, the district court was correct in enjoining the operation of the defendants' facility.

Defendants' final contention is that the Nebraska Right to Farm Act, §§ 2-4401 to 2-4404, protects their facility from being a private or public nuisance. Defendants rely on § 2-4403 of the act, which provides:

> A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation existed before a change in the land use or occupancy of land in and about the locality of such farm or farm operation and before such change in land use or occupancy of land the farm or farm operation would not have been a nuisance.

Without passing on the question as to whether the Nebraska Right to Farm Act, which became effective July 17, 1982, can be applied retrospectively, it is clear on its face that under the facts of this case the act affords the defendants no protection.

The plaintiffs purchased their farm on March 14, 1974, and have lived there since July of 1974. The initial defendant, Franklin Pork, Inc., was incorporated July 11, 1974, and purchased the farmland north of the Clines' farm on August 15, 1974. The operation of the pig facility did not begin until sometime after August 15, 1974. It is obvious that there was not a change in the land use or occupancy of land in and about the locality of the defendants' farm operation subsequent to the defendants' commencing of the operation of the pig facility. Consequently, the act is inapplicable on its face.

The trial court being correct in all respects, it is affirmed.

AFFIRMED.

# RAYMOND L. MULDER, APPELLANT AND CROSS-APPELLEE, V. MINNESOTA MINING & MANUFACTURING COMPANY, DOING BUSINESS AS 3M COMPANY, APPELLEE AND CROSS-APPELLANT.

361 N.W.2d 572

Filed February 8, 1985. No. 84-201.

1. **Workmen's Compensation: Appeal and Error.** The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case.
2. **Workmen's Compensation: Evidence: Proof.** The burden of proof in a compensation case is upon the plaintiff to establish by a preponderance of the evidence that his disability was caused by an injury arising out of and in the course of his employment.
3. **Workmen's Compensation: Appeal and Error.** Where the record in a compensation case reflects nothing more than a resolution of conflicting medical testimony, this court will not substitute its judgment for the judgment of the compensation court.
4. **Workmen's Compensation.** Where an accident combines with a preexisting condition to produce disability, the injured workman may recover compensation.
5. **Workmen's Compensation: Evidence.** Where the evidence is in conflict, the compensation court may find a percentage of disability within the range of the testimony.
6. **Expert Witnesses.** Triers of fact are not required to take the opinions of experts as binding upon them.
7. **Workmen's Compensation: Attorney Fees.** No attorney fee should be allowed on rehearing where the employer receives a reduction of the award on rehearing.
8. _____: _____. Where an award for permanent partial disability is made on rehearing, following an award for temporary total disability, the employee is entitled to an award of attorney fees on the rehearing.
9. **Workmen's Compensation: Time.** Where a reasonable controversy exists between the parties as to the payment of compensation, the employee is not entitled to statutory penalties for waiting time.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Robert F. Martin, for appellant.

Tim J. Kielty, for appellee.

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

PER CURIAM.

This is an appeal in a proceeding under the Workmen's

Compensation Act.

The plaintiff, Raymond L. Mulder, was injured on May 12, 1982, while employed by the defendant, Minnesota Mining & Manufacturing Company, as a "general helper." The injury occurred when the plaintiff was struck in the low back by a metal brace that fell from a rack. The plaintiff twisted his back in an attempt to avoid the falling metal brace.

After the hearing before a single judge of the compensation court, the plaintiff recovered an award for medical expenses and temporary total disability from September 1, 1982, to the date of the hearing, February 17, 1983, and thereafter so long as he remained totally disabled.

On rehearing, the plaintiff recovered an award for temporary total disability from September 1, 1982, through March 1, 1983, and for 50 percent permanent partial disability for 274 weeks thereafter. The award also included medical expenses, attorney fees, witness fees, and deposition expense.

The plaintiff has appealed and contends that the compensation court erred in failing to award the plaintiff compensation for permanent total disability, a penalty for waiting time, and witness fees for expert witnesses in accordance with their charges as expert witnesses. The defendant has cross-appealed and contends that the compensation court erred in awarding the plaintiff compensation for any disability after September 1, 1982, including medical expenses, attorney fees, witness fees, and deposition expenses.

The facts are not in dispute that a metal brace fell and struck the plaintiff while he was employed by the defendant. However, there is a sharp conflict in the testimony of the medical witnesses as to the effect of the accident and its relation to the plaintiff's disability.

On the day that the accident occurred, the plaintiff saw his family physician, Dr. William Eaton, who diagnosed the injury as a "superficial laceration of the lower left back, a bruised back," and sutured the wound. Subsequently, under Dr. Eaton's supervision, x rays were taken of the plaintiff's back, which showed degenerative disease but no "boney trauma." Dr. Eaton further testified, by way of deposition, that he

considered this to be a "relatively negative X-ray" and that the plaintiff made no complaints other than "[t]he times that he was in his back symptom was discomfort around the area that was traumatized, the abrasion and the laceration and the general bruising in this area." Dr. Eaton last saw the plaintiff on June 29, 1982, at which time the plaintiff related that he had seen a chiropractor to fix his back; the appointment on the 29th, however, was not related to the back injury.

The plaintiff testified that he did not notice any particular pain in his back other than the laceration until the sutures were removed. Following their removal, he noticed his right leg was numb. According to the plaintiff, Dr. Eaton examined him in light of this complaint, but found nothing. In early June the plaintiff began seeing a chiropractor, who restricted plaintiff's lifting capacity at work.

Following a conversation with, and upon the recommendation of, one of his employment supervisors, the plaintiff consulted Dr. Edward Simodynes, an orthopedic surgeon, on August 5, 1982. At that time the plaintiff had pain in his lower back and right leg; he could not sit for more than 10 minutes; he was having problems lifting; and he was limping.

Dr. Simodynes testified, by deposition, that the plaintiff complained of pain in his back that extended into his right hip and thigh and that his right hip tended to fall asleep. According to Dr. Simodynes, his symptoms suggested possible nerve root impingement by a disk lesion. Dr. Simodynes was unable to proportion what percentage of the condition was attributable to the work injury as compared to any preexisting back condition. On cross-examination Dr. Simodynes testified that if the possibility of a disk lesion did not surface, then he would conclude that plaintiff suffered from a chronic lumbosacral strain or a degenerative back condition. His diagnosis was "not a certainty," but Dr. Simodynes did express the opinion: "According to my evaluation at that time, I thought he should return to work, attempt work under the conditions specified. I felt that in all probability, he could perform some restricted labor."

On September 1, 1982, the plaintiff began seeing another orthopedic surgeon, Dr. John Brantigan.

On September 3, 1982, the plaintiff's employment was terminated because of the plaintiff's violation of the defendant's attendance rules and absences from work without notice.

Dr. Brantigan testified by deposition that the plaintiff complained of pain in his back, radiating down his right leg, and a "catching" in his right leg. Prior to testifying, Dr. Brantigan had last examined the plaintiff on July 8, 1983. Dr. Brantigan testified that the plaintiff was completely disabled. "That was based," he said, "on a clinical general assessment that it was inconceivable to me that in his general condition at that time, that he would have been able to work. That would have included a combination of orthopedic disability and psychiatric disability." It was his opinion that the injury was caused by the accident at work; and after performing two myelograms and two CAT scans, he diagnosed that plaintiff suffered from a chronic lumbosacral strain. On cross-examination he testified that according to the manual published by the American Academy of Orthopedic Surgeons, provided for reference by orthopedic surgeons in evaluating permanent physical impairment, plaintiff had a 5- to 10-percent impairment rating in relation to his chronic back strain.

Upon Dr. Brantigan's referral, the plaintiff began seeing a psychiatrist, Dr. Bruce Gutnik, on February 7, 1983. The plaintiff complained to Dr. Gutnik that since his injury at work and subsequent unemployment, he had developed a fairly severe depression. Dr. Gutnik diagnosed the plaintiff as having a depressive neurosis with anxiety, and prescribed medication and therapy. He testified that the cause of the plaintiff's condition was the injury at work and the financial problems the plaintiff had and his fear of the workmen's compensation hearings. Dr. Gutnik testified: "I don't believe he could work"; and offered a guarded prognosis:

> I think without treatment he is not going to get better. I think with treatment we can at least reduce some of the symptoms so he is not as miserable as he has been. Whether or not he will get to the point that he doesn't need continuing medication and treatment or not, I don't

know.

Dr. Michael O'Neal, an orthopedic surgeon, "at the request of the Disability Board of the State of Nebraska," examined the plaintiff. Dr. O'Neal testified that plaintiff's problems were compatible with a herniated or ruptured disk. Based on his examination, Dr. O'Neal thought the plaintiff had a 25-percent permanent partial disability of the body as a whole.

The plaintiff was further examined by Dr. John Engler, a psychologist. He testified that he considered the plaintiff capable of doing work in the light range of exertion—lifting. He further testified that the plaintiff's psychological condition did not indicate that he was unable to work in some capacity. In his opinion the plaintiff's condition was part of an ongoing history and not necessarily caused by the work injury.

Lastly, Dr. Patrick Bowman, an orthopedic surgeon, testified that the plaintiff suffered from a chronic lumbar strain and that a reasonable relationship could be established between the accident and his symptoms. It was Dr. Bowman's opinion that the plaintiff's injury was "not typically consistent with total impairment" and that his condition generally carried an impairment rating of less than 10 percent.

Neb. Rev. Stat. § 48-185 (Reissue 1984) provides in relevant 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.

In light of these limitations we review the findings of the Workmen's Compensation Court. *Tranmer v. Mass Merchandisers*, 218 Neb. 151, 352 N.W.2d 610 (1984).

The first issue is whether the plaintiff's disability arose out of or in the course of his employment by the defendant. The

defendant contends that "[t]here is no competent evidence in the record of any objective nature to support the finding that plaintiff suffered an injury other than a laceration to his back on May 12, 1982 . . . ." Brief for Appellee at 7. The defendant argues that any further injury is attributable to the plaintiff's prior degenerative back condition or his own overexertion.

The burden of proof was upon the plaintiff to establish by a preponderance of the evidence that his disability was caused by an injury arising out of and in the course of his employment. *Doty v. Aetna Life & Casualty*, 217 Neb. 428, 350 N.W.2d 7 (1984). The compensation court acknowledged the conflict between the medical witnesses and concluded that the plaintiff's back condition and mental depression were either caused or aggravated by the accident. A review of the record reveals substantial evidence to support those findings.

The next issue which must be considered is the degree of disability found by the compensation court. This court does not reweigh the facts. *Person v. Red Lion Inn*, 217 Neb. 745, 350 N.W.2d 570 (1984). Indeed, this court has said often: " ' "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." ' " *Paris v. J. A. Baldwin Mfg. Co.*, 216 Neb. 151, 158, 342 N.W.2d 198, 202 (1984).

Part of the difficulty in determining the extent of disability under the facts of this case stems from the dual nature of the plaintiff's injury: he has both a back injury and mental depression. As we held in *Haskett v. National Biscuit Co.*, 177 Neb. 915, 920, 131 N.W.2d 597, 600-01 (1964), it is within the province of the compensation court to consider both factors when determining the amount of compensation to which the plaintiff is entitled:

> The evidence in this case shows that as a result of the accident of May 2, 1962, the plaintiff suffered an injury to his back, a lumbosacral sprain, and has developed an anxiety hysteria, or conversion reaction, which has resulted in disability. Both Dr. Farrell and Dr. Jones testified that the accident was the precipitating cause of

the psychiatric condition which resulted in the plaintiff's present disability.

There is evidence that the plaintiff was predisposed to develop such a condition, and that the same injury to another person might not have resulted in a similar disability. But that is no defense. Where an accident combines with a preexisting condition to produce disability, the injured workman may recover compensation. Cole v. Cushman Motor Works, 159 Neb. 97, 65 N.W.2d 330.

Upon the record in this case it cannot be said that the findings made by the compensation court were clearly wrong so that they should be disturbed on appeal. *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983). Rather, the evidence supports the finding that the plaintiff was temporarily totally disabled from September 1, 1982, through March 1, 1983, and has sustained a 50-percent permanent partial disability. There was substantial evidence that the plaintiff could do light work and was not permanently totally disabled.

Although none of the medical witnesses testified that the permanent disability of the plaintiff was 50 percent, where the evidence is in conflict, the compensation court may find a percentage of disability within the range of the testimony. See, generally, 3 A. Larson, The Law of Workmen's Compensation § 79.52(c) (1983) and cases cited therein.

In *Thinnes v. Kearney Packing Co.*, 173 Neb. 123, 112 N.W.2d 732 (1962), in reviewing the record de novo, we found that the plaintiff sustained a 35-percent disability as a result of a work-related accident. There, the plaintiff had contended that he was permanently and totally disabled, while the defendant contended that the plaintiff's permanent disability did not exceed 15 percent. In reaching that result this court said: "This finding is based upon all of the factors which enter into earning power and is not limited to the evidence relating to loss of bodily functions." *Id.* at 130, 112 N.W.2d at 736-37. See, also, *Micek v. Omaha Steel Works*, 136 Neb. 843, 287 N.W. 645 (1939). Furthermore, "Triers of fact are not required to take the opinions of experts as binding upon them." *Erving v. Tri-Con Industries*, 210 Neb. 339, 344, 314 N.W.2d 253, 256 (1982).

Rather, such opinions are advisory in character. *Brown v. Globe Laboratories, Inc.*, 165 Neb. 138, 84 N.W.2d 151 (1957).

The parties have raised an issue concerning the attorney fees awarded by the compensation court.

After the one-judge hearing, the compensation court awarded the plaintiff compensation for temporary total disability from and including September 1, 1982, to the date of the hearing, February 17, 1983, and thereafter for so long as the plaintiff remained totally disabled. The defendant filed an application for rehearing, and on rehearing, the compensation court awarded the plaintiff compensation for temporary total disability for 26 weeks and compensation for *permanent partial disability for 274 weeks*. The plaintiff was allowed an attorney fee of $1,500 on rehearing, one judge dissenting.

The award of compensation for permanent partial disability on rehearing under the circumstances in this case entitled the plaintiff to an award of an attorney fee on the rehearing before the compensation court. See, *Earnest v. Lutheran Memorial Hospital*, 211 Neb. 438, 319 N.W.2d 66 (1982); *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982).

The plaintiff also contends that he was entitled to an award of attorney fees and a penalty for waiting time. The rule is, however, that where a reasonable controversy exists between the parties as to the payment of compensation, the employee is not entitled to statutory penalties for waiting time. *Savage v. Hensel Phelps Constr. Co.*, 208 Neb. 676, 305 N.W.2d 375 (1981). In the case at bar, the compensation court found that a reasonable controversy existed. That was a question of fact, and the finding is supported by the evidence.

The compensation court awarded the plaintiff witness fees at the statutory rate for three witnesses who testified at the hearing, one of whom was a physician. The plaintiff contends that he should have been awarded witness fees in accordance with the contracts between the plaintiff and two expert witnesses who testified by deposition.

Prior to the 1983 amendment to Neb. Rev. Stat. § 48-172 (Reissue 1984), the statute did not contain a specific provision regarding witness fees. In *Inserra v. Village Inn Pancake*

*House*, 197 Neb. 168, 247 N.W.2d 625 (1976), we held that the statute did not authorize the fee of an expert witness to be taxed as costs. Section 48-172 as amended effective August 26, 1983, which was prior to the rehearing in this case, now provides in part:

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

The statute provides for the allowance of fees for "necessary witnesses attending the proceedings" and requires approval by the court of the "reasonableness of the fees."

The fees in question here were for witnesses who did not attend the hearing. The record does not show any abuse of discretion by the compensation court in regard to the award of witness fees as costs.

The plaintiff contends that a letter from one of the defendant's witnesses to the compensation court was an ex parte communication which constituted misconduct. The record fails to show that any prejudice resulted from this incident. See *State v. Bromwich*, 213 Neb. 827, 331 N.W.2d 537 (1983).

From the award on rehearing, the plaintiff appealed to this court, and the defendant cross-appealed. The cross-appeal by the defendant was an appeal within the meaning of Neb. Rev. Stat. § 48-125 (Reissue 1984).

As pertains here, the statute provides:

> If the employer files an application for a rehearing before the compensation court from an award of a judge of the compensation court *and fails to obtain any reduction in the amount of such award*, the compensation court shall allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, and the Supreme Court shall in like manner allow the employee a

> reasonable sum as attorney's fees for the proceedings in that court.

(Emphasis supplied.) Since the employer has obtained no reduction in the award here, the plaintiff is entitled to an allowance for attorney fees in this court.

The judgment of the compensation court is affirmed, and the plaintiff is allowed the sum of $500 for the services of his attorney in this court.

AFFIRMED.

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RICHMAN GORDMAN STORES, INC., ET AL., APPELLEES, V. BOARD OF EQUALIZATION OF HALL COUNTY, NEBRASKA, AND RAYMOND HESSEL, ASSESSOR, HALL COUNTY, NEBRASKA, APPELLANTS.

361 N.W.2d 578

Filed February 8, 1985. No. 84-318.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Reversed and remanded with directions to dismiss.

Gary L. Schacht, Chief Deputy Hall County Attorney, for appellants.

John E. Beltzer of Wilson & Beltzer, for appellees, and, on brief, Luebs, Dowding, Beltzer, Leininger, Smith & Busick.

Patrick J. Vuchetich of Nebraska Association of County Officials, for amici curiae Adams County et al.

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

PER CURIAM.

The Hall County Board of Equalization has appealed from an order of the district court for Hall County, Nebraska, which directed that postjudgment interest be paid to plaintiffs (property owners).

This court had previously affirmed the judgment of the

district court which reduced the valuation of the property owners' real property for the tax years 1979 and 1981 to $1,200,000. See *Richman Gordman v. Board of Equalization*, 215 Neb. 379, 338 N.W.2d 761 (1983) (*Richman Gordman I*).

The record discloses that following our decision in *Richman Gordman I*, the property owners filed a motion in the district court for Hall County, Nebraska, requesting the court to order the county to refund to the property owners taxes paid for the years 1979, 1980, and 1981 on a valuation in excess of $1,200,000 and to further enter an order requiring the Board of Equalization of Hall County, Nebraska, to pay interest on the refund. The trial court denied prejudgment interest to the property owners but ordered that the county board of equalization pay to the property owners postjudgment interest by reason of the provisions of Neb. Rev. Stat. § 45-103 (Reissue 1984). Section 45-103 reads as follows: "Interest on all decrees and judgments *for the payment of money* shall be from the date of the rendition thereof . . . ." (Emphasis supplied.) Unfortunately for the property owners, the decree entered by the district court in *Richman Gordman I* was not for the payment of money but, rather, was a decree which reduced the value of the property for the years in question. There was no evidence before the district court, nor is there any evidence before this court on appeal, that any taxes were ever in fact paid or that Hall County is obligated to make any refund to the property owners. In effect, the state of the record is such that were we to determine that the property owners were entitled to receive interest pursuant to § 45-103, we would be rendering an advisory opinion. That we choose not to do. See, *Ellis v. County of Scotts Bluff*, 210 Neb. 495, 315 N.W.2d 451 (1982); *American Fed. of S., C. & M. Emp. v. State*, 200 Neb. 171, 263 N.W.2d 643 (1978). The judgment of the district court is therefore reversed and remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

HASTINGS, J., concurring in the result.

While I agree with the result reached by the majority in this case, I believe that its opinion may be misleading.

That opinion cites the general statute relating to interest on

judgments "*for the payment of money*," Neb. Rev. Stat. § 45-103 (Reissue 1984), and then goes on to say:

> Unfortunately for the property owners, the decree entered by the district court in *Richman Gordman I* was not for the payment of money but, rather, was a decree which reduced the value of the property for the years in question. There was no evidence before the district court, nor is there any evidence before this court on appeal, that any taxes were ever in fact paid or that Hall County is obligated to make any refund to the property owners.

Technically, perhaps that last statement is correct. However, the record does disclose a motion filed by the plaintiffs which specifically requests an order of the court "[o]rdering a refund of the taxes paid for the year 1982 which were paid on a valuation in excess of One Million Two Hundred Thousand and No/100 Dollars ($1,200,000.00)" and "[o]rdering the Defendants to pay interest on the taxes paid . . . ." The court's journal entry sustaining the motion in part states that "the Plaintiffs-Appellants are entitled to interest upon the amount due as a refund from and after May 29, 1982 . . . ." That language comes about as close to suggesting that the taxes had in fact been paid as could be expressed. Therefore, I do believe that the issue of interest entitlement under § 45-103 should not have been completely avoided.

I do have a serious question as to whether a taxpayer is entitled to a refund on taxes paid without protest, at least, on a valuation later found to be excessive. As I read Neb. Rev. Stat. §§ 77-1510 and 77-1511 (Reissue 1981), it is the duty of the reviewing court on an appeal from the board of equalization, on a claimed excessive valuation, to determine the true valuation. This determination must then be certified to the county treasurer and to the officer charged with the duty of preparing the tax list. § 77-1511. The language of § 77-1510 leaves in my mind considerable doubt as to whether the court has any authority in this instance to order a refund of taxes or enter a money judgment.

Finally, it seems to me, the majority opinion suggests that perhaps the district court could have ordered a refund of taxes, and, if it had, it would have been a judgment for the payment of

money and thereby qualified for interest under § 45-103. I do not agree.

" 'A state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or by a lawful contract of its executive officers.' " *Peterson v. State*, 114 Neb. 612, 621, 209 N.W. 221, 224 (1926). Any waiver of a state's sovereign immunity must be strictly construed. *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979).

A statute of the State of Kansas provides in substance that all judgments shall bear interest upon the date on which they are rendered. Kan. Stat. Ann. § 16-204 (1981). In *Brown v. State Highway Commission*, 206 Kan. 49, 476 P.2d 233 (1970), the plaintiff argued that because the legislature in 1929, with its enactment of Rev. Stat. § 68-419 (Supp. 1930), had waived the state's immunity with respect to damages resulting from highway defects, it had, by implication, brought the state within the purview of the general interest statute. The Kansas court, in rejecting this argument, stated:

> A statute waiving immunity must be strictly construed, and the court has no right to enlarge the scope of the statute or to amend the law by judicial interpretation.
>
> . . . .
>
> The statute authorizing this action against the state highway commission expressly provides for payment of any judgment rendered in such case out of the highway fund. Nothing, however, is said about allowing interest on such a judgment, nor is there anything from which we can conclude that the legislature intended, by way of implication, to waive the state's immunity from liability for interest.

*Id.* at 50-51, 476 P.2d at 234-35. See, also, *Myers v. Dept. of Crime Control & Pub. Safety*, 67 N.C. App. 553, 313 S.E.2d 276 (1984); *City of Springfield v. Allphin*, 82 Ill. 2d 571, 413 N.E.2d 394 (1980).

I find nothing in our statutes to indicate the conclusion that our Legislature intended, by way of implication, to waive the state's immunity from liability for interest. Specifically to the contrary, Neb. Rev. Stat. § 77-1735 (Reissue 1981) provides in

the case of a taxpayer who has paid an invalid tax, such taxpayer is entitled to a judgment which "shall be rendered . . . *with interest* and such judgment shall be collected as in other cases." (Emphasis supplied.)

A further example of legislative intent is found in the section on eminent domain, whereby interest is specifically allowed under certain circumstances by Neb. Rev. Stat. § 76-711 (Cum. Supp. 1984). Two sections of the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,215 and 81-8,216 (Reissue 1981), make it quite clear that "the state shall be liable in the same manner, and to the same extent as a private individual under like circumstances," and "costs shall be allowed in all courts to the successful claimant to the same extent as if the state was a private litigant, subject to the limitation of Neb. Rev. Stat. § 24-329 (Reissue 1978)."

The language of § 77-1510 in no way suggests that interest be allowed or that the state, or county, shall be liable to the same extent as a private individual or litigant. Having failed to employ such language, I conclude that the intendment of the Legislature in this instance was that interest shall not be paid.

If the Legislature feels it proper to provide for interest in cases such as this, it has only to institute appropriate legislation.

BOSLAUGH and GRANT, JJ., join in this concurrence.

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STATE OF NEBRASKA EX REL. BOBBIE LINDA MARIE LAUGHLIN, APPELLANT, V. LARRY LEO HUGELMAN, APPELLEE.

361 N.W.2d 581

Filed February 8, 1985. No. 84-383.

1. **Child Custody: Paternity.** Where it is determined that an individual is the natural parent, even though one may initially deny paternity, and thereafter establishes a familial relationship with the children, both emotional and financial, the question of which parent should have custody of the children should be determined on the basis of the best interests of the children.
2. **Modification of Decree: Child Custody.** Where facts affecting the custody and best interests of children existing at the time of the decree awarding custody are not called to the attention of the court, and particularly in default cases, where

the issues affecting custody have not been fully tried, the court, upon a proper motion for modification, may consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Michael J. Elsken, for appellant.

Laureen Van Norman, for appellee.

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

KRIVOSHA, C.J.

The appellant, Bobbie Linda Marie Laughlin, and the appellee, Larry Leo Hugelman, are the natural parents of minor twin children, born out of wedlock. Laughlin appeals from an order entered by the district court for Lancaster County, Nebraska, which granted to Hugelman the permanent custody of the twins, subject to Laughlin's reasonable rights of visitation. Laughlin maintains that the district court's order was erroneous because (1) there was no material change of circumstance such as would permit the court to change the custody of the children from the mother to the father and (2) the trial court erred in admitting into evidence testimony regarding proceedings held before the separate juvenile court of Lancaster County prior to the date on which the district court for Lancaster County determined that Hugelman was the putative father. We affirm the judgment of the district court.

The record reflects that on March 4, 1980, Laughlin gave birth to twins. Hugelman apparently denied that he was the father of the children, and an action for paternity was subsequently commenced. Thereafter, on September 11, 1981, pursuant to a stipulation entered into between the parties, the district court entered an order finding that Hugelman was the natural father of the children and ordering him to pay a specific amount of child support. No specific finding was made in the order determining paternity as to who should have legal custody of the children. It would appear from the record that no evidence was introduced by either party regarding legal

custody and that the issue of custody was not considered by the court.

The record does, however, disclose that sometime prior to September 11, 1981, a petition was filed in the separate juvenile court of Lancaster County, Nebraska, alleging that Laughlin neglected or refused to provide proper or necessary subsistence and medical care to her children and that, upon inspection, the home was found to be dirty and unsanitary. The petition further alleged that the twins were found in a urine-soaked playpen, that there were flies on both children, and that they were malnourished. Laughlin admitted the allegations in the petition, and also admitted that she had neglected the children. The juvenile court accepted her admission as having a factual basis and declared the children neglected. The children were later returned to Laughlin's custody, subject to supervision by the welfare department, and subject to certain conditions. At a later hearing the juvenile court found that the conditions of the order had not been met due to the fact that the twins had been placed in foster care from November 5, 1980, to early February 1981.

At a hearing on March 3, 1981, the juvenile court found the Laughlin children to be homeless and destitute and without proper support within the meaning of Neb. Rev. Stat. § 43-202(2) (Reissue 1978), and once again placed them in foster homes. On May 5, 1981, the juvenile court found that the children should be returned to Laughlin, subject to the supervision of the welfare department. The supervision was discontinued and the juvenile court petition dismissed on July 3, 1981.

The evidence further discloses that after September 11, 1981, when Hugelman was declared to be the father of the children, he regularly exercised his right of visitation and paid all of the child support ordered, even during periods of time when he was not employed. On March 9, 1982, pursuant to a stipulation entered into between Laughlin and Hugelman, custody of the children was given to Hugelman, who had since married someone else. In September of 1983 Laughlin filed an application requesting that the twins be restored to her possession and that child support be modified to reflect new

employment obtained by Hugelman. Hugelman counterclaimed, alleging that it was in the children's best interests to remain with him, and requested that he be granted permanent custody. On April 11, 1984, the district court granted permanent custody of the children to Hugelman, subject to Laughlin's reasonable rights of visitation.

Citing *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981), Laughlin argues that in a paternity case a presumption exists favoring custody of a child born out of wedlock with the mother, absent the existence of a familial relationship between the child and the father. Laughlin then argues that because the father in this case denied paternity until the order of the court on September 11, 1981, he has not established such a familial relationship with the children and, hence, is not entitled to consideration for custody. We do not believe that to be the correct view. The basis for our decision in *Cox* was to recognize that the traditional presumption granting custody of illegitimate children to the mother in all cases should be abandoned. We said in *Cox* at 28, 302 N.W.2d at 38:

> In a paternity action where paternity has been admitted and the natural father has demonstrated a familial relationship with the child and has fulfilled parental responsibilities of support and maintenance, the fact that the child was born out of wedlock should be disregarded, and custody and visitation of minor children should be determined on the basis of the best interests of the children. In determining with which of the natural parents the child shall remain, the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) are to be applied.

The evidence is clear that from and after September 11, 1981, when it was determined that Hugelman was the father, he has maintained a familial relationship with the children, exercising his rights of visitation, and providing them with support and, at times, a home and family. It seems to us that the better rule must be that where, as here, it is determined that an individual is the natural parent, even though one may initially deny paternity, and thereafter establishes a familial relationship with the children, both emotional and financial, the question of which parent should have custody of the children should be

determined on the basis of the best interests of the children. We believe, therefore, that no presumption as to custody exists in this case, and, instead, we are required to determine what is in the children's best interests. While Hugelman did not at the outset admit he was the natural father, he met the test set out in *Cox* in all other respects once paternity was determined.

When we examine the record to determine what is in the best interests of the children, it appears without serious question that leaving them with the father is indeed in their best interests. A review of the record discloses that, on the one hand, Hugelman is married, maintains stable employment and a good home, and, by all accounts, loves the children. Two witnesses specifically testified that the children are affectionate toward him and that he treats them well. On the other hand, Laughlin herself testified that she has lived at six different residences in the last 3 years. By her own admission she is a rather poor housekeeper and, at the time of the trial, was living with a woman who had been declared incapacitated due to chronic drug and alcohol abuse. Additionally, the woman's unmarried lover and the woman's child were also living with Laughlin. While none of these factors, either standing alone or taken together, may be of such nature to find Laughlin unfit, when compared to the home offered by the father, they require us to find that placing custody of the children with the mother is not in the children's best interests.

Laughlin argues that unless there has been a substantial change in circumstances, the custody of the children should not be changed from her to the father. See *Helgenberger v. Helgenberger*, 209 Neb. 184, 306 N.W.2d 867 (1981). We believe that the argument fails for two reasons. In the first place, there is no indication that custody was ever initially determined by the court. There is, therefore, no issue regarding a change of custody as contemplated by the rule. While it is true that during a portion of the children's young lives they have been in the physical custody of the mother, it is likewise true that at other times they have been in the physical custody of the father, or in foster care. The initial order determining paternity simply did not address the question of custody, and therefore it is difficult for us to see how it can be said that the court is modifying an

earlier custody order.

The second reason why the argument has no merit is that no evidence regarding the best interests of the children was ever presented to the trial court when paternity was determined. When the paternity order was entered, it appears that the court was unaware that Laughlin had admitted that her children had previously been neglected. It is likely that had these matters been presented to the court and a dispute over custody of the children had arisen, Laughlin would not have been awarded the custody of the children in the first instance. Laughlin's argument runs something to the effect that there is not a change in circumstance if the evidence discloses that the mother was deficient before she acquired physical custody of the children and remains equally deficient thereafter. Such an argument would totally ignore the best interests of the children and obviously could not be the rule to be followed by this court. In considering the best interests of the children, we are compelled to agree with the trial court and find that the best interests of the children require that they remain with the father.

Laughlin's other assignment of error is to the effect that the trial court erred in permitting evidence of the earlier juvenile proceedings to be admitted in the subsequent custody proceedings. In our view the evidence was clearly admissible in a case of this nature. In the case of *Buchele v. Tuel*, 204 Neb. 641, 646-47, 284 N.W.2d 564, 568 (1979), a similar argument was advanced in a custody proceeding following the divorce of the parties. In rejecting that argument we said:

> The original decree awarding custody to Myron was concededly not a situation involving fraud, duress, or misrepresentation upon Debra; neither was it a default decree, as she was present and testified. [Citation omitted.] However, there was not total disclosure to the court of all factors relating to the awarding of child custody, specifically with regard to the living arrangement of Myron and the custody agreement based on the sex of the child. As we stated in Cline v. Cline, *supra*: "The judicial focus in cases such as this has been on what the trial court actually knew at the time of the entry of the custody decree and not on what the parties knew or should

have known which was not produced at the time of trial. This court has continually adhered to the principle that the best interests of the child are the governing considerations in determining custody. Modern authority supports the view that where facts affecting the custody and best interests of children existing at the time of the decree awarding custody are not called to the attention of the court, *and particularly in default cases*, where the issues affecting custody have not been fully tried, the court, upon a proper motion for modification, may consider all facts and circumstances, including those existing prior to and at the time of the judgment or decree, in making a subsequent determination of custody." (Emphasis supplied.)

We can think of nothing more relevant for consideration by the court in attempting to determine what is in the best interests of the children than the proceedings which earlier had determined by Laughlin's own admission that the children had been neglected. Certainly the manner in which Laughlin cared for the children prior to the present proceedings is extremely relevant, if not perhaps the most relevant evidence. The district court was correct in admitting into evidence the earlier proceedings in this case.

For these reasons, therefore, the decision of the district court in awarding permanent custody of the minor children to the appellee, Larry Leo Hugelman, is affirmed.

AFFIRMED.

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THOMAS E. MCLAUGHLIN, APPELLEE, V. SELF-INSURANCE SERVICES AND SWIFT & COMPANY, APPELLANTS.

361 N.W.2d 585

Filed February 8, 1985. No. 84-454.

1. **Workmen's Compensation: Appeal and Error.** On appeal from an award of the Nebraska Workmen's Compensation Court, this court does not reweigh the facts but accords to the findings of the compensation court the same force and

effect as a jury verdict in a civil case; the findings will not be set aside where they are supported by the evidence and are not clearly wrong.

2. **Workmen's Compensation: Evidence.** In testing the sufficiency of the evidence in a workmen's compensation case, the successful party is entitled to have every controverted fact resolved in his favor and to receive the benefit of every inference which can be drawn from the evidence.
3. **Workmen's Compensation: Words and Phrases.** The "unexpected or unforeseen" requirement of an accident, as defined in Neb. Rev. Stat. § 48-151(2) (Reissue 1984), is satisfied if either the cause was of an accidental character or the effect was unexpected or unforeseen.
4. _____: _____. The "suddenly and violently" element of an accident, as defined in Neb. Rev. Stat. § 48-151(2) (Reissue 1984), means not "instantaneously and with force" but, rather, an injury which occurs "at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment."

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Richard M. Dustin of Gaines, Otis, Haggart, Mullen & Carta, for appellants.

Thomas F. Dowd of Dowd, Fahey, Dinsmore & Hoffman, for appellee.

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

PER CURIAM.

The defendant employer, Swift & Company, Omaha, Nebraska, and Self-Insurance Services, Shawnee Mission, Kansas, appeal from an award on rehearing of the Nebraska Workmen's Compensation Court, which found that the plaintiff employee, Thomas E. McLaughlin, suffered injuries to his right elbow, right wrist, and right middle finger as the result of an accident arising out of and in the course of his employment, and granted him 20 3/7 weeks of temporary total disability compensation. Swift and Self-Insurance claim McLaughlin failed to sustain his burden of proving either that he was involved in an accident or that his injuries were the result of the event he describes. We affirm.

McLaughlin, 28 years of age, had been employed by Swift for some 9 years. During all of this time he operated an 850 Whizard knife, that is, a knife powered by a 1/3-horsepower

motor which is attached to a cable suspended from the ceiling of the work area. The knife is used to trim fat off hams. One of the purposes of the motor seems to be to rotate and vibrate the knife. There was evidence that the Whizard knife produced minimal vibration and minimal torque.

According to McLaughlin, as soon as he activated the knife on May 25, 1983, he realized that it had a bad cable, causing the knife to exert unusual stress and pressure. He reported this fact to his foreman, but he was told to continue with his work. After awhile, McLaughlin felt and heard something snap in his right elbow. He thereupon began to develop a soreness in his arm, and the two smaller fingers of his right hand began to go numb. He continued to use the knife a while longer, and then reported the matter to Swift's nurse. During the approximately 2½ hours that McLaughlin used the Whizard knife on May 25, 1983, he processed between 1,000 and 1,250 hams, requiring approximately 10 arm movements per ham. McLaughlin's elbow and finger symptoms continued, and he consulted a physician about them on June 3, 1983. On August 23, 1983, McLaughlin began to complain of a clicking sound and sensation in the middle finger of his right hand. The physician diagnosed an ulnar neuritis of the right elbow, that is, an inflammation with resultant tenderness of the ulnar nerve at the right elbow; a carpal tunnel syndrome of the right wrist, that is, an involvement with attendant pain of the median nerve at its wrist passage; and a stenosing tenosynovitis of the middle finger of the right hand, that is, a scarring in the sheath through which the tendon passes. The physician treated all these symptoms conservatively, but advised McLaughlin that if the symptoms in the fingers did not improve, consideration would have to be given to surgery. The surgery would move the ulnar nerve from its normal position under the medial epicondyle to a position over that bone. McLaughlin last saw his physician on October 18, 1983, and was released to return to work on October 24.

The same physician and others in his office had treated McLaughlin previously because of pain in the right shoulder and arm on November 24, 1981, at which time the conditions were diagnosed as a cervical problem and a carpal tunnel

syndrome of the right wrist. While a child, McLaughlin also suffered a fracture of the right medial epicondyle, which resulted in a nonunion but which did not produce upper extremity symptoms until June of 1983. Inasmuch as the symptoms in 1983 were different from those manifested in 1981, the physician was of the opinion that the conditions for which McLaughlin was treated in 1981 were not the same conditions for which he was treated in 1983.

After being asked to assume that McLaughlin's employment with Swift required "repetitive use of [McLaughlin's] right arm and hand," the physician testified, based on reasonable medical certainty, that although he did not know precisely what happened to McLaughlin while at work on May 25, 1983, the elbow, wrist, and finger conditions for which he treated McLaughlin in 1983 were related to the repetitive use of his right hand and arm required by his employment.

A majority of the three-judge Workmen's Compensation Court panel concluded that McLaughlin's 1983 injury "is a product of an accident in the nature of repetitive trauma but not that it necessarily resulted from the vibration of the defective cable on the wizard [sic] knife."

We are committed to a standard of review which accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case; the findings will not be set aside where they are supported by the evidence and are not clearly wrong. In short, we do not reweigh the facts on appeal. *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984); *Doggett v. Brunswick Corp.*, 217 Neb. 166, 347 N.W.2d 877 (1984). Further, in testing the sufficiency of the evidence, the successful party is entitled to have every controverted fact resolved in his favor and to receive the benefit of every inference which can be drawn from the evidence. *Tranmer v. Mass Merchandisers*, 218 Neb. 151, 352 N.W.2d 610 (1984); *Doty v. Aetna Life & Casualty*, 217 Neb. 428, 350 N.W.2d 7 (1984).

With those standards firmly in mind we now turn our attention to the first assignment of error, which questions the sufficiency of the evidence to establish an accidental injury.

Neb. Rev. Stat. § 48-151(2) (Reissue 1984) defines an

accident as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."

There is no question but that there were produced, on May 25 and August 23, 1983, objective symptoms. We have said that the "unexpected or unforeseen" requirement is satisfied if either the cause was of an accidental character or the effect was unexpected or unforeseen. *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982). *Sandel* held that a "tennis elbow" resulting from nothing more than the repeated arm and hand movements satisfied the unexpected or unforeseen requirement of an accident. The movements involved picking up, turning, and placing three pieces of corrugated cardboard 80 by 97 inches, 300 times per work shift, into a "slitter-scorer" machine. *Sandel* further ruled that the "suddenly and violently" element meant not "instantaneously and with force" but, rather, an injury which occurs "at an identifiable point in time requiring the employee to discontinue employment and seek medical treatment." *Id.* at 158, 317 N.W.2d at 916. In *Tranmer v. Mass Merchandisers, supra*, this court affirmed an award of compensation based on bilateral carpal tunnel syndromes caused by the placing of and securing of lids on filled baskets of merchandise and then lifting the baskets from one conveyor belt to another.

Consequently, it cannot be said the compensation court was clearly wrong in finding that McLaughlin had met his burden of proving an accidental occurrence. Obviously, if a 2½-hour period required between 10,000 and 12,500 arm movements, 9 years of such employment activity required an astronomical number of like movements. Neither was the compensation court clearly wrong in choosing to accept the physician's reasonably certain medical opinion that the injuries were "related" to the repeated arm movements required by McLaughlin's employment.

The award of the compensation court being supported by findings of fact which are not clearly wrong, it is affirmed. Pursuant to the provisions of Neb. Rev. Stat. § 48-125 (Reissue 1984), McLaughlin is allowed an attorney fee of $500 to be taxed as costs for the services of his attorney in this court. *Smith*

*v. Fremont Contract Carriers, supra.*

AFFIRMED.

CAPORALE, J., dissenting.

I agree that this case is controlled by *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982), and its subsequent *sub silentio* application in *Tranmer v. Mass Merchandisers*, 218 Neb. 151, 352 N.W.2d 610 (1984). However, I thought at the time that *Sandel* was wrongly decided and continue to so think. Accordingly, I dissent in this case for the same reasons I dissented in *Sandel*.

BOSLAUGH and HASTINGS, JJ., join in this dissent.

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STATE OF NEBRASKA, APPELLEE, V. HAROLD W. CRISP, APPELLANT.

361 N.W.2d 544

Filed February 8, 1985. No. 84-478.

1. **Confessions: Evidence.** In order to be admissible a statement or confession must have been freely and voluntarily made, and must not have been extracted by any direct or implied promise or inducement, no matter how slight.
2. **Confessions.** The determination of whether a statement was freely and voluntarily made necessarily turns on the totality of circumstances in any particular case.
3. **Confessions: Appeal and Error.** A finding of the trial court that the statement of an accused was freely and voluntarily made will ordinarily not be set aside on appeal unless the finding is clearly erroneous.
4. **Confessions.** An interrogating police officer's promise to see what he could do for a suspect being questioned, who expressed a need for help because of his alcohol and drug addiction, is not such an inducement as to render the suspect's statements involuntary.

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

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

Paul L. Douglas, Attorney General, and Timothy E. Divis, for appellee.

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

CAPORALE, J.

In this appeal defendant, Harold W. Crisp, argues that his felony first degree murder conviction should be reversed and vacated because the trial court erred in failing to suppress each and all of the statements he made to an Omaha police officer. The record does not sustain his assignment of error, and we accordingly affirm the conviction which resulted in a sentence of imprisonment for life, consecutive to any other sentence for which Crisp was already liable.

The victim, Rose Mary Johanna Caples, was last seen alive at an Omaha bar on September 12, 1983. Her partially decomposed body was found on October 13, 1983, in a field behind an Omaha manufacturing plant. Subsequently, Officer James Wilson of the Omaha Police Department was assigned to investigate the death. As part of his investigation, Officer Wilson talked with defendant's brother, Joseph Crisp. Joseph Crisp testified at trial that defendant had come to his house early one morning in mid-September of 1983, at which time defendant appeared frightened and intoxicated by drugs and alcohol, and said he thought he had killed someone and that he had to leave. Joseph Crisp noticed blood on defendant's clothing and that defendant was driving a car which did not belong to him. The brother showed defendant how to get onto the Interstate to Chicago and parted with him at that point. Joseph Crisp did not see defendant again until after the latter's arrest.

Mary Flowers, who lived with Joseph Crisp, testified that defendant came to their house around September 13, 1983, and told her he thought he had stabbed a woman when he was attempting to steal her purse and her car. Ms. Flowers noticed blood on the defendant's hands and that he had with him a large brown purse which he emptied, displaying money, identification and other papers, and a wallet. Defendant used the money in the purse to buy drugs before leaving for Chicago.

A store owner from Iowa testified that on September 13, 1983, in the early morning hours, he discovered defendant burglarizing his store. The car he identified as driven by

defendant was found to have belonged to the victim.

On October 20, 1983, Officer Wilson traveled to Fairhope, Alabama, to interview defendant, who had been arrested there on unrelated charges. Before the interview began, Officer Wilson advised defendant of his *Miranda* rights. During their conversation, defendant informed Officer Wilson that he had recently attempted suicide at the Alabama jail, and repeatedly told Officer Wilson that he needed help, an observation defendant was to repeat at later meetings with Officer Wilson. Officer Wilson testified he told defendant he would "talk to the county attorney as far as having his defense people get him evaluated or whatever," and that he would see "what I [Wilson] could do as far as getting psychiatric help given to him, conferring with the county attorney, I would do what I could." Defendant testified that Officer Wilson said he (defendant) "would get help." Although the record does not tell us what, if anything, the county attorney may have done, it does reflect that Officer Wilson did in fact tell the county attorney that defendant wanted help.

During the October 20 interview, defendant made a statement to Officer Wilson about robbing the victim. After completion of that statement defendant was again advised of his *Miranda* rights, and Officer Wilson then obtained defendant's tape-recorded statement. In this tape-recorded statement defendant said he had escaped from the Douglas County jail work release program and that he had stolen the victim's car so that he could leave town. He admitted striking the victim and throwing her body out of the car, but did not admit killing her. Defendant reiterated that he was high on alcohol and drugs during the altercation and that he needed help.

The following day defendant was flown back to Omaha, accompanied by Officer Wilson. Before leaving the airport in Fairhope, Officer Wilson again read the *Miranda* rights to defendant. However, Officer Wilson did not interrogate defendant during the air trip.

Upon arriving in Omaha defendant was transported to police headquarters. Defendant informed Officer Wilson that he wanted to give another statement, and defendant was once

again advised of his *Miranda* rights. In this statement defendant admitted killing the victim but later refused to allow this statement to be tape-recorded.

Prior to trial, a hearing was held on defendant's motion to suppress each and all of the statements he had made to Officer Wilson. The court found each of the statements to have been made freely and voluntarily, and further found that defendant had been properly advised of his *Miranda* rights and had knowingly and voluntarily waived those rights. The court then ruled the statements were admissible at trial.

Defendant then waived a jury, and at the bench trial the statements at issue were admitted into evidence over his objection.

Defendant contends that although he had been properly advised of his *Miranda* rights, his statements were nonetheless not freely and voluntarily given because he was improperly induced into making them by Officer Wilson's promises to obtain the help which defendant needed.

We have repeatedly said that in order to be admissible a statement or confession must have been freely and voluntarily made, and must not have been extracted by any direct or implied promise or inducement, no matter how slight. *State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571 (1984); *State v. Mayhew*, 216 Neb. 761, 346 N.W.2d 236 (1984); *State v. Rife*, 215 Neb. 132, 337 N.W.2d 724 (1983); *State v. Erks*, 214 Neb. 302, 333 N.W.2d 776 (1983); *State v. Hunsberger*, 211 Neb. 667, 319 N.W.2d 757 (1982). The determination of whether a statement was freely and voluntarily made necessarily turns on the totality of circumstances in any particular case. *State v. Rife, supra*. A finding of the trial court that a statement of an accused was freely and voluntarily made will ordinarily not be set aside on appeal unless the finding is clearly erroneous. *Id.*

We held in *State v. Mayhew, supra*, that a county attorney's promise to recommend a concurrent sentence for the defendant in return for his confession constituted an improper inducement such as to render the statement inadmissible. In *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979), we held that a police officer's offer to attempt to have the defendant's case transferred to juvenile court in return for his confession

was an improper inducement and rendered the defendant's statement involuntary. In *State v. Erks, supra*, we noted that statements by police to the defendant that the court would be informed about whether the defendant cooperated with the investigation did not, in and of themselves, constitute improper inducements. We further noted that deception practiced by the police was not sufficient to make an otherwise valid confession inadmissible unless it was such as to produce a false or unworthy confession. We also stated that "[a]n interrogation tactic in which the police appear to befriend the defendant and are 'on his side' does not in itself render a confession involuntary." 214 Neb. at 305, 333 N.W.2d at 779. We held in that case, however, that the defendant, being accused of a crime of a sexual nature, could have been influenced by indications that the police who sought help for him would also protect him and his family from embarrassment and that the trier of fact could find that confessions made in response to those inducements were not made voluntarily.

In *State v. Muenchau and Brown*, 209 Neb. 552, 308 N.W.2d 824 (1981), Judge Boslaugh in a single-judge opinion ruled that when a tangible benefit is offered in exchange for a confession, the confession must be suppressed. He then concluded that a promise by an interrogating officer to make the county attorney aware that defendant had cooperated by giving a statement was not such an inducement as to render the statement involuntary. He reasoned that the county attorney would know by the existence of the statement itself that the accused had cooperated and, therefore, no tangible benefit had been offered.

The record in this case establishes that defendant did indeed tell Officer Wilson several times that he was addicted to alcohol and drugs and needed help. However, while these facts indicate that defendant may have been susceptible to improper inducement, there is nothing to indicate that Officer Wilson offered to get help for defendant in return for a confession. This is perhaps best illustrated by defendant's own testimony on direct examination by his trial attorney:

> Q. Well, let me ask you this. Did he say you wouldn't get any help unless you told him the truth?

A. No, he didn't. He told me that I would get help; that he would see that I would get help, period. He kept on telling me this.

Q. Well, did he indicate that if you didn't cooperate with him, you wouldn't get help?

A. No, he didn't.

Q. Did you think that would happen?

A. Say that again.

Q. Did you think that you had to tell him what was going on or you wouldn't get any help?

A. Yes, I did.

Q. Why?

A. I don't really know. I can't answer that, because I don't know.

Q. You just felt that way?

A. I just felt that way.

Considering the totality of the circumstances, we find that defendant was not improperly induced to give his statements to Officer Wilson. Although defendant let Officer Wilson know that he needed help, Officer Wilson did not offer a tangible benefit to him in return for his confession. Officer Wilson told defendant only that he would do what he could to obtain help, but did not say that obtaining the statements was a condition to Officer Wilson's trying to do what he could. At the most, Officer Wilson's comments may have led defendant to believe that Officer Wilson had befriended him. That circumstance, in and of itself, is not enough to render defendant's statements involuntary and inadmissible.

The trial judge, having listened to testimony and observed the demeanor of the witnesses, determined that defendant gave his statements knowingly, freely, and voluntarily. It cannot be said that the trial court's determination was clearly erroneous. We therefore affirm defendant's conviction.

AFFIRMED.

WHITE and SHANAHAN, JJ., dissent.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. R. SCOTT FITZKE, RESPONDENT.

362 N.W.2d 19

Filed January 23, 1985. No. 85-065.

Original action. Judgment of disbarment.

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

PER CURIAM.

This matter was submitted upon the complaint against R. Scott Fitzke, made by the Committee on Inquiry of the Fifth Disciplinary District, and his voluntary surrender of license and consent to the entry of a disciplinary order against him.

Upon due consideration, it is ordered by the court, based upon the charges described in the complaint and the respondent's voluntary surrender of his license, waiver of disciplinary proceedings, and consent to the entry of an order of disbarment, that said R. Scott Fitzke be, and hereby is, disbarred effective January 23, 1985.

JUDGMENT OF DISBARMENT.

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STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. LARRY R. FRANK, RESPONDENT.

363 N.W.2d 139

Filed February 15, 1985. No. 82-368.

Original Action. Judgment of disbarment.

Terry C. Dougherty, for relator.

David L. Herzog, P.C., for respondent.

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

PER CURIAM.

This is an original proceeding in which the Nebraska State

Bar Association, relator, filed a formal showing in this court on December 29, 1983, suggesting conduct on the part of the respondent amounting to the practice of law at a time when he was under suspension as an attorney.

The prior suspension mentioned above originated with the May 21, 1982, filing of formal charges of unprofessional conduct by the relator. An order suspending the respondent from the practice of law was entered by this court on July 15, 1983. Those proceedings are found in *State ex rel. NSBA v. Frank*, 214 Neb. 825, 336 N.W.2d 557 (1983).

That opinion sets forth the facts supporting such suspension. Generally, respondent, in handling a decedent's estate, failed to file a timely federal estate tax return. In general, that dereliction of duty on the part of the respondent subjected the estate to penalties and interest of some $26,298.58. A settlement was made between the parties whereby the respondent was to pay the estate a total of $17,500 in installments. The record does not disclose the final disposition of that settlement.

The opinion went on to state at 829, 336 N.W.2d at 560: "However, when the respondent first realized his mistake in missing the filing date, the return was only 2 months out of time. Instead of informing his client of the error, respondent intentionally embarked upon a program of deception and misrepresentation for a period of approximately 2 years."

Another factor made much of during oral argument was the fact that respondent earlier, and on the 17th day of June 1982, had been suspended from the practice of law for failure to pay the required annual dues for the year 1982. An October 12, 1982, letter from respondent's counsel, addressed to the clerk of this court, enclosed a check in payment of those dues and a request for reinstatement. By that time, and in December of 1981, charges had been filed with the Committee on Inquiry of the Second Disciplinary District, resulting in the earlier-mentioned suspension. This court, on November 16, 1982, denied the application for reinstatement.

Counsel then filed a motion for reconsideration on November 17, 1982. For reasons which are not apparent from the record, that motion was not denied, nor the check returned, until February 4, 1983. However, the fact remains that

respondent, or at least his counsel of record, was fully aware of the suspension and denial of the motion for reconsideration. Additionally, the respondent himself was fully aware of that suspension. He had no information that would justify his belief that he had been reinstated, other than comments from his counsel that a check for his dues had been sent together with a request for reinstatement. He was fully aware of his continuing suspension when told by his attorney on November 17, 1982, that his request for reinstatement had been denied and that an additional pleading asking for reconsideration had been filed.

It is somewhat difficult to understand just what all of this information has to do with the present charge. However, it seemed very important to the respondent at the hearing before the referee and at oral argument in this court. Perhaps it was an attempt at demonstration of extenuating circumstances. We do not see it that way.

The present charge originated with a showing filed in this court on December 29, 1983, by the Counsel for Discipline. The showing recites the facts of the two previous suspensions. Additionally, it alleges activity on the part of the respondent amounting to the practice of law during the month of December 1983 while he was still under suspension.

The activity on the part of the respondent consisted of work done in connection with the estate of his grandfather. His uncle, Robert Bevins, a resident of Kansas, was named as the personal representative. Apparently, all that was necessary was a determination of inheritance tax. The uncle requested respondent's help.

The petition, various voluntary appearances, and the order determining and assessing inheritance tax were all prepared by the respondent. Additionally, he obtained the signatures of the county attorneys of both Boone and Washington Counties. He prepared and personally signed an affidavit of mailing notice which recites that he was the attorney for Robert Bevins. He appeared before the county judge for Washington County and obtained his approval of, and signature on, the order determining and assessing the inheritance tax.

We believe it is so obvious as to eliminate the need for the citation of authorities that a proceeding to determine an

inheritance tax in an estate proceeding constitutes the practice of law, the respondent's statement to the contrary notwithstanding. Even he agreed that in his 7 or 8 years of practice he had learned a few things in connection with estate proceedings and some of that knowledge "was infused into that" (preparation of the legal documents).

Respondent insists that it was really his uncle that was handling the proceedings and he simply acted as a delivery boy in transmitting the papers to the court in order to save his uncle a trip to Nebraska during extremely bad weather.

Although denying that he accepted any compensation from his uncle in doing the work requested of him, he stated: "The estate hasn't been closed yet. At the time the estate was opened I received $200 from my uncle." The decedent died on March 20, 1983, and therefore that fee would have to have been received during the time respondent was under suspension.

Neb. Rev. Stat. § 7-101 (Reissue 1983) provides in part that

> no person shall practice [law] as an attorney . . . by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. No such paper shall be received or filed in any action or proceeding unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding.

It should be obvious that one who is suspended from the practice of law is no longer an "admitted attorney."

We believe it is one thing for a lay person to engage in the unauthorized practice of law and thereby subject himself or herself to criminal penalties, and quite another situation where one who has been bound by oath to comply with the Code of Professional Responsibility nevertheless completely ignores the order of this court suspending him from practice.

The result we reach in this case is in accord with that of *State ex rel. NSBA v. Thierstein*, 218 Neb. 603, 357 N.W.2d 442 (1984), in which an order of disbarment following an act of practicing law during a period of suspension was entered on November 1, 1984.

It is therefore ordered that Larry R. Frank be, and hereby is, disbarred forthwith.

JUDGMENT OF DISBARMENT.

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DOLAN PETERSON ET AL., APPELLANTS, V. GERING IRRIGATION DISTRICT ET AL., APPELLEES.

363 N.W.2d 141

Filed February 15, 1985. No. 83-366.

1. **Irrigation Districts: Waters.** The principal purpose for the organization of an irrigation district is to furnish water for irrigation to all landowners within the district upon fair and equitable terms and conditions.
2. _____: _____. In deciding what is just and equitable in determining water apportionment, the size of the tract, the elevations of possible points of delivery, the topography and the nature of the soil, the location and availability of alternative or additional sources of water supply, and the comparative advantages and disadvantages to the landowner and the irrigation district should all be considered.

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

Dennis L. Arfmann, for appellants.

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees.

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

BOSLAUGH, J.

This case arises out of a controversy concerning the delivery of irrigation water by the defendant Gering Irrigation District (hereinafter defendant) to the plaintiffs' land. Three directors of the irrigation district were joined as additional parties to the suit.

The plaintiffs, Dolan and Arlene Peterson and Greg and Ann Peterson, own approximately 230 acres of land in Scotts Bluff County, Nebraska. The land is a rectangular tract which

lies adjacent to and north of the defendant's canal. The land slopes generally from the south to the north. The highest elevation on the plaintiffs' land is 98.00 feet.

In a prior case between these same parties, the plaintiffs obtained a writ of mandamus which required the defendant district "to deliver unto relator's land at the 98.00 level, which is the high point of relator's land, that volume of water to which the relator's land is legally entitled . . . ."

This action was commenced to enjoin the defendants from interfering with the plaintiffs' irrigation distribution system. The petition alleged that the defendants had wrongfully removed an irrigation distribution box plaintiffs had built upon their land and that the defendants had wrongfully entered plaintiffs' land to construct a device to measure the flow of water. The defendants filed a counterclaim seeking an order requiring the plaintiffs to remove an irrigation distribution box they had installed. The defendants also sought determination of the parties' rights and obligations concerning the construction, placement, and elevation specifications of the plaintiffs' distribution box and of its own measuring devices. In their reply and answer to defendants' counterclaim, plaintiffs alleged they were not receiving delivery of their proper, legal, and statutory amount of water. Plaintiffs also asked for a determination of the relative rights and obligations of the parties.

After hearing the evidence and viewing the premises, the trial court found that the defendant was properly delivering irrigation water to the plaintiffs' land and that the plaintiffs were not entitled to an injunction, and enjoined the plaintiffs from interfering with the measurement and delivery of irrigation water to the plaintiffs' land.

There are many conflicts in the evidence. Since this is an action in equity, it is reviewed de novo by this court. *Northport Irr. Dist. v. Jess*, 215 Neb. 152, 337 N.W.2d 733 (1983). Where the evidence is in conflict, we give consideration to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.

There is no contention in this case that the plaintiffs did not

receive their fair allotment of irrigation water. The evidence is that during the growing season in question, the plaintiffs did not request delivery of all of the water to which they were entitled. The principal issue in this case is whether the defendant should be required to deliver water to the plaintiffs' land at a higher surface elevation.

The record shows that irrigation water is supplied from the defendant's canal and to the plaintiffs' land through a turnout consisting of a 12-inch metal pipe with a slide gate or headgate over the open end which permits the defendant to control the flow of water from the canal onto the plaintiffs' land.

The plaintiffs have installed several different receiving structures at the turnout over the years. The first receiving structure was a steel box; its purpose was to collect the water received from the canal and channel the water into the plaintiffs' irrigation system. Since that time, the plaintiffs have removed and installed several different concrete receiving structures. The plaintiffs have used a number of different irrigation methods, ranging from gravity to a sophisticated mechanical system known as a "Lockwood HydraLinear."

In June of 1981 the defendant installed a measuring device known as a "Cipolletti weir" at the turnout on the plaintiffs' land. Water now flows from the canal through the turnout into a 9- by 8- by 4-foot concrete structure. The water contained in this structure is the "weir pool." Water flows out of the weir pool through the weir, which is a metal plate with a U-shaped or trapezoidal opening. The opening in the weir plate or blade is approximately 3 feet wide and 2 feet deep, with a vertical scale affixed to the blade near the opening. As water flows through the weir, it is possible to determine the volume of water by reading the scale. In order to get an accurate reading, water must fall over the weir blade into a basin with a lower elevation. The difference in elevation between the flow line of the weir and the floor of the receiving basin must be at least .2 feet. If there is no fall, any reading on the scale is simply that of immobile or backed-up water. Currently, the elevation or flow line of the weir blade is 98.18 feet.

After the weir was installed the defendant determined that the elevation of the floor of the plaintiffs' receiving structure or

basin was above the high point of the land. Because water flowed directly over the weir blade into the receiving structure, it was impossible for the water to fall the necessary .2 feet in order to be accurately measured. When the plaintiffs refused to alter their receiving structure, the defendant removed it. The plaintiffs have now installed a new receiving structure.

The plaintiffs contend that they are entitled to receive water at an elevation higher than the high point of the land. In order for this to be accomplished, the defendant would have to raise the elevation of the weir blade and place structures or "checks" in the canal so as to raise the level of the water in the canal. The plaintiffs contend there is not enough "head," or force, when the water enters their land for gravity irrigation to be successful. Specifically, the plaintiffs point to a remote portion of land east of the turnout, and referred to as station 3800, which has an elevation of 97.7 feet.

The defendants, on the other hand, contend that it is their duty only to deliver water at the elevation of the high point of the land, that plaintiffs can successfully irrigate with water delivered at that elevation, and that to deliver the water at a higher level would jeopardize the canal.

At the time of trial the plaintiffs irrigated with the hydralinear, and also gravity irrigated using gated pipe. To remove silt from the water before its use by the hydralinear, the plaintiffs constructed two "settling ponds," or pits, near the turnout. The water was then pumped from the pits through underground pipes from the settling ponds to structures called "risers" on the plaintiffs' land. The hydralinear would travel up and down the field attaching itself to the risers, from which it would draw water for irrigation. In order to reach land not traveled by the hydralinear, the plaintiffs channeled water through gated pipes.

Dolan Peterson testified that many times the hydralinear system would shut down automatically because there was not sufficient water with which to operate. He further testified that there were also periods during which there was not sufficient water to gravity irrigate.

Kevin Prior, an engineer, testified as an expert witness for the plaintiffs. It was his opinion that the plaintiffs could properly

irrigate their land if the weir blade were raised to an elevation of 99.5 feet and the canal were checked to an elevation of 100.45 feet.

On the other hand, the defendants' evidence was that the plaintiffs can properly irrigate their land with water delivered at an elevation of 98.00 feet. Walter L. Trimmer, an irrigation engineer employed by the Lockwood Corporation, and who designed the pipeline used with the hydralinear on the Peterson land, testified that the minimum requirement for the defendant was to deliver water to the plaintiffs' land at a water surface elevation of 98.00 feet.

Larry McCaslin, an engineer called as an expert witness by the defendants, testified that water "delivered to the high point of the land, not above but to the high point of the land, would be satisfactory and would be acceptable practice in this case." Evidence introduced by the defendants, in the form of daily water reports kept by the Gering Irrigation District, showed that on numerous occasions throughout the irrigation season in which plaintiffs complained they were not receiving a proper delivery of water, the plaintiffs' receiving pits were flooded so that the weir could not measure the amount of water being delivered because the plaintiffs were actually backing up water into the canal. It was the defendants' contention at oral argument that "the problems of Mr. Peterson are of his own making."

Testimony by the expert witnesses makes it clear that the matter cannot be considered with reference to the plaintiffs' land alone. The original design and construction of the canal was for delivery of water at the surface elevation of the land and not at some point above that elevation. If the Gering Irrigation District were required to raise the plaintiffs' weir, the capacity of the canal would not allow the district to consistently deliver to the plaintiffs the water to which they are entitled without building a check in the canal. Furthermore, the district would be required to place checks at other locations throughout the district and raise the elevation of the banks of the canal. These changes would not only be costly but would make the canal susceptible to damage or overflow in periods of high waters, rains, etc., and also produce a shortage of water at the end of

the canal.

"The principal purpose for the organization of an irrigation district is to furnish water for irrigation to all the landowners within the district upon fair and equitable terms and conditions." *State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 103, 286 N.W.2d 426, 431 (1979). In *Blome* the question presented was how many points of water delivery were reasonably required on any given tract of land. This court held that such a determination must be made on a case-by-case basis:

> The traditional concept that each tract of land is different is particularly significant here. The size of the tract; the elevations of possible points of delivery; the topography and the nature of the soil; the location and availability of alternative or additional sources of water supply; and the comparative advantages and disadvantages to the landowner and the irrigation district should all be considered in determining what is just and equitable in each case.

*Id.* at 106, 286 N.W.2d at 432.

We believe the record sustains a finding that the defendant district is delivering water to the plaintiffs' land in a fair and equitable manner. The expert witness McCaslin testified that it is in line with practical agricultural practices for irrigation water to be delivered at the elevation of the high point of the land. Once there, as long as the proper quantity is delivered, it is no longer the district's responsibility but, rather, the irrigator's responsibility to move the water to any other point on the land.

The placement of the weir at the high point of plaintiffs' land permits the defendant to comply with its statutory duty to measure the water flowing from its canals. Neb. Rev. Stat. § 46-260 (Reissue 1984). Although it is not impossible to do so, the evidence indicates that to raise the weir would hamper defendant's further duty to provide plaintiffs with the amount of water to which they are entitled. Neb. Rev. Stat. § 46-231 (Reissue 1984). The plaintiffs are receiving their proper appropriation of water, and the evidence is that their field can be successfully irrigated by gravity with water delivered at the elevation of the high point of their land. It cannot be denied that the plaintiffs would benefit, as would many other farmers, if

the water were delivered at a higher surface elevation. However, neither can it be denied that, under the facts of this case, the plaintiffs are being furnished water upon fair and equitable terms and conditions. See *Blome, supra*. See, also, *State, ex rel. Clarke, v. Gering Irrigation District*, 109 Neb. 642, 192 N.W. 212 (1923); *Farmers & Merchants Irrigation Co. v. Brumbaugh*, 81 Neb. 641, 116 N.W. 512 (1908).

The judgment is, therefore, affirmed.

AFFIRMED.

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DOLAN PETERSON ET AL., APPELLANTS, V. GERING IRRIGATION DISTRICT, APPELLEE.

363 N.W.2d 145

Filed February 15, 1985. No. 83-542.

1. **Summary Judgment.** Summary judgment is appropriate where the moving party establishes that there is no genuine issue of material fact and that 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 that party the benefit of all favorable inferences that may be drawn therefrom.
3. **Irrigation Districts: Political Subdivisions.** An irrigation district properly organized under the statutes is a political subdivision.
4. **Irrigation Districts: Political Subdivisions Tort Claims Act.** Actions against an irrigation district are governed by the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983).
5. **Irrigation Districts: Political Subdivisions Tort Claims Act: Claims.** A notice of a possible future "claim" against an irrigation district under Neb. Rev. Stat. § 46-160 (Reissue 1984) does not satisfy the requirements of Neb. Rev. Stat. § 23-2404 (Reissue 1983).

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

Dennis L. Arfmann, for appellants.

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

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

BOSLAUGH, J.

This is a companion case to case No. 83-366, decided today. The cases were consolidated for argument in this court.

The essential facts concerning the disputes between the parties are stated in case No. 83-366.

In this case the plaintiffs sought to recover alleged damages to their crops, totaling $33,009.87, for the defendant's failure to properly deliver water during the 1981 growing season.

On July 24, 1981, the plaintiffs submitted a document entitled "C L A I M" to the chairman of the board of the Gering Irrigation District. The claim alleged that the defendant was liable for damages resulting from its failure to deliver water pursuant to Neb. Rev. Stat. § 46-160 (Reissue 1984). No action was taken on this "claim." Subsequently, on June 22, 1982, plaintiffs filed a petition alleging the same in the district court for Scotts Bluff County. After numerous motions and amendments to the pleadings, the trial court, on May 26, 1983, sustained defendant's motion for summary judgment on the grounds that there was no issue as to any material fact and that the claim was not filed pursuant to the Nebraska Political Subdivisions Tort Claims Act. The plaintiffs have appealed.

The issues on appeal are whether (1) the Gering Irrigation District is a political subdivision; (2) plaintiffs' "claim" satisfied the requirements for filing under the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983); and (3) the plaintiffs were entitled to an additional 6 months within which to file a claim pursuant to the Nebraska Political Subdivisions Tort Claims Act.

Summary judgment is appropriate where the moving party establishes that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. 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 that party the benefit of all favorable inferences that may be drawn therefrom. *Bruyninga v. Nuss*, 216 Neb. 801, 346 N.W.2d 245 (1984).

As to the first issue, we believe that it is clear that the Gering Irrigation District is a political subdivision. In *Wight v.*

*McGuigan*, 94 Neb. 358, 360, 143 N.W. 232, 233 (1913), *overruled on other grounds* 117 Neb. 841, 223 N.W. 132 (1929), this court said: "It has previously been declared by this court that an irrigation district properly organized under the statute is a public corporation. It is a political subdivision . . . ." As such, actions against an irrigation district are governed by the Nebraska Political Subdivisions Tort Claims Act, which provides that "no suit shall be maintained against such political subdivision on any tort claim except to the extent, and only to the extent, provided by this act." § 23-2401.

Section 23-2404 provides:

> All tort claims under this act shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision, or the governing body of a political subdivision may provide that such claims may be filed with the duly constituted law department of such subdivision. It shall be the duty of the official with whom the claim is filed to present the claim to the governing body. All such claims shall be in writing and shall set forth the time and place of the occurrence giving rise to the claim and such other facts pertinent to the claim as are known to the claimant.

The time constraints within which to file a tort claim are governed by § 23-2416, which provides in part: "Every claim against a political subdivision permitted under this act shall be forever barred, unless within one year after such claim accrued, the claim is made in writing to the governing body." It is plaintiffs' contention that they did file a claim; therefore, the next issue to be considered is whether plaintiffs' "claim" satisfied the requirements for filing under this act.

The record shows that on July 24, 1981, the plaintiffs served a document entitled "C L A I M" upon the chairman of the board of the Gering Irrigation District. The document began:

> YOU ARE HEREBY GIVEN NOTICE pursuant to 46-160 R.R.S. Neb. 1943 that Dolan N. Peterson and Arlene Peterson, husband and wife, and Greg Peterson and Ann Peterson, husband and wife, as owners and purchaser under contract do hereby inform you that you have failed to deliver water by reason of negligence or omission of duties and responsibilities of the District and

> that such individuals shall hold such district liable for whatever damages *may result* as a result of failure to deliver water as required by the laws of the State of Nebraska.

(Emphasis supplied.) The document contained no statement as to the amount of damage or loss sustained by the plaintiffs, nor did it allege that such damage or loss had occurred. In a sworn affidavit the president of the Gering Irrigation District stated that "the Board at all times considered the document as a notice filed pursuant to the provisions of Section 46-160, R.R.S. 1943." Section 46-160 states that an irrigation district is liable in damages for negligence in delivering or failure to deliver water; provided, however, that the chairman of the board of directors of the district is served with written notice within 30 days after such negligent acts are committed.

Despite plaintiffs' characterization of the document as a "claim," it made no demand against the district; rather, it only alerted the district to the possibility of a claim. In *In re Estate of Feuerhelm*, 215 Neb. 872, 341 N.W.2d 342 (1983), this court considered whether a "STATEMENT OF CLAIM" filed against an estate was a claim within the limitations of Neb. Rev. Stat. § 30-2485 (Reissue 1979). The court distinguished a notice from a claim, stating at 875, 341 N.W.2d at 344-45:

> The suggested "claim" demonstrates further deficiency. Although the language of Thompson's individual claim did alert the personal representative to the possibility of a claim by the trust, Thompson's claim did not contain a demand by the trust upon the estate for satisfaction of any obligation. Mere notice to a representative of an estate regarding a possible demand or claim against an estate does not constitute presenting or filing a claim under § 30-2486. If notice were accorded the stature of a claim, the resultant state of flux and uncertainty would frustrate and avoid the purpose and objectives of the nonclaim statute.

The remaining issue in this appeal is whether the plaintiffs were entitled to an additional 6 months within which to file a claim pursuant to the Nebraska Political Subdivisions Tort Claims Act. As relevant here, § 23-2416 provides:

> (2) If a claim is made or filed under any other law of

> this state and a determination is made by a political subdivision or court that this act provides the exclusive remedy for the claim, the time to make a claim and to begin suit under this act shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by the political subdivision, if the time to make the claim and to begin suit under this act would otherwise expire before the end of such period. The time to begin suit under this act may be further extended as provided in subsection (1) of this section.

On November 4, 1982, a demurrer was sustained on the basis that the defendant was a political subdivision. The plaintiffs were given 20 days to amend their petition, and in the failure thereof the action would be dismissed. Thereafter, the plaintiffs amended their petition twice, but did not allege a cause of action other than in tort. Neither did plaintiffs file a claim pursuant to the tort claims act. On May 26, 1983, summary judgment was granted for the defendant on essentially the same grounds.

In its first order of November 4, 1982, the trial court determined that the act provided the exclusive remedy for the plaintiffs under the pleadings in this case. Section 23-2416 mandates: "[T]he time to make a claim and to begin suit under this act shall be extended for a period of six months from the date of the court order making such determination . . . ." Contrary to plaintiffs' argument, the statute does not obligate the court to make a finding that the time to make a claim has been extended. Rather, it was within the plaintiffs' right to make such a claim; having failed to do so, their action was barred.

The judgment of the district court is affirmed.

AFFIRMED.

# JERRY BIRKEL, APPELLANT, V. HASSEBROOK FARM SERVICE, INC., A CORPORATION, APPELLEE.

363 N.W.2d 148

Filed February 15, 1985. No. 83-529.

1. **Breach of Contract: Damages.** In an action for breach of a contract, a wronged party may recover damages when, at entering a contract, a wrongdoer had reason to know the damages which would probably result from a breach or when damages are the kind which naturally follow a breach.
2. _____: _____. A wronged party in a contractual dispute may recover any loss, injury, or expense incurred in reasonable efforts to minimize his injury.

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

Vard R. Johnson of Broom and Johnson, for appellant.

Donald R. Witt and Diane Bevans Carlson of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

KRIVOSHA, C.J., HASTINGS, SHANAHAN, and GRANT, JJ., and MCCOWN, J., Retired.

SHANAHAN, J.

Jerry Birkel appeals his judgment for damages in the amount of $15,940 entered after a jury's verdict in the district court for Butler County against Hassebrook Farm Service, Inc. Birkel sued Hassebrook for damages arising out of the purchase and installation of a grain storage and drying bin. We reverse and remand for a new trial.

Birkel farms 445 acres on which he produces corn, milo, beans, and alfalfa. From 1955 through 1977 Birkel used a 500-bushel batch dryer to dry grain and then stored the grain in three storage units on his farm. These storage units held approximately 40,000 bushels. In 1978, in an effort to upgrade his operations, Birkel contacted Hassebrook about a new dryer and storage bin with an auxiliary auger system to transfer grain from the new dryer to existing storage bins on Birkel's farm. Birkel signed contracts for the new equipment replacing his present drying system. Hassebrook took Birkel's old dryer as a trade-in on the new equipment. The contracts expressly required that the new dryer, bin, and auger be installed in a

"workmanlike manner." Installation was completed in 1978.

In the spring of 1980, after using the new equipment for nearly 2 years, Birkel detected problems in the recently installed facilities and found spoiled grain in the storage bins. In August, Birkel hired additional labor in a salvage operation to sort the good grain from the spoiled. Although he could not salvage 600 bushels of grain, Birkel salvaged the balance of the grain and sold the salvaged grain. He incurred a total grain loss of $17,092.71.

Testimony established that Hassebrook had failed to rivet part of the dryer apparatus to the concrete floor of the new facility. Such failure to securely fasten parts of the drying system was characterized as "bad workmanship," according to witnesses at trial. On the other hand, Hassebrook attributed Birkel's loss to poor grain management.

The court would not admit evidence about the cost of Birkel's efforts to salvage the unspoiled grain. Also, Birkel attempted to present evidence that an alternative or substitute grain-drying facility was necessary in his farm operations until the defective drying and storage system purchased from Hassebrook was replaced. One of Birkel's expert witnesses, Larry VonFossen, a specialist in agricultural engineering and storage facilities, was asked whether Birkel would have additional operating costs to the farm if the defective installation deprived Birkel of a dryer and storage facility. The critical part of the question asked VonFossen follows:

> Q. Mr. VonFossen, in regard to Mr. Birkel's situation with this bin, the drying unit and the storage units, if Mr. Birkel was deprived of the use of this for a year, a season at a time, would he have additional cost to replace this bin, operating costs?
>
> [Hassebrook's attorney]: I object to the question. It is calling for an opinion for which there is insufficient foundation. It is also calling for an opinion regarding recovery of damages that is not recoverable under Nebraska law, therefore it is irrelevant and immaterial.
>
> . . . .
>
> THE COURT: Sustained.
>
> [Birkel's attorney]: We would move to make an offer of

proof, Your Honor.

. . . .

[Birkel's attorney]: Comes now the plaintiff and as an offer of proof, tenders to the Court that if this witness were allowed to answer, he would answer that the plaintiff, Jerry Birkel, has continuing costs of drying equipment for drying his annual yield of corn until this bin is repaired.

In addition thereto, he has lost storage facilities because he does not have an adequate dryer on the premises.

[Hassebrook's attorney]: I renew my objection. It is calling for an opinion for which there is insufficient foundation, and also to request for an opinion on damage which is not recoverable under Nebraska laws, and therefore is irrelevant and immaterial.

THE COURT: I will sustain it.

The trial court refused to give Birkel's tendered instruction on incidental and consequential damages due to Hassebrook's breach of contract. The jury returned a verdict for Birkel in the amount of (1) $12,140 for damages to buildings and equipment and (2) $3,800 for damages to grain.

On appeal Birkel argues that he should have been allowed to adduce evidence concerning his additional costs in obtaining alternative drying and storage facilities, after Hassebrook's breach of the installation contract. Birkel also argues that he should have been permitted to present evidence regarding the expenses incurred for labor and rental equipment in salvaging the unspoiled grain in mitigation of damages. We believe that the trial court should have allowed Birkel's evidence about expenses in obtaining alternative drying and storage facilities as a substitute for the malfunctioning grain storage and drying bin. Failure to admit such evidence is reversible error.

We note that Hassebrook argues Birkel's offer of proof is insufficient because there is nothing about "additional costs." Rule 103(1)(b) of the Nebraska Evidence Rules contains:

> (1) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:
>
> . . . .

> (b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked.

Neb. Rev. Stat. § 27-103 (Reissue 1979). Rule 103(1)(b) provides that only the substance of the excluded testimony must be disclosed in an offer of proof. Further, if the substance of the evidence is apparent from the context in which the question is asked, an offer of proof is not necessary. *Sherman County Bank v. Kallhoff*, 205 Neb. 392, 288 N.W.2d 24 (1980). The question asked the expert witness clearly indicates that Birkel's expert, if permitted, would have testified that Birkel had sustained additional costs in obtaining alternative drying and storage facilities. However, the substance of the evidence from Birkel's expert witness was readily apparent from the nature and context of the question. An offer of proof was superfluous under the circumstances.

Hassebrook's objection to the testimony of Birkel's expert witness was predicated on relevancy, namely, additional cost of operation is not a proper item of damages recoverable, and, therefore, is irrelevant.

As a general rule, a party injured by a breach of contract is entitled to recover all damages which are reasonably certain and which are naturally expected to follow the breach. *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 197 N.W.2d 646 (1972). As § 347 of the Restatement (Second) of Contracts (1981) states at 112:

> Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by
>
> (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
>
> (b) any other loss, including incidental or consequential loss, caused by the breach, less
>
> (c) any cost or other loss that he has avoided by not having to perform.

The requirement of foreseeability of damages limits recovery. The necessity of foreseeability in damages had its genesis in the landmark case of *Hadley v. Baxendale*, 9 Ex. 341,

156 Eng. Rep. 145 (1854), now a keystone in contract law. Section 351 of the Restatement, *supra*, incorporates foreseeability as a factor in determining damages recoverable:

> (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
>
> (a) in the ordinary course of events, or
>
> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
>
> (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

*Id.* at 135.

Under the principles of reasonable certainty and natural consequence of a breach of contract, as set forth in *Midlands Transp. Co. v. Apple Lines, Inc., supra*, and in view of the Restatement (Second) of Contracts, in an action for breach of a contract a wronged party may recover damages when, at entering a contract, a wrongdoer had reason to know the damages which would probably result from a breach or when damages are the kind which naturally follow a breach. In the case at hand, Hassebrook can hardly argue it was unaware that Birkel would have to find alternative facilities in the event that the purchased and installed facilities failed. Further, given the nature of Birkel's operations known to Hassebrook, it cannot be seriously maintained that Birkel's expenses in finding alternative drying and storage facilities are not an element of damage contemplated when the contract was entered or did not naturally follow from Hassebrook's breach of contract. Also, we note *Olson v. Pedersen*, 194 Neb. 159, 231 N.W.2d 310 (1975), wherein this court held that a wronged party in a contractual dispute may recover any loss, injury, or expense incurred in reasonable efforts to minimize his injury.

Because we reverse for a new trial on the question of

damages, we need not address Birkel's argument concerning recovery of damages attributable to the salvage operations. If properly presented in the action, salvage costs may, likewise, be recoverable. See *Olson v. Pedersen, supra.*

REVERSED AND REMANDED FOR A NEW TRIAL.

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KENNETH DRINKWINE, APPELLEE AND CROSS-APPELLANT, V. DAVID FLEBBE ET AL., MEMBERS OF THE NEBRASKA STATE PERSONNEL BOARD; JAN PIEPER, DIRECTOR, STATE DEPARTMENT OF PERSONNEL, ET AL., APPELLANTS AND CROSS-APPELLEES.

363 N.W.2d 152

Filed February 15, 1985. No. 83-688.

1. **Termination of Employment: Employment Contracts.** The device of discharging an employee and later reinstating the employee without backpay cannot be used to avoid employment provisions limiting employee suspensions without pay.
2. **Administrative Law: Employment Contracts.** The Nebraska State Personnel Board does not have authority to ignore the provisions of a union contract, approved by the Legislature, between employees and another state agency.

Appeal from the District Court for Lancaster County: MARK J. FUHRMAN, Judge. Affirmed in part, and in part reversed.

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

Beverly Evans Grenier of Steven D. Burns, P.C., for appellee.

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

GRANT, J.

This is an appeal from an order of the district court for Lancaster County modifying a decision of the Nebraska State Personnel Board (hereinafter Board). The Board had ordered reinstatement of a discharged correctional officer without backpay. The district court affirmed the reinstatement of the

employee but modified the Board's order by awarding backpay for the period in excess of 15 days during which the employee was out of work, and awarded an attorney fee. We affirm in part and reverse in part the order of the district court.

The plaintiff-appellee, Kenneth Drinkwine, was a correctional officer at the Lincoln Correctional Center, a facility operated by the Department of Correctional Services (hereinafter Department). On February 1, 1982, he refused to work the position to which he had been assigned. He was relieved of duty without pay, pending disciplinary action. On February 5, 1982, he received notice of termination of his employment, effective February 2, 1982, with 2 weeks' pay in lieu of further notice. Drinkwine filed a grievance requesting reinstatement and backpay. His grievance was denied by the head of the Department and by the state Director of Personnel. He appealed the denial to the Board. The Board found that the Department had deprived Drinkwine of his due process rights by not providing a hearing to allow Drinkwine the opportunity to present mitigating circumstances, and ordered reinstatement. The Board, however, awarded no backpay. Drinkwine appealed the denial of backpay to the district court, naming the members of the Board, the Director of Personnel, and the Department as defendants. In his appeal Drinkwine claimed that his union contract with the Department limited "suspension without pay" to 15 days. The district court agreed, and awarded "back pay for that period of his enforced leave of absence which is in excess of fifteen (15) working days that he was without work from February 1, 1982, until September 1, 1982." The court also taxed costs and attorney fees to defendants. Defendants appeal, alleging three assignments of error.

Defendants' first assignment of error sets out that "[t]he district court improperly interpreted the portion of the contract in dispute." They allege that the plaintiff was never "suspended without pay," but was "dismissed" pending appeal. Brief for Appellants at 7. The distinction cannot stand, on close analysis.

Different jurisdictions take different positions in considering the distinction, if any, between suspension without pay and discharge and reinstatement without backpay. We feel the better

view is that set forth in *Millan v. Morris View*, 177 N.J. Super. 620, 427 A.2d 605 (1981). In that case an employee was discharged for insubordination. After a hearing before the Civil Service Commission, the employee was ordered reinstated without backpay after a 6-month suspension because the commission found that her actions did not warrant dismissal. A New Jersey statute limited suspensions without pay to 6 months. However, the commission's order, because it was rendered a year and a half after the employee's discharge, resulted in a net loss of pay of 18 months. "Hence, the practical effect of the Commission's ruling, no pay for the entire period until reinstatement, is equivalent to suspension for 18 months." *Id.* at 624, 427 A.2d at 606-07. The New Jersey court determined that the commission "lacks authority to ignore the clear mandate of the statutory provision limiting suspension to a six-month period." *Id.* at 625, 427 A.2d at 607. In this case, although Nebraska does not have a statute on the point, neither the Department, the personnel director, nor the Board had the authority to ignore the clear agreement, set out in Drinkwine's union contract, limiting suspensions to 15 days.

Thus, in the instant case, the Board is limited by the contract between Drinkwine's union and the Department to imposing suspensions without pay for 15 days or less. The effect of reinstatement without backpay is to suspend Drinkwine for 7 months without pay, in violation of the union contract. We hold that the device of discharging an employee and later reinstating the employee without backpay cannot be used to avoid employment provisions limiting employee suspensions without pay. The district court's award of backpay for the period over 15 days is correct and is affirmed. An opposite result would allow the Department to avoid its responsibilities under the contract with the union and to impose a suspension without pay of more than 15 days through wrongful discharge and reinstatement.

Defendants' second assignment of error is that the trial court improperly limited the discretion of the Board. Defendants argue that the union contract provision limiting suspensions is binding only upon the Department, not upon the Board, and that it cannot be read to limit the Board in fashioning an appropriate remedy. The Board, they suggest, is governed only

by statutes and by its own regulations. We do not agree.

State agencies are authorized to enter into collective bargaining agreements by Neb. Rev. Stat. § 48-837 (Reissue 1984). Any agreements negotiated pursuant to that section must be approved by the Legislature. The contract in dispute was approved by the Legislature as required (L.R. 191, 87th Leg., 1st Sess., May 28, 1981). It cannot reasonably be said that the state can allow one of its agencies to enter a contract and allow another agency reviewing disputes arising out of that contract to ignore it. The Legislature's approval of the contract negated any argument that any arm of the state is not bound by it. The Board is therefore bound by the contractual provision limiting suspensions without pay to 15 days. Within the limits of that contract and its own regulations, the Board is free to fashion an appropriate remedy.

The final assignment of error is that the trial court should not have awarded attorney fees because the state's position was substantially justified. Neb. Rev. Stat. § 25-1803 (Cum. Supp. 1984) provides that attorney fees shall be awarded to a prevailing party and against the state unless the state's position was "substantially justified." On cross-appeal Drinkwine argues that he should have been allowed to make a showing of attorney fees pursuant to Neb. Rev. Stat. § 25-1804 (Cum. Supp. 1984). The court awarded $500 attorney fees without such a showing.

We need not reach either contention because, as provided in Neb. Rev. Stat. § 25-1807 (Cum. Supp. 1984), the sections set out above are applicable only to "legal and administrative proceedings initiated after July 17, 1982." The grievance in this action was presented to the superintendent of the Lincoln Correctional Center on February 26, 1982. The denial of the grievance was appealed to the Director of Personnel on April 2, 1982, and to the State Personnel Board on June 7, 1982. The proceeding was clearly initiated prior to the effective date of the act. We therefore cannot base an award of attorney fees on that statute. Absent statutory authority or uniform practice, we cannot award attorney fees. *Quinn v. Godfather's Investments*, 217 Neb. 441, 348 N.W.2d 893 (1984).

The award of attorney fees is reversed. The judgment of the

district court in all other respects is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

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IN RE GUARDIANSHIP OF TERRY G. GRIESS.
MINDY GRIESS, PERSONAL REPRESENTATIVE OF THE ESTATE OF TERRY G. GRIESS, DECEASED, APPELLANT, V. DALE J. BLACK AND WESTERN SURETY COMPANY, APPELLEES.

362 N.W.2d 65

Filed February 15, 1985. No. 83-731.

Appeal from the District Court for Nance County: JOHN C. WHITEHEAD, Judge. Affirmed.

Thomas A. Wagoner, for appellant.

Philip T. Morgan of Morgan & Morgan, for appellee Black.

KRIVOSHA, C.J., WHITE, and SHANAHAN, JJ., and MCCOWN, J., Retired, and BUCKLEY, D.J.

PER CURIAM.

This matter involves a conservator's accounting and distribution of funds to a protected person. On the claimant's appeal to the district court, the county court judgment was affirmed. See Neb. Rev. Stat. §§ 30-1601 (Cum. Supp. 1984) and 24-541.06 (Cum. Supp. 1982). Upon our review of the record made in the county court, we find no error. The judgment of the district court is affirmed.

AFFIRMED.

# NC+ HYBRIDS, A NEBRASKA CORPORATION, APPELLANT, V. GROWERS SEED ASSOCIATION, A TEXAS CORPORATION, APPELLEE.

363 N.W.2d 362

Filed February 15, 1985. No. 83-852.

1. **Garnishment.** Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy. Being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before any remedy is available under such statutes.
2. _____. Through garnishment in aid of execution a garnishee becomes a "stakeholder" or custodian holding a fund, credit, or property belonging to one or the other of the parties to a lawsuit producing the judgment for which execution is sought.
3. _____. Garnishment in aid of execution is an incident to a judgment or an ancillary procedure whereby a judgment creditor seeks to collect a judgment by reaching a judgment debtor's property in the hands of a third party.
4. _____. If a garnisher is dissatisfied with a garnishee's answer but does not controvert or traverse the answer given, the garnishee's answer is the only filed pleading containing allegations or statements about property, funds, or credits of a judgment debtor, a solitary pleading which is taken as true and conclusive.

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

Terry R. Wittler of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

J. Scott Paul of Boland, Mullin & Walsh, for appellee.

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

SHANAHAN, J.

NC+, a corporation, appeals the judgment of the district court for Lancaster County releasing and discharging Steven Bruce Booker, on behalf of certain Underwriters at Lloyd's, London, a garnishee, on account of NC+'s failure to file an application for determination of liability as provided in Neb. Rev. Stat. § 25-1030 (Cum. Supp. 1984). We affirm.

On November 3, 1981, NC+ obtained a judgment for $86,638.88 against Growers Seed Association for damages resulting from a breach of warranty in a sale of contaminated hybrid sorghum seed purchased by NC+. A summons in garnishment was served on Booker on May 17, 1982, and on

June 8 Booker filed his "Answers to Garnishment Interrogatories and Response to Summons in Garnishment."

In his answers to NC+'s interrogatories, Booker admitted existence of insurance policies in the form of a "Seedsmen's Errors and Omissions, Claims Made Indemnity policy." A copy of the policy was attached to Booker's answers. One of the interrogatories and the answer by Booker were as follows:

> Did any of the policies referred to in your answer [to the interrogatories] . . . provide coverage for this incident? . . .
>
> ANSWER: Yes.
>
> In further response to the Summons in Garnishment and the Interrogatories of NC+ Hybrids, the Garnishee shows to the Court that there is no debt owing or other obligation owed by the Garnishee to the judgment debtor nor is it in possession of any property of the judgment debtor; that all obligations arising by virtue of a certain Seedsmen's Errors and Omissions, Claims Made Indemnity policy [attached] . . . were complied with by the execution of the Proof of Loss [attached] . . . by the judgment debtor on September 15, 1981 and the issuance of the corresponding check [attached] . . . to the judgment debtor on September 23, 1981.

Booker attached to his answers a photostatic copy of Booker's check dated September 23, 1981, and payable to Growers Seed in the amount of $13,380.80. The check to Growers Seed bore the endorsement:

> In complete accord and satisfaction of the obligations of Underwriters' signatories to Lloyd's Certificate No. 25 R 23263 for the claim of Growers Seed Association arising out of NC+ Hybrids, a Nebraska corporation v. Growers Seed Association, a Texas corporation, District Court of Lancaster County, Nebraska - Docket No. 337, Page 001.

Booker's check was endorsed by Growers Seed. Booker concluded his answer to the interrogatories with the prayer: "[H]aving fully answered the Summons in Garnishment and Garnishment Interrogatories, the Garnishee prays that the garnishment proceedings . . . be dismissed . . . ."

NC+ took no further action in the garnishment proceedings until August 19, 1983, approximately 1 year and 3 months after

Booker's answers to interrogatories had been served and filed, when NC+ filed a request for production of documents. On August 30 Booker moved for discharge as a garnishee on the basis of § 25-1030:

> If the garnishee appears and answers and his or her disclosure is not satisfactory to the plaintiff, or if he or she fails to comply with the order of the court, by delivering the property and paying the money owing into court, or giving the undertaking required in section 25-1029, the plaintiff may file an application within twenty days for determination of the liability of the garnishee. The application may controvert the answer of the garnishee, or may allege facts showing the existence of indebtedness of the garnishee to the defendant or of the property and credits of the defendant in the hands of the garnishee. The answer of the garnishee, if one has been filed, and the application for determination of the liability of the garnishee shall constitute the pleadings upon which trial of the issue of the liability of the garnishee shall be had. If the plaintiff fails to file such application within twenty days, the garnishee shall be released and discharged.

NC+ on September 7 requested leave to file an application for determination of Booker's liability. The district court denied NC+'s request and discharged Booker from the garnishment proceedings, ruling that NC+ had failed to file its application within the time prescribed by § 25-1030. Further, the district court held that filing an application within the specific time limit of § 25-1030 was mandatory and that it had no discretion to permit filing an application outside the statutorily specified time.

As assignments of error, NC+ claims that the trial court erred (1) in holding that a garnisher's failure to file an application for determination of garnishee's liability bars a challenge to legal conclusions contained in the garnishee's answers to interrogatories and (2) in abusing its discretion by refusing to allow the garnisher to file an application to determine liability outside the 20-day limit found in § 25-1030. NC+ asserts:

> NC+ is not dissatisfied with the facts as set forth in the

> answers to interrogatories filed by Lloyd's. It simply disputes the legal conclusion contained in them that the settlement discharged all of Lloyd's' [Booker's] responsibility to Growers and hence, NC+. NC+ should not be required to file any kind of a pleading or application to have this legal question determined by the court.

Brief for Appellant at 7.

When asked to interpret a statute, the Supreme Court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. It is our duty to discover, if possible, legislative intent from the statute itself. *Adkisson v. City of Columbus*, 214 Neb. 129, 333 N.W.2d 661 (1983). The Supreme Court, in construing a statute, looks to the objects to be accomplished, the evils and mischief sought to be remedied, or the purposes to be served, and places upon the statute a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. *Mitchell v. Douglas County*, 213 Neb. 355, 329 N.W.2d 112 (1983). Further, effect must be given, if possible, to all the several parts of a statute. No sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. It is not within the province of this court to read meaning into a statute that is not warranted by legislative language; neither is it within the province of the court to read anything plain, direct, and unambiguous out of a statute. *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 294 N.W.2d 330 (1980).

The first issue is whether an answering garnishee is entitled to be released and discharged from the garnishment if the garnisher does not file an application for determination of liability within the time specified in § 25-1030.

Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy. See, *Christiansen v. Moore*, 184 Neb. 818, 172 N.W.2d 620 (1969); *Beggs v. Fite et al.*, 130 Tex. 46, 106 S.W.2d 1039 (1937). Being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before

any remedy is available under such statutes. *Shevin v. Venderbush Company*, 280 Mich. 499, 273 N.W. 780 (1937); *Liberty Loan Corp. & Affiliates v. Eis*, 69 Wis. 2d 642, 230 N.W.2d 617 (1975).

Through garnishment in aid of execution a garnishee becomes a "stakeholder" or custodian holding a fund, credit, or property belonging to one or the other of the parties to a lawsuit producing the judgment for which execution is sought. *Russell v. Lau*, 30 Neb. 805, 47 N.W. 193 (1890); *Bank & S. Co. v. Katz*, 146 Ohio St. 297, 65 N.E.2d 708 (1946). Garnishment in aid of execution is an incident to a judgment or an ancillary procedure whereby a judgment creditor seeks to collect a judgment by reaching a judgment debtor's property in the hands of a third party. As a stranger to the proceedings in which a judgment has been obtained, a garnishee is normally an innocent third party exposed to inconvenience and hazards or expense of extended litigation. *State ex rel. Bagnell Inv. Co. v. Luten*, 647 S.W.2d 539 (Mo. 1983); *Beggs v. Fite et al., supra.*

In view of the nature of garnishment demanding an expeditious disposition of proceedings, it is reasonable that the Nebraska Legislature sought to protect a garnishee from often unnecessary and sometimes oppressive litigation. See *DeSuno v. Safeco Ins. Co. of America*, 118 Ariz. 553, 578 P.2d 634 (1978). To achieve prompt disposition the Legislature has specified a relatively short time for counteraction by a judgment creditor or garnisher in the event of any dissatisfaction with a garnishee's disclosure contained in answers to interrogatories, namely, a written application filed within 20 days in order to determine liability where a garnishee's answers negate a debt, property, or credit due the judgment debtor from the garnishee.

In the application the garnisher may controvert or traverse the garnishee's response or may allege facts demonstrating that the garnishee owes a debt to the judgment debtor or that the garnishee holds property or a credit of the judgment debtor. By the application the garnisher frames the issue: Does the garnishee owe a debt to the judgment debtor or hold property, funds, or credits of a judgment debtor? The answers of the garnishee and the controverted answers or factual allegations in

the garnisher's application constitute the pleading for disposition of the liability issue under § 25-1030. See *Assurance Corp. v. Mitchell*, 120 Colo. 531, 211 P.2d 551 (1949). Contrary to the interpretation suggested by NC+, § 25-1030 does not differentiate types of dissatisfaction requiring an application to determine liability or exonerating the garnisher from filing such application, that is, dissatisfaction with facts vis-a-vis dissatisfaction with conclusions. We are not at liberty to insert into § 25-1030 any language qualifying the dissatisfaction a garnishee may experience for dispensation from the statutory requirements.

NC+ points to a line of cases which relieve a garnisher from filing an application for determination of liability or traversing a garnishee's answers given in response to interrogatories. Cf., *Grain Dealers Mutual Insurance Company v. Quarrier*, 175 So. 2d 83 (Fla. App. 1965); *Dunckelman Distributing Company, Inc. v. Hyde*, 334 So. 2d 236 (La. App. 1976). However, those cases indicate that a garnisher's counteraction is not necessary where a garnishee's answers admit facts establishing a garnishee's obligation to a judgment debtor. There could hardly be a more clear statement and categorical denial than the answer given by Booker: "[T]here is no debt owing or other obligation owed by [Booker] to the judgment debtor nor is [Booker] in possession of any property of the judgment debtor."

If a garnisher is dissatisfied with a garnishee's answer but does not controvert or traverse the answer given, the garnishee's answer is the only filed pleading containing allegations or statements about property, funds, or credits of a judgment debtor, a solitary pleading which is taken as true and conclusive. *Coward v. Barnes*, 232 Ark. 177, 334 S.W.2d 894 (1960); *Phelps v. Schmuck*, 151 Kan. 521, 100 P.2d 67 (1940); *Morris v. Beatty*, 390 Ill. 568, 62 N.E.2d 478 (1945); *Snyder Nat. Bank v. Pinkston*, 219 S.W.2d 606 (Tex. Civ. App. 1949). Further, failure to proceed as required by § 25-1030 constitutes an abandonment or discontinuance of garnishment proceedings. See, *State ex rel. Bagnell Inv. Co. v. Luten, supra; Martin v. Cullum et al*, 144 Ga. App. 886, 243 S.E.2d 108 (1978).

NC+ contends that the district court abused its discretion and should have allowed NC+ to file an application for determination of liability outside the 20-day period set forth in § 25-1030. For support NC+ refers to Neb. Rev. Stat. § 25-822 (Reissue 1979): "The court, or the judge thereof in vacation, for good cause shown, may extend the time for filing an answer or reply upon such terms as may be just." In light of the language of § 25-1030, we cannot accept NC+'s contention. Generally, a statute is not read as automatically requiring judicial construction. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. *Bachus v. Swanson*, 179 Neb. 1, 136 N.W.2d 189 (1965). Section 25-1030 is unambiguous, and interpretation is unnecessary in this case. As a general rule, the word *shall* is considered mandatory and is inconsistent with the idea of discretion. *Moyer v. Douglas & Lomason Co.*, 212 Neb. 680, 325 N.W.2d 648 (1982). Because garnishment is a creature of statute, garnishment proceedings are necessarily governed by statutory provisions and specifications. Courts may not allow garnishment proceedings to follow any course other than that charted by the Legislature. *DeSuno v. Safeco Ins. Co. of America*, 118 Ariz. 553, 578 P.2d 634 (1978).

The judgment of the district court is affirmed.

AFFIRMED.

# MENNONITE DEACONESS HOME AND HOSPITAL, INC., A NEBRASKA CORPORATION, APPELLEE, V. GATES ENGINEERING COMPANY, INC., A DELAWARE CORPORATION, APPELLANT.

363 N.W.2d 155

Filed February 15, 1985. No. 83-898.

1. **Uniform Commercial Code: Sales: Warranty.** The test for inclusion in or exclusion from the sales provisions of Neb. U.C.C. art. 2 (Reissue 1980) is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved.
2. _____: _____: _____. The existence of an express warranty depends upon the particular circumstances in which the language is used and read. A catalog description or advertisement may create an express warranty in appropriate circumstances.
3. _____: _____: _____. A warranty is express when the seller makes an affirmation with respect to the article to be sold, pending the agreement of sale, upon which it is intended that the buyer shall rely in making the purchase.
4. _____: _____: _____. A positive statement of a seller of the condition of personal property made during negotiations for its sale which indicates an intention to be bound by the truth thereof, and which was so understood and relied upon by the other party, is an express warranty.
5. **Uniform Commercial Code: Breach of Warranty: Proof.** To establish a breach of 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. In order for the goods to be merchantable under Neb. U.C.C. § 2-314 (Reissue 1980), they must be at least such as are fit for the ordinary purposes for which such goods are used.
6. _____: _____: _____. In order for one to recover for a breach of an implied warranty of fitness, the purchaser must prove that (1) the seller had reason to know of the buyer's particular purpose, (2) the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish appropriate goods, and (3) the buyer, in fact, relied upon the seller's skill or judgment.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Gary G. Thompson of Hubka, Kraviec & Thompson, for appellant.

David R. Buntain of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

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

KRIVOSHA, C.J.

The appellant, Gates Engineering Co. (Gates), appeals from a judgment entered following a jury trial in the district court for Gage County, Nebraska, in favor of Mennonite Deaconess Home and Hospital, Inc., doing business as Beatrice Community Hospital and Health Center (the hospital). The hospital sued Gates for breach of both express and implied warranties regarding a roofing system manufactured by Gates for installation on a building owned by the hospital. The jury returned a verdict in favor of the hospital in the amount of $33,729.29. Gates maintains that the verdict was in error because (1) no express warranties were made by Gates to the hospital and (2) the "goods" sold by Gates to the hospital were not defective and, therefore, no breach of any implied warranties was established. We affirm.

Mennonite Deaconess Home and Hospital, Inc., is the owner and operator of a community hospital in Beatrice, Nebraska. In 1979 the hospital began experiencing leaks from that portion of its roof located above the geriatrics wing. The original flat roof was a built-up compound roof consisting of layers of prestressed concrete, particle board, asbestos insulation, tar paper, and tar and rock aggregate. After attempting to repair the roof for approximately a year and a half, the hospital determined that it was necessary to replace the roof. Joseph Crowley, the hospital's director of environmental services, studied several methods for accomplishing that goal. One possibility was to replace the roof with another built-up compound roof of the type originally installed. A second option was the application of a spray-on material to seal the holes. A third option was a one-ply system available from several sources. The evidence discloses that a one-ply system consists of a rubberlike material which is attached to the outside perimeter of the building. Rubber sheeting is then laid across the roof and sealed where the sheets overlap. A one-ply system is not attached directly to the building except on the outer perimeter. After the rubber sheets are installed, rock ballast is laid on top of the rubber to hold it down.

The appellant, Gates, is a manufacturer specializing in the formulation of products of rubberlike, or elastomeric,

materials, both from synthetic rubber products and natural rubber products. Gates also produces coating materials for corrosion and erosion protection, particularly in the chemical and power industries. It also produces sheet liquid and sealant materials which are used in the construction industry, and, in particular, manufactures a one-ply roofing system.

On December 6, 1979, representatives of the hospital met with David Nece, president of Armstrong Construction Company, and Leonard Russell, a sales representative of Gates. Russell introduced himself, and stated, "I came along with Mr. Nece to show and explain the Gates *single-ply system*." (Emphasis supplied.) During the course of the meeting, there was discussion about the Gates system, the temperature and weather conditions involved, the elasticity of the Gates system, previous installations of the system, and warranties. Russell, the Gates representative, gave the hospital representatives two Gates brochures describing the one-ply roofing system. The first brochure, entitled "GACOFLEX One Ply Elastomeric Roofing Systems," provided in part as follows:

> Gates Engineering combines product technology with knowledgeable personnel to provide you with product *and system selection, system detailing for your specific requirements and field technical assistance*.
>
> Gates' systems service can provide the elements so necessary for a successful roof installation based on one ply elastomeric roofing experience dating back to 1957:
>
> . Product and System Selection
> . Details for Installation
> . Field Service
> . Registered Systems Contractors
> . 10 Year Warranty

(Emphasis supplied.) The brochure also stated: "3. Workmanship. Work *shall* be completed by a competent, *registered System I roofing contractor* in a manner conducive to good workmanship and overall completion of the specification." (Emphasis supplied.) The evidence discloses that "System I" was a Gates designation identifying the Gates roof. "Registered System I roofing contractor(s)" are those contractors registered and approved by Gates. Therefore,

without Gates' prior approval, one could not become a "registered System I roofing contractor."

The brochure then provided:

> WARRANTY PROVISIONS:
>
> Gates Engineering provides *single source responsibility* for roofing and flashing with each roofing system.
>
> Whether roofing new construction or re-roofing on existing structure, each GACOFLEX system requires consideration and approval by Gates' technical staff and installation by a registered system roofing contractor. Under these conditions a 10 year roof warranty is available.

(Emphasis supplied.)

A second brochure given to the hospital by Gates was entitled "Gates Engineering GACOFLEX System I Roofing EPDM loose laid and ballasted one-ply system," and stated in part: "*Gates Engineering* provides single source responsibility for the roofing and flashing system. *Each installation is carefully considered and approved by Gates'* technical staff and installed by a Registered System I Roofing Contractor." (Emphasis supplied.)

At the conclusion of this meeting, and while representatives of both Armstrong and Gates were present, the hospital prepared a contract with Armstrong Construction, providing for the installation of the Gates roofing system. The contract included the following general instruction: "Cover with Gates One Ply (Gaco E-2S) *with Manufacturers Representative Supervision*." There was also included in the contract a special instruction which provided: "Will Provide Gaco (10) Year Roof Waranty [sic]."

At the conclusion of the meeting, representatives of the hospital, Armstrong, and Gates went up on the hospital roof to look at a number of projections, and in particular an expansion joint about which the hospital had some question. The hospital was assured that the Gates system would handle the problem.

The roofing system was installed by Armstrong in February of 1980 and a field representative of Gates was present on the job for approximately two-thirds of the time it took to install the roof. When the installation was completed, the hospital

withheld 10 percent of the contract price, pending issuance of the 10-year warranty, and paid the balance to Armstrong. On April 24, 1980, an employee of Gates visited the hospital to inspect the installation of the roof. The inspection report contained several pages of observations, conclusions, and recommendations concerning mistakes which were made in the installation of the roof. A copy of the inspection report was sent to Armstrong and given to the hospital. The hospital demanded that Armstrong correct the defects. Armstrong refused to do so. Gates, likewise, refused to correct the problems and further refused to issue the 10-year warranty based upon the fact that the roof was not installed in what Gates described as a good and workmanlike manner.

Within 60 days after the Gates inspection, the hospital experienced problems with water leakage in the area covered by the new roof. Water came in around various projections where the roofing material had not been adequately fastened down. In addition, the overlapping seams of rubber material began pulling apart and water came in to patient rooms and the common area. In September of 1981 the hospital finally decided to purchase a new roofing system from another company and replaced the entire roof. The evidence discloses that the hospital did not learn until at least a year after the roof was installed that Armstrong had never been registered by Gates and had never installed a one-ply roof before.

Before turning to the question of whether there were breaches of express and implied warranties, we turn to the question of whether the transaction upon which suit was brought was a "sale of goods" within the meaning of the Uniform Commercial Code or, rather, was a contract for the rendering of "services." If the transaction was really a contract for services and not a sale of goods, the provisions of article 2 of the Uniform Commercial Code do not apply. The question of whether this is a contract for the sale of goods depends upon an examination of the entire contract. The cases are uniform in holding that the U.C.C. applies where the principal purpose of the contract is the sale of goods, even though in order for the goods to be utilized, some installation is required. On the other hand, if the contract is principally for services and the goods are

merely incidental to the contract, the provisions of the U.C.C. do not apply.

The test for inclusion in or exclusion from the sales provisions is not whether the contracts are mixed but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved, or whether they are transactions of sale, with labor incidentally involved. *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974). And in *Colorado Carpet Installation, Inc. v. Palermo*, 668 P.2d 1384, 1388 (Colo. 1983), the Supreme Court of Colorado said:

> The scope of the contract, however, included not only the sale of goods but also the performance of labor or service. Thus, we must determine whether such a mixed contract qualified as a contract for the sale of goods or, instead, constituted a contract for labor or service outside the scope of section 4-2-201(1), C.R.S.1973.
>
> The performance of some labor or service frequently plays a role in sales transactions. "Goods," however, are not the less "goods" merely because labor or service may be essential to their ultimate use by the purchaser. The mere furnishing of some labor or service, in our view, should not determine the ultimate character of a contract for purposes of section 4-2-201(1) of the Uniform Commercial Code. Rather, the controlling criterion should be the primary purpose of the contract—that is, whether the circumstances underlying the formation of the agreement and the performance reasonably expected of the parties demonstrates the primary purpose of the contract as the sale of goods or, in contrast, the sale of labor or service. We agree in this respect with the following statement in Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974):
>
> "The test for inclusion or exclusion is not whether (goods and services) are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (*e.g.*, contract with artist for painting) or is a transaction of sale, with

labor incidentally involved (*e.g.*, insulation of a water heater in a bathroom)."

*Accord, e.g., Care Display, Inc.* v. *Didde-Glaser, Inc.*, 225 Kan. 232, 589 P.2d 599 (1979); *Burton v. Artery Co., Inc.*, 279 Md. 94, 367 A.2d 935 (1977); *Meyers v. Henderson Construction Co.*, 147 N.J.Super. 77, 370 A.2d 547 (1977). *See generally* Annot., *Applicability of U.C.C. Article 2 to Mixed Contracts for Sale of Goods and Services*, 5 A.L.R. 4th 501 (1981).

This "primary purpose" test, we believe, is designed to promote one of the expressed statutory policies of the Uniform Commercial Code—"(t)o simplify, clarify, and modernize the law governing commercial transactions."

See, also, *Anthony Pools v. Sheehan*, 295 Md. 285, 455 A.2d 434 (1983); *Boddie v. Litton Unit Handling Systems*, 118 Ill. App. 3d 520, 455 N.E.2d 142 (1983); *Meeker v. Hamilton Grain Elevator Co.*, 110 Ill. App. 3d 668, 442 N.E.2d 921 (1982); *Jandreau v. Sheesley Plumbing & Heating Co.*, 324 N.W.2d 266 (So. Dak. 1982).

We believe that an examination of the contract, the brochures, and the evidence adduced at trial makes it manifestly clear that this contract had as its predominant factor the roofing material manufactured by Gates, and only incidentally involved installation by a contractor approved by Gates. The evidence establishes that the hospital was not simply purchasing a new roof of any type or description. Quite to the contrary, as reflected by the evidence, the hospital determined, after careful consideration, to use the one-ply system specifically manufactured and supplied by Gates. The contract specifically identified the type of roof to be installed and further identified it in such a manner that nothing other than the Gates material could be used. It is clear to us that what was being purchased here was a completed roof of the type manufactured by Gates, though installed by others approved by Gates. We believe that the situation here clearly falls into that category in which courts have uniformly held that the contract was for the sale of goods and covered by the Uniform Commercial Code. Having thus determined that the provisions of the Uniform Commercial Code apply, we turn to the

question of whether there was a breach of an express warranty.

Neb. U.C.C. § 2-313 (Reissue 1980) provides as follows:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact *or promise* made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

In *Peterson v. North American Plant Breeders*, 218 Neb. 258, 262-63, 354 N.W.2d 625, 630 (1984), we said:

> The existence of an express warranty depends upon the particular circumstances in which the language is used and read. . . . A catalog description or advertisement may create an express warranty in appropriate circumstances. . . . *The trier of fact must determine whether the circumstances necessary to create an express warranty are present in a given case. . . . The test is "whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment."*

(Citation omitted.) (Emphasis in original.)

Further, we have said that a warranty is express when the

seller makes an affirmation with respect to the article to be sold, pending the agreement of sale, upon which it is intended that the buyer shall rely in making the purchase. See *England v. Leithoff*, 212 Neb. 462, 323 N.W.2d 98 (1982). In *Fricke v. Hart*, 206 Neb. 590, 595, 294 N.W.2d 737, 739-40 (1980), we said: "A positive statement of a seller of the condition of personal property made during negotiations for its sale which indicates an intention to be bound by the truth thereof and which was so understood and relied upon by the other party, is an express warranty."

Gates agrees that an express warranty may be created in an advertising brochure, but argues that before such warranty may arise, the language in the brochure must evidence a clear intent to create the warranty. Gates then argues that because it was merely selling the roofing material, exclusive of installation, and that because the parties agree that the failure of the roof was the result of poor installation and not defective material, there is insufficient evidence in the record to sustain the verdict of the jury. We believe, in that regard, Gates simply misconstrues the nature of the transaction. The hospital was not contracting for the purchase and installation of any roof. It was, in fact, purchasing a "roofing system" designed, manufactured, and supplied by Gates and installed by persons approved by Gates under its supervision.

The testimony at trial indicates that the Gates representative who was present at the initial meeting with the hospital also considered the contract to be one for a "roofing system" consisting of both the Gates material and the Gates-supervised installation. He testified in part as follows:

> Q. And so when you go to a customer such as the hospital, what you're selling is a system; isn't that right?
>
> A. Right.
>
> Q. And what the customer is buying is an installed roof?
>
> A. Right.
>
> Q. And part of that installation is the product, and part of it is the manner in which it's installed; isn't that right?
>
> A. Yes.

Representatives of Gates attempted to explain away the language of the brochures by maintaining that the statements contained in the brochures were the things that an architect or contractor was responsible to perform if a good job was to be accomplished and if the warranty was to be issued. The evidence simply does not support that view, or at least the jury could reasonably find that the evidence did not support that view.

The evidence was sufficient to permit the jury to find that statements made by the Gates representative at the initial meeting were intended to be relied upon by the hospital. One of those statements was that before Armstrong would be permitted to install the roof, it would have to be a registered System I applicator. Unknown to the hospital, Armstrong was not a registered System I contractor.

There was sufficient evidence for the jury to find that through Gates' sales brochures and by reason of statements made by its representative, the roof would be installed by a registered System I roofing contractor and that it was not. The hospital was led to believe that the work would be completed by a competent, registered System I roofing contractor in a manner conducive to good workmanship, and it was not.

Further, the hospital was assured that someone from Gates would be on the roof during installation. Obviously, the point of having a representative of Gates on the roof during installation was not simply to add more ballast to the roof; the point of having a representative from Gates on the roof during installation was to ensure that the material was installed correctly. Yet, notwithstanding the presence of that representative, the record discloses that the installation was defective. There was sufficient evidence for the jury to find that the installation was to be supervised by a representative of Gates to assure a proper installation and that it was not. All of these statements constituted affirmations of fact or promises which constituted express warranties, breached by Gates.

We cannot say as a matter of law that the jury verdict in the case at bar was erroneous. Competent evidence was presented to the jury upon which it could find for the hospital upon the issue of express warranty. That being the case, we must affirm.

A jury verdict will not be disturbed on appeal unless it is clearly erroneous and against the preponderance of the evidence and so clearly contrary to findings that it is the duty of the reviewing court to correct it. See, *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983); *Krug v. Laughlin*, 208 Neb. 367, 303 N.W.2d 311 (1981); *Lintner v. Roos*, 202 Neb. 476, 276 N.W.2d 93 (1979). Further, a jury verdict is sufficient if there is any competent evidence presented to the jury upon which it could find for the successful party. All conflicts in the evidence, expert or lay, and the credibility of the witnesses is for the jury and not for the court on review. See, *Kniesche v. Thos*, 203 Neb. 852, 280 N.W.2d 907 (1979); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973). The finding by the jury that there had been a breach of an express warranty was not error.

We then turn to the question of whether there was a breach of implied warranties. The hospital maintained that Gates breached the implied warranty of merchantability provided in Neb. U.C.C. § 2-314 (Reissue 1980), as well as the implied warranty of fitness, in violation of Neb. U.C.C. § 2-315 (Reissue 1980).

Section 2-314 provides in part as follows:

> (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.

Section 2-315, dealing with the implied warranty of fitness, provides as follows:

> 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.

Once again, Gates argues that because the evidence establishes that the material itself was not defective and, in fact, the damage which resulted was caused by the defective installation and not by the condition of the goods, §§ 2-314 and 2-315 do not apply. We believe that this argument suffers from the same weakness as did Gates' argument regarding the express warranty. The hospital was not purchasing raw material. It was purchasing a roofing system which was partially dependent upon proper installation.

While the requirements of § 2-314, implied warranty of merchantability, are not the same as § 2-315, implied warranty of fitness, the evidence in this case would support a breach of either or both of these sections.

To establish a breach of 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. See *O'Keefe Elevator v. Second Ave. Properties*, 216 Neb. 170, 343 N.W.2d 54 (1984). In order for the goods to be merchantable under § 2-314, they must be at least such as are fit for the ordinary purposes for which such goods are used. See *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978). The record is without dispute that Gates was to provide the hospital with a one-ply System I roof which would not leak when installed. That, they did not do. This, then, was evidence of a breach of merchantability within the meaning of § 2-314.

The conditions under which a breach of implied warranty of fitness exist are also present in this case. In order for one to recover for a breach of an implied warranty of fitness, the purchaser must prove that (1) the seller had reason to know of the buyer's particular purpose, (2) the seller had reason to know that the buyer was relying on the seller's skill or judgment to furnish appropriate goods, and (3) the buyer, in fact, relied upon the seller's skill or judgment. See, *O'Keefe Elevator v. Second Ave. Properties, supra; El Fredo Pizza, Inc. v. Roto-Flex Oven Co., supra; Larutan Corp. v. Magnolia Homes Manuf. Co.*, 190 Neb. 425, 209 N.W.2d 177 (1973).

Once again, we believe that the evidence was sufficient to permit the jury to find all of the necessary elements. Certainly, the jury could find that Gates had reason to know of the hospital's particular purpose for the roof. Likewise, the jury could find that Gates had reason to know that the hospital was relying on Gates' skill or judgment to furnish the appropriately installed roof. Indeed, the hospital told Gates it was. And, finally, the jury could certainly find that the hospital relied upon Gates' skill or judgment. It was only after the hospital was contacted by the representatives of Gates and assured of the quality of the roof that it purchased the Gates roof rather than another one-ply roof.

Again, relying upon the rules earlier noted in this opinion with regard to decisions of a jury, we cannot say that in light of the evidence the jury was in error in reaching its conclusion. For this reason, therefore, the verdict of the jury finding in favor of the hospital and against Gates must be affirmed.

AFFIRMED.

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CAROLYN K. POINTER, INDIVIDUALLY AND AS ASSIGNEE OF JERRY POINTER, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

363 N.W.2d 164

Filed February 15, 1985. No. 83-907.

**Actions: States: Service of Process: Jurisdiction: Waiver: Case Overruled.** When the Legislature has waived the State's sovereign immunity as to a particular cause of action and has designated a person or official as the agent of the State upon whom summons may be served, that person or official validly may enter a voluntary appearance for the State, thereby waiving the issue of *in personam* jurisdiction. To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), conflicts with this holding, it is overruled.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Reversed and remanded for further proceedings.

Barlow, Johnson, DeMars & Flodman, 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 has appealed an order of the district court which dismissed her petition seeking damages under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), because of the lack of personal jurisdiction over the State of Nebraska.

As a result of a July 12, 1978, automobile accident, plaintiff filed a claim for damages with the State of Nebraska State Claims Board as required by the State Tort Claims Act. This claim was denied on December 18, 1980, and she filed her petition in the district court for Cass County. She caused summons to be served on the State of Nebraska by delivery to the Secretary of State. Section 81-8,212 requires service to be made on the Attorney General. At that point, it is obvious that no jurisdiction had been obtained over the State of Nebraska.

However, rather than raising that issue by special appearance, or simply ignoring the ineffective service, the Attorney General filed a motion to strike; voluntarily appeared and waived argument on the motion; filed an answer and counterclaim; filed a motion for continuance; successfully participated in a bifurcated trial on the issue of the statute of limitations, following which the court dismissed plaintiff's petition; appeared in court and argued against plaintiff's motion for a new trial, which was granted; stipulated with opposing counsel for continuance of a hearing; and filed a written objection to a certificate of readiness. For the first time, on June 20, 1983, 2 days after the deadline for filing a petition under § 81-8,227, the Attorney General raised the issue of jurisdiction due to improper service by filing a written motion to dismiss.

As a general rule, after a defendant has made eight general appearances in court, an objection to personal jurisdiction would be ludicrous. This court has written several opinions in the past which suggest that, in the absence of authorization, the

Attorney General is not authorized to enter a voluntary appearance on behalf of the State. Those cases are cited in the trial judge's memorandum opinion and order: *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979); *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939); *McNeel v. State*, 120 Neb. 674, 234 N.W. 786 (1931); *Eidenmiller v. State*, 120 Neb. 430, 233 N.W. 447 (1930); *McShane v. Murray*, 106 Neb. 512, 184 N.W. 147 (1921).

However, in *Catania*, also a State Tort Claims Act suit, the Legislature had waived sovereign immunity as to the subject matter but had specifically mandated that venue for such actions must be laid in the county where the injury occurred and that such requirement could not be waived. Similarly, *McNeel* and *Eidenmiller* were venue cases and, as such, involved subject-matter jurisdiction. In *McShane* there simply had been no waiver of sovereign immunity by the Legislature, and consequently it would be apparent that a voluntary appearance would be ineffective. Finally, *Anstine*, although involving a statute which permitted the State to be sued, failed to provide for a method of obtaining jurisdiction. This court at that time simply refused to accept the notion that a statute which required service of summons "as in civil causes" applied to the State of Nebraska.

The Legislature, by enacting the State Tort Claims Act, has waived the sovereign immunity of the State in certain actions, including the one here involved. Section 81-8,218 provides: "The Attorney General shall represent the state in any suit brought under this act, and is authorized to compromise or settle any such suit, with the approval of the court in which such suit is pending."

"*If the state has consented to be sued*, a failure to serve process in an action against it is immaterial if the attorney general appears voluntarily . . . ." (Emphasis supplied.) 81A C.J.S. *States* § 321 at 1007 (1977).

In *State v. Omega Painting, Inc.*, 463 N.E.2d 287 (Ind. App. 1984), a painting contractor sued the State of Indiana on a certain contract. The Indiana rules of procedure required, in suing a governmental organization, that service of summons must be made on both the executive officer of the organization and the Attorney General. Although the facts are not

completely clear, it appears that at least the executive officer of the organization was not served.

That court held that the requirements of the rules of procedure were mandatory even though the word "may" was used. The court then stated:

> It is undisputed that the agency was not served with a copy of the complaint and summons by Omega. This should result in a failure of process and constitute proper grounds for dismissal upon the State's motion. However, it is also true that a party not otherwise subject to the personal jurisdiction of the court may, nevertheless, submit himself to the court's jurisdiction. . . . This may occur when such a party either fails to timely object to the court's jurisdiction or seeks affirmative relief from the court. . . . Such submission will preclude any further contention that the court lacked *in personam* jurisdiction.

*Id.* at 290. In that case the State served interrogatories, which Omega claimed waived any jurisdictional question. The court replied:

> In this we are constrained to agree with Omega. While the State could have properly preserved the question of jurisdiction in its answer and then proceeded with a defense on the merits, by filing its interrogatories prior to the assertion of the defense, the State has waived the jurisdictional issue.

*Id.* at 293. See, also, *39th-40th Corp. v. Port of New York Authority*, 188 Misc. 657, 65 N.Y.S.2d 712 (1946).

We simply hold in this case that in those instances where the Legislature has waived the State's sovereign immunity as to a particular cause of action and has designated a person or official as the agent of the State upon whom summons may be served, that person or official validly may enter a voluntary appearance for the State, thereby waiving the issue of *in personam* jurisdiction. To the extent that *Anstine v. State*, 137 Neb. 148, 288 N.W. 525 (1939), and other similar cases conflict with this opinion, they are overruled.

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

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# KIZZIER CHEVROLET COMPANY, INC., OF SCOTTSBLUFF, NEBRASKA, APPELLANT, V. GENERAL MOTORS CORPORATION, OLDSMOBILE DIVISION, ET AL., APPELLEES.

363 N.W.2d 167

Filed February 15, 1985. No. 84-309.

1. **Administrative Law: Judgments.** The judgment or order of an administrative agency is rendered when the decision is announced upon the law and the facts.
2. **Administrative Law: Motor Vehicles: Appeal Bonds: Time.** In order to perfect an appeal from an order of the Nebraska Motor Vehicle Industry Licensing Board, an appeal bond must be filed with the board within 10 days of the rendition of the order. Neb. Rev. Stat. § 60-1415 (Reissue 1984).

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Robert G. Simmons, Jr., of Wright, Simmons & Selzer, for appellant.

Stephen H. Nelsen of Cline, Williams, Wright, Johnson & Oldfather, for appellee General Motors.

Paul E. Hofmeister of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee Dalton Buick-Oldsmobile.

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

PER CURIAM.

The plaintiff, Kizzier Chevrolet Company, Inc., of Scottsbluff, Nebraska, appeals from the order of the district court affirming the decision of the Nebraska Motor Vehicle Industry Licensing Board dated April 4, 1983, and dismissing the plaintiff's petition.

The plaintiff is an Oldsmobile dealer in Scottsbluff, Nebraska, which obtained its franchise by transfer from S & T Motors. The facts regarding that transaction are set out in *S & T Motors v. General Motors Corp.*, 203 Neb. 188, 277 N.W.2d 701 (1979). While the appeal in that case was pending, General Motors issued an Oldsmobile franchise to Dalton Buick of Scottsbluff, Nebraska.

On November 23, 1982, the plaintiff filed an application before the licensing board for an order terminating the

franchise of Dalton Buick-Oldsmobile-Pontiac-Cadillac, Inc. (formerly Dalton Buick), on the theory that the Dalton Buick franchise was an additional franchise and there had been no compliance with Neb. Rev. Stat. §§ 60-1422 and 60-1424 (Reissue 1984).

After an evidentiary hearing the licensing board dismissed the application, finding that an earlier application filed by the plaintiff had been denied on April 3, 1980, and that the Dalton Buick-Oldsmobile franchise was not a new or additional franchise. The order recited: "DATED at Lincoln, Lancaster County, Nebraska this 4th day of April, 1983." A certificate which appears in the record, and which was sworn to by the executive secretary of the board, recites that a copy of the order was mailed to the plaintiff on April 5, 1983. The record shows that the plaintiff received a copy of the order on April 6, 1983.

The plaintiff filed an appeal bond with the board on April 15, 1983, and a petition on appeal in the district court for Lancaster County, Nebraska, on April 27, 1983.

The trial court found that the appeal was out of time and that the issues presented were res judicata, and dismissed the petition. This appeal is from that order. The issues are (1) whether Kizzier timely perfected its appeal from the board's decision and (2) whether the issues before the board were res judicata.

Neb. Rev. Stat. § 60-1435 (Reissue 1984) provides: "Any party to a hearing before the board may take an appeal from any final order entered in such hearing in the manner provided for appeals in this act." As relevant here, Neb. Rev. Stat. § 60-1415 (Reissue 1984) sets forth the procedure for appeal as follows:

> The board shall state in writing, officially signed by the chairperson or vice-chairperson and the executive director, its findings and determination after such hearing and its order in the matter. . . . Should the applicant for a license or a license holder desire to appeal from the decision of the board, he or she shall, within ten days, file an appeal bond with the board in the sum of one thousand dollars and he or she shall, within thirty days after service on him or her of the final decision or order of the board,

file a petition in the district court in the county where such action was taken, which appeal shall be governed by the provisions of section 84-917.

The statutory requirement is that an appeal bond shall be filed "within ten days." The 10-day period from April 4, 1983, expired April 14, 1983. The plaintiff filed its appeal bond with the board on April 15, 1983, 1 day late.

The plaintiff cites a number of cases, including *Fritch v. Fritch*, 191 Neb. 29, 213 N.W.2d 445 (1973), for the proposition that a judgment is not rendered until the pronouncement has been noted on the trial docket. In *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976), we distinguished *Fritch* and that line of cases, which have interpreted a statute that pertains literally only to courts, from a situation involving an administrative agency. Citing *Brown v. City of Omaha*, 179 Neb. 224, 137 N.W.2d 814 (1965), which involved an appeal from the personnel board of the city of Omaha, this court held that a judgment or order is rendered "when the decision is announced upon the law and the facts, and that the transmittal of the order to the parties is not an integral part of the judicial act." 196 Neb. at 218, 241 N.W.2d at 840.

The plaintiff also contends that the time for filing the appeal bond should be computed from the date it received notice of the order. The plaintiff argues that this is mandated by Neb. Rev. Stat. § 84-915 (Reissue 1981), governing Nebraska administrative agencies, which provides in part: "Parties to the proceeding shall be notified of the decision and order in person or by mail."

We considered a similar issue in *In re Covault Freeholder Petition*, 218 Neb. 763, 359 N.W.2d 349 (1984). There, the statute in question provided that the time for taking an appeal began to run "after entry of such action on the records of the board." Neb. Rev. Stat. § 79-403(1) (Cum. Supp. 1984). On the other hand, the time for taking an appeal pursuant to the rules governing Nebraska administrative agencies began "after the service of the final decision by the agency." Neb. Rev. Stat. § 84-917 (Reissue 1981). This court said: "To suggest that the language of § 79-403(1) is the same as § 84-917 is to ignore the plain meaning of the words." 218 Neb. at 767, 359 N.W.2d at

353.

In this case § 60-1415 specifically provides that the time for filing an appeal bond is 10 days from the licensing board's decision, whereas the time for filing an appeal petition is 30 days from service of notice of the board's order. The requirement that the appeal bond be filed within 10 days was part of the original act. 1957 Neb. Laws, ch. 280, § 15, p. 1023. The requirement that the petition in the district court be filed within 30 days after service of the order was added by amendment in 1974. 1974 Neb. Laws, L.B. 754. To suggest that the time for filing an appeal bond commences at the same time as the filing of an appeal petition is to ignore the plain language of the statute. "Absent some violation of due process, the Legislature may prescribe the time in which an appeal must be taken, even if the procedure, on careful reflection, is foolish or contrary to other procedures provided." 218 Neb. at 767, 359 N.W.2d at 353.

The requirement of filing an appeal bond within the time prescribed is mandatory and essential to confer jurisdiction on the district court. *Brown v. City of Omaha, supra.* Where such requirement has not been met, it is proper for the district court to dismiss the action. *Gesman v. State*, 216 Neb. 126, 342 N.W.2d 196 (1984); *Black v. State*, 218 Neb. 572, 358 N.W.2d 181 (1984).

The failure of the appellant to timely perfect its appeal makes it unnecessary to consider the remaining issue.

The judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

GRANT, J., dissenting.

I respectfully dissent from the court's holding that appellant did not perfect its appeal from the Motor Vehicle Industry Licensing Board. Neb. Rev. Stat. § 60-1415 (Reissue 1984) sets out two requirements to perfect an appeal from the board. The statute states in part:

> Should the applicant for a license or a license holder desire to appeal from the decision of the board, he or she shall, within ten days, file an appeal bond with the board in the sum of one thousand dollars and he or she shall, within

thirty days after service on him or her of the final decision or order of the board, file a petition in the district court in the county where such action was taken, which appeal shall be governed by the provisions of section 84-917.

The statute clearly gives any appellant 30 days *after service* of the decision or order to file a petition on appeal, but, as the court now determines, gives that same applicant 10 days after the decision to file an appeal bond. By interpreting the statute to mean that the 10-day time period begins to run on the day the decision is rendered, the court, in effect, holds that the Legislature has set a trap for the unwary. If an affected party does not independently determine when the decision was rendered and file an appeal bond within 10 days after that date, that appellant is too late to appeal. In the instant case the board only delayed the order for 1 day before notifying the affected parties, and thus appellant missed its 10-day period by only 1 day. In another case the board might hold the decision 4 or 5 days, thus making compliance with the statute almost impossible—particularly for those located at any distance from the board's statutory location in Lincoln (Neb. Rev. Stat. § 60-1404 (Reissue 1984)). The situation approaches depriving an appellant of due process, but that question need not be reached if § 60-1415 be interpreted, as I think it must, to require that both the 10-day period and the 30-day period begin to run after service of the decision on those affected. This approach would comply fully with the requirements of Neb. Rev. Stat. § 84-915 (Reissue 1981) (requiring that parties be notified) and those set out in Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1981) (providing for administrative appeals). It would also follow this court's holding in a State Railway Commission case, *Denver Chicago Transp. Co., Inc. v. Poulson*, 172 Neb. 862, 864, 112 N.W.2d 410, 412 (1961), where we said, "The question presented is whether the time for appeal begins to run before the commission has notified the parties of its decision and order as required by the statute [§ 84-915]. We hold that it does not."

I would reverse and remand the case without determining the remainder of the issues because, as I view the case, the district court, after it dismissed the case for lack of jurisdiction, could not then dispose of the merits of the case.

SHANAHAN, J., joins in this dissent.

# MARVEL W. BAUMBACH, APPELLANT, V. STANDARD CHEMICAL MANUFACTURING CO. ET AL., APPELLEES.

363 N.W.2d 170

Filed February 15, 1985. No. 84-592.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the force and effect of a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Workmen's Compensation: Evidence.** 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.
3. **Expert Witnesses.** A good faith conflict due to self-contradiction of an expert's opinions presents a question to be resolved by the trier of fact.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

James E. Harris of Harris, Feldman Law Offices, and Sheldon Gallner of Gallner & Gallner, P.C., for appellant.

Joe P. Cashen of Kennedy, Holland, DeLacy & Svoboda, for appellees.

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

BOSLAUGH, J.

This is an appeal in an action under the Nebraska Workmen's Compensation Act.

The plaintiff, Marvel W. Baumbach, was employed by the defendant Standard Chemical Manufacturing Co. as a truckdriver. The plaintiff claims that he is totally disabled as the result of an accident which he alleges occurred on April 29, 1983, while he was operating a truck in the employ of the defendant. On that occasion the plaintiff testified his truck ran over a 4-inch "jump-up" at a bridge north of Albion, Nebraska, which caused the truck to "jump 5 feet in the air." As a result of this jolt, the plaintiff "had pains through every side" of his neck and his "arms went numb." The plaintiff described his condition at that time as "just like having a broken neck, like a broken bone."

After the hearing before a single judge of the compensation court, the plaintiff recovered an award for temporary total disability from April 30, 1983, to the date of the hearing and for so long thereafter as he remained temporarily totally disabled.

On rehearing before three judges of the compensation court, with one judge dissenting, the original award was set aside and the petition dismissed. The plaintiff has appealed from that judgment.

The plaintiff testified that he had approximately 28 years' experience as a truckdriver and had been employed by the defendant since 1975. Beginning in September 1982 the plaintiff was required to drive over rough roads and developed "aches" in his neck and "tingling" in his arms. He consulted Dr. Miller in March 1983 and was referred to Dr. Margules, a neurological surgeon.

Dr. Margules testified that he first saw the plaintiff on October 25, 1980. At that time the plaintiff complained primarily of clumsiness and weakness of the knees and lower extremities. He also complained of paresthesia in the upper extremities and pain in the cervical region. Examination by x rays and a myelogram revealed osteoarthritis and degenerative disk disease at the C5-6 level. Interspaces below could not be visualized because of very heavy musculature of the shoulders. Dr. Margules did not recommend surgery at that time.

Dr. Margules saw the plaintiff again on November 17, 1980, and he was doing well.

Dr. Margules next saw the plaintiff on March 29, 1983, and the plaintiff was complaining of tingling in both arms. He saw the plaintiff again on April 18. The plaintiff said that he was having increasing difficulty, so he was admitted to the hospital on April 30. Dr. Margules' clinical diagnosis was that the plaintiff was having radicular compression from degenerative cervical disk disease, posterior marginal osteoarthritis, and disk herniation.

On May 11, 1983, Dr. Margules operated on the plaintiff and removed the disk material at the C5-6 and C6-7 interspaces, removed the osteoarthritic spicules, and fused the C5, C6, and C7 vertebras. The surgery disclosed that the plaintiff had severe osteoarthritis, a condition that had developed over a period of

10, 15, or more years.

The plaintiff made a good recovery from the surgery but had some residual paresthesia and minimal radicular pain.

Dr. Margules estimated the plaintiff's permanent partial disability after the spinal fusion to be 15 percent of the body as a whole. The plaintiff also has myocardial disease and vascular disease in his lower extremities.

Dr. Margules testified that the herniation of a disk could be the result of repetitive trauma, either microtrauma or macrotrauma, or a single trauma; if the plaintiff hit a severe bump on April 29, 1983, that could start the chain of events resulting in acute radicular pain. He also testified that disk herniation could be a result of normal progression of degenerative disk disease or osteoarthritis. Finally, he testified that in his opinion the repeated trauma or the single event of the large bump triggered the disk herniation.

Dr. Kratochvil, an orthopedic surgeon, testified as an expert witness for the defendants. Based upon a study of the hospital records, Dr. Kratochvil testified that in his opinion the plaintiff had a degenerative herniated disk condition at the time of his examinations by Dr. Margules on March 29 and April 18, 1983. He further testified that it was his opinion that the "jolt" while driving the truck on April 29, 1983, was not the cause of the disk herniation at the C5-6 and C6-7 levels and that the myelogram made in 1980 indicated disk herniation existed at that time.

Findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the force and effect of a jury verdict in a civil case and will not be set aside unless clearly wrong. *Scott v. State*, 218 Neb. 195, 352 N.W.2d 890 (1984).

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. *Novotny v. Electric Hose & Rubber Co.*, 214 Neb. 216, 333 N.W.2d 406 (1983).

The record discloses that there is a conflict in the medical evidence. There is a conflict between the testimony of Dr. Kratochvil and that of Dr. Margules, and there is some conflict in the testimony of Dr. Margules. These were conflicts to be

resolved by the trier of fact and were resolved against the plaintiff by the compensation court. See, *Doggett v. Brunswick Corp.*, 217 Neb. 166, 347 N.W.2d 877 (1984); *Zaleski v. Farmland Foods, ante* p. 157, 361 N.W.2d 523 (1985).

In order for the plaintiff to recover in this court, the evidence would have to be such that a finding for the plaintiff was compelled as a matter of law. The evidence in this case did not rise to that status, and we are unable to say that the findings on rehearing were clearly wrong. The judgment must, therefore, be affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE V. CLYDE W. MOSS, SR., APPELLANT.

363 N.W.2d 367

Filed February 15, 1985. No. 84-615.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed in part, and in part reversed and remanded for resentencing.

Jack Zitterkopf and John B. McDermott of McDermott, Depue & Zitterkopf, for appellant.

Paul L. Douglas, Attorney General, and L. Jay Bartel, for appellee.

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

PER CURIAM.

This is an appeal in a criminal case. The defendant was charged with first degree murder and pled guilty to the charge of murder in the second degree. Neb. Rev. Stat. § 28-304(1) (Reissue 1979). The defendant was sentenced to a term of life imprisonment, "but in any event not less than 20 years," in the Nebraska Penal and Correctional Complex.

The defendant appeals and assigns as error that the court

erred in pronouncing an indeterminate sentence not authorized by law, and therefore invalid, and that the sentence as pronounced was excessive.

We remand the cause to the district court for resentencing. We held in *State v. Stranghoener*, 208 Neb. 598, 304 N.W.2d 679 (1981), and *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974), that under the present statute upon conviction for second degree murder the court is not authorized to pronounce an indeterminate sentence. The court may impose a definite term of years not less than the minimum authorized by law or, in the alternative, may impose a sentence of life imprisonment.

As the sentence is clearly invalid, the cause must be remanded for resentencing, and we therefore do not consider the second assignment of error.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR RESENTENCING.

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## GERALD E. PRIEST, PERSONAL REPRESENTATIVE OF THE ESTATE OF LARRY EUGENE PRIEST, DECEASED, APPELLANT, V. LARRY LEE MCCONNELL, APPELLEE.

363 N.W.2d 173

Filed February 22, 1985. No. 83-520.

1. **Pretrial Conferences.** Pretrial conferences are conducted in order to simplify and narrow the issues of the case and to avoid traps and surprises.
2. **Witnesses: Trial: Pretrial Motions.** The trial court has discretionary power to exclude the testimony of a witness whose identity is deliberately withheld in discovery.
3. **Expert Witnesses.** Expert 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. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury.
4. _____. Where the opinion testimony of an expert witness does not have a sound and reasonable basis, it should be stricken.
5. **Expert Witnesses: Appeal and Error.** Where there has been a clear abuse of discretion, the ruling of a trial court in receiving or excluding an expert's opinion will be reversed.
6. **Blood, Breath, and Urine Tests: Evidence: Proof.** The authenticity of a sample

of bodily fluid must be established before a chemical analysis of the sample may be admitted into evidence.

7. **Evidence: Proof.** Where an object passes through several hands before being produced in court, it is necessary to establish a complete chain of evidence which traces the possession of the article to the final custodian.
8. **Jury Instructions: Appeal and Error.** Generally, this court will not consider instructions not objected to.
9. _____: _____. The trial court is under a duty, on its own motion, to correctly instruct on the law. This court may take cognizance of plain error in instructions indicative of a probable miscarriage of justice.

Appeal from the District Court for Brown County: HENRY F. REIMER, Judge. Reversed and remanded for a new trial.

Wesley C. Mues of Knapp, Mues & Beavers, and John O. Sennett of Black & Sennett, for appellant.

Jeffrey A. Silver, for appellee.

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

BOSLAUGH, J.

This is an appeal in an action for damages for the wrongful death of Larry Eugene Priest. The jury returned a verdict for the defendant, Larry Lee McConnell, and the case was dismissed.

The action was brought by the personal representative of the estate of Larry Eugene Priest. He has appealed and has assigned as error (1) that the defendant's failure to timely disclose its expert witnesses violated the pretrial order; (2) that the testimony of the expert witness concerning "confabulation" was irrelevant; (3) that a proper foundation was not laid for testimony regarding the alcohol content of decedent's blood and urine samples; (4) that the trial court failed to properly instruct the jury; and (5) that the jury's use of a dictionary during deliberations was misconduct.

This action arises out of a one-vehicle accident which occurred on Highway 7, south of Ainsworth, Nebraska, on November 16, 1980. As a result of that accident, Larry Priest and Linda Lister were killed. The petition alleged that the defendant was the driver of the vehicle and that Larry Priest was a guest passenger. At trial the defendant stated that he

owned the vehicle involved—a pickup truck—but that he did not remember who was driving. He testified that he had been at the Frontier Bar and the Elks Club playing pool and dancing that evening. The defendant said that he had a beer at the Frontier Bar, but did not drink at the Elks Club. He testified that he remembered leaving the Elks Club at approximately 1 a.m. and unlocking the door to his pickup. He did not recall Larry Priest or Linda Lister ever getting into his truck. The defendant stated that the next thing he remembered was lying in a ditch after the accident. He testified, however, that in the hospital, immediately after the accident, the sheriff asked him who was driving and he replied, "I guess I was." The remaining facts relate to matters concerning pretrial and trial procedures and shall be discussed as they relate to each issue.

The plaintiff's first assignment of error concerns the defendant's failure to comply with the trial court's pretrial order, which provided:

> Parties are allowed to add to their witness and exhibit lists at least 30 days before trial; unless witness deposed, counsel is to provide opposing counsel with a summary statement of the testimony expected to be given by additional witnesses, and to provide copies of additional exhibits or present said exhibits for examination to opposing counsel at least 30 days before trial.
>
> Defendant's counsel to provide the Court and opposing counsel with initial witness and exhibit lists within 60 days of this date.

Plaintiff contends that because defendant did not comply with the pretrial order and did not give timely notice of his expert witnesses, namely, Helen Waltemath and Professor Donald L. Stumpff, the trial court was in error in receiving their testimony.

The pretrial order was issued on November 16, 1982. At that time the court assessed the defendant $200 in attorney fees and $80 in mileage, payable to the plaintiff's attorneys, for not answering interrogatories in a timely manner. Answers to the interrogatories were subsequently filed.

On February 16, 1983, the defendant filed amended answers to interrogatories, identifying Dr. Joseph H. Selliken as an expert but making no mention of Waltemath or Professor

Stumpff. On March 15, 1983, trial was set for May 9. On April 27, 1983, the defendant served a notice for the taking of the deposition of Helen Waltemath on April 30. Immediately thereafter, on April 29, the plaintiff filed a motion to quash the taking of this deposition, alleging that Waltemath was not listed on the defendant's witness list; that her name first appeared on a supplemental witness list received by the plaintiff on April 27, 1983; that the pretrial order indicated that additional witnesses should be added prior to 30 days before trial; and that permitting Waltemath as an additional witness would prejudice the plaintiff. The plaintiff further raised the lack of notice concerning Waltemath's deposition as one of the grounds in a motion in limine to prohibit testimony that Larry Priest was intoxicated at the time of the accident.

At a hearing on motions prior to trial, the plaintiff's and defendant's attorneys set forth different versions of a conversation between them prior to the taking of Waltemath's deposition and the plaintiff's attorneys' refusal to attend the same. The trial court sustained the motion to quash the deposition and the motion in limine insofar as the deposition was to be used to prove intoxication. The court, however, allowed Waltemath to testify in person, subject to cross-examination.

As to Professor Stumpff, his name was listed in response to plaintiff's interrogatory requesting a list of persons who have "given a written or recorded statement regarding any of the occrrences [sic] which are the subject matter of this action." He was identified as an individual who had testified at a previous criminal trial involving this accident. However, there is nothing in the transcript indicating that the defendant ever identified him as an expert witness. When asked in oral argument why the plaintiff was not given notice of Waltemath's and Stumpff's designations as expert witnesses pursuant to the pretrial order, the defendant's attorney replied that he had made a mistake. He insisted, however, that it was of no consequence, since plaintiff had not been prejudiced.

Pretrial conferences are conducted in order to simplify and narrow the issues of the case and to avoid traps and surprises. *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302

N.W.2d 697 (1981). In the case at bar the defendant knew, well within the time limits imposed by the pretrial order, that he was going to call Waltemath and Professor Stumpff as expert witnesses at the trial. Yet Stumpff was never designated as an expert witness, and Waltemath was never identified at all until less than 2 weeks before trial. Despite defense attorney's characterization of his actions as a mistake, the result was a "trap" for the plaintiff's attorney.

This court has on previous occasions discussed counsel's failure to identify witnesses before trial. In *Cardenas v. Peterson Bean Co.*, 180 Neb. 605, 611-12, 144 N.W.2d 154, 159 (1966), we stated:

> The trial court has discretionary power to exclude the testimony of a witness whose identity is deliberately withheld in discovery under proper circumstances. The trial court would also have discretion to impose an alternative sanction to effectively protect against harm due to lack of prior knowledge of the witness, such as continuing the hearing or deferring the questioning of such a witness. The object of the rule requiring the disclosure of the names of witnesses before trial is to enable the parties to discover the truth and eliminate surprise, and, dependent on the facts, the overall policy of discovering all the truth, in some circumstances, might be more adequately served by permitting testimony after postponement until the element of surprise has been eliminated. These matters, however, are primarily within the broad discretion of the trial court.

In the case at bar the trial court quashed Waltemath's deposition and permitted an in camera voir dire of Professor Stumpff prior to his testimony at trial. While such procedures are not preferred over compliance with pretrial orders, it was within the trial court's discretion to deal with the situation in such a manner. Owing to the remedy provided, the defendant's attorney's actions do not alter the disposition of this case. That, however, does not excuse his conduct.

Of the remaining assignments of error, we first consider the relevancy of the testimony of defendant's expert witness, Professor Stumpff, regarding "confabulation." The plaintiff's

pretrial oral motion in limine to exclude Professor Stumpff's testimony was sustained; nonetheless, his testimony was later received. According to Professor Stumpff, "Confabulation is to make a logical story or sense with no basis of facts." He testified that confabulation can occur when there is a blank period in a person's memory such that there is no factual basis for the recalling of an experience, but the person will try to construct a plausible explanation of his actions based on previous knowledge or past experience. In this case Professor Stumpff's testimony was presented in light of conflicting statements made by the defendant. The defendant testified that he had no recollection of who was driving on the night the accident occurred, but admitted that after the accident he was asked by the sheriff who was driving, and responded, "I guess I was."

In an in camera voir dire examination preceding his testimony at trial, Professor Stumpff stated that for an episode to be consistent with the theory of confabulation, there must have been some sort of neurological damage to the brain, either through the use of alcohol or drugs or a blow to the head. Absent a blow to the head, of which there was no evidence in this case, he stated that the plausibility of confabulation occurring depended on whether there was a level of alcohol in the body sufficient to produce "alcoholic blackout." The professor did not determine whether the defendant had consumed enough alcohol to reach that level where confabulation could occur. Furthermore, he had never examined the defendant. Professor Stumpff conceded in camera that he could not be certain that confabulation had occurred in the instant case; it was, however, a theory that could be an explanation.

At trial Professor Stumpff was asked a lengthy hypothetical question by defense counsel which assumed the acceptance of certain facts relating to the incident, some of which were controverted. At the conclusion of the hypothetical question, defense counsel asked:

> Assume further, and lastly, that after the occurrence of the accident somebody says or makes inquiry as to who was driving, and the individual answers, "I was." Do you have

> an opinion, with a reasonable degree of scientific certainty, based upon your experience and your studies, as to whether or not the facts that I have just given to you and the symptoms that I have just given to you are *consistent with confabulation*? Yes, or no, please?

(Emphasis supplied.) Professor Stumpff answered "yes."

Neb. Rev. Stat. § 27-702 (Reissue 1979) provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Expert testimony must meet these requirements in order to be admissible. *State v. Ammons*, 208 Neb. 812, 305 N.W.2d 812 (1981). At best, it was the opinion of Professor Stumpff that the facts were consistent with confabulation. At no time was there any closer application of the theory to the facts at hand. Whether the facts were consistent with confabulation was not relevant, and his testimony should not have been received. The general rule is:

> "Expert 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. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury."

*Langfeld v. Department of Roads*, 213 Neb. 15, 27-28, 328 N.W.2d 452, 459 (1982). See, also, *Fletcher v. State*, 216 Neb. 342, 344 N.W.2d 899 (1984).

Where the opinion testimony of an expert witness does not have a sound and reasonable basis, it should be stricken. *Danielsen v. Richards Mfg. Co., Inc.*, 206 Neb. 676, 294 N.W.2d 858 (1980). There was no showing that confabulation occurred or even that the defendant sustained such neurological damage as would support its possible occurrence. As such, there was no basis in fact to support Professor Stumpff's testimony. Where there has been a clear abuse of discretion, the ruling of a trial court in receiving or excluding an expert's

opinion will be reversed. *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984). 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 opposing party has had an opportunity to cross-examine the expert witness in that regard. Indeed, there is a vast difference between permitting an expert to give an opinion when all the factors necessary to draw a conclusion are in evidence and in permitting an explanation based on assumptions that have no adequate foundation in the evidence. *Nickal v. Phinney*, 207 Neb. 281, 298 N.W.2d 360 (1980).

The third assignment of error to be considered is the trial court's failure to find that there was not sufficient foundation to permit evidence of the results of alcohol content tests performed on blood and urine samples taken from the body of Larry Priest. Despite plaintiff's objections that a complete chain of custody had not been established, Waltemath was allowed to testify that the alcohol content of his blood was .105 percent and that the alcohol content of his urine was .16 percent.

The record reveals that Dr. Melvin Campbell recalled taking *blood* samples from both the deceased Larry Priest and Linda Lister. Dr. Campbell said that he took the samples at the mortuary, but he did not remember to whom he passed them for handling. Usually, he said, they are given to the sheriff or mortician.

Sheriff Donald Brown testified that he took blood *and urine* samples to his office; he did not know where he got the Larry Priest samples, but he did remember who gave him the Linda Lister samples.

Dr. Selliken performed the autopsies of the decedents. He testified that he was given samples labeled with their names from a uniformed individual at the Ainsworth sheriff's office. He transported the samples to his laboratory in North Platte, where he put them in a lockbox used for keeping specimens. Dr. Selliken requested that Waltemath perform alcohol tests on the samples. Waltemath then took the samples out of the lockbox in the laboratory. She testified that one of the samples had "Dr. Selliken's name on it, Brown county, and Dewey Long . . . [and]

Priest."

In *Raskey v. Hulewicz*, 185 Neb. 608, 177 N.W.2d 744 (1970), a challenge was made to the sufficiency of the foundation for the chemical analysis of a urine sample. This court said that "the authenticity of the urine sample must be unequivocally established before its admission into evidence, as an elementary safeguard of a defendant's rights." *Id.* at 615-16, 177 N.W.2d at 749. In the case at bar there is no evidence as to the origin of the urine sample of Larry Priest. Not only did Dr. Campbell not remember taking any urine samples but the sheriff had no knowledge of where he obtained either the urine or blood samples of Larry Priest. The first time that any urine sample is directly associated with Larry Priest is when Waltemath removed it, along with the ambiguously labeled samples, from the lockbox in her laboratory.

At best, the chain of custody concerning the blood samples is equivocal. Not only did Dr. Campbell not remember to whom he gave the blood samples but the sheriff did not know how he obtained any of the samples from Larry Priest. Once again, Waltemath's testimony is that these blood samples were among those ambiguously labeled samples she retrieved from the lockbox. In *State v. Apker*, 204 Neb. 577, 578, 284 N.W.2d 14, 16 (1979), this court said:

> "We hold 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." In State v. Langer, 192 Neb. 525, 222 N.W.2d 820 (1974), we said: "Important in such situations are the nature of the exhibit, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object."

Where an object passes through several hands before being produced in court, it is necessary to establish a complete chain of evidence which traces the possession of the article to the final custodian. If one link in the chain is missing, the object may not

be introduced into evidence. *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977).

Appellant also contends that the trial court's jury instructions were improper, specifically, in that no instruction was given on "comparative negligence" and "contributory negligence," and in that no definition of "negligence" was given. Generally, this court will not consider instructions not objected to. *Silvey & Co., Inc. v. Engel*, 204 Neb. 633, 284 N.W.2d 560 (1979). "However, the trial court is under a duty, on its own motion, to correctly instruct on the law and this court may take cognizance of plain error in instructions indicative of a probable miscarriage of justice." *Id.* at 636, 284 N.W.2d at 562.

While these omissions, standing alone, might not warrant reversal, prejudicial error is evidenced when those omissions are coupled with the factor that the jury resorted to a dictionary to supply itself with certain definitions. In fact, the final error assigned in this case concerns the jury's use of a dictionary during its deliberations. The affidavits of two of the jurors indicate that the bailiff provided the jury with a standard English dictionary, from which definitions for "negligence," "contributory," and "preponderance" were obtained. One of the jurors stated that the dictionary was requested because some of the jurors were having a dispute regarding the burden of proof on certain elements of the case. He further stated that "the use of the dictionary in the jury room with the issue of the burden of proof and the word 'preponderance' had an impact of [sic] the decision of the jury."

In *Schreiner v. State*, 155 Neb. 894, 54 N.W.2d 224 (1952), this court considered an assignment of error regarding a jury's use of a dictionary. There, the jury had the dictionary for only a few minutes, and the foreman advised the trial court that they had looked up a definition but " 'we didn't get too much out of it.' " *Id.* at 897, 54 N.W.2d at 226. The remaining jurors advised the trial court that the reference to the dictionary had not affected their deliberations. Under those circumstances no error was found. However, in reaching its decision, this court reviewed the standard set out in previous cases:

In Matters v. State, 120 Neb. 404, 232 N.W. 781, a juror

> during deliberations produced a dictionary and read from it the definition of some words which were contained in an instruction. We held: "This conduct was highly improper. The jury should have relied solely upon the evidence for the facts, and upon the court's instructions for the law, of the case. Not every violation of the proprieties, however, is sufficient to reverse a judgment. It is only such misconduct of the jury as is calculated to prejudice the substantial rights of the defendant that is ground for a new trial. . . ."

*Id.* at 898, 54 N.W.2d at 226.

In sum, it cannot be said that the combined failure of the trial court to properly instruct the jury and the jury's resort to a dictionary to fill in the blanks did not result in prejudice to the plaintiff.

For the reasons stated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

SHANAHAN, J., concurring.

I agree that Stumpff's opinion was improperly before the jury. Nevertheless, certain statements in the majority opinion are incomplete and, therefore, inaccurate interpretations of the Nebraska Evidence Rules.

In cases such as that before us, the trial court must ask itself two preliminary questions: (1) Will the expert opinion assist the trier of fact? (Rule 702, Neb. Rev. Stat. § 27-702 (Reissue 1979)); and (2) Is the witness qualified as an expert? (Rule 104(1), Neb. Rev. Stat. § 27-104(1) (Reissue 1979)). See, *Loftin and Woodard, Inc. v. United States*, 577 F.2d 1206 (5th Cir. 1978); *United States v. Normile*, 587 F.2d 784 (5th Cir. 1979).

If the answers to those preliminary questions are in the affirmative, Rule 705(1), Neb. Rev. Stat. § 27-705(1) (Reissue 1979), permits admission of the expert's opinion or inference without an in-court prior disclosure of underlying facts or data, unless the judge requires otherwise. In the absence of judicial request for underlying facts or data, a witness found by the court to be qualified as an expert may, without any further development of facts, express an opinion in the field wherein the witness has expertise. After admission of the expert's

opinion, the burden rests with the adversary to cross-examine and develop the underlying facts or absence of facts which exposes any weakness in the expert's opinion. In this posture a jury determines what weight is due an expert's opinion. However, if direct, cross, or redirect examination of the expert discloses an inadequate basis for an expert's opinion, the "opinion" may be stricken as mere guesswork, conjecture, or speculation. For example, in *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979), we held that, on proper objection and motion to strike, an expert's opinion should have been stricken where an expert, basing his opinion on the presence of a gravel supply to be mined from an appraised property, gave an opinion about the value of real estate but on further direct and cross-examination showed the availability and extent of gravel deposits to be conjectural or speculative.

During voir dire in chambers before he gave his opinion as evidence for the jury, Stumpff categorically stated that the prerequisite for confabulation is neurological damage to the brain through (1) a level of alcohol producing "alcoholic blackout" or (2) a blow on the head. Stumpff acknowledged he had not determined whether McConnell drank enough alcohol to reach the level where a "blackout" occurs. There was no evidence of a blow to McConnell's head. Consequently, in the course of his in-chambers examination, Stumpff conclusively demonstrated that he had no basis for his opinion. While testifying before the jury, Stumpff was not rehabilitated to regenerate an opinion on confabulation and should not have been permitted to express his opinion to the jury. When the majority indicates that an expert's opinion is properly admitted only when "the basis of the opinion and the facts on which it is based are before the jury and the opposing party has had an opportunity to cross-examine the expert," such a standard for admissibility is not supported by, and in fact conflicts with, the Nebraska Evidence Rules.

The majority restricts an expert's opinion to those situations "when all the factors necessary to draw a conclusion are in evidence," which expression is dicta and dangerous dicta at that. Such restriction would resurrect the requirement of a

hypothetical question—an evidentiary format no longer necessary but permissible under the Nebraska Evidence Rules. Also, Rule 703 of the Nebraska Evidence Rules permits an expert to base his opinion or inference on facts or data perceived by the expert or made known to him at or before the hearing, including the type of facts or data reasonably relied upon by experts in the particular field in forming opinions or inferences, which "facts or data need not be admissible in evidence." The evidentiary issue here relates to Stumpff's acknowledged absence of a foundation for his opinion, not the necessity of other adduced evidence as a premise for an expert's opinion.

The trial court should have excluded Stumpff's opinion as a result of his demonstrated inadequate basis for the opinion he expressed.

KRIVOSHA, C.J., and WHITE, J., join in this concurrence.

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ELLIS & GUY ADVERTISING, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. JAMES COHEN AND HOWARD VANN, APPELLANTS AND CROSS-APPELLEES.

363 N.W.2d 180

Filed February 22, 1985. No. 83-778.

1. **Jury Instructions: Appeal and Error.** While it is the duty of the trial court, without any request to do so, to instruct the jury on issues raised by the pleadings and supported by the evidence, failure of counsel to object to the giving of certain instructions after they have been submitted to counsel for review will preclude raising an objection to the instructions on appeal, unless there is plain error indicative of a probable miscarriage of justice.
2. **Directed Verdict.** It is not error for the trial court to overrule a motion for a directed verdict where there is some evidence presenting a question for the jury.
3. **Prejudgment Interest.** While there may be no reasonable controversy as to the amount of a claim nor as to plaintiff's right to recover from some defendant, if there is a reasonable controversy as to who is responsible for the claim, prejudgment interest should not be awarded.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Affirmed.

Warren S. Zweiback and Patricia A. Lamberty of Zweiback, Kasher, Flaherty & DeWitt, P.C., for appellants.

Margaret Schneider of Swarr, May, Smith & Andersen, P.C., for appellee.

BOSLAUGH, WHITE, and GRANT, JJ., and MCCOWN, J., Retired, and COLWELL, D.J., Retired.

GRANT, J.

In its third amended petition filed June 14, 1983, plaintiff-appellee, Ellis & Guy Advertising, Inc. (hereinafter Ellis & Guy), sued defendants-appellants, James Cohen and Howard Vann, alleging that "each of them purchased advertising services from the plaintiff . . . ."; that "defendants . . . are indebted to the plaintiff in the amount of $9,167.93 for services rendered"; that "said sum is due pursuant to invoice dated June 30, 1981"; and that "demand has been made upon the defendants . . . but no payment has been made." Ellis & Guy sought judgment against Cohen and Vann individually, together with prejudgment interest after June 30, 1981.

Cohen and Vann joined in an "Answer to Third Amended Petition," in which they generally denied the material allegations of the third amended petition, and "by way of further answer" alleged "that to the extent the the [sic] services . . . were purchased or provided, they were purchased by and provided by plaintiff to Vanco Pizza, Inc., a Nebraska corporation." Cohen and Vann prayed that the Ellis & Guy petition be dismissed.

From these pleadings the parties agree in their briefs that this is an action "based upon an alleged oral contract between Plaintiff and Defendants." The site and date of the alleged contract are not set out in the pleadings, and the record indicates a series of contracts rather than one detailed agreement; but we accept the case as seen and tried by the parties.

Jury trial began on August 31, 1983. Ellis & Guy completed its evidence and rested on the same day. Cohen and Vann completed their testimony and rested the next day, September 1. An instruction conference was held on September 2, final

arguments made, the case submitted to the jury, and the jury returned its verdict for Ellis & Guy and against Cohen and Vann in the amount of $9,167.93.

Thereafter, Cohen and Vann timely filed their motion for new trial, and Ellis & Guy filed its motion for prejudgment interest. Both motions were denied. Cohen and Vann appeal from the judgment and the denial of their motion for new trial, and Ellis & Guy cross-appeals from the denial of its motion for prejudgment interest.

Cohen and Vann assign four errors in their appeal to this court. One assignment is that the court erred in failing to give any instruction on defendants' theory of equitable estoppel; two assignments are that the trial court erred in giving instruction No. 10; and the last assignment is that the court erred in denying defendants' motion for a directed verdict. For the reasons hereinafter set out we affirm.

In deciding the first three assignments of error, we are again faced with the problem arising when, after an instruction conference at which neither of the parties to a lawsuit raises any objection to the instructions as given, the parties then challenge on appeal the giving of, or the failing to give, certain instructions.

In the case at bar the record shows that trial counsel were never hurried in the pleading or presentation of their respective cases or in the instruction conference held. Yet, after ample time to find errors in the instructions, at that conference counsel affirmatively showed that they had no objection to any part of the court's proposed instructions.

We held in *McCauley v. Briggs*, 218 Neb. 403, 408, 355 N.W.2d 508, 511-12 (1984):

> [I]t is the duty of the trial court, without any request to do so, to instruct the jury on the issues presented by the pleadings and supported by the evidence. [Citations omitted.]
>
> In applying that principle we have established that the failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude

raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice.

In the case of *Enyeart v. Swartz*, 218 Neb. 425, 427, 355 N.W.2d 786, 788 (1984), where the court and counsel overlooked the giving of an instruction on proximate cause, we reversed the case, stating:

> While we are ever committed to our view that the failure to object to instructions or the failure to tender instructions generally precludes one from raising the matter on appeal (see *McCauley v. Briggs, ante* p. 403, 355 N.W.2d 508 (1984)), and we continue to urge counsel to assist the court in the interest of both conserving judicial time and eliminating the unnecessary occurrence of trial costs which ultimately must be borne by one or the other litigant, we nevertheless believe that we cannot ignore the error present here.

In this case the instructions complained of were not objected to at the instruction conference, were not set out in the motion for new trial, and were not mentioned at the mandatory prehearing conference pursuant to the rules of this court. The subject first came to light in the appellants' brief filed February 21, 1984. Thus, the trial court was not given any chance to consider if appellants' theories had any merit. The reason for appellants' late challenge to the instructions in this case is different than in most cases. Often the matter of proper instructions is simply overlooked by counsel. Here, counsel represented Cohen and Vann during the trial and up through the prehearing conference in this court. Then, for reasons not stated, trial counsel was replaced by the attorneys presenting this appeal. With the broad approach taken in this appeal, where challenges are made to the trial procedures, the litigants, in effect, have sought to employ their own "postjudgment civil relief act," wherein all actions of trial counsel may be challenged in an appeal by different counsel. This approach is beyond proper appellate procedures.

In this case we again state, as set out in *Enyeart*, our urging that counsel should assist the court in the instruction phase of the trial, as an aid both to the court and to their clients. Again, we must return to our basic principle, set out in the *McCauley*

case, that in such situations we look only for "plain error indicative of a probable miscarriage of justice."

With reference to appellants' contention that the court erred in failing to instruct on appellants' theory of equitable estoppel, our examination of the transcript filed herein shows that the issue of equitable estoppel was not raised in the pleadings until a separate "Amended Answer" was filed by each defendant. These answers alleged that Ellis & Guy was estopped from denying that it dealt with a corporation rather than with Cohen and Vann individually. The record before us shows that copies of these amended answers were mailed to Ellis & Guy's attorney on August 31, 1983—the first day of the trial of this case. The transcript further shows that these answers were filed with the clerk of the district court on November 3, 1983—more than 2 months after the trial of this case. The record does show that the day preceding the instruction conference the trial judge stated that he was not going to instruct on the equitable estoppel issue. The record shows that amended answers were allowed to be filed. Why copies were filed at such a late date is not shown. In view of the record before us, and counsel's failure to object at the instruction conference as to the court's refusal to submit the equitable estoppel issue, it is obvious there is no plain error indicative of a probable miscarriage of justice. Appellants' failure to bring the issue before the trial court precludes raising an objection on appeal. The district court's actions with regard to the equitable estoppel question are affirmed.

Appellants' two assignments of error on instruction No. 10, as given by the trial court, also were raised for the first time on appeal.

The challenged instruction submitted both plaintiff's and defendants' theories of the case to the jury. As a result, the instruction was somewhat long and possibly confusing, but examination of the instruction does not disclose any plain error resulting in a probable miscarriage of justice.

The instruction told the jury that Ellis & Guy pleaded and adduced evidence showing that Ellis & Guy dealt with Cohen and Vann as individuals and that Ellis & Guy had the burden of proving those allegations. In the same instruction the jury was instructed on the different liabilities imposed on persons acting

as agents of corporations and on persons acting as individuals and, in effect, that if defendants pleaded and relied on the fact that plaintiff had entered into this contract with Vanco Pizza, Inc., defendants would have to prove that fact.

In its third amended petition Ellis & Guy alleged it dealt with Cohen and Vann as individuals. The court properly placed the burden on Ellis & Guy to prove that. In their answer Cohen and Vann not only generally denied the allegations that they entered into a contract as individuals but affirmatively alleged that the identical services furnished by Ellis & Guy were, in fact, furnished to Vanco Pizza, Inc. The effect of such an affirmative factual allegation in their answer necessarily means that Cohen and Vann are stating that Ellis & Guy entered into the contract with a specific corporation. In that situation the burden of proof obviously rests on Ellis & Guy to prove it dealt with Cohen and Vann as individuals. The court's instruction so stated. Once that is established, however, there is no burden of proof on Ellis & Guy to prove that it did *not* deal with a specific corporation. The court did not require Ellis & Guy to prove that negative.

The court instructed that if the jury determined that Ellis & Guy dealt with Cohen and Vann only as agents for Vanco Pizza, Inc., they could not be found liable for the advertising services. The court, however, in view of Cohen and Vann's pleadings, instructed the jury that if existence of the alleged Ellis & Guy-Vanco Pizza, Inc., contract was the reason that Cohen and Vann were not liable as individuals, then the burden of proving that contract was on Cohen and Vann. While that allegation does not rise to the level of an affirmative defense such as duress or estoppel, the allegation does inject a fact question into the jury's deliberations, and the jury must be instructed as to how that fact is to be proved and the effect of such proof. The trial court could not put the burden of proving that fact on plaintiff. In view of the record the court's instruction does not indicate a probable miscarriage of justice. Cohen and Vann had gone beyond just defending against the plaintiff's claim and had alleged the existence of a specific fact which could possibly render them not liable. In such a situation plaintiff has no burden to prove the negative of such a defense.

It might well be that the instruction could have been more clearly worded, but in the absence of an objection at the instruction conference, and in view of the manner in which this case was pleaded and tried, we cannot say there was any plain error indicative of a probable miscarriage of justice.

The last assignment of error is that the trial court erred in not directing a verdict in favor of Cohen and Vann. The evidence in the record, although certainly disputed, shows that there were conferences, at some unspecified times, between Cohen and Vann, as individuals, and representatives of Ellis & Guy and that these conferences resulted in agreements by Cohen and Vann, as individuals, to purchase advertising services. The evidence would support a finding that the two were acting as individuals. The evidence would also support a finding that Cohen and Vann were, in all their negotiations with Ellis & Guy, acting as agents for a corporation. It was stipulated that the services were rendered and the prices were fair. A jury question was presented. The court was correct in not directing a verdict in favor of Cohen and Vann.

Ellis & Guy cross-appeals from the trial court's determination that while there was no dispute as to the amount in question, there was a reasonable controversy about who owed that amount, and, therefore, no prejudgment interest should be allowed. Ellis & Guy contends in its brief that where a claim is liquidated, prejudgment interest is allowed as a matter of right. *Land Paving Co. v. D. A. Constr. Co.*, 215 Neb. 406, 338 N.W.2d 779 (1983), and *O'Keefe Elevator v. Second Ave. Properties*, 216 Neb. 170, 343 N.W.2d 54 (1984), hold that a claim is liquidated where there is no reasonable controversy as to either plaintiff's right to recover or as to the amount of such recovery. Here, while there is no reasonable controversy as to Ellis & Guy's right to recover from someone nor as to the amount of recovery, there is a controversy as to from whom Ellis & Guy may recover—that is, are Cohen and Vann liable to Ellis & Guy or is some other entity liable? Such a dispute is a controversy which requires that prejudgment interest not be awarded. The trial court's denial of prejudment interest was correct.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. MICHAEL STEWART, APPELLANT.

363 N.W.2d 368

Filed February 22, 1985. No. 84-016.

1. **Rules of Evidence: Other Acts.** Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)) is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged.
2. _____: _____. Proof of other acts admissible under Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)) is not restricted to those acts occurring before the event for which a defendant is prosecuted. Proof of other acts may be admissible even if such acts occurred after the offense charged against the defendant.
3. **Other Acts: Self-Defense.** Generally, other acts may be used to refute the accused's claim of self-defense.
4. **Other Acts: Intent.** Other acts may be used as relevant evidence to counter a defendant's contention that at the time of the offense his action lacked the requisite criminal intent due to intoxication.

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

Paul L. Douglas, Attorney General, and Terry R. Schaaf, for appellee.

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

SHANAHAN, J.

A jury in the district court for Lancaster County found Michael Stewart guilty of (1) assault in the second degree, Neb. Rev. Stat. § 28-309(1)(a) (Reissue 1979), and (2) use of a deadly weapon to commit a felony, Neb. Rev. Stat. § 28-1205(1) (Reissue 1979). The district court sentenced Stewart to a term of imprisonment of 14 months to 4 years for the assault charge and a term of 1 to 2 years for the weapon charge. Sentence on the weapon charge ran consecutively to the assault sentence.

Lily "Rings" Heydorn shared an apartment with Stewart and his cousin, Ray Webb. Stewart was accustomed to carrying a Buck hunting knife in a sheath attached to his belt. The Buck hunting knife resembles an oversized pocketknife with a 3- to 4-inch blade. Stewart frequently and instructionally demonstrated to Rings "how fast he could open the knife" with "just one hand" by "flipping the wrist."

At Rings' apartment on November 25, 1982, Thanksgiving Day, Rings, Webb, and Stewart gathered for Thanksgiving dinner with Rings' mother, Bernice Heydorn, and Rings' brother, Mark. Throughout Thanksgiving Day, Stewart had been drinking heavily. After Thanksgiving dinner Bernice, Webb, and Stewart watched TV in the living room, while Rings and Mark remained in the dining room. Stewart continued drinking Jack Daniels whiskey. Around midnight, Stewart and Webb engaged in a wrestling match in the living room. Stewart was wearing the sheath containing his Buck knife. Bernice, present in the living room, saw Stewart shove Webb "pretty hard" down on the davenport and tell Webb to "sit down and shut up." According to Bernice, Webb was "pretty steamed" and responded, "I don't have to take this." Webb rose from the davenport only to have his leather vest torn off by Stewart. The wrestling match resumed, and a telephone was knocked "off the hook" in "quite a scuffle," according to Bernice. Webb and Stewart tried to strike each other and became locked in each other's arms. The wrestling match concluded with Stewart holding the blood-covered Buck knife with his right hand and lying on the davenport while yelling at Webb, "[C]ome on, you S.O.B., I'll cut you again." Webb, bleeding, was leaning over the davenport and then collapsed on the floor. Webb sustained a horizontal knife wound on his side in line with the rib cage, slightly forward from his left arm. Bernice telephoned the police and an ambulance. The police arrived approximately 5 minutes after Bernice's call.

After the police arrived, officers found Stewart's Buck knife near the scene of the scuffle and questioned Stewart about the incident in which Webb was wounded. In the course of police investigation at Rings' residence and at the police department, Stewart gave varied accounts of the incident. Admissibility of

Stewart's statements to the police is not an issue. According to officers, Stewart told the police that "Webb had a knife in his right hand and was coming toward" Stewart. In an attempt to disarm Webb, Stewart twisted Webb's right arm behind his back, and it was then that Webb was "possibly stabbed." In another version of the incident Stewart told police that Webb "had fallen on the knife." At Rings' house police later found a kitchen knife with a 6- to 7-inch blade which Stewart maintained had been used in Webb's attack on him. During the trial, Stewart's counsel extensively cross-examined officers about the possibility of Stewart's intoxication when the police arrived at Rings' residence after Webb was wounded.

Shortly before Brenda Gunn, a State's witness, testified during Stewart's trial, counsel met with the court in chambers. The prosecutor gave a detailed description of Gunn's prospective testimony, namely, on departing a bar in Omaha Stewart had stabbed a man because the other man had "flirted" with or tried to "pick up" Stewart's female companion, and in Lincoln Stewart wielded a knife during a fight with one Michael Blocker. Defense counsel gave his views about relevancy of the two incidents but requested no action from the trial court except an examination of Stewart's appeal from a previous Douglas County conviction for assault. See *State v. Stewart*, 209 Neb. 719, 310 N.W.2d 706 (1981). After a short recess and out of the presence of the jury, the court stated to counsel that Gunn would be permitted to testify about the Omaha and Blocker incidents "for the limited purpose of showing intent or absence of accident." In reference to Rule 403 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-403 (Reissue 1979)) and Gunn's prospective testimony, the trial court stated that "the probative value does outweigh any prejudicial effect."

As previously indicated by the prosecutor, Gunn testified about two incidents involving Stewart and his use of a knife. According to Gunn, on several unspecified occasions between the first of July and the end of September in 1983, Stewart had told Gunn about the first incident, a fracas which occurred when an individual attempted to "pick up" Stewart's female companion as Stewart and his companion were leaving an Omaha bar. Stewart became "angry and got mad," and with a

knife cut the interloper. A date for the Omaha fracas was not established. Stewart's counsel made no objection based on relevance throughout the direct examination of Gunn except an objection to a question about Stewart's minimum daily consumption of alcoholic beverages. On cross-examination of Gunn, Stewart's counsel unsuccessfully tried to obtain a concession that Stewart stated he was intoxicated during the Omaha fracas or had consumed such quantities of alcohol that the only reasonable inference was Stewart's intoxication during the incident.

Gunn then testified about a second incident which occurred in her presence and involved Michael Blocker and Stewart. On an evening in early July 1983, after he had drunk a great deal of alcohol, Stewart, en route to a liquor store, encountered and argued with Blocker. The argument subsided. Later, Stewart found Blocker seated on a porch of a nearby residence of one of Gunn's friends. An additional affray ensued, during which Blocker and Stewart struck each other, with Blocker getting the best of the exchange. Gunn and another woman intervened and pulled Blocker from Stewart, who entered the house and reappeared carrying a knife. When Stewart, brandishing the knife, was approximately 2 feet from Blocker, the two women disarmed Stewart while Blocker ran away.

After the State rested its case Stewart did not present any witnesses and did not testify.

Among the instructions given by the court was NJI 14.11A regarding the limited and proper use or consideration of Stewart's other acts in arriving at a verdict. Also, with Stewart's approval the court instructed the jury on Stewart's theories of defense, namely, self-defense (NJI 14.33) and intoxication (NJI 14.31). The jury found Stewart guilty of the charges.

Stewart contends that the trial court committed reversible error by admitting the testimony of Brenda Gunn about Stewart's "other acts" involving a knife and, further, by instructing the jury concerning such "other acts." As additional grounds claimed for reversal, Stewart contends that the two-count information, that is, the charges of assault and use of a weapon during the commission of the assault, have twice put Stewart in jeopardy for the same offense, contrary to the

Constitutions, state and federal. See, Neb. Const. art. I, § 12; U.S. Const. amend. V. Finally, Stewart contends that the evidence is insufficient to sustain his conviction.

We have previously dispelled the erroneous notion that Rule 404(2) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-404(2) (Reissue 1979)) contains pigeonholes for admission of evidence pertaining to "other acts." Rule 404(2) of the Nebraska Evidence Rules is an inclusionary rule permitting the use of relevant, specific acts for all purposes except to prove character of a person in order to show that such person acted in conformity with character. Thus, Rule 404(2) permits evidence of other acts if such acts are relevant for any purpose other than to show a defendant's propensity or disposition to commit the crime charged. *State v. Craig, ante* p. 70, 361 N.W.2d 206 (1985).

Intent is the state of mind operative at the time of an action. *State v. Craig, supra.*

Proof of other acts admissible under Rule 404(2) is not restricted to those acts occurring before the event for which a defendant is prosecuted. Proof of other acts is admissible even if such acts occurred after the offense charged against the defendant. *United States v. Arroyo-Angulo*, 580 F.2d 1137 (2d Cir. 1978) (misconduct committed 9 months after the crime charged in the indictment is relevant).

In Stewart's case the other acts were not offered to show a propensity or disposition to commit an assault on Webb, that is, to prove Stewart's character in order to show that he acted in conformity with his character. Rather, the other acts, as testified by Gunn, were relevant and tended to negative Stewart's assertion that Webb was accidentally wounded as a result of Webb's falling on the knife. Further, Stewart told police that Webb was holding a knife in his right hand and, in an attempt to disarm Webb, Stewart twisted Webb's right arm backward, thereby accidentally inflicting the knife wound on Webb's left side. Such a contortionistic exhibition strains the most vivid imagination and expands the confines of credulity. Nevertheless, the other acts testified by Gunn tend to eliminate accident as Stewart's explanation for the wound sustained by Webb. The other acts described by Gunn had additional

probative value in showing Stewart's intent, his state of mind, and were relevant to demonstrate that Stewart's conduct and actions toward Webb were accompanied by criminal intent rather than a justified protective intent existing in self-defense. Generally, other acts may be used to refute the accused's claim of self-defense. See, *State v. Jenkins*, 158 Conn. 149, 256 A.2d 223 (1969); *Commonwealth v. Krolak*, 164 Pa. Super. 288, 64 A.2d 522 (1949). Stewart's other acts with a knife tended to counter his contention that at the time of the offense he lacked the requisite criminal intent due to intoxication. See *United States v. Smith*, 552 F.2d 257 (8th Cir. 1977). Under the circumstances Gunn's testimony about other acts involving Stewart and a knife was relevant. We agree with the trial court that the probative value of Stewart's other acts outweighs the danger of unfair prejudice, confusion of the issues, or the possibility of misleading the jury. See Rule 403, Nebraska Evidence Rules. The evidence about which Stewart complains was admissible.

In considering assignments of error claimed in the reception of evidence, we must examine the trial record made, not the record counsel believes he has made or wishes in retrospect he had made. Stewart's attorney did not object on the basis of relevancy when the evidence now assailed was adduced. " 'A defendant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced.' " *State v. Archbold*, 217 Neb. 345, 351, 350 N.W.2d 500, 505 (1984); *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983). Perhaps in anticipation of an adverse ruling, counsel refrained from objecting lest the jury's attention be directed to prejudicial aspects of incidents which might otherwise be depreciated or minimized as acts of one apparently intoxicated. When Stewart's counsel was forewarned about Gunn's testimony but did not object to that witness' testimony, absence of an objection appears to have been a matter of trial strategy, a matter on which we will not speculate. *State v. Archbold, supra*. Under the circumstances, with evidence of Stewart's other acts before the jury, the instruction on the jury's use or consideration of such evidence was proper.

As acknowledged by Stewart's attorney during oral

argument, this court has already addressed and disposed of Stewart's assignment of error based on double jeopardy. The constitutional prohibition against double jeopardy has no application where two separate and distinct crimes are committed as the result of one and the same act, because the constitutional proscription is directed to the identity of the offense and not to the act. Consequently, multiple punishments can be imposed for the same act without violating the double jeopardy provisions of the Constitutions, state and federal, where imposition of the multiple punishments is specifically authorized by state statute. See *State v. Jackson*, 217 Neb. 332, 348 N.W.2d 866 (1984).

Regarding Stewart's final assignment of error, namely, insufficiency of the evidence to sustain his conviction, it has long been the rule in this state that a jury's verdict will be upheld if, reviewing the evidence in the light most favorable to the State, there is sufficient evidence to support the jury's verdict. See *State v. Massey*, 218 Neb. 492, 357 N.W.2d 181 (1984). There is ample evidence to support the jury's verdict in convicting Stewart of both offenses charged against him.

AFFIRMED.

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STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. GARY L. GIESE, RESPONDENT.

363 N.W.2d 173

Filed February 15, 1985. No. 85-108.

Original action. Judgment of disbarment.

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

PER CURIAM.

This matter was submitted upon the complaint against Gary L. Giese, made by the Committee on Inquiry of the Sixth Disciplinary District, and his voluntary surrender of license and

consent to the entry of a disciplinary order against him.

Upon due consideration, it is ordered by the court, based upon the charges described in the complaint and the respondent's voluntary surrender of his license, waiver of disciplinary proceedings, and consent to the entry of an order of disbarment, that said Gary L. Giese be, and hereby is, disbarred effective February 15, 1985.

JUDGMENT OF DISBARMENT.

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DEBBY GALL, APPELLANT, V. GREAT WESTERN SUGAR COMPANY, A CORPORATION, ET AL., APPELLEES.

363 N.W.2d 373

Filed March 1, 1985. No. 83-636.

1. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce allegations of pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law.
2. _____. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence.
3. _____. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
4. **Causes of Action: Mental Distress.** The elements of a cause of action based upon the intentional infliction of emotional distress are (1) that there has been intentional or reckless conduct, (2) that the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community, and (3) that the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.
5. **Mental Distress: Liability.** One has no liability where he has done no more than insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.
6. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reason.

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

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

John F. Simmons of Wright, Simmons & Selzer, for appellees.

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

CAPORALE, J.

Plaintiff-appellant, Debby Gall, alleges that the defendants-appellees, Great Western Sugar Company and its parent, Hunt International Resources Corporation, intentionally inflicted emotional distress upon her and breached their duty of fair and good faith dealing by certain telephone calls they caused to be made to her at her place of employment. In this appeal Debby Gall claims the trial court erred in sustaining Great Western's motion for summary judgment, in sustaining Hunt International's special appearance, and in dismissing her action as to both defendants. We affirm.

We first consider Debby Gall's claim that the trial court erroneously sustained Great Western's motion for summary judgment. As we recently reiterated, the primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom, and the moving party is entitled to judgment as a matter of law. Further, in considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all the favorable inferences which may reasonably be drawn from the evidence. Additionally, the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; that party must therefore produce enough evidence to

demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Witherspoon v. Sides Constr. Co., ante* p. 117, 362 N.W.2d 35 (1985).

Although not without contradiction, the various depositions, affidavits, answers to interrogatories, and responses to requests for admissions received in evidence, viewed most favorably to Debby Gall and giving her the benefit of all favorable inferences to be drawn from them, disclose the following facts relevant to the allegations in her petition. Debby Gall was employed at the Bank of Gering and was pregnant, the latter fact being known to one Elizabeth Voyles, a claims agent employed by Great Western, who received her salary from Hunt International. Carl Gall, Debby's husband, was employed by Great Western. On November 28, 1980, Carl Gall was involved in an employment accident, as the result of which he sustained an injury to his right forearm such as to create doubt as to whether his right hand could be saved. Great Western made arrangements and paid for Carl Gall to be treated at Denver, Colorado, by Dr. Frank Scott, a physician specializing in the treatment of hands. Debby Gall accompanied her husband to Denver. Elizabeth Voyles' first contact with Debby Gall appears to have occurred when Elizabeth Voyles telephoned Carl Gall in order to have him complete some documents. At this time Elizabeth Voyles talked with Debby Gall to determine whether the latter had a place to stay while in Denver. The two also talked with each other, during the times that Carl Gall underwent treatment in Colorado, with regard to facilitating payments of compensation by Great Western to Carl Gall. There seems to be no dispute with respect to the benefits paid by Great Western to Carl Gall. His workers compensation checks were sent to Debby Gall at her place of work, at her request. Debby Gall also asked to be called at work should information be needed.

After the Galls returned to Gering, Elizabeth Voyles, failing in her efforts to reach Carl Gall, telephoned Debby Gall at the latter's place of work on February 19, 1981, and advised her that Great Western had a job which could be performed by a

person with only one arm. Elizabeth Voyles stated that since it was not certain that Carl Gall's hand could be saved, it would be desirable that he accept this job, which had to be filled immediately and which paid more than the disability benefits he was receiving; that it was acceptable to Dr. Scott that he do so; and that if he did not accept the job, he would be fired and all his insurance would be canceled. It developed that although Dr. Scott had initially concluded that Carl Gall could return to work as of February 19, 1981, he changed his mind on February 26 and instituted a program of physical therapy. Elizabeth Voyles advised Great Western's plant manager that Carl Gall would not be able to return to work. Although Debby Gall received similar telephone calls at her work from Elizabeth Voyles after February 19, the record does not establish that she received any such telephone calls after February 26.

Debby Gall took offense to the calls, saying she was made to feel as if her husband were not doing anything. She immediately broke out in hives, to which she had a lifelong proneness, experienced intermittent headaches, became nervous, cried, could not accomplish her work at the Gering bank without help, experienced tiredness, and lost weight. The hives cleared up in an hour and a half or so, and the headaches responded to medication within 45 minutes. Debby Gall's mother testified by affidavit that at one time she was fearful her daughter might miscarry because she discharged blood; however, Debby Gall did not mention it. Debby Gall became concerned that if her husband were fired, there would not be insurance to pay for her pregnancy and delivery expenses. However, she was enrolled in an insurance program which provided such benefits through her own employment at the Gering bank. Although the physician treating Debby Gall's pregnancy wondered why she was tired and her weight fluctuated, she never mentioned the telephone calls to him. When she mentioned her headaches, he attributed them to her pregnancy. She underwent no special medical or other professional treatment for the complaints she attributed to the telephone calls. The record does not establish that Debby Gall made Elizabeth Voyles aware of the upsetting effects of the telephone calls.

Debby Gall left her employment in an advanced state of

pregnancy on May 29, 1981. Her child was born on July 1, 1981, and she did not return to work. The insurer providing coverage through the bank paid Debby Gall's pregnancy and delivery expenses; no claim was made to Great Western.

We have had a number of occasions to consider the law applicable to the intentional infliction of emotional distress, or the tort of outrage, over the last half century. This court held as early as 1934 that the intentional infliction of emotional distress is actionable even where no physical injury results. In *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934), recovery was permitted where the creditor threatened to sue the defendant and counterclaimant debtor, appealed to the defendant's employer, and made the defendant's neighbors aware of the indebtedness, all "designedly and for the purpose of harassing the defendant until he would meet their demands, whether the sum claimed was justly due or not." *Id.* at 463, 253 N.W. at 426.

More recently, in affirming the sustainment of defendant's demurrer in *Paasch v. Brown*, 193 Neb. 368, 227 N.W.2d 402 (1975), we adopted the Restatement rule that one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. Restatement (Second) of Torts § 46 (1965). We noted that the conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. We then held that the failure to accomplish promptly the acts required by a court decree did not give rise to a separate tort action based on outrageous conduct.

In *Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221 (1981), plaintiff was splashed with hot radiator fluid at a filling station, whereupon her sister removed plaintiff's blouse to relieve the burns. They then twice asked for something with which to cover plaintiff and were finally given a dirty fender cover. Shortly thereafter, they decided to go to the hospital, but found their car would not start. The filling station attendant had removed an engine part and would not replace it until the

fender cover was returned. Finally, plaintiff was given a shirt to wear. In affirming the trial court's refusal to submit the cause to the jury, we held that plaintiff's embarrassment and humiliation did not rise to the level of distress required, again noting that the distress must be so severe that no reasonable person could be expected to endure it. The majority opinion also suggested that the conduct was not sufficiently outrageous.

In the next case, *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983), plaintiff and defendant had divorced, but the defendant nonetheless began to harass the plaintiff after she became involved with another man, whom she eventually married. He investigated the plaintiff's friend. Defendant drove by plaintiff's house 10 to 15 times a month, once attempted to force plaintiff off the road, and entered plaintiff's house through an unlocked door. He also disseminated information that plaintiff was pregnant when she and defendant married. Defendant also attempted to get the school board to decline to renew plaintiff's teaching contract. The plaintiff consulted a psychiatrist and testified that defendant's actions caused her to worry and lose sleep, that she was nervous and often cried, and that her relationship with her new husband was adversely affected. In reversing a judgment entered pursuant to a verdict for the plaintiff, a majority of this court again suggested that defendant's actions, as a matter of law, were not sufficiently outrageous, and held the evidence did not show the requisite degree of emotional distress. It was considered significant that there was an absence of medical testimony and of evidence that plaintiff's job performance had been adversely affected. We reaffirmed the rule that to recover damages for intentional infliction of emotional distress, the plaintiff must show that the distress was so severe that no reasonable person could be expected to endure it, stating that the proof must show more than mere worry, anxiety, vexation, or anger.

In the most recent prior case, *Mindt v. Shavers*, 214 Neb. 786, 337 N.W.2d 97 (1983), we held a sexual assault to be sufficiently outrageous and extreme conduct, and permitted recovery. The evidence, including expert testimony, established that the plaintiff suffered from a fear of pregnancy and that her relationship with men had deteriorated. She also became

isolated and experienced shame, humiliation, and lowered self-esteem. Her grade-point average in school dropped, and she transferred to another university. She suffered insomnia, weight loss, and a dramatic increase in alcohol and cigarette consumption, and experienced nightmares.

The foregoing cases establish the following to be the elements of a cause of action based upon the intentional infliction of emotional distress: (1) That there has been intentional or reckless conduct; (2) That the conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and is to be regarded as atrocious and utterly intolerable in a civilized community; and (3) That the conduct caused emotional distress so severe that no reasonable person should be expected to endure it.

In a case dealing with the negligent, as distinguished from the intentional or reckless, infliction of emotional distress, *Fournell v. Usher Pest Control Co.*, 208 Neb. 684, 305 N.W.2d 605 (1981), a majority of the court held that the failure of a pest control company to discover an infestation of termites and the damage caused by them to plaintiffs' house did not constitute a tort because as a matter of law the negligent conduct did not create an unreasonable risk of causing bodily harm. Since *Fournell* concerns negligent conduct, it provides no guidance with respect to the case before us. See Restatement (Second) of Torts §§ 312, 313, 436, and 436A (1965).

The record before us establishes as a matter of law that the requisite elements for recovery do not exist. Any distress which Debby Gall may have suffered was inflicted neither intentionally nor recklessly. Her concern about the lack of insurance coverage to pay her pregnancy and delivery expenses was unfounded. Elizabeth Voyles' conduct may have been insensitive, but she accurately cataloged the consequences which would flow if Carl Gall were able to work and refused to accept the employment available to him. Debby Gall had inserted herself between Great Western and Carl Gall by asking that compensation benefit checks be mailed to her, and by asking that she be called at work if the need arose. Neither was the conduct of Great Western either outrageous in character or extreme in degree. Great Western certainly had a legitimate

interest both on its own behalf and in the ultimate well-being of its employee to determine whether it had work its employee could perform. There is no suggestion that Great Western claimed a legal right it did not possess. One has no liability where he has done no more than insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress. *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983), quoting *Paasch v. Brown*, 193 Neb. 368, 227 N.W.2d 402 (1975). Further, the emotional distress suffered by Debby Gall falls short of the requisite degree of severity. As noted in previous cases, there is no occasion for the law to intervene in every case of hurt feelings. *Paasch v. Brown, supra; Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221 (1981).

Debby Gall cites no authority for her claim that Great Western owed a special duty to deal fairly with her and in good faith. The case upon which she relies, *Olson v. Union Fire Ins. Co.*, 174 Neb. 375, 118 N.W.2d 318 (1962), in fact holds that the insurer had acted neither negligently nor in bad faith in refusing to settle a tort claim against its insured. The duty of the insurer in *Olson* to exercise due care and good faith in the compromise of the claim against its insured arose out of its exclusive contractual right to settle or resist the claim. See *Hadenfeldt v. State Farm Mut. Auto. Ins. Co.*, 195 Neb. 578, 239 N.W.2d 499 (1976). Debby Gall was not an insured of Great Western; in fact, she had no legal relationship with Great Western at all. Any relationship which existed, Debby Gall herself imposed. She points to no basis for finding that Great Western owed her any special duty, and we find none.

Because the record fails to establish the essential elements of the theories of recovery Debby Gall alleged against Great Western, the trial court properly concluded that there exists no genuine issue as to any material fact, that the ultimate inferences to be drawn from those facts are clear, and that Great Western is entitled to judgment as a matter of law.

Since the same allegations were made against Hunt International, and since the same evidence applies and would necessarily lead to dismissal of Debby Gall's action against it, we need not concern ourselves with whether the sustainment of

Hunt International's special appearance was erroneous. For if the sustainment were erroneous, the dismissal is nonetheless correct. A proper result will not be reversed merely because it was reached for the wrong reason. See *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983).

AFFIRMED.

KRIVOSHA, C.J., concurring.

Because of the record in this case, I concur in the result reached by the majority opinion. However, in support of its position the majority has cited *Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221 (1981), and *Hassing v. Wortman*, 214 Neb. 154, 333 N.W.2d 765 (1983). Because of the concurrence authored by Judge White in *Davis* and the dissent, also authored by Judge White, in *Hassing*, with which I concurred in each instance, I do not wish to be misunderstood as having now changed my view as to those two cases. The actions in both *Davis* and *Hassing* were outrageous then and remain so now. The facts in this case simply do not match either *Davis* or *Hassing*.

SHANAHAN, J., dissenting.

There is no question that Carl Gall sustained serious bodily injury and had a valid claim under the Nebraska Workmen's Compensation Act. On February 26 Voyles knew that Dr. Scott, the attending physician, did not authorize Carl Gall's return to work. With that medical information and the additional knowledge about Debby Gall's pregnancy, then in the fourth month, Voyles telephoned Debby on her job at the bank or at home some six times after February 26. Debby's coworkers verified Voyles' telephone calls to Debby at the bank. During telephone contacts, Voyles told Debby that Carl would be fired if he did not return to work and accept a new job with Great Western, although Voyles, a claims adjuster, had no position of authority with Great Western to make such decision or change in Carl's employment. According to Voyles, termination of Carl's employment at Great Western would cause a forfeiture of health insurance coverage and benefits on which Galls were relying to pay maternity medical bills regarding Debby's pregnancy. Existence of health insurance provided by the bank was apparently unknown to Debby when Voyles called,

because, after leaving employment at the bank in May, Debby never applied for benefits under the bank's program, and Debby's supervisor at the bank "took it upon himself" to process a claim on behalf of Debby.

As a result of Voyles' calls, Debby broke out in hives, experienced headaches, became nervous, cried, was unable to carry out her duties at the bank without help from her coworkers, and suffered nervous twitches, primarily in her fingers. According to third parties' affidavits before the court, the calls from Voyles caused Debby to "become extremely upset" even to the point that Debby was "unable to do her work and [was required] to leave her post [at the bank] to use someone's office to try to regain her composure. . . . [H]er hands would quiver." One affiant stated that Debby's emotional state did not "settle down before the next call would come [from Voyles]." Another affiant characterized Debby as "suffering from extreme emotional distress" as a result of Voyles' calls.

Although an insurer, in pursuing its economic interests, may be privileged to assert in a permissible way its legal rights, such assertion must be done in good faith and not in an outrageous manner. See *Fletcher v. Western National Life Ins. Co.*, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

"The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." Restatement (Second) of Torts § 46, comment *e.* at 74 (1965). An employee, as a third-party claimant on a policy of workmen's compensation coverage, may bring a cause of action against an employer's insurance company for "outrage" in adjusting the employee's valid claim for workmen's compensation. See *Robertson v. Travelers Insurance Co.*, 100 Ill. App. 3d 845, 427 N.E.2d 302 (1981).

As expressed in *Eckenrode v. Life of American Insurance Company*, 470 F.2d 1, 4 (7th Cir. 1972):

> It is recognized that the outrageous character of a person's conduct may arise from an abuse by that person of a position which gives him power to affect the interests

> of another; and that in this sense extreme "bullying tactics" and other "high pressure" methods of insurance adjusters seeking to force compromises or settlements may constitute outrageous conduct. . . . It is also recognized that the extreme character of a person's conduct may arise from that person's knowledge that the other is peculiarly susceptible to emotional distress by reason of some physical or mental condition or peculiarity. [Citing Restatement (Second) of Torts § 46 comment *f*. (1965).]

The record shows Voyles' persistent calls raised the recurring specter of Debby's maternity expenses with Carl unemployed and without family health insurance. Did Voyles intentionally or recklessly cause severe emotional distress to Debby? Did Voyles go beyond the bounds of decency into a sphere of atrocious and intolerable conduct?

Liability for the tort of outrage has been said to exist when, "[g]enerally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' " Restatement, *supra*, comment *d*. at 73. Under the circumstances there was a genuine issue of fact for a jury—whether Voyles' activities with Gall were outrageous.

If Voyles' activities were an exercise of a legal right in a permissible way, as indicated by the majority, insurance adjusters have been granted a gilt-edged license to run roughshod over families of claimants having legitimate claims against an insurance company. However, the truly troublesome feature in the present case is adoption of a standard allowing jury determination of "outrage" only in cases of conduct which would cause Attila the Hun to cringe.

GRANT, J., joins in this dissent.

# PATRICK J. EGAN, APPELLANT, V. THE CATHOLIC BISHOP OF LINCOLN, A NEBRASKA NONPROFIT CORPORATION, ET AL., APPELLEES.

363 N.W.2d 380

Filed March 1, 1985. No. 84-061.

1. **Restrictive Covenants: Injunction.** An action to enjoin breach of restrictive use covenant is equitable in nature.
2. **Restrictive Covenants: Waiver.** The right to enforce a restrictive covenant may be waived by acquiescing in its violation, the circumstances of each case controlling whether there has been such a waiver.
3. **Nuisances: Injunction.** One's right to enjoin a nuisance is not defeated by the fact that he purchased his property after the nuisance came into existence.
4. **Nuisances.** The essential ingredient of a nuisance is its unlawful or wrongful character.
5. **Restrictive Covenants.** Covenants restricting use of land are not favored in the law.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Rodney M. Confer of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

Robert B. Crosby of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

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

CAPORALE, J.

Plaintiff-appellant, Patrick J. Egan, seeks a mandatory injunction requiring defendants-appellees, The Catholic Bishop of Lincoln, a nonprofit corporation hereinafter referred to as the corporate bishop, and the Sister Servants of the Holy Spirit of Perpetual Adoration, Inc., a nonprofit corporation hereinafter referred to as the corporate Sisters, to remove or alter a structure claimed to have been erected by the corporate bishop and Sisters in violation of a reciprocal negative easement. Egan appeals from the dismissal of his petition, assigning as error the trial court's determination that the doctrine of reciprocal negative easements does not apply in Nebraska; its failure to find there exists a common plan

restricting the portion of the subdivision in which the new structure was built to private, one-family residential use; and its finding that the corporate bishop and Sisters had no notice of the restriction. The corporate bishop and Sisters defend on the ground, among others, that Egan, if the claimed easement or restriction exists, waived his right to enforce it by virtue of his knowledge of the construction prior to the purchase of his property. We agree with that defense and therefore find it unnecessary to resolve Egan's assignments of error. We affirm.

The property in question was originally acquired by Charles Stuart in 1925 and became what is now known as the Piedmont Addition of Lincoln. In 1926 Stuart, together with his wife, conveyed the property without use restrictions to Stuart Investment Company, in which he owned a controlling interest and through which he developed the addition. The original plat of the addition, filed on June 4, 1927, contained no restrictive covenants or encumbrances.

Stuart built his house on two and a half lots of the addition, which remained titled in the development company throughout his life.

The remaining 107½ lots in the residential portion of the addition were sold over a 30-year period. All of these remaining lots were bound by identical provisions in the conveying deeds restricting the properties to private, one-family residential use. In accordance with Stuart's plan, 2 of the 16 blocks in the addition were given to the city of Lincoln for parks, 1 lot was sold to the city for a nominal consideration in order that a fire station might be built, and 1 block was restricted to business uses.

Stuart lived in his house until his death in 1938. Following Stuart's death, his widow remained in the home for 4 additional years. Thereafter, Stuart's son took possession of the house under a lease restricting use of the property to "a home, and for no other purpose whatever." Following the death of Stuart's widow, the property was conveyed to the son on September 1, 1943, without restrictions on the use to be made of it and "free from encumbrance."

The son, after living on the property for several years, conveyed it to Philip S. Hardy by a warranty deed in 1951. The

deed warranted that the property was "free and clear of all incumbrance." The son testified that "there was nothing in writing in any restrictive covenant to the prior deeds in that — on that piece of property that was conveyed to me, and there was no reason to impose any other covenant than what was in the original deed." It was the son's understanding that Hardy intended to use the property as a home for himself and his family.

On January 28, 1960, Hardy conveyed the property to the corporate bishop by a deed warranting that the property was "free from encumbrance, except easements, reservations and restrictions of record." The minutes of the meeting at which the board of the corporate bishop voted to purchase the property recite that the meeting was called "for the purpose of deciding whether the Hardy home should be purchased as a Bishop's residence." The corporate bishop's offer to purchase the house was conditioned on the property's being free from encumbrance. The abstract of title to the corporate bishop's property, prepared on January 13, 1960, contained no restrictive covenants but did reflect the aforedescribed lease with the son and the plat of the subdivision showing the undivided lot, one-half of which ultimately became the corporate bishop's property. The first reference in the abstract of that half lot is the son's lease.

The then bishop of the Lincoln Diocese, Bishop Casey, lived in the house from 1960 until 1967. In 1967 the present bishop and president of the corporate bishop, Bishop Flavin, began living in the house. In testifying about the use made of the house, Flavin stated that in addition to being where a bishop "eats and sleeps," it is where he "does his most important work." It is where "we make all our plans. It's where I do all of my homework. It's where I meet people to discuss problems and projects with. It's a place where I do my . . . official writing as a bishop." Flavin testified that he had an office on the property as well as at another location in Lincoln.

In 1973 Flavin decided to change his residence, whereupon the corporate bishop obtained a special permit from the Lincoln City Council for six members of the corporate Sisters to occupy the house. The application for the permit specified

that the house was to be used as a temporary home for the Sisters, whose residency was "not to exceed two years," that they would "live together as a single housekeeping unit," and that "[n]o more than three automobiles will be parked or stored on or near the premises by the Sisters who reside on the premises."

In 1977 Flavin developed plans to build a separate, new and additional structure on the subject property to house an altar and sanctuary and to provide some additional sleeping quarters. On April 18, 1979, the corporate bishop obtained a building permit to construct the new structure.

On June 1, 1979, approximately a month and a half after the corporate bishop obtained its building permit, Robert Buchman and others sought to restrain the construction but were unsuccessful. Although the record establishes further unsuccessful activity by the plaintiffs in that suit, it does not reflect the status of the suit at the time of the trial of this action.

Egan purchased his property, which consists of the half lot to the south of and adjoining the corporate bishop's property and a full lot south of and adjoining the half lot, on November 14, 1979. The three other sides of the corporate bishop's property abut streets. Prior to his purchase, Egan had, on September 30, 1973, joined an organization which supports the corporate Sisters, and on one occasion visited the corporate bishop's property. At that time the property was "basically like the other homes in Piedmont," although the house contained a chapel with an altar and a cloister. There were no parking lots and but one building, the house. Egan testified that he received mailings from the organization in 1973 but had not received any for several years, until after he filed the suit. He at no time made inquiry of any of the members of the corporate Sisters concerning the new structure.

At the time of his purchase, according to Egan, construction was pretty well along on the corporate bishop's new structure,

> but there were no parking lots as such. The window, this large glass window, had not been put in, to my recollection, and the workmen were over there building.
>
> The side parking lot between the structure and my home was not there. There was a grass area and a crushed rock

drive.

The front of the house had not been changed or by the parking area had not been changed. The driveway had not been widened and parking stalls had not been put out in front.

An architect for the firm which designed the new structure testified that based on the proportion of construction costs owed, the building was 73 percent completed on November 1, 1979, and 86 percent completed on November 30, 1979. He also testified, however, that a layman would not have been able to judge the percentage of completion by looking at the building.

The new structure and parking lot were completed in May 1980. Testimony established that, following construction, the appearance of the property had changed. Egan described the following changes:

Well, they have added the large parking lot between the new addition to the building and my lot line. They have, I'd say, quadrupled the size of the driveway in front of the building which would be facing South Cotner Boulevard with parking stalls along the entire drive. I don't mean horizontal parking lot, I mean more a vertical parking stall in nature.

Those would be the major changes, I guess, from the time I moved in.

They have added outdoor lighting or parking lot type lighting.

Father Pleskac, chaplain to the members of the corporate Sisters who had occupied the corporate bishop's house, testified that after construction was completed the area between the new structure and Egan's property line had been paved for a parking lot and that additional spaces were paved along the circular driveway in front of the house. In addition, a new driveway allowed traffic to enter the parking lot from a public street.

Egan testified that at the time he bought his property he believed that all property in Piedmont was restricted to one-family residential use. Egan knew of the construction on the corporate bishop's property before he began to negotiate his purchase but took no action in an effort to stop it because he owned no interest to protect at that time. When he purchased

his property, he did not expect the construction to be completed because he knew of the Buchman lawsuit and thought it would be successful. Egan also testified that once he had moved onto his new property, he discussed the Buchman lawsuit with his neighbors. He wanted to add his suit to the Buchman suit, but found he was unable to do so and proceeded to file this action within 2 weeks of his purchase.

The reciprocal negative easements doctrine holds that where a common grantor develops land for sale in lots and pursues a course of conduct which indicates an intention to execute a general scheme or plan of improvement for the benefit of himself and the purchasers of the various lots, and by numerous conveyances incorporates in the deeds substantially uniform restrictions, conditions, and covenants against the use of the property, the grantees acquire by implication the equitable right to enforce similar restrictions against the residential lot or lots retained by the grantor or subsequently sold without the restrictions to a purchaser with actual or constructive notice of the restrictions and covenants. *Mid-State Equipment Co. v. Bell*, 217 Va. 133, 225 S.E.2d 877 (1976). See, also, *Warren v. Detlefsen*, 281 Ark. 196, 663 S.W.2d 710 (1984); *Arnold v. Chandler*, 121 N.H. 130, 428 A.2d 1235 (1981); *Bomar v. Echols*, 270 S.C. 676, 244 S.E.2d 308 (1978); *Land Developers, Inc. v. Maxwell*, 537 S.W.2d 904 (Tenn. 1976); *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925).

Although we have enforced restrictive covenants when contained in the grantee's chain of title, *Plumb v. Ruffin*, 213 Neb. 335, 328 N.W.2d 792 (1983), *Pool v. Denbeck*, 196 Neb. 27, 241 N.W.2d 503 (1976), *Reed v. Williamson*, 164 Neb. 99, 82 N.W.2d 18 (1957), *Hogue v. Dreeszen*, 161 Neb. 268, 73 N.W.2d 159 (1955), and *Wright v. Pfrimmer*, 99 Neb. 447, 156 N.W. 1060 (1916), we have not had occasion to consider whether we would adopt the reciprocal negative easements doctrine and enforce a restriction not contained in the grantee's chain of title. Nor do we reach the question now. For we conclude from our de novo review, *Pool v. Denbeck, supra*, that even if we were to adopt the doctrine and even if the evidence in this case were to establish the elements of the doctrine to be present, matters we do not decide, Egan waived

his right, if any, to enforce the easement or restriction.

Although not directly in point, in enforcing a restriction, we observed in *Meierhenry v. Smith*, 208 Neb. 88, 302 N.W.2d 365 (1981), that the right to enforce a restrictive covenant may be waived by acquiescing in its violation, the circumstances of each case controlling whether there has been such a waiver. Egan did not acquiesce in the violation of any use restriction which may pertain to the corporate bishop's property; however, it is uncontroverted that Egan knew before as well as during the negotiations for the purchase of his property that construction of a new structure was proceeding on the corporate bishop's property notwithstanding a pending legal challenge to the construction. We hold that under those circumstances Egan waived any right he may have had to enforce any restriction which might arise through the reciprocal negative easements doctrine. See *Ludke v. Egan*, 87 Wis. 2d 221, 274 N.W.2d 641 (1979), holding that purchasers who knew at the time of their purchase of the existence of a road across their land, resulting in the subsequent declaration of an easement in favor of a third party, were in no position to claim the breach of a covenant against encumbrances.

Egan seeks to avoid this result by analogizing the violation of a reciprocal negative easement to the maintenance of a nuisance. We have held that one's right to enjoin a nuisance is not defeated by the fact that he purchased his property after the nuisance came into existence. *Seifert v. Dillon*, 83 Neb. 322, 119 N.W. 686 (1909). The analogy, however, is inapposite. The law does not tolerate a nuisance, because it is essentially unlawful or wrongful in character. *City of Omaha v. Flood*, 57 Neb. 124, 77 N.W. 379 (1898). On the other hand, the law disfavors restrictions on the use of land. *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984). Thus, the law of nuisances bears no relationship to the question of when one has waived the right to enforce a restriction on the use of land.

The trial court's judgment of dismissal is correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating in the decision.

MARY LOU YRKOSKI, APPELLEE, V. MARTIN J. YRKOSKI, APPELLANT.

363 N.W.2d 385

Filed March 1, 1985. No. 84-149.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

Philip T. Morgan of Morgan & Morgan, for appellant.

Edward F. Carter, Jr., of Barney, Carter, & Johnson, P.C., and Cleo Robak, for appellee.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed; each party to pay his or her own costs, including attorney fees.

AFFIRMED.

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IN RE APPLICATIONS 15145, 15146, 15147, AND 15148 OF THE LITTLE BLUE NATURAL RESOURCES DISTRICT.
BASIN ELECTRIC POWER COOPERATIVE, APPELLANT, V. LITTLE BLUE NATURAL RESOURCES DISTRICT ET AL., APPELLEES.

363 N.W.2d 500

Filed March 1, 1985. No. 84-175.

1. **Pretrial Motions: Pleadings.** For the purpose of ruling on a motion for leave to intervene, the allegations of the petition in intervention are deemed to be true.
2. _____: _____. A direct and immediate interest which will mandatorily require the granting of a motion for leave to intervene must be such a direct and immediate interest that one seeking to intervene will either lose or gain by the direct operation of the judgment.

Appeal from the Nebraska Department of Water Resources. Affirmed.

Lyman L. Larsen and Thomas R. Litjen of Kennedy, Holland, DeLacy & Svoboda, and Claire M. Olson, for appellant.

Robert B. Crosby and Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee Little Blue Natural Resources District.

Richard G. Kopf of Cook & Kopf, P.C., for appellee Central Platte Natural Resources District.

George E. Svoboda of Sidner, Svoboda, Schilke, Wiseman, Thomsen & Holtorf, and Lyle B. Gill, Fremont City Attorney, for appellees Lower Platte North Natural Resources District et al. and city of Fremont.

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

GRANT, J.

This appeal is from the denial of a motion seeking leave to intervene in a proceeding before the Department of Water Resources of the State of Nebraska (Department). The motion to intervene was filed by appellant, Basin Electric Power Cooperative (Basin Electric). Appellees are various parties appearing in the proceeding before the Department. The city of Fremont, Lower Platte North Natural Resources District, and other entities support Basin Electric's petition to intervene. Little Blue Natural Resources District (Little Blue) and Central Platte Natural Resources District oppose the proposed intervention.

The proceeding in which Basin Electric seeks to intervene began in November of 1977, when Little Blue filed applications with the Department seeking permits to divert and store over 300,000 acre-feet of water per year from the Platte River system for irrigation purposes. This proceeding has been before this court on two previous occasions. In *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 206 Neb. 535, 294 N.W.2d 598 (1980) (*Little Blue I*), we held that transbasin diversion is not prohibited in Nebraska, and reversed the Department's denial of Little Blue's application. The proceeding was remanded to

the Department to determine if the proposed diversion was contrary to the public interest.

The Department, without holding further hearings, granted Little Blue's applications on remand. This decision then was appealed to the Nebraska Supreme Court by Lower Platte North Natural Resources District and others. This court, in *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 210 Neb. 862, 317 N.W.2d 726 (1982) (*Little Blue II*), held that the Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. §§ 37-430 to 37-438 (Reissue 1978), should have been considered by the Department and was not. We remanded the case, stating at 875, 317 N.W.2d at 734:

> We believe that, upon remand, further hearings should be held by the director and relevant evidence should be adduced relating particularly to those factors set forth in § 46-235 as now amended, as well as the project's effect upon the endangered species. In so holding we do not pass upon the validity of § 46-235.

The proceeding has been going forward before the Department since our remand in *Little Blue II* on March 19, 1982.

On January 6, 1984, Basin Electric filed its motion for leave to intervene in the proceeding, together with its petition in intervention. Basin Electric did not request an evidentiary hearing nor was one held. On February 23, 1984, this petition was denied, without prejudice, by order of the Department. Basin Electric did not file a motion for new trial, and appeals from the Department's order denying intervention. The order denying intervention is a final order for purposes of appeal. *Shold v. Van Treeck*, 82 Neb. 99, 117 N.W. 113 (1908). For the purposes of ruling on Basin Electric's motion for leave to intervene, we assume the allegations of the petition in intervention to be true. See, *Kozak v. Wells*, 278 F.2d 104 (8th Cir. 1960); *Rick v. Boegel*, 205 N.W.2d 713 (Iowa 1973).

Basin Electric set out in that petition that it is a cooperative corporation organized in North Dakota; that it is part owner and manager of the Laramie River Station near Wheatland, Wyoming, which station is a part of the Missouri Basin Power Project (the Project); that the Laramie station gets its cooling

water from the Laramie River, a tributary of the North Platte River; that in lawsuits begun in 1976 and 1978 in U.S. District Court including the State of Nebraska, Basin Electric, the Project, and others, the state sought to enjoin the completion of the Project because, as alleged by the state, the water depletion by the Project located near Laramie, Wyoming, would adversely affect endangered whooping cranes and their habitat on the Platte River between Chapman and Overton, Nebraska, called the Big Bend Area; and that on October 2, 1978, the U.S. District Court enjoined completion of construction of the Project.

The petition in intervention further alleged that because of the federal court order of October 2, 1978, the Project faced financial losses of approximately $100 million per year if construction were stopped; that, therefore, on December 4, 1978, the Project agreed to a negotiated settlement, called the Grayrocks Settlement, with all parties to that lawsuit; and that, pursuant to the settlement agreement, the Project agreed to limit its consumption of water to a maximum of 23,250 acre-feet of water per year, agreed to other water-related restrictions, and agreed to contribute $7,500,000 to a trust organized to help maintain the Big Bend Area in Nebraska as a habitat for the endangered whooping cranes.

The petition in intervention further alleged that in this case in which Basin Electric sought intervention, Little Blue and others sought to store or divert 300,000 acre-feet of water near the Big Bend Area, located approximately 280 miles downstream from the Project, and that the Big Bend Area is the same area which the state alleged was threatened by the water depletions sought by Basin Electric at the Project.

The petition in intervention further stated that Basin Electric was informed and therefore believed that certain parties to the current applications were engaged in settlement negotiations, that Basin Electric has a direct and immediate interest in the outcome for the settlement negotiations, that many citizens of Nebraska consume power supplied by the Project to Nebraska, and that it is in the public interest to ensure that the Project is not unnecessarily restricted in the production of power.

The petition further stated that no other party to the current

proceeding represents the exact interest of Basin Electric; that Basin Electric does not necessarily oppose the applications if the Department "finds, in fact, that their being granted will not affect adversely the critical habitat"; but that Basin Electric's interest is unique in that Basin Electric is entitled to relief if the Department would reach a finding inconsistent with the state's earlier position on the question of the whooping crane habitat.

Based on these factual allegations in its petition in intervention, Basin Electric concluded and asserted that it had a direct and immediate interest in the proceeding because the Department's actions in granting the applications of Little Blue and others may, in the words of the petition, "deplete the flows of the river in such fashion as to modify or destroy the required critical habitat of the Endangered Whooping Crane"; that it had a further direct and immediate interest "in seeing that the State of Nebraska is consistent and fair in the actions it takes with respect to the allocation of these water resources"; and that if the Department permits diversion and storage of over 300,000 acre-feet of water just a few miles upstream from the Big Bend Area, that action would be contrary to the position of the State of Nebraska in the federal court case where the state successfully opposed Basin Electric's use of more than 23,250 acre-feet of water 280 miles upstream from the Big Bend Area.

Basin Electric, in the prayer of its proposed petition in intervention, requested that it be made a party; that the applications be denied to the extent that the Department finds the granting of the applications "adversely affect[s] the critical habitat of the Endangered Whooping Crane"; and that in the event the Department finds that granting the applications will not adversely affect the habitat, it provide relief to Basin Electric and the Project "from the restrictive provisions pertaining to water usage contained in the 'Agreement of Settlement and Compromise' to the extent the jurisdiction of the Department permits."

Little Blue, in its response to Basin Electric's motion for leave to intervene, admitted that Basin Electric "was ill-advised when it negotiated the 'Agreement of Settlement and Compromise' " set out in the petition in intervention, and opposed the Basin Electric intervention, because intervention is not allowed as a

matter of right, is not timely, would serve no useful purpose, and would prejudice Little Blue. Other parties took various differing positions with regard to the proposed intervention—some opposing it and some supporting it.

As stated above, no evidentiary hearings were held on Basin Electric's motion to intervene. The question was submitted on briefs to the Department, and on February 23, 1984, the Department entered its order denying Basin Electric's petition in intervention.

The Department based its order on three determinations: (1) That Basin Electric had no rights to waters in the Platte River or its tributaries in Nebraska; (2) That the proposed intervention was untimely; and (3) That Basin Electric was not an indispensable party because it failed to show that it has information which will not be otherwise presented or that its interests cannot be protected by the parties to the proceeding.

Basin Electric timely appealed the Department's order, assigning as error the failure of the Department to grant Basin Electric's motion to intervene and in dismissing its petition in intervention. We affirm the action of the Department.

In its brief supporting its assignment of error, Basin Electric argues that it has a direct and immediate interest in the proceeding, and therefore has a right to be made a party, and that under the Department's own regulation Basin Electric was required to be made a party at its request.

In such an administrative proceeding we hold the "direct and immediate interest" referred to in the Department's regulation to be of the type recognized by Nebraska courts in such matters. We held in *Best & Co., Inc. v. City of Omaha*, 149 Neb. 868, 877-78, 33 N.W.2d 150, 156 (1948):

> The interest in a matter in litigation which will authorize a person to intervene in an action . . . must be such a direct and immediate interest that the person or persons seeking to intervene will either lose or gain by the direct operation and legal effect of the judgment which may be rendered in the action. . . . An indirect, remote or conjectural interest in the result of the suit is not enough to permit intervention.

See, also, *State ex rel. City of Grand Island v. Tillman*, 174

Neb. 23, 115 N.W.2d 796 (1962).

With regard to Basin Electric's alleged "direct and immediate interest" in the proceeding, the Department found that Basin Electric claimed no direct water use in Nebraska. That finding is supported by the allegations in Basin Electric's petition in intervention. Basin Electric takes an agreed-upon volume of water at a point at least 250 miles upstream from the proposed point of diverting water from the Platte River in the pending applications. That amount was agreed to by Basin Electric and apparently acceptable to it. There is nothing in the record before us pointed out by Basin Electric to indicate, in any way, that the volume of water sought by Little Blue in the pending applications will affect the amount of water which Basin Electric has agreed is sufficient for its purpose at a point at least 250 miles upstream. The water which Little Blue seeks in this case has long since passed the possible control of Basin Electric.

As stated in the Department's order denying intervention, "Waters unintentionally, or by previous commitments, intentionally having escaped Petitioner's [Basin Electric's] control are deemed unappropriated. They become the property of the public and are dedicated to the use of the people, subject to appropriation." In so holding the Department relied on Neb. Const. art. XV, §§ 4, 5, and 6, and the holding of *Northport Irr. Dist. v. Jess*, 215 Neb. 152, 337 N.W.2d 733 (1983). We believe the reliance of the Department on the cited sections of the Nebraska Constitution and the Nebraska law was proper. Under the facts as alleged in its petition in intervention, Basin Electric had no immediate and direct interest in the water which was the subject matter of the pending applications.

The remaining factual bases of Basin Electric's allegation that it has a direct and immediate interest in Little Blue's applications are two. First, Basin Electric alleged that in 1978 it contributed $7,500,000 pursuant to the Grayrocks Settlement in a U.S. District Court over whether Basin Electric should complete a power plant in Wyoming; that the State of Nebraska was a party to that Grayrocks Settlement; and that Basin Electric desires to make sure that the State of Nebraska, acting through the Department, acts fairly and does not decide the case so as to reduce the effect of the settlement. It is obvious

that the Department, in these pending applications, has no jurisdiction to affect, in any way, a settlement made 6 years ago in another court. The Department has no jurisdiction to interpret, in any binding way, the terms or results of that settlement. As a basis for intervention, neither the settlement nor Basin Electric's participation in that settlement gives Basin Electric a "direct and immediate interest" in these applications.

The second of the remaining bases for intervention may be summarized in a statement that Basin Electric is concerned about the continued, proper protection and operation of the whooping crane habitat near the Big Bend Area. If Basin Electric's concern is the protection of its contribution to the federal court settlement, that could not constitute a "direct and immediate interest" in this proceeding. Basin Electric made its contribution to establish a trust to protect the habitat for the whooping crane. That contribution has been made. Basin Electric's pecuniary interest in the trust has ended. The Department properly held that the establishment of the trust did not give Basin Electric any direct and immediate interest in this proceeding.

It is apparent of course that Basin Electric may allege, as could any other citizen, that it is interested in the protection of the whooping crane habitat. That, in and of itself, cannot constitute such a direct and immediate interest in this proceeding that mandatorily requires the granting of permission to intervene. Other citizens and groups have the same concerns and are before the Department.

Basin Electric's argument that the regulations of the Department state that permission must be granted to Basin Electric to intervene is decided by the foregoing holding that Basin Electric has no direct and immediate interest in this proceeding. The Department has adopted regulations pursuant to the requirements of Neb. Rev. Stat. ch. 84, art. 9 (Reissue 1981). The pertinent regulation is set out in the practice and procedures rules of the Nebraska Department of Water Resources, tit. 454, Ch. 4, § 001.09 (1983), entitled "Objectors," which provides:

> Interested persons who have such a direct and immediate interest in the matter under consideration that

> they may lose by direct operation of and legal affects of the determination which may be rendered shall be made parties upon their request; persons not so affected may be made parties to the proceedings upon their request at the discretion of the Director or Hearing Officer. If so included, such persons when made party to the proceedings shall be referred to as objectors.

While this regulation (which incidentally was amended by the Department in August of 1984) does not provide, in detail, the provisions of permissive interpretations and interventions of right as set out in Nebraska's statutes on intervention (Neb. Rev. Stat. §§ 25-328 to 25-330 (Reissue 1979)), it does set out the fundamentals of procedure resulting in intervention. The regulation provides that persons having a described form of interest in a proceeding *shall* be made a party at their request, and the other persons *may* be made a party. As set out above, the Department has found that Basin Electric has no such "direct and immediate" interest in the proceeding that it must be made a party, and we have agreed.

With regard to Basin Electric's further arguments that its petition in intervention must be granted because its position is unique and its motion for leave to intervene was timely, we note, first, that Basin Electric's petition in this proceeding was found by the Department to be untimely. On March 19, 1982, Little Blue's second appeal from the decision of the Department was granted in this court and the proceeding remanded with directions that "further hearings should be held by the director and relevant evidence should be adduced relating particularly to those factors set forth in § 46-235 as now amended, as well as the project's effect upon the endangered species." *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 210 Neb. 862, 875, 317 N.W.2d 726, 734 (1982). The Department was specifically ordered to receive evidence and consider the very factors now alleged in Basin Electric's petition in intervention with regard to the endangered species. Nonetheless, Basin Electric did not file its motion for leave to intervene until January 6, 1984—almost 2 years later. Neither the Administrative Procedures Act (Neb. Rev. Stat. § 84-901 and §§ 84-909 to 84-916 (Reissue 1981)) nor the regulations of the Department provide for any time limits

on the rights of parties to intervene either as a matter of right or permissively. Nonetheless, the Department, as an agency of the State of Nebraska, must have sufficient latitude in its operations in matters under its jurisdiction to exercise that jurisdiction fairly. As set out in *County of Blaine v. State Board of Equalization & Assessment*, 180 Neb. 471, 474, 143 N.W.2d 880, 883 (1966):

> The procedure which the Administrative Procedures Act prescribes for use in contested cases by administrative agencies is essentially that which is normally used in adversary proceedings. In applying the Administrative Procedures Act to the proceedings of the State Board of Equalization and Assessment, some consideration must be given to the particular nature of the state board including its purpose and function.
>
> . . . .
>
> It is apparent that a procedure which might be suitable for a hearing involving relatively few parties would not be practicable where the parties are numerous and the issues complex.

We hold that in cases before it, where the Department does not abuse its discretion, the Department may legally deny the late intervention of a person or entity. In this proceeding the Department found as follows:

> [H]owever, it is deemed Petitioner's [Basin Electric's] participants [sic] would result in delay and disruption.
>
> Pursuant to the provisions of the so-called Grayrocks Settlement, Petitioner is one of the trustees of the Platte River Whooping Crane Critical Habitat Maintenance Trust. The Director has noted that employees of the Trust have observed these proceedings on several past occasions. Petitioner has for several years had the means of knowing about these proceedings. Additionally, several Trust employees are presently scheduled to appear as witnesses in these proceedings. Presumably their observations of the proceedings as witnesses can and will be reported to the Trustees. Thus, knowledge of these proceedings has not come suddenly to the Trust or to the Petitioner. Intervention at this point in these proceedings

is not timely. It could result in undue and unnecessary burdens to the Applicant and other objectors of record.

We determine the Department had authority to make such determinations in connection with permissive intervention and did not abuse its discretion in finding that Basin Electric's intervention was not timely.

The same Department finding disposes of Basin Electric's argument that its position is unique. The proceeding has been going on since 1977, and in its latest phase, concerning the whooping crane habitat, for almost 2 years. The Department found that employees of the very trust to which Basic Electric contributed have been observing the proceeding for several years. National and local wildlife organizations have been in the proceeding for years and protect the same interests as Basin Electric in this regard.

The action of the Department in denying Basin Electric's petition in intervention is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. KEVIN R. GROVES, APPELLANT.

363 N.W.2d 507

Filed March 1, 1985. No. 84-282.

1. **Constitutional Law: Statutes: Appeal and Error.** In a facial challenge to the overbreadth and vagueness of a law, that is, a claim that the law is invalid in toto and therefore incapable of any valid application, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge fails. The court then examines the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, upholds the challenge only if the enactment is impermissibly vague in all its applications.
2. **Constitutional Law: Words and Phrases.** The word "abuse" insofar as it includes verbal abuse is construed to include only those which have been described as "fighting" words, that is, those which by their very utterance tend to inflict injury or tend to incite an immediate breach of the peace. As so construed, a statute or ordinance violates neither the first amendment to the Constitution of the United States nor article I, § 5, of the Constitution of

Nebraska.

3. **Words and Phrases.** Whether any particular use of abusive language constitutes "fighting words" depends not only upon the words but also upon the circumstances in which they are used.
4. **Statutes: Standing.** In order to have standing to challenge a vague statute or ordinance, one must not have engaged in conduct which is clearly proscribed by the statute or ordinance, and cannot complain of the vagueness of the law as applied to the conduct of others.

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

Michael T. Levy of Levy & Lazer, P.C., for appellant.

Herbert M. Fitle, Omaha City Attorney, Gary P. Bucchino, Omaha City Prosecutor, Richard M. Jones, and David F. Smalheiser, for appellee.

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

WHITE, J.

Appellant, Kevin R. Groves, was convicted after trial in the municipal court of the city of Omaha, Douglas County, Nebraska, of the offense of disorderly conduct as defined by Omaha Mun. Code § 20-42 (1980). The district court for Douglas County affirmed the conviction but modified the sentence of the municipal court from 75 to 20 days. He appeals to this court.

Two assignments of error are advanced, which may be summarized as follows. Section 20-42 is unconstitutional because it is overbroad in that it applies to protected conduct under the Constitution of the United States and the Constitution of the State of Nebraska, and this section is vague in that it fails to give fair and adequate notice of the type of conduct prohibited and is susceptible to arbitrary enforcement. We shall consider the assignments together. A brief recitation of the facts is necessary.

On October 5, 1983, Edward Hale, a police officer of the city of Omaha, was working as a private security guard at the Holiday Inn motel complex at 3321 South 72d Street, Omaha, Nebraska. The complex consists of a number of buildings and a large 14-acre parking lot. Officer Hale's employment included

patrolling the parking lot in a truck to provide security for vehicles parked there. At about 3:40 a.m. Officer Hale observed the appellant, Groves, in the far east part of a parking lot, standing next to a Cadillac automobile. The parking lot was located approximately 200 feet from the nearest building. Officer Hale approached Groves, who was about 100 feet from him. As the officer neared Groves, he observed what appeared to be a pair of boltcutters in his right rear pocket. When Officer Hale pulled within 10 feet of Groves, Groves started to walk away. Officer Hale identified himself as a police officer, produced his badge, and showed it to Groves. Groves' response was, "What the fuck do you want?" Officer Hale responded that he wished to see his identification. Groves reached into his pocket, got out his driver's license, gave it to the police officer, and advanced toward Officer Hale in what Hale described as a menacing manner. Groves' words at that time were, "I don't give a fuck, give a fuck who you are." In response, Officer Hale produced his revolver and pointed it at Groves. Groves then started walking to his own automobile about 40 feet from where the Cadillac was parked. Officer Hale summoned assistance from the Omaha Police Department and, approximately 8 minutes later, several cruisers responded.

Before assistance arrived, appellant stepped inside his car, backed it out, and parked it near where Officer Hale's truck was stopped. Groves came out of his car, aware that Officer Hale had called for assistance, and called Officer Hale a "motherfucker" and a "pig" and requested the officer to try to arrest him singlehandedly. At the time of this confrontation Officer Hale observed a sheath on the defendant's hip, partially concealed beneath his coat. Officer Hale recognized the sheath as one that typically contained a "Buck knife." When additional police officers arrived, Groves called one of the summoned officers a "fuckhead," and a struggle ensued with the officer before Groves was forcibly handcuffed and arrested. The boltcutters observed by Officer Hale were recovered from under the front seat of Groves' car.

Section 20-42 of the Omaha Municipal Code provides as follows: "It shall be unlawful for any person purposely or knowingly to cause inconvenience, annoyance or alarm or

create the risk thereof to any person by: (a) Engaging in fighting, threatening or violent conduct; or (b) Using abusive, threatening or other fighting language or gestures; or (c) Making unreasonable noise." We shall address the vagueness and overbreadth arguments together.

Recently, in *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984), we had occasion to consider the constitutionality of Neb. Rev. Stat. § 28-305(1) (Reissue 1979) with respect to a manslaughter charge. We said in that case at 561-62, 357 N.W.2d at 219:

> *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982), teaches that in a facial challenge to the overbreadth and vagueness of a law, that is, in this context, a claim that the law is invalid in toto and therefore incapable of any valid application, our first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. We are to then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, uphold the challenge only if the enactment is impermissibly vague in all its applications. In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others.

Therefore, applying the language of *State v. Frey* to this case, our first question, then, is whether or not the enactment reaches a substantial amount of constitutionally protected conduct. It does not. As we observed in *State v. Boss*, 195 Neb. 467, 471, 238 N.W.2d 639, 643 (1976):

> The word abuse and similarly broad terms in like statutes have been held to pass constitutional muster under the First Amendment to the Constitution of the United States only if they are construed so as to apply the statute to punish only what have been called "fighting words." Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031. . . . " '[F]ighting' words [are] 'those

> which by their very utterance inflict injury or tend to incite an immediate breach of the peace.' "

We hold that the words "fuckhead" and "motherfucker" are such fighting words, and we again specifically reject the implicit argument advanced by appellant that a police officer is somehow less susceptible to abuse than other members of the general public. As we said in *Boss*:

> We specifically reject the authority of Williams v. District of Columbia, 419 F.2d 638, and the concurrence of Mr. Justice Powell in Lewis v. City of New Orleans, *supra*, wherein it is suggested that the words here used cannot be fighting words when directed to a police officer because he is trained to accept such abuse without violent reaction.

*Id.*

As Groves' conduct is not constitutionally protected, the overbreadth argument must be rejected. We are, then, now to conclude whether or not the ordinance is vague. Section 20-42(c) is constitutionally suspect. We are again faced with the defendant's lack of standing to attack this record. We have said, to repeat the words in *State v. Frey, supra* at 561-62, 357 N.W.2d at 219: "In order to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others." As the ordinance clearly applied to prohibited conduct engaged in by Groves, he lacks standing to suggest that the ordinance may be impermissibly applied to others. The assignments of error are without merit. The judgment and sentence of the trial court are affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. I do so on three specific grounds. First, I believe that the majority opinion is in error in its declaration that in order for one to maintain a facial challenge to the overbreadth and vagueness of a law where the enactment does not reach a substantial amount of constitutionally protected conduct, the challenge can be upheld only if the enactment is impermissibly

vague in *all* of its applications. Second, I believe that the language of the statute is impermissibly vague, and therefore unconstitutional. Third, I believe that the facts of the case fail to establish that the defendant committed the crime for which he was charged and convicted.

I turn first to the question of when a facial challenge as to overbreadth or vagueness can be maintained. I am afraid that just as the U.S. Supreme Court got onto a wrong track when it decided the case of *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982), so too did this court get onto the wrong track when we recently decided the case of *State v. Frey*, 218 Neb. 558, 357 N.W.2d 216 (1984). The majority opinion in the instant case continues along that wrong trail.

In *Frey*, relying upon what we perceived to be the position of the U.S. Supreme Court in *Hoffman Estates*, we held that Frey lacked standing to challenge the constitutionality of the statute in question, because in order for one to have standing to challenge a vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others unless the statute is impermissibly vague in all its applications.

A closer examination of the opinion in *Hoffman Estates*, in light of a later decision of the U.S. Supreme Court, *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), leads one to the inescapable conclusion that *Hoffman Estates* does not stand for such a rule and, in any event, does not reflect the law in this jurisdiction.

First, *Hoffman Estates* involved a preenforcement facial challenge of a civil statute seeking to regulate an economic matter. As observed by the majority in *Hoffman Estates, supra* at 498-99:

> These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often

> more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.
>
> Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.
>
> This ordinance simply regulates business behavior and contains a scienter requirement with respect to the alternative "marketed for use" standard. The ordinance nominally imposes only civil penalties.

Any other reference in the *Hoffman Estates* opinion to criminal action and the standards required in such criminal actions is mere dicta.

The majority opinion in *Hoffman Estates, supra* at 497, said:

> A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications.

No authority was cited for that proposition other than *Hoffman Estates* itself. Furthermore, this passage must be read in light of the Court's specific acknowledgment that commercial regulation is subject to a relaxed vagueness analysis. As noted earlier, even the *Hoffman Estates* opinion recognizes that legislation interfering with first amendment

interests is examined under "a more stringent vagueness test."

Apparently, the U.S. Supreme Court has recognized the error of *Hoffman Estates* and has already abandoned its teachings. We should do likewise. In *Kolender v. Lawson, supra*, the U.S. Supreme Court was asked to pass upon the constitutionality of a California penal statute which provided:

> Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

See Cal. Penal Code § 647(e) (West 1970). The petitioner was detained or arrested on approximately 15 occasions, though he was only prosecuted twice and convicted once. He then brought a civil action seeking a declaratory judgment that § 647(e) is unconstitutional. Neither the facts as presented to the U.S. Supreme Court nor the statute itself is such that it would be vague in all of its applications. Obviously, one who had just committed a crime and was wandering about the street without apparent reason might be asked to identify himself and to account for his presence. Nevertheless, the U.S. Supreme Court struck the statute down as being unconstitutionally vague. In doing so the Court said:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. [Citations omitted.] Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement."

*Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). In n.8 to the opinion the Court addressed the *Hoffman Estates* opinion, saying at 358-59:

> In his dissent, JUSTICE WHITE claims that "[t]he upshot of our cases . . . is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." [Citation omitted.] The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." [Citation omitted.] Second, where a statute imposes criminal penalties, the standard of certainty is higher. [Citation omitted.] This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have some valid application. See, *e.g., Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). The dissent concedes that "the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment . . . ." [Citation omitted.] However, in the dissent's view, one may not "confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own." [Citation omitted.] But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines. See, *e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 609 (1967); *NAACP v. Button*, 371 U.S. 415, 433 (1963). . . .
>
> No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. . . . *Hoffman Estates, supra*, also relied upon by the dissent, does not support its position. In addition to reaffirming the validity of facial challenges in situations where free speech or free association are affected [citation omitted], the Court emphasized that the ordinance in *Hoffman Estates* "simply regulates business

behavior" and that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow." [Citation omitted.]

I am firmly convinced that should we continue to follow the trail mistakenly set out for us by the unsupported authority in *Hoffman Estates*, we shall wind up at a dead end and be compelled to find our own way back. We should abandon that trail now, concede that we were misled, and once again reestablish what has long been the rule, both in this jurisdiction and in the federal jurisdiction as well. See *State v. Hamilton*, 215 Neb. 694, 340 N.W.2d 397 (1983).

At least where the legislation arguably impinges on first amendment values, I believe the rule to be as expressed by the U.S. Supreme Court in *Gooding v. Wilson*, 405 U.S. 518, 521, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1971), wherein the Court said:

> "Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights."

See, also, *Lewis v. City of New Orleans*, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974); *Plummer v. City of Columbus*, 414 U.S. 2, 94 S. Ct. 17, 38 L. Ed. 2d 3 (1973). All that one can say with regard to the decision in *Hoffman Estates* is that it is an anomaly in the law and, as an anomaly, should be disregarded.

I turn next to the question of whether the ordinance is unconstitutionally vague. As noted by the majority, and as conceded by the city of Omaha, unless this court is able to apply some valid judicial construction limiting the reach of the ordinance solely to constitutionally unprotected speech, we have no choice but to declare the ordinance invalid. I believe that the judicial gloss sought to be applied by the court simply does not adhere and therefore fails to make the test.

The majority has determined that the words "fuckhead" and "motherfucker" are fighting words per se. I believe that not to be the law. In *State v. Boss*, 195 Neb. 467, 472, 238 N.W.2d 639, 643 (1976), relied upon by the majority, we said "we agree that whether any particular use of abusive language constitutes 'fighting words,' depends not only upon the words, but upon the circumstances as well." I believe that under the facts of this case the use of those words could not have constituted fighting words, but I defer that for a moment. At this juncture I simply address the question of whether the ordinance is vague. In doing so we are reminded that " '[a] crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject thereto as to what conduct will render them liable to punishment thereunder. . . .' " *State v. Hamilton, supra* at 695, 340 N.W.2d at 398. The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things and providing a punishment for their violation should not permit such a double meaning that the citizen may act upon one conception of its requirements and the courts upon another. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application violates the first essential element of due process of law. In *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972), the U.S. Supreme Court referred to these principles in the following manner:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague

> laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

See, also, *State v. Hamilton*, 215 Neb. 694, 340 N.W.2d 397 (1983).

An examination of the ordinance in question is a perfect example of what it was in *Hamilton* about which we were concerned. To begin with, this ordinance on its face not only makes it a crime to use fighting words but, likewise, makes it a crime to engage in a whole host of activities, including making unreasonable noise in such a manner as to cause inconvenience, annoyance, or alarm, or create the risk thereof to *any* person. If two individuals on the street, enjoying the fact that they have accomplished some task, make unreasonable noise, thereby causing annoyance to a third person, the ordinance has been violated. It is difficult to imagine how one could draft an ordinance more vague than the one under consideration. In *Coates v. City of Cincinnati*, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971), the U.S. Supreme Court struck down an unlawful assembly statute prohibiting conduct "annoying to persons passing by." In doing so the U.S. Supreme Court said at 614:

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, "men of common intelligence must necessarily guess at its meaning."

See, also, *Terminiello v. Chicago*, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949); *Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1971).

The Alaska Supreme Court was called upon to examine a similar ordinance in *Marks v. City of Anchorage*, 500 P.2d 644

(Alaska 1972). In striking down the ordinance the court said at 652-53:

> When these fundamental and long-established principles of constitutional law are applied to the Anchorage ordinance, there is no escape from the conclusion that the ordinance is likewise void for vagueness. Since the prefatory language of the ordinance, containing the mens rea for the specifically enumerated prohibited acts, is itself impermissibly vague, no part of the ordinance can stand. The defective prefatory language is "with purpose and intent to cause public *inconvenience, annoyance* or *alarm* or recklessly create a risk thereof." (emphasis added). Coates v. Cincinnati, *supra*, specifically declared the word "annoying" to be unconstitutionally vague and the words "inconvenience" and "alarm" are not less so. The rest of the ordinance is also peppered with indefinite words . . . .
>
> In sum, not only does the ordinance fail to give adequate notice of what conduct is prohibited, but it is particularly subject to the abuse of uneven enforcement.

The majority seeks to avoid the difficulty presented to us by the ordinance by suggesting that even though some of the ordinance may be invalid, that portion of Omaha Mun. Code § 20-42(b) (1980) specifically referring to "fighting language" was sufficient to convict. The difficulty with all of that is that Groves was not charged with violating § 20-42(b) by using fighting language. He was charged with a violation of all three parts of § 20-42, and he was found guilty of violating all of § 20-42. We have no way of knowing whether he was found guilty by reason of the court finding that he had in fact used fighting words or simply because he was making unreasonable noise. See *Williams v. District of Columbia*, 419 F.2d 638 (D.C. App. 1968). It is not suggested by this dissent that there may not be a manner in which a constitutional ordinance might be drafted. It is, however, suggested that where the drafters have failed to perform their duties, this court should not undertake to do so.

The simple fact of the matter is that no reasonable person can know in advance what activity is truly prohibited by the

provisions of § 20-42. For that reason the ordinance must be declared unconstitutional.

The final reason I believe the majority opinion is in error is because I do not believe the evidence was sufficient to convict Groves of causing inconvenience, annoyance, or alarm by using fighting language.

It is difficult for me to conceive how an officer, with a drawn, loaded service revolver, who is being specifically paid by a private business to provide security of the type that the officer was providing at the moment the altercation occurred, could be either inconvenienced, annoyed, or alarmed by a man with a foul mouth. The only testimony in the record which even remotely establishes inconvenience, annoyance, or alarm on the part of the police officer is as follows:

> Q. All right. Can you, rather than state a conclusion, "menacing," can you describe what sort of actions or what sort of posture he was in, words expressed to you as he approached you?
>
> A. He says, "I don't give a fuck, give a fuck who you are." And he started towards me in a fashion I felt was menacing to me, to my own safety.

It was at this point that the officer drew his loaded revolver.

It is difficult to conclude that this evidence was sufficient to establish inconvenience, annoyance, or alarm of a man who is being paid to be inconvenienced, annoyed, or alarmed, and therefore permitted to carry a loaded revolver. That fact is further borne out when, on cross-examination, Officer Hale testified as follows:

> Q. Officer Hale, how long have you been a police officer?
>
> A. Twelve years.
>
> Q. You've been called names before, haven't you. . .
>
> A. Many times.
>
> Q. In connection with your duties. . .
>
> A. Yes.
>
> Q. As a police officer? You've been called a motherfucker before, in connection with your duties as a police officer?
>
> A. I have.

Q. It goes with the territory, doesn't it?

A. It does.

Furthermore, it is apparent from the testimony that the arrest occurred before the officer could, under any reasonable circumstance, be inconvenienced, annoyed, or alarmed, even if we knew what those terms meant. One of the arresting officers testified as follows:

> Q. Do you recall any specific language that he used that led you to that conclusion, did you hear any abusive language or threatening language?
>
> A. Yes, quite a bit of swearing in a rather loud tone.
>
> Q. At who?
>
> A. It wasn't directed intitially [sic] at any one in particular, just in a manner of conversation; however. . .
>
> Q. What specific words were used?
>
> A. He used the word fuck several times. I told the party to quiet down or he'd be placed under arrest for disorderly conduct.
>
> Q. What was his response to that?
>
> A. He said, "You're nothin' but a fuckhead."
>
> Q. What happened next?
>
> A. I said, "You're under arrest for disorderly conduct," placed him under arrest.

In effect, then, we have now made words expressed to no one in particular fighting words, thereby permitting an individual to be arrested. The officer had already determined that he was going to arrest Groves if he continued to make noise, whether he used fighting words directed at anyone or not.

No one condones the use of foul language addressed to anyone, and in particular to a law enforcement officer; yet, finding the use of foul language to be socially unacceptable is not the same as making it the basis for denying one a first amendment right to free speech.

In my view the ordinance is vague and, therefore, in violation of the Constitution. I believe that this is a case in which we can make that determination. I further believe that the evidence is insufficient to establish beyond a reasonable doubt that the officer in question could have been inconvenienced, annoyed, or alarmed. I have difficulty believing that one with a loaded

revolver can be annoyed by one with a loaded mouth.

SHANAHAN, J., dissenting.

I join Chief Justice Krivosha in his dissent that the questioned ordinance is unconstitutionally vague, but make additional comment about the ordinance's vagueness. What is sought to be prohibited by the ordinance is "inconvenience, annoyance or alarm," or creating the risk of causing such situations or conditions. To paraphrase the basic prohibition of the ordinance, it is unlawful to make trouble for somebody, to irritate someone, to frighten anybody, or to bring about the possibility or danger of causing trouble, irritation, or fright to anyone. Such nebulous and subjective situations cannot constitutionally be the basis for prosecution. The various subparts of the ordinance are only a futile facade for vagueness.

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STATE OF NEBRASKA, APPELLEE, V. KEVIN R. FIENE, APPELLANT.

363 N.W.2d 385

Filed March 1, 1985. No. 84-330.

**Judgments: Courts: Notice: Time: Appeal and Error.** Where a defendant or his attorney has actual notice of the entry of a sentencing order in a county court within 10 days of the entry of such order, an appeal to the district court must be perfected pursuant to the requirements of Neb. Rev. Stat. § 29-611 (Reissue 1979).

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and Henry M. Grether III, for appellee.

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

GRANT, J.

Defendant, Kevin R. Fiene, was arrested and tried in the county court for Dawson County for driving an automobile

while under the influence of alcoholic liquor or while having ten-hundredths of one percent or more of alcohol in his body fluids. A determination that Fiene violated either, or both, of such charges would constitute a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). See *State v. Wenzel*, 215 Neb. 395, 338 N.W.2d 772 (1983). On July 28, 1983, Fiene was found guilty by written court order (filed July 29, 1983) of "DRIVING WHILE UNDER THE INFLUENCE OF ALCOHOLIC LIQUOR, 39-669.07 (W M.O.)." Fiene was sentenced to probation, including a fine and a 60-day driver's license suspension.

This county court order was timely appealed to the district court on August 2, 1983. The county court approved Fiene's appeal bond filed the same day. This appeal by Fiene fully complied with the requirements of Neb. Rev. Stat. § 29-611 (Reissue 1979).

By memorandum opinion and order dated August 30, 1983, the district court held that the county court had improperly admitted evidence as to a test taken of Fiene's breath at the time of his arrest (for reasons not relevant to this appeal), and ordered

> that this matter be reversed and remanded to the County Court; that the County Court enter an opinion determining whether it based its finding of guilt upon the admission of the breath test or upon the testimony of the officer; that if the Court relied upon the breath test as the determining factor for guilt, this matter shall be dismissed; that if the Court relied on other evidence, excluding the evidence of the breath test, for the determination of guilty, the finding of guilt by the Court shall be reimposed and the sentence of the County Court carried out.

While this reversal and remand presented various problems arising from the fact that it does not directly "affirm, modify, or vacate the judgment, or . . . remand the case to the county . . . court for a new trial," as required by Neb. Rev. Stat. § 29-613 (Reissue 1979), the order did effectively transfer jurisdiction of the case to the county court.

It is at this point that confusion, introduced by defendant's

pleading, enters the case. As stated above, the district court, on August 30, 1983, had remanded the case to county court. The case has passed out of the jurisdiction of the district court. Nonetheless, on September 1, 1983, defendant filed a "Motion for New Trial" in the district court. The efficacy of such a motion is, at best, questionable. See *In re Estate of Weinberger*, 207 Neb. 711, 300 N.W.2d 818 (1981). For the purposes of this opinion, however, and since no party questions the validity of the procedure, it will be assumed the matter proceeded properly. The confusion continued when the district court, by order filed on November 18, 1983, ordered:

> NOW on this 4th day of November, 1983, this matter comes on for hearing having been taken under advisement by the Court. The Court being duly advised finds that the Motion For New Trial should be, and hereby is overruled. That the Defendant shall pay the costs of this action in the sum of $347.70 if the conviction is not set aside in the County Court of Dawson County, Nebraska.
>
> SO ORDERED this 18th day of November, 1983.

Fiene's attorney was sent a "Notice of Judgment" by the clerk of the district court on November 22, 1983. The clerk's certificate stated, in part, "Order entered on Nov. 4, 1983 and filed in office of [sic] Nov. 18 1983."

The county court then entered an order stating, among other things:

> NOW on this 9th day of November, this matter comes on for hearing on the Court's own motion. The Defendant's motion for new trial being overruled by the Honorable John P. Murphy; gives this court jurisdiction of the case.
>
> The District Court's order filed August 30, 1983, reversed and remanded this case for an opinion of this Court on whether it relied upon the breath test or other evidence for the determination of guilt of the defendant.

The order concluded by stating that "the original sentence imposed by this Court is hereby ratified and reimposed." On the same date (but filed November 14, 1983) the county court entered its sentencing order, again placing defendant Fiene on probation with the same fine and suspension as earlier imposed.

The two November 9, 1983, orders of the county court were made, after the remand of the district court, on the county court's own motion. Neither defendant Fiene nor his attorney was present or notified.

This order of sentencing by the county court presents various problems to any reviewing court. It is questionable if a sentence may be "reimposed," and, in any event, a defendant may not be sentenced *in absentia* unless he has waived his appearance. *State v. Ernest*, 200 Neb. 615, 264 N.W.2d 677 (1978). Nonetheless, the county court did have jurisdiction to enter the order. If the order was wrong, it should have been challenged on appeal to the district court.

On December 7, 1983, defendant's attorney filed, in the county court, a "Written Notice Of Appeal," stating:

> COMES NOW the Defendant, Kevin R. Fiene, and gives his written notice of his intention to appeal the judgment entered by this Court on the 9th day of November, 1983.
>
> The Defendant continues his cash bond of $100.00 as previously deposited herein. The Defendant, in addition to the cash bond, further undertakes to the Court that he will appear at the District Court of Dawson County, Nebraska, forthwith and from day to day thereafter until the final disposition of the appeal and to answer the complaint against him and to abide by the judgment of the District Court and not depart therefrom without leave.

There was no bond set by the court on this appeal (as required by § 29-611), but apparently the bond was unilaterally set by defendant's counsel.

The county attorney then filed a motion to dismiss Fiene's appeal to the district court because Fiene had failed to file a proper appeal bond within 10 days as required by § 29-611, and thus the district court had no jurisdiction of the appeal. On February 13, 1984, the district court dismissed the appeal. After the appeal was dismissed defendant again filed a "Motion for New Trial," directed to this dismissal order, and alleging in part that the decision "is not sustained by sufficient evidence" and that errors of law occurred "at trial and excepted to by the party making the application." This motion was filed within 10 days,

and apparently defendant believed that this motion would forestall the running of the 30-day time period to appeal the February 13, 1984, dismissal order of the district court.

The district court order denying Fiene's "Motion for New Trial" was entered on April 6, 1984. On May 4, 1984, defendant filed his notice of appeal to this court. This procedure raises questions on appeal to this court similar to those presented in *In re Estate of Weinberger*, 207 Neb. 711, 300 N.W.2d 818 (1981). We do not rule on the effect of the procedure, however, because the point is not argued to us and because we feel that the order of the district court must be affirmed on other grounds having impact on the operations of this court and all the courts involved.

The foundation and ultimate basis of defendant's appeal to this court is that defendant and his attorney had no notice of the county court sentence of November 9, 1983, and therefore could not be held to the requirement of § 29-611 that an appeal bond must be filed within 10 days of the county court order to appeal to a district court.

In oral argument to this court, and in at least four places in his brief filed herein, defendant Fiene's attorney states that he first discovered the November 9, 1983, county court sentencing order on December 1 or 2, 1983. At page 4 of his brief, Fiene states that he filed his motion of appeal from the county court to district court on December 7, 1983, "upon discovery of the sentencing on December 1 or 2, 1983 . . . ." At page 14 of his brief, Fiene's attorney states that "it was not until December 1 or 2, 1983, that the Defendant/Appellant's attorney discovered that the order and sentence had been entered." At pages 16-17 of his brief, defendant's attorney states: "It was not until December 1 or 2, 1983, that the Defendant/Appellant's attorney discovered the order on sentence and that thereafter on December 7, 1983, within 10 days of the Defendant/Appellant's discovery of the order on sentence, the Defendant/Appellant perfected his appeal to this Court." At page 19 of his brief, defendant states that his time for appeal "should not run until the Defendant/Appellant discovers or receives notice of the sentencing" and that "such order was not discovered by the Defendant/Appellant's attorney until

December 1 or 2, 1983."

Such allegations, of course, raise serious questions in this court, including the question of whether defendant's lack of notice and knowledge has operated to deprive him of due process. The foregoing statements of Fiene's counsel become disturbing to this court when we note in the record presented to us for review that on November 17, 1983, Fiene's same counsel filed in the county court a "Motion for Rehearing," alleging in part "[t]hat on November 9, 1983, without providing a hearing to the Defendant, the Court entered its Order." The certificate of service filed with this motion is signed by defendant's attorney and certifies that a copy of the motion was mailed to the county attorney of Dawson County on November 15, 1983. It is obvious that, in spite of his protestations that the county court order of November 9, 1983, was not discovered until December 1 or 2, 1983, defendant's attorney knew of the order on November 15, 1983—only 6 days after the challenged order—leaving ample time to perfect an appeal to the district court. He did not perfect his appeal to the district court, as required by the provisions of § 29-611, although time was available. Defendant did not perfect his appeal even if the time for appeal was extended to 10 days following his actual notice of the challenged order.

In this state of the record we hold that the district court properly dismissed defendant's purported appeal of December 7, 1983, to the district court. We affirm.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. GEWING BRAND, APPELLANT.

363 N.W.2d 516

Filed March 1, 1985. No. 84-427.

1. **Constitutional Law: Appeal and Error.** Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived.

2. **Constitutional Law: Criminal Law: Sentences.** Factors to be considered in evaluating whether a sentence constitutes cruel and unusual punishment under the federal Constitution and Neb. Const. art. I, §§ 9 and 15, are (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.
3. _____: _____: _____. Legislatures are not required to select the least severe penalty possible, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.
4. **Constitutional Law: Criminal Law: Sentences: Prior Convictions.** Enhancing a sentence because of a prior conviction is not cruel and unusual punishment.

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

Lathrop, Albracht & Lathrop, for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr, and, on supplemental brief, Patrick T. O'Brien, Deputy Attorney General, and Mark D. Starr, for appellee.

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

CAPORALE, J.

Defendant, Gewing Brand, was charged with sexual assault in the first degree, second offense. The court accepted his plea of guilty to the sexual assault, which was accomplished by the use of force, and at a separate enhancement hearing determined that he had once previously been sentenced for first degree sexual assault. The trial judge thereupon sentenced Brand on the present charge to imprisonment for 35 years without the possibility of parole. Brand was also determined to be a mentally disordered sex offender and was therefore ordered to begin serving his sentence at the Lincoln Regional Center, where he is to stay until he is no longer such or until he has received the maximum benefit from his treatment. In this appeal Brand's assignments of error present the issue of whether the sentence is so excessive as to constitute cruel and unusual punishment. We hold it is not, and affirm.

The statute under which Brand was sentenced, Neb. Rev. Stat. § 28-319 (Reissue 1979), provides in pertinent part as follows:

> (1) Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in the first degree.
>
> (2) Sexual assault in the first degree is a Class II felony. The sentencing judge shall consider whether the actor shall have caused serious personal injury to the victim in reaching his decision on the sentence.
>
> (3) Any person who shall be found guilty of sexual assault in the first degree for a second time shall be sentenced to not less than twenty-five years and shall not be eligible for parole.

As a Class II felony, the crime of first degree sexual assault is punishable by a maximum of 50 years' imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1979).

Brand argues that § 28-319, as applied in this particular case, is unconstitutional in that it violates the prohibitions against cruel and unusual punishment contained in the eighth amendment to the U.S. Constitution and article I, § 9, of the Nebraska Constitution. He further argues that it violates the requirement of article I, § 15, of the Nebraska Constitution that all penalties be proportioned to the nature of the offense. To the extent his argument may be directed to the claim that the statute is unconstitutional by its terms, it is a claim not presented to the trial court and, thus, will not be considered here. Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. If not so raised, it will be considered to have been waived. *State v. Kaiser*, 218 Neb. 556, 356 N.W.2d 890 (1984).

*Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), sets forth the factors to be considered in evaluating whether a sentence constitutes cruel and unusual punishment under the federal Constitution. They are (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for commission of the same crime in other jurisdictions.

As to the first prong of this analysis, it is clear that rape is a

serious crime, even more so when the defendant has previously committed the same act. Although holding that a sentence of death for the rape of an adult female was grossly disproportionate and excessive punishment forbidden by the eighth amendment, the U.S. Supreme Court, in *Coker v. Georgia*, 433 U.S. 584, 597, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977), said that rape

> is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self."

*Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), teaches that legislatures are not required to select the least severe penalty possible, so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved.

We must next look at the sentences authorized in Nebraska for other crimes. Other Class II felonies include kidnaping if the abducted is voluntarily released, Neb. Rev. Stat. § 28-313(3) (Reissue 1979); robbery, Neb. Rev. Stat. § 28-324 (Reissue 1979); and first degree arson, Neb. Rev. Stat. § 28-502 (Cum. Supp. 1984). Kidnaping where the victim is not voluntarily liberated, § 28-313(1), and first degree murder, Neb. Rev. Stat. § 28-303 (Reissue 1979), are Class 1A felonies punishable by life imprisonment. First degree murder may also be a Class I felony punishable by death. Second degree murder, Neb. Rev. Stat. § 28-304 (Reissue 1979), is a Class 1B felony punishable by 10 years' to life imprisonment. Crimes which are defined as Class III felonies and receive a less severe sentence, of from 1 to 20 years or a $25,000 fine, include manslaughter, Neb. Rev. Stat. § 28-305 (Reissue 1979); first degree assault, Neb. Rev. Stat. § 28-308 (Reissue 1979); second degree sexual assault, Neb. Rev. Stat. § 28-320(2) (Reissue 1979); second degree arson, Neb. Rev. Stat. § 28-503 (Cum. Supp. 1984); and burglary, Neb. Rev. Stat. § 28-507 (Reissue 1979). See § 28-105 for classification of penalties.

The sentence imposed for the second offense first degree

sexual assault in this case is not disproportionate when considered in light of the sentences authorized for the crimes enumerated above.

Enhancing the sentence because of the prior conviction also is not cruel and unusual punishment. The habitual criminal statute, which in substance has the same effect, has been upheld against similar constitutional attacks. *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980); *State v. Goodloe*, 197 Neb. 632, 250 N.W.2d 606 (1977), *overruled on other grounds* 204 Neb. 41, 281 N.W.2d 223 (1979); *State v. Martin*, 190 Neb. 212, 206 N.W.2d 856 (1973).

Brand argues that life imprisonment, which could be imposed for kidnaping, first degree murder, or possibly second degree murder, is actually less severe than the sentence authorized in his case, since he does not have the possibility of parole. However, convicted felons do not have an absolute right to parole. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979), interpreting Nebraska's parole statutes, held: "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 7. The Court went on to stress the discretionary nature of parole by stating: "[T]here is no prescribed or defined combination of facts which, if shown, would mandate release on parole." *Id.* at 8. Further, the Court stated: "That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained." *Id.* at 11.

It follows, therefore, that those convicted of kidnaping or first or second degree murder have no right to parole, and there is no guarantee that they will ever be paroled. Such a life sentence, therefore, is not necessarily less severe than the 35-year term Brand received. See, also, *Gallego v. United States*, 276 F.2d 914 (9th Cir. 1960), which upheld the constitutionality of a federal statute forbidding the suspension of a sentence or the granting of probation in cases of certain violations of the Narcotic Drugs Import and Export Act, 21 U.S.C. §§ 171 et seq. (1956), but did not exact a penalty so out of proportion to the crime as to shock a balanced sense of justice.

The third and last prong of the federal analysis calls upon us to compare the sentence imposed with that authorized by other states. Such a review reveals that although the sentence imposed in this case is among the harsher of the penalties authorized by any state, it is not so disproportionate as to render it cruel and unusual punishment and thus unconstitutional. For example, Florida authorizes life imprisonment if force likely to cause serious personal injury is used, Fla. Stat. Ann. §§ 775.082(3)(a) (West Supp. 1984) and 794.011(3) (West 1976); Georgia, Idaho, Maryland, and Washington authorize life imprisonment, Ga. Code Ann. § 16-6-1(b) (1984), Idaho Code § 18-6104 (1979), Md. Crim. Law Code Ann. §§ 462 and 464 (Repl. 1982), Wash. Rev. Code Ann. §§ 9A.44.040 and 9A.20.021 (West Supp. 1985); Louisiana authorizes life imprisonment without parole, probation, or suspension of sentence if force or threats of force are used, La. Rev. Stat. Ann. § 14:42 (West Supp. 1985); and North Carolina authorizes life imprisonment if force is used, N.C. Gen. Stat. §§ 14-27.2 and 14-1.1(a)(2) (Repl. 1981).

The foregoing analysis convinces us that the sentence imposed upon Brand pursuant to § 28-319 passes federal constitutional muster. We find nothing in article I, § 9 or 15, of the Constitution of this sovereign state which requires more in this regard than does the eighth amendment to the U.S. Constitution. As recently noted in *State v. Ruzicka*, 218 Neb. 594, 598, 357 N.W.2d 457, 461 (1984), the Nebraska constitutional prohibition against cruel and unusual punishment "does not abridge the Legislature's power to select such punishment as it deems most effective in the suppression of crime." Neither does the requirement that all penalties be proportioned to the nature of the offense do so.

It is well established that a sentence imposed within statutory limits will not be disturbed on appeal. *State v. Copple*, 218 Neb. 837, 359 N.W.2d 782 (1984); *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984). The sentence imposed is well within the statutory limits. Brand has a long arrest record, including a prior first degree sexual assault conviction and a conviction of second degree sexual assault which had been reduced from a charge of first degree sexual assault. He also has convictions for burglary, larceny from the person, and possession of

marijuana. Brand committed several of these crimes, including the two prior sexual assaults, while on parole for other crimes. Furthermore, when the present sexual assault was committed, Brand was on a 72-hour furlough from a work release program.

There being no abuse of discretion in the sentence imposed, it is affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. ROY L. ELLIS, APPELLANT.

363 N.W.2d 389

Filed March 1, 1985. No. 84-439.

**Identification Procedures: Indictments and Informations: Right to Counsel.** Only those identification confrontations which occur after the defendant has been formally charged with the offense for which the identification testimony is sought require presence of counsel.

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

William M. Berlowitz, for appellant, and, on brief, Roy L. Ellis, pro se.

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, Roy L. Ellis, appeals from an order entered by the district court for Douglas County, Nebraska, denying post conviction relief sought pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). On direct appeal Ellis' conviction was affirmed. See *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983) (*Ellis I*). Ellis' principal contention in this post conviction proceeding is that he had ineffective assistance of counsel. His claim is based upon the fact that Ellis' trial counsel did not argue that he was denied his constitutional

rights when he was required to appear in a series of pretrial lineups without assistance of counsel. We believe that the law is clear in matters of this nature and that the decision of the trial court must be affirmed.

The facts of the case are set out in detail in *Ellis I*. For the purpose of this appeal, it is sufficient to state that Ellis was arrested and charged by a felony complaint. While in jail, he was placed in some 20 lineups, of which 3 or 4 were related to a robbery of a Kentucky Fried Chicken restaurant in Omaha. The complaint which led to Ellis' arrest was unrelated to the robbery of the Kentucky Fried Chicken restaurant. An employee of the restaurant identified Ellis at a lineup as one of the robbers, and charges were then filed against him alleging commission of the Kentucky Fried Chicken robbery. Ellis, admittedly, was not afforded counsel during these lineups.

We have previously had occasion to examine a similar, though not identical, question and have found contrary to Ellis' position. In *State v. Smith*, 209 Neb. 86, 87, 306 N.W.2d 181, 182 (1981), we said:

> In *Kirby v. Illinois*, 406 U.S. 682, 688, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972), the U.S. Supreme Court held that the sixth amendment right to assistance of counsel in a lineup situation "attaches only at or after the time that adversary judicial proceedings have been initiated against" the defendant by the filing of an indictment or information. This is also the rule in Nebraska. *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976). Appellant was not entitled to assistance of counsel at the time the lineup here was held since formal charges had not then been filed against him, and, thus, the identification may not be suppressed on that ground.

Even if the filing of a complaint triggers an accused's sixth amendment rights, a question we need not now decide, no such complaint had yet been filed against Ellis in connection with the Kentucky Fried Chicken robbery.

The eighth circuit court of appeals has also examined this question and, likewise, has rejected arguments similar to those now made by Ellis. In *Sanchell v. Parratt*, 530 F.2d 286, 290 n.2 (8th Cir. 1976), the eighth circuit court of appeals said:

> This argument misapprehends the meaning of *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. [sic] 411 (1972). We agree with the district court that that case controls, and that under *Kirby* only those identification confrontations which occur after the defendant has been formally charged with the offense for which the identification testimony is sought require presence of counsel.

Other federal courts of appeals have likewise considered the question and reached the same conclusion. See, *United States v. Tyler*, 592 F.2d 261 (5th Cir. 1979); *Boyd v. Henderson*, 555 F.2d 56 (2d Cir. 1977); *Jackson v. Jago*, 556 F.2d 807 (6th Cir. 1977).

The rationale behind such a rule is perhaps best set out in *Young v. State of Oklahoma*, 428 F. Supp. 288 (W.D. Okla. 1976). In the *Young* case the robbery in question occurred on December 18, 1973. On December 25, Young was arrested on outstanding warrants for driving while intoxicated, and on December 26 the robbery lineup was conducted. Young did not have counsel present. In discussing Young's claim that his counsel right had attached due to the formal driving while intoxicated charges, the court said at 291-92:

> It is the rule that the Sixth and Fourteenth Amendments right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated and a person is not entitled to counsel at a lineup where he has not been charged by Information, Complaint or any other formal accusation. *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); *Harris v. Turner*, 466 F.2d 1319 (C.A.10 1972). The petitioner contends that the rule should not apply in this case because he had been arrested and was in custody after formal charges of the traffic offenses had been filed. He fails to distinguish between the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel. The issue is not whether he was in custody but whether the lineup was a "critical stage" in his prosecution on the robbery charge. *Kirby* makes clear that it was not. The Court in its decision reviewed the principal right to

counsel cases and pointed out: ". . . All of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment." 406 U.S. at 689, 92 S. Ct. at 1882. In *United States v. Davis*, 399 F.2d 948, 951 (C.A.2 1968), cert. denied, 393 U.S. 987, 89 S. Ct. 465, 21 L. Ed. 2d 449, prior to *Kirby* that court provided this clarifying analysis: ". . . We do not read *Wade* and its siblings as saying that the mere fact of custody, especially when this is for an unrelated crime, automatically triggers the Sixth Amendment right to counsel, as it would the Fifth Amendment privilege against self-incrimination. The importance of custody from a Fifth Amendment standpoint is that it is conceived as furnishing the element of compulsion which that Amendment demands, see *Miranda v. State of Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The protection of the Sixth Amendment applies to 'the accused' in 'all criminal prosecutions,' and while *Wade* [*U. S. v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149] makes clear that this includes certain pretrial proceedings, 388 U.S. at 224-225, 87 S. Ct. 1926, that is a long way from saying that the protection attaches as soon as suspicion is aroused. The fact of custody adds little of Sixth Amendment relevance, especially when, as here, this is for an unrelated crime."

None of the events mentioned by the *Kirby* court had occurred to the petitioner with respect to the crime here at issue. Moreover in this case the victim had not made a photographic identification of the petitioner and prior to the lineup there was not probable cause to charge the petitioner with the robbery. The identification of the petitioner by the victim was a prerequisite to the charge. In no proper sense had the petitioner become the accused or the prosecution against him for this offense commenced.

That is not to say that there cannot be a situation where one may be taken into custody under a subterfuge, the police knowing full well that he is the individual they seek to charge.

That, however, is not the case presented to us here. When we separate out the case which brought Ellis into custody from the case in which he was subsequently charged by reason of the lineup, it is clear that he had not yet been charged with the Kentucky Fried Chicken restaurant robbery and was not entitled to counsel at that point.

In view of the fact, therefore, that Ellis was not entitled to have counsel present at the lineup, he did not receive ineffective assistance of counsel when counsel failed to argue that point. The district court was correct in denying Ellis' motion for post conviction relief. The judgment is affirmed.

AFFIRMED.

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IN RE APPLICATION 15738 OF THE FRENCHMAN VALLEY IRRIGATION DISTRICT ET AL.
BASIN ELECTRIC POWER COOPERATIVE, APPELLANT, V. FRENCHMAN VALLEY IRRIGATION DISTRICT ET AL., APPELLEES.

363 N.W.2d 506

Filed March 1, 1985. No. 84-498.

Appeal from the Nebraska Department of Water Resources. Affirmed.

Lyman L. Larsen and Thomas R. Litjen of Kennedy, Holland, DeLacy & Svoboda, and Claire M. Olson, for appellant.

Robert B. Crosby and Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester, for appellees.

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

PER CURIAM.

The facts and law in this appeal are essentially identical with those in *Basin Elec. Power Co-op v. Little Blue N.R.D., ante* p. 372, 363 N.W.2d 500 (1985), decided by this court this day.

In view of our decision in that case, the decision of the director of the Department of Water Resources of the State of Nebraska denying appellant's motion to intervene in the instant case is affirmed.

AFFIRMED.

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IN RE APPLICATIONS 15974, 15975, 15976, 15977, 15978, 15979, 15980, 15981, 15982, 15983, 15984, AND 15985 OF THE TWIN VALLEY CONSERVATION ASSOCIATION, INC.
BASIN ELECTRIC POWER COOPERATIVE, APPELLANT, V. TWIN VALLEY CONSERVATION ASSOCIATION, INC., ET AL., APPELLEES.

363 N.W.2d 506

Filed March 1, 1985. No. 84-499.

Appeal from the Nebraska Department of Water Resources. Affirmed.

Lyman L. Larsen and Thomas R. Litjen of Kennedy, Holland, DeLacy & Svoboda, and Claire M. Olson, for appellant.

Richard G. Kopf of Cook & Kopf, P.C., for appellee Twin Valley Conservation Association.

George E. Svoboda of Sidner, Svoboda, Schilke, Wiseman, Thomsen & Holtorf, and Lyle B. Gill, Fremont City Attorney, for appellees Lower Platte North Natural Resources District et al. and city of Fremont.

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

PER CURIAM.

The facts and law in this appeal are essentially identical with those in *Basin Elec. Power Co-op v. Little Blue N.R.D., ante* p. 372, 363 N.W.2d 500 (1985), decided by this court this day. In view of our decision in that case, the decision of the director of the Department of Water Resources of the State of Nebraska

denying appellant's motion to intervene in the instant case is affirmed.

AFFIRMED.

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IN RE INTEREST OF DENNIS J. AANDAHL.
DENNIS J. AANDAHL, APPELLANT, V. LANCASTER COUNTY MENTAL HEALTH BOARD, APPELLEE.

363 N.W.2d 392

Filed March 1, 1985. No. 84-550.

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

No appearance for appellee.

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

HASTINGS, J.

Pursuant to the October 28, 1983, order of the Lancaster County Mental Health Board, the appellant was found to be a mentally ill dangerous person under the provisions of the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1981), and was committed to the Nebraska Department of Public Institutions for treatment. That order was appealed to the district court for Lancaster County, which dismissed the appeal as moot. The appellant has appealed to this court, claiming error on the part of the district court in dismissing his appeal. We agree.

Section 83-1043 requires the district court to review appeals from the mental health board de novo on the record, and this court to hear appeals from the district court in accordance with criminal procedure.

An appellate court, in this case the district court, may decline to express an opinion on a mere abstraction or to determine a moot case. *City of Crete v. County of Saline*, 214 Neb. 200, 332 N.W.2d 926 (1983).

The only information in the record suggesting that the issue in this case was moot is a portion of the individualized treatment plan prepared for the appellant pursuant to an earlier 1983 voluntary commitment. That plan was dated November 8, 1983. The pertinent part of the plan states as follows:

> II. DISCHARGE PLAN: 1) Return to community [to] live possibly ILP 2) Finances, employ 3) After care CMHCLC, 4) Activity Day Tx or employment.
>
> Criteria For Discharge:
>
> 1 follow through with scheduled programing for 2 months
>
> 2 meet treatment goals & objectives

It should be noted at this point, however, that the appellant went on unauthorized leave from his voluntary commitment during the latter part of October 1983. He was then arrested on October 27, 1983, by virtue of a warrant of arrest issued on the basis of a petition filed with the Lancaster County Mental Health Board. It was on the foundation of that petition that the present involuntary commitment was ordered.

Although no reason for a finding of mootness appears in the district court's order, apparently the quoted portion of the individualized treatment plan was interpreted as indicating that a final determination had been made for the appellant's release. It does not support such an inference.

The appellant is entitled to a de novo review by the district court of the correctness of his commitment.

The judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# STATE OF NEBRASKA, APPELLEE V. DUANE BARGEN, APPELLANT.

363 N.W.2d 393

Filed March 1, 1985. No. 84-637.

1. **Pleas.** A plea of guilty admits all facts alleged in the information and recited in open court by the State.
2. **Indictments and Informations: Appeal and Error.** A defendant may raise on appeal for the first time that an information failed to set forth each essential element of the crime charged.
3. **Statutes.** Statutes in pari materia must be construed together in order to give meaning to the provisions of both.
4. _____. The court will avoid constructions of statutes which lead to absurd or unjust results.
5. **Indictments and Informations: Appeal and Error.** An information questioned for the first time on appeal must be held sufficient unless so defective that by no construction can it be said to charge the offense for which the accused was convicted.
6. **Pleas.** A factual basis for a plea of guilty may be established by inquiry of the prosecution, interrogation of the defendant, or examination of the presentence report.
7. **Sentences: Appeal and Error.** As a general rule, a sentence imposed within the statutory limits will not be disturbed on appeal unless the trial court abused its discretion.
8. **Sentences.** A sentencing judge properly may consider information contained in a presentence report in imposing sentence. Such judge has broad discretion as to the source and type of information which may be used to assist in determining the kind and extent of punishment to be imposed.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Jerry Soucie of Rehm & Bartling, for appellant.

Paul L. Douglas, Attorney General, and Timothy E. Divis, for appellee.

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

HASTINGS, J.

The defendant has appealed from a 6-months' county jail sentence following his conviction on a plea of guilty to a violation of Neb. Rev. Stat. §§ 8-409.01 and 8-409.02 (Reissue 1983). This is a Class IV felony providing for a sentence of imprisonment of as much as 5 years.

Assigned as errors by the defendant are: (1) The information failed to allege a criminal offense; (2) There was no factual basis provided by the State or revealed by the presentence investigation report to establish guilt of the criminal offense charged; and (3) The sentence was excessive. We affirm.

The amended information filed by the State charged two felony counts under these statutes, which violations were alleged to have occurred on July 20 and October 24, 1983. Pursuant to an agreement, following the defendant's plea of guilty to the July 20 offense, the other count of the information was dismissed. The arraignment proceedings fully comported with the requirements of due process.

As amended without objection, the information charged that

> while Duane Bargen was an active officer or director of an industrial loan and investment company, to-wit: Lincoln Savings Company, directly or indirectly borrowed funds of said industrial loan and investment company in an amount exceeding that allowed under Nebraska Revised Statutes Sections 8-409.01 and 8-409.02, to-wit: did borrow $160,000 on note number 011-068 and borrowed $8,722.49 on note number 010-150.

A plea of guilty admits all facts alleged in the information and recited in open court by the State. *State v. Jones*, 214 Neb. 145, 332 N.W.2d 702 (1983); *Marteney v. State*, 210 Neb. 172, 313 N.W.2d 449 (1981); *Clark v. State*, 150 Neb. 494, 34 N.W.2d 877 (1948). Nevertheless, a defendant may still raise on appeal the fact that an information failed to set forth each essential element of the crime. *Nelson v. State*, 167 Neb. 575, 94 N.W.2d 1 (1959).

Those facts and information establish that the defendant, through a corporation which he and his wife owned and controlled, bought a home in Lancaster County, Nebraska, on May 10, 1982. As part of that transaction, a note and mortgage on that property, dated the same day in the amount of $96,000, were given to the seller. On May 11, 1982, this same corporation of the defendant's executed a note and mortgage to Lincoln Savings Company in an unspecified amount on the identical property.

On July 20, 1983, defendant, through his corporation, obtained a loan of $160,000 from Lincoln Savings Company, which was secured by a note and mortgage on the above-mentioned real estate. Also, on July 20, 1983, defendant's corporation borrowed $8,722.49 from Lincoln Savings Company, as evidenced by an unsecured note. On that same day Lincoln Savings Company in effect sold $100,000 of the one note to Northeast Savings Investment Company. At all times referred to, the defendant was president and a board member of Lincoln Savings Company, an industrial loan and investment company as defined by Neb. Rev. Stat. ch. 8, art. 4 (Reissue 1983).

Section 8-409.01 provides in part as follows:

> No director, officer, or employee of an industrial loan and investment company . . . shall borrow any of the funds of the industrial loan and investment company, directly or indirectly, without first having secured the approval of the board of directors of such industrial loan and investment company. . . . The amount of any loan shall be limited as provided in sections 8-409 and 8-409.02.

Section 8-409.02(3) permits an officer or employee to borrow from the funds of the industrial loan and investment company "[s]ixty thousand dollars or less if at the time the loan is made it is secured by a first lien on a dwelling which is to be owned by such officer or employee and used by him or her as a residence."

The defendant's first assignment of error relates to the absence of an allegation in the information that the particular loans were made without approval of the board of directors as set out in § 8-409.01. As a matter of fact, the defendant had received such approval for one loan in an unspecified amount on May 10, 1982, recorded as a mortgage on his residence on May 11. Thus, argues the defendant, the information failed to allege an essential element of the crime, i.e., lack of board approval.

However, the defendant overlooks the $60,000 limitation on any type of loan, whether approved or not, as specified in § 8-409.02. That section and § 8-409.01 are in pari materia and must be construed together in order to give meaning to the

provisions of both. *SID No. 1 v. County of Adams*, 209 Neb. 108, 306 N.W.2d 584 (1981). Also, the court will avoid constructions which lead to absurd or unjust results. *In re Boundaries of McCook P.P. Dist.*, 217 Neb. 11, 347 N.W.2d 554 (1984).

Although § 8-409.01 seems to permit "insider" loans with board approval, when read together with § 8-409.02 it is abundantly clear that in any event such a loan in excess of $60,000, even with board approval, is unlawful. An information questioned for the first time on appeal must be held sufficient unless so defective that by no construction can it be said to charge the offense for which the accused was convicted. *Nelson v. State*, 167 Neb. 575, 94 N.W.2d 1 (1959). The first assignment of error is without merit.

The factual basis is also sufficient as presented by the prosecution at the arraignment and reinforced by the presentence investigation. Together, they established that the defendant obtained a loan, with board approval, but in excess of the statutory limit for one loan, and a loan of $8,722.49 with no board approval. The fact that the $160,000 loan was later reduced to the statutory maximum by sale of a portion of it to Northeast Savings does not erase the violation. A factual basis for a plea of guilty may be established by inquiry of the prosecution, interrogation of the defendant, or examination of the presentence report. *State v. Jones*, 214 Neb. 145, 332 N.W.2d 702 (1983).

Finally, with regard to the claimed excessiveness of the sentence, the general rule is that a sentence imposed within the statutory limits will not be disturbed on appeal unless the trial court abused its discretion. *State v. Ruzicka*, 218 Neb. 594, 357 N.W.2d 457 (1984); *State v. Gillette*, 218 Neb. 672, 357 N.W.2d 472 (1984).

An examination of the presentence investigation report discloses facts which possibly could support additional charges. As stated in that report, "The examination of Lincoln Savings Company from 8-4-82 to 8-9-82 revealed $287,347 in loans to family members of President Duane L. Bargen. . . . 'This volume of loans represents 85.9% of total equity, capital . . . .' "

In another portion of the presentence report, an employee of

Lincoln Savings Company specifically recalled a loan of $50,000 plus, not included in the above figure, made to a different family member who simply turned the check over to the defendant. This suggests that the offense of which the defendant was convicted may only have been the "tip of the iceberg."

The sentencing judge properly may consider information contained in a presentence report in imposing sentence. Such judge has broad discretion as to the source and type of information which may be used to assist in determining the kind and extent of punishment to be imposed. *State v. Porter*, 209 Neb. 722, 310 N.W.2d 926 (1981). There was no abuse of discretion by the trial court in the imposition of the sentence in this case.

The judgment and sentence of the district court are affirmed.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V. JOHN L. AUSTIN, APPELLANT.

363 N.W.2d 397

Filed March 1, 1985. No. 84-663.

1. **Criminal Law: Constitutional Law: Right to Counsel.** The sixth and fourteenth amendments to the U.S. Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.
2. **Ordinances: Judicial Notice: Appeal and Error.** The Nebraska Supreme Court will not take judicial notice of a municipal ordinance which does not appear in the record.

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

Ronald Rosenberg of Rosenberg Law Offices, for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

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

PER CURIAM.

On March 27, 1984, the Lincoln Police Department issued two complaints to the appellant, John L. Austin. The first complaint charged Austin with negligent driving, in violation of Lincoln Mun. Code § 10.32.220 (1984). The second complaint charged Austin with opposing, hindering, delaying, and interrupting a police officer in making an arrest, in violation of Lincoln Mun. Code § 9.12.040 (1984). Austin was arraigned on both complaints the following morning and entered pleas of not guilty to both charges. On April 16, 1984, following trial, Austin, who appeared pro se, was convicted and was fined $100 on each count. On appeal to the district court for Lancaster County, Nebraska, the judgments were affirmed, but the fines were reduced to $50 on each count. Austin now appeals to this court, maintaining that the district court erred in failing to find that Austin's constitutional rights were violated when he was not afforded an opportunity to have counsel appointed or did not knowingly and intelligently waive counsel. Austin also argues that the district court erred in failing to hold that he had been denied his statutory right to court-appointed counsel pursuant to Neb. Rev. Stat. § 29-1804.05 (Reissue 1979). We believe that both claims are without merit, and affirm.

The record in this case is clear that Austin was not imprisoned for any period of time but, rather, was only fined. In *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), the U.S. Supreme Court was presented with a case nearly identical to the case at bar. In *Scott* the petitioner, an indigent without appointed counsel, was convicted of theft and fined $50. The conviction was affirmed by the Supreme Court of Illinois, despite Scott's contention that the sixth and fourteenth amendments to the Constitution of the United States required that Illinois provide trial counsel to him at no expense. Basically, Scott argued that a line of U.S. Supreme Court cases culminating in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), required state provision of counsel whenever imprisonment was an authorized penalty, whether applied or not. In rejecting Scott's contention and affirming the judgment of the Supreme Court of Illinois, the U.S. Supreme Court said:

> Although the intentions of the *Argersinger* Court are not unmistakably clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States. We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.

*Scott v. Illinois, supra* at 373-74.

In view of the fact that the record here makes it clear that no jail sentence was actually imposed, there was no requirement to appoint counsel under the sixth and fourteenth amendments to the Constitution of the United States.

Austin further argues that even if he is not entitled to counsel under the sixth and fourteenth amendments to the Constitution of the United States, he was entitled to counsel under the provisions of § 29-1804.05, which provides:

> At a felony defendant's first appearance before a court without retained counsel, the court shall advise him of his right to court-appointed counsel if he is indigent.
>
> If he asserts his indigency, the court shall make a reasonable inquiry to determine his financial condition, and may require him to execute an affidavit of his indigency. If the court determines him to be indigent, it shall formally appoint the public defender to represent him in all proceedings before the court, and shall make a notation of such appointment and appearances of the public defender upon the felony complaint. *The same*

> *procedure shall be followed by the court in misdemeanor cases punishable by imprisonment.*

(Emphasis supplied.)

The difficulty with Austin's argument is that the record simply fails to support his claim. Although Austin was represented by counsel in the district court, neither ordinance of the city of Lincoln was offered in evidence, nor was the court asked to take judicial notice of the ordinances. The record in this case is silent as to which, if either, of the charges filed against Austin was punishable by imprisonment. All that we know from the record before us is that he was fined. This court will not take judicial notice of municipal ordinances not properly made a part of the record. As stated in *State v. Long*, 206 Neb. 446, 448, 293 N.W.2d 391, 393 (1980):

> The charges filed against the defendant are a part of the record, but the ordinances involved in the prosecution are not contained in the record. This court will not take judicial notice of a municipal ordinance which does not appear in the record. *State v. Korf*, 201 Neb. 64, 266 N.W.2d 86 (1978).

In order for us to determine that the provisions of § 29-1804.05 are applicable, we would have to assume that either of the charges was punishable by imprisonment. We refuse to make that assumption. Absent introduction of the ordinances into evidence, the provisions of § 29-1804.05 are wholly inapplicable. For these reasons we find that the decision of the district court was in all respects correct and should be affirmed.

AFFIRMED.

# LEWIS G. ALLEN, APPELLEE AND CROSS-APPELLANT, V. IBP, INC., FORMERLY IOWA BEEF PROCESSORS, INC., APPELLANT AND CROSS-APPELLEE.

363 N.W.2d 520

Filed March 8, 1985. No. 83-771.

1. **Workmen's Compensation: Limitations of Actions.** Where compensation has been commuted by agreement and paid in a lump sum without court approval, Neb. Rev. Stat. § 48-139 (Reissue 1984), such a payment is not final; it is nothing more than an advance payment; and the statute of limitations, Neb. Rev. Stat. § 48-137 (Reissue 1984), does not begin to run until the last periodic payment would have been paid, had payments been made in installments.
2. **Workmen's Compensation: Appeal and Error.** The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong.
3. _____: _____. In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom.
4. **Workmen's Compensation: Interest: Attorney Fees: Statutes.** The assessment of interest pursuant to Neb. Rev. Stat. § 48-125(2) (Reissue 1984), like the allowance of attorney fees, is a remedy affecting procedure only, and the same may be awarded on a claim that arose before 1983 Neb. Laws, L.B. 18, became law.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part remanded with directions.

Wayne E. Boyd of Smith, Smith & Boyd, for appellant.

Diane B. Carlson and Walter E. Zink II of Baylor, Evnen, Curtiss, Grimit & Witt, and Whicher, Ford & Gurdin, for appellee.

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

COLWELL, D.J., Retired.

This action was brought by appellee, Lewis Allen (hereinafter Allen), to recover workmen's compensation benefits from the appellant, IBP, Inc. (hereinafter IBP). A single judge of the Workmen's Compensation Court dismissed Allen's petition. On rehearing before the three-judge panel, he was awarded benefits for temporary total disability,

rehabilitation services, and medical expenses.

IBP appeals, discussing two assignments of error: (1) Allen's petition was barred by the statute of limitations; and (2) Allen did not sustain an accidental injury arising out of and in the course of his employment, causing the complained-of injuries.

Allen injured his back on January 16, 1979, while carrying a pan of meat in performance of his employment duties. He was paid temporary total disability for 12 weeks by IBP, and on October 25, 1979, IBP paid him a $2,223.26 lump sum payment representing 288 weeks of 5 percent permanent partial disability. No final settlement or release was ever executed, and the lump sum payment was not approved by any court. On February 19, April 19, and May 28, 1982, Allen suffered further injuries while in the employ of IBP. He has been unable to work since the May 28 accident. He filed his petition in the Workmen's Compensation Court on October 25, 1982.

Evidence in the rehearing showed that Allen had been diagnosed as having Paget's disease, severe arthritis, and a degenerative disk disease. There was also evidence that Allen's employment had contributed to the degenerative disk condition and had aggravated the disk condition and the arthritis.

The three-judge panel of the Workmen's Compensation Court found that Allen had suffered compensable injuries on January 16, 1979, and on February 19, April 19, and May 28, 1982. It also found that he was temporarily totally disabled from May 29, 1982, and will remain so for an indefinite period.

> [T]he findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong.
>
> In testing the sufficiency of evidence to support findings of fact made by the Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom.

*Hyatt v. Kay Windsor, Inc.*, 198 Neb. 580, 584, 254 N.W.2d 92, 95 (1977).

The first assignment concerns Neb. Rev. Stat. § 48-137

(Reissue 1984), which reads:

> In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within two years after the accident, one of the parties shall have filed a petition as provided in section 48-173. . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years *from the time of the making of the last payment.*

(Emphasis supplied.)

Under the facts here, when did the statute of limitations begin to run? IBP claims that the time was October 25, 1979, when the lump sum payment was made. Allen argues that, absent court approval, the time begins to run when the last of the 288 weekly payments would have been paid had they been paid periodically; that being the statutory time "from the time of the making of the last payment." We agree with Allen.

Neb. Rev. Stat. § 48-139 (Reissue 1984) provides in part:

> Whenever an injured employee or his dependents and the employer agree that the amounts of compensation due as periodic payments for death, permanent disability or claimed permanent disability, under this act, shall be commuted to one or more lump-sum payments, such settlement or agreement therefor *shall* be submitted to the Nebraska Workmen's Compensation Court . . . .

(Emphasis supplied.)

Neb. Rev. Stat. § 48-140 (Reissue 1984) provides:

> All settlements by agreement of the parties with the approval of the compensation court and all awards of compensation made by the court, except those amounts payable periodically for six months or more, shall be final and not subject to readjustment; *Provided, no settlement shall be final unless it be in conformity with the provisions of this act and approval by and a finding by the compensation court and the district court or any appellate court.*

(Emphasis supplied.)

"A commuted award extends over the full period originally

covered by the same." (Syllabus of the court.) *Peterson v. Borden's Produce Co.*, 125 Neb. 404, 250 N.W. 240 (1933).

In *Dufrene v. Aetna Casualty & Surety Company*, 298 So. 2d 724 (La. 1974), the Louisiana court held that a $3,500 lump sum payment for 100 weeks of $35 periodic payments was only an advance payment, since it was not first approved by the court as required by law.

In *Southern Cotton Oil Co. v. Friar*, 247 Ark. 98, 444 S.W.2d 556 (1969), the employee had received two lump sum payments covering a 150-week period. Three years after the second payment, but less than 2 years after the 150-week period had expired, the employee filed a claim for additional compensation. The Arkansas court held that "the statute only commences at the date the last payment would have been due if the compensation had been paid in installments . . . ." *Id.* at 101, 444 S.W.2d at 558. See, also, *University v. Ind. Comm.*, 138 Colo. 505, 335 P.2d 292 (1959).

> Although the authorities are not in complete agreement, most of the courts which have passed on this question have held that where compensation is commutated and paid in a lump sum, payment so made at the time of commutation does not constitute a "last" payment so as to start the running of the statutory period within which review may be sought; the statutory period, in such a case, does not run against a review application until the time when the payments on the original award or agreement would have run out had they continued to have been paid in instalments. As a reason for such rule, it has been pointed out that commutation does not in and of itself affect the merits as to whether in a particular case further compensation may or may not be attempted to be secured, *but constitutes nothing more nor less than an advance payment.*

(Emphasis supplied.) Annot., 165 A.L.R. 9, 59-60 (1946).

While the A.L.R. citation referred to reopening or review of awards, the same rationale applies to original applications for compensation. Where compensation has been commuted by agreement and paid in a lump sum without court approval, § 48-139, such a payment is not final; it is nothing more than an

advance payment, and the statute of limitations, § 48-137, does not begin to run until the last periodic payment would have been paid, had payments been made in installments. To hold otherwise would, as here, permit employers to thwart claims of employees by imposing finality contrary to applicable statutes. Further, such a rule is in keeping with the general rule, "This jurisdiction has repeatedly held that the Workmen's Compensation Act is one of general interest, not only to the workman and his employer, but as well to the state and it should be so construed that technical refinements of interpretation will not be permitted to defeat it." *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 360, 258 N.W.2d 922, 926 (1977).

There is no merit to IBP's claim that there was no proof of an accident in the course of Allen's employment. Allen was carrying a pan of meat, bending under a conveyorlike machine, when he suffered the January 1979 accident. In February of 1982 he was twisting a side of beef when he first felt the pain. Those injuries required Allen to discontinue work and seek medical treatment. See *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982).

IBP also contends that there is insufficient evidence to support a finding that Allen's disability was caused by a work-related accident. Rather, it would have us find that the disability is the result of Allen's preexisting arthritis and Paget's disease. While it is clear that Allen's preexisting conditions contributed to his disability, it is also adduced from the testimony of the doctors that the accidents contributed to the disability. "It is sufficient to show that the injury and preexisting disease combined to produce disability, and it is not necessary to prove that the injury accelerated or aggravated the disease, in order to satisfy the requirement of the statute that the disability arose out of the employment." *Hagler v. Jensen*, 173 Neb. 699, 703, 114 N.W.2d 755, 758 (1962); *Tilghman v. Mills*, 169 Neb. 665, 100 N.W.2d 739 (1960). The evidence clearly supports the findings and the award made by the three-judge panel.

The final issues are raised by Allen's cross-appeal claiming that his award on rehearing should have included a reasonable attorney fee and interest as provided by Neb. Rev. Stat.

§ 48-125 (Reissue 1984), as amended by 1983 Neb. Laws, L.B. 18, effective August 26, 1983, which includes the following:

> (1) . . . If the employer files an application for a rehearing before the compensation court from an award of a judge of the compensation court and fails to obtain any reduction in the amount of such award, the compensation court *shall* allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, and the Supreme Court *shall* in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in that court. *If the employee files an application for a rehearing before the compensation court from an order of a judge of the compensation court denying an award and obtains an award* or if the employee files an application for a rehearing before the compensation court from an award of a judge of the compensation court where the amount of compensation due is disputed and obtains an increase in the amount of such award, *the compensation court may allow the employee a reasonable attorney's fee to be taxed as costs against the employer for such rehearing, and the Supreme Court may in like manner allow the employee a reasonable sum as attorney's fees for the proceedings in such court.* A reasonable attorney's fee allowed pursuant to this section shall not affect or diminish the amount of the award.
>
> (2) *When an attorney's fee is allowed pursuant to this section, there shall further be assessed against the employer an amount of interest on the final award obtained . . . .*

(Emphasis supplied.)

Prior to the effective date of the L.B. 18 amendment, Allen, as appellant, was not entitled to either attorney fees or interest. § 48-125 (Reissue 1978); *Savage v. Hensel Phelps Constr. Co.*, 208 Neb. 676, 305 N.W.2d 375 (1981).

It was recently held in *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984), that the 1983 amendment to § 48-125 (L.B. 18) providing for the allowance of attorney fees is a remedy which affects procedure only, and such fees, when allowed, may be taxed as an item of costs when awarding

compensation on a claim that arose before the amendatory act was passed.

The facts here are generally similar to *Smith*; both claims arose before L.B. 18 became law. Both awards were granted after L.B. 18 became law. We discuss two differences that are without distinction: (1) Allen's hearing was held April 19, 1983, before L.B. 18 became law; in *Smith* the hearing was held after the effective date of L.B. 18; and (2) *Smith* relates only to attorney fees; Allen claims both attorney fees and interest.

"A trial . . . is: 'The examination before a competent tribunal . . . of the facts or law put in issue in a cause, for the purpose of determining such issue.' " *Otteman v. Interstate Fire & Cas. Co., Inc.*, 171 Neb. 148, 153, 105 N.W.2d 583, 586 (1960). A judgment is the court's final consideration and determination of the respective rights and obligations of the parties, as those rights and obligations presently exist. See, 46 Am. Jur. 2d *Judgments* § 1 (1969); *Kometscher v. Wade*, 177 Neb. 299, 128 N.W.2d 781 (1964).

> "[T]he recovery of costs is governed by the statute in force at the time the right to have them taxed accrued. In other words, *the right to costs depends upon the statutes in force at the termination of the action*, and not upon those in force when it was commenced." . . .
>
> The conclusion is that the statute in force when attorney's fees are properly and *timely allowed and taxed* in the district and supreme courts controls, and not the statute in force when proceedings are commenced before the compensation commissioner or the compensation court.

(Emphasis supplied.) *Solomon v. A. W. Farney, Inc.*, 136 Neb. 338, 348, 286 N.W. 254, 260 (1939).

From these authorities we conclude that it is the time that the compensation award was entered and not the hearing date that controls the application of the *Smith* rule, even though this language in *Smith* appears at 655, 358 N.W.2d at 215: "The question then becomes, Was this a substantive or procedural change so as to make the critical effective date the day of the accident or the day of the hearing?" We interpret this reference to a "hearing" to mean judgment, since it is followed by this citation from *Western Newspaper Union v. Dee*, 108 Neb. 303,

187 N.W. 919 (1922): " '[T]he attorney's fee relates to the remedy and may be taxed as an item of costs in entering *judgment* . . . .' " (Emphasis supplied.) 218 Neb. at 656, 358 N.W.2d at 215.

The assessment of interest on the final award as provided in § 48-125(2) is conditioned upon an allowance of attorney fees; further, the right to interest depends upon the statute in force at the time attorney fees, if any, are allowed, and the time that the compensation award is made. The assessment of interest pursuant to § 48-125(2), like the allowance of attorney fees, is a remedy affecting procedure only, and the same may be awarded on a claim that arose before L.B. 18 became law.

Allen's claim for attorney fees and interest was first presented in this court. The record is silent concerning either an application for such allowances or any consideration given by the three-judge hearing panel. We may assume that neither occurred, inasmuch as at the time of the rehearing, April 19, 1983, L.B. 18 not only was not effective, it had not even been as yet signed by the Governor. (1983 Neb. Laws, 88th Leg., 1st Sess. 165.) Additionally, our opinion in *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984), which provided the authority to interpret that law as applicable in an instance such as this, was not released until November 9, 1984.

Because of *Smith*, retrospectively considered, the three-judge hearing panel did in fact possess the discretion to award the employee attorney fees and interest. Although we do not mean to suggest that in every instance when a court or other tribunal possesses such discretion, it must either make such an award or explain why it does not do so, we believe because of the situation as it exists in this case, it should be given the opportunity to examine and pass on that issue. Therefore, we remand the case to the compensation court for that purpose.

Appellee is allowed $750 as attorney fees in this court.

AFFIRMED IN PART, AND IN PART
REMANDED WITH DIRECTIONS.

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

I concur in the result generally reached by the majority. Because, however, of reasons more particularly set out in my concurrence in *Smith v. Fremont Contract Carriers*, 218 Neb.

652, 358 N.W.2d 211 (1984), I dissent from that portion of the opinion which holds that the allowance of attorney fees and interest is a procedural matter only and therefore may be allowable in this case.

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ROBERT E. SMITH, APPELLANT AND CROSS-APPELLEE, V. JAMES R. GANZ, SR., APPELLEE AND CROSS-APPELLANT.

363 N.W.2d 526

Filed March 8, 1985. No. 83-865.

1. **Attorney and Client: Compromise and Settlement.** In civil cases it is for the client to decide whether he will accept a settlement offer.
2. **Attorney and Client.** A lawyer is required to exercise independent professional judgment on behalf of a client and should represent a client zealously within the bounds of the law.
3. _____. In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own.
4. **Divorce: Compromise and Settlement: Attorney and Client.** Failure to communicate an offer of settlement in a dissolution action cannot be made the basis of a claimed act of professional negligence absent evidence that the proposed settlement was not unconscionable and would therefore likely have been approved by the district court.
5. **Attorney and Client: Limitations of Actions: Damages: Negligence: Breach of Warranty.** Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within 2 years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such 2-year period, then the action may be commenced within 1 year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. Neb. Rev. Stat. § 25-222 (Reissue 1979).
6. **Property Division.** While there is no precise mathematical formula to be used in determining the fairness of a property division, generally speaking, awards in marriage dissolution proceedings vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case.
7. **Contracts: Fraud.** In the absence of fraud one who signs an instrument without reading it, when he can read and has an opportunity to do so, cannot avoid the

effect of his signature merely because he was not informed of the contents of the instrument.

Appeal from the District Court for Buffalo County: DeWayne Wolf, Judge. Reversed and remanded with directions to dismiss.

Susan Jacobs of Healey, Brown, Wieland, Kluender, Atwood & Jacobs, for appellant.

John A. Wagoner, for appellee.

Krivosha, C.J., Boslaugh, White, Hastings, Caporale, Shanahan, and Grant, JJ.

White, J.

Plaintiff, Robert E. Smith, brought suit in district court against the defendant, James R. Ganz, Sr., his former lawyer in a marriage dissolution action, for damages alleged to have been caused by the professional negligence of the defendant during that representation. The jury found for the plaintiff and awarded damages of $90,000. In response to the defendant's motion for judgment notwithstanding the verdict or for a new trial, the trial court ordered that the defendant's motion for new trial would be granted unless the plaintiff consented to a remittitur reducing the award to $65,000. The plaintiff appeals to this court, assigning as error the trial court's refusal to accept the award of damages returned by the jury and its ordering the remittitur. On cross-appeal the defendant assigns as error the district court's overruling of his demurrer ore tenus alleging that the plaintiff's cause of action was barred by Neb. Rev. Stat. § 25-222 (Reissue 1979). We reverse and remand with instructions to dismiss the petition.

An understanding of the facts surrounding the dissolution of the marriage of plaintiff from his former wife, Patricia A. Smith, is necessary. The Smiths were married on August 21, 1960. At the time of the marriage neither party possessed significant amounts of personal property or any real property. Three children were born of the marriage. Patricia Smith worked outside the home during the greater part of the 17-year marriage, excluding a 7-year period devoted to the care of the children. At all times she assisted in farmwork and kept a home

for the parties and the children.

A decree of divorce was entered on May 10, 1977. It is with respect to the property settlement incorporated in the decree that the alleged malpractice is addressed. A property statement reflects a net marital estate of approximately $147,000.

Defendant Ganz is a practicing lawyer in Gibbon, Nebraska, and was acquainted with the Smiths. The Smiths contacted him in his professional capacity. Ganz advised the Smiths that he could not represent both parties in their marital dispute. Patricia Smith secured other counsel and ultimately filed an action for dissolution. Defendant Ganz continued to represent Robert Smith. Ultimately, the parties agreed to a property settlement. Patricia Smith received as her total share of the personal property one-half of the household furnishings, the sum of $6,900 in cash, and a 1975 Corvette automobile. She waived all claim to alimony. Concerning the 188 acres of land owned by the parties, the title of which was held in joint tenancy, each retained a one-half ownership, but as tenants in common.

Sometime in 1981 Patricia Smith consulted her lawyer about a yearly argument with Robert concerning his failure or refusal to supply Patricia with one-half of a beef and a dressed hog, which Robert had agreed to do during the time Patricia had custody of at least one of the children. Much to Robert's consternation, Patricia's reaction was to file an action in partition seeking to sell the farm held as tenants in common. Following the entry of a decree in partition, the parties negotiated a settlement, and Robert agreed to pay Patricia the sum of $110,000 for her one-half interest. Robert also paid certain attorney fees and costs incident to the partition action.

In the instant case Smith alleges two specific acts of negligence against defendant Ganz: (1) That he failed to communicate an offer of settlement made by Patricia's attorney in which she would have accepted the sum of $20,000 as a property settlement, $5,000 in alimony, and waived any interest in the parties' farm; and (2) That Ganz failed to explain to Robert that as an incident of ownership of real estate as tenants in common, cotenants each have a right of partition. The plaintiff's theory, apparently, is that if he had known of the

possibility of a partition action and of the proposed settlement offer at the time of the divorce, he would have accepted the settlement offer.

Upon a thorough review of the record, we find the defendant's assigned error on cross-appeal to be dispositive of the case. We were not favored by counsel with a copy of the court's instructions to the jury, and therefore cannot tell in what form the defense of the statute of limitations was submitted to the jury or, indeed, if it was at all. However, we do know from the record that although the defendant's demurrer ore tenus was overruled by the court, the substance of that demurrer, the statute of limitations, was preserved in an appropriate amendment to the defendant's answer. Therefore, we are not compelled to discuss the function of that pleading but may pass to the ultimate issue. That issue is simply whether, as a matter of law, the plaintiff's cause of action is barred by the statute of limitations.

Section 25-222 provides in pertinent part:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . .

As we stated in *Interholzinger v. Estate of Dent*, 214 Neb. 264, 269, 333 N.W.2d 895, 899 (1983), the relevant questions concerning any action under this statute are: "Was there an act of malpractice? If so, when did it occur and when did plaintiffs' cause of action accrue?"

Turning then to plaintiff's first allegation of malpractice, the defendant's alleged failure to communicate an offer of settlement, we observe that the Code of Professional Responsibility, in demarcating the boundaries of an attorney's

authority, provides that typically, "in civil cases, it is for the client to decide whether he will accept a settlement offer." Canon 7, EC 7-7. "A lawyer is required to exercise independent professional judgment on behalf of a client and should represent a client zealously within the bounds of the law. See Canons 5 and 7, Code of Professional Responsibility." *State ex rel. Nebraska State Bar Assn. v. Gobel*, 201 Neb. 586, 589, 271 N.W.2d 41, 42 (1978). EC 7-7 also notes that "[i]n certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own."

In dissolution cases property settlement agreements are highly favored and are binding on the court unless unconscionable. *Dobesh v. Dobesh*, 216 Neb. 196, 342 N.W.2d 669 (1984). Any attorney practicing in the area of family law, such as the defendant, would be well aware of the guidelines set by this court in determining the fairness of a property settlement.

> While there is no precise mathematical formula to be used in determining the fairness of a property division, " ' "[g]enerally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved depending upon the facts and circumstances of the particular case." ' " *Martin v. Martin*, 215 Neb. 508, 510, 339 N.W.2d 754, 756 (1983).

*Rockwood v. Rockwood, ante* p. 21, 22, 360 N.W.2d 497, 499 (1985).

In the present case, according to the testimony of the plaintiff's own expert witness, taking into consideration the size of the marital estate, the proposed settlement offer of $25,000 might border on the unconscionable. We find, therefore, that the alleged failure to communicate an offer of settlement in a dissolution action cannot be made the basis of a claimed act of professional negligence absent evidence that the proposed settlement was not unconscionable and would therefore likely have been approved by the district court. See Neb. Rev. Stat. § 42-366 (Reissue 1984).

In regard to the plaintiff's second allegation of professional negligence, he asserts that following the change in ownership of

the property, pursuant to the property settlement agreement reached by the parties, he was of the belief that Patricia could only devise the property upon her death to the parties' three children and that he was entitled to all rentals of the farm while so owned as tenants in common. He further asserts that he had no idea that Patricia could partition the land, until she in fact filed such an action. Smith, therefore, argues that since the present action against the defendant Ganz was commenced within 1 year after his "discovery" of Ganz' alleged malpractice, his action is not barred by the statute of limitations.

As we observed in *Interholzinger v. Estate of Dent, supra*, "Under our law, in the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument." 214 Neb. at 271, 333 N.W.2d at 899.

We conclude that appellant knew from the date the property settlement was signed that he was named as an owner of an undivided one-half interest of the real estate. To hold that he was not apprised of facts that would have led him to discover the alleged act of negligence, i.e., to inquire of the rights of a cotenant, is to elevate willful ignorance to a virtue. We see no justification to make an exception from the long held rule that the record claim of ownership is notice to the world to be aware of the claim and to require at one's peril to inform oneself of the extent of that claim.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

# TERRY W. TANK ET AL., APPELLANTS, V. STEVEN M. PETERSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF DONALD E. PETERSON, DECEASED, ET AL., APPELLEES.

363 N.W.2d 530

Filed March 8, 1985. No. 83-913.

1. **Directed Verdict.** In reviewing the sustaining of a motion for a directed verdict, the evidence will be construed most strictly against the moving party and in favor of the party against whom the verdict was granted.
2. **Evidence: Appeal and Error.** The trial court's ruling considering the acceptance or rejection of evidence will not be reversed unless there is shown to be a clear abuse of discretion.
3. **Expert Witnesses.** Expert testimony 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 and conjecture.
4. **Directed Verdict.** A directed verdict is proper only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion.
5. **Aviation: Negligence.** Violations of Federal Aviation Administration regulations do not constitute negligence per se, but are evidence of negligence which may be taken into consideration along with all other evidence.
6. **Negligence.** Plaintiffs are not required to eliminate all possibilities of how an accident may have happened; they are required only to establish a factual basis from which to infer negligence on the part of the defendant.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded for a new trial.

James R. Welsh and E. Terry Sibbernsen of Welsh, Sibbernsen & Roach, for appellants.

William G. Line and John F. Kerrigan of Kerrigan, Line & Martin, for appellees.

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

WHITE, J.

This is a wrongful death action arising out of an airplane crash. The suits were brought by the personal representatives of the estate of Willis H. and Marva Lea Tank, both deceased, against the personal representative of the estate of Donald E. Peterson, deceased, a partnership doing business as Don Peterson & Assoc. Steel Bldg. Co., and Douglas F. Steenblock,

a partner in the company.

This case was previously before this court on a different question. See *Tank v. Peterson*, 214 Neb. 34, 332 N.W.2d 669 (1983).

After the plaintiffs had presented their case in chief, the trial court sustained the respective motions for directed verdict on behalf of the partnership and Steenblock on the grounds that "the plaintiff's evidence did not show the fatal trip was a business one." No errors are assigned concerning this ruling, and, as such, it is not an issue in this appeal. The trial court also sustained Steven Peterson's motion to strike the testimony of three expert witnesses of the plaintiffs. The court then sustained Peterson's motion for directed verdict. It is the propriety of these latter two rulings which constitutes the issues in this appeal.

The record reveals that on November 25, 1979, the plaintiffs' decedents, Willis H. and Marva Lea Tank, were passengers in a 1967 twin-engine Piper Aztec aircraft allegedly piloted by Donald E. Peterson. The plane was last seen at approximately 7 p.m. on that day departing from runway 32 at the Columbus, Nebraska, airport. The wreckage of the plane was discovered the next morning approximately 2 miles northeast of the Columbus airport. There were no eyewitnesses to the crash. All persons aboard were killed.

In plaintiffs' second amended petition they alleged 19 specific acts of negligent conduct of Donald Peterson as the direct and proximate cause of the deaths of Willis and Marva Tank.

The facts as to the alleged cause of the crash are contained primarily in the testimony of the plaintiffs' three expert witnesses. By order of the trial court this testimony was struck on the basis that "the opinions of the witnesses were based upon improper and invalid assumptions and considerations, upon facts not in evidence and which were beyond the knowledge and expertise of the witness; and that the opinions and testimony were so speculative and conjectural as to have no probative value."

We set forth an extended version of the facts, keeping in mind that in reviewing the sustaining of a motion for a directed

verdict, the evidence will be construed most strictly against the moving party and in favor of the party against whom the verdict was granted. *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984).

On the evening of November 25, 1979, the plaintiffs' decedents were passengers on an airplane allegedly piloted by Donald E. Peterson. At approximately 7 p.m. on that evening, the twin-engine 1967 Piper Aztec airplane departed runway 32 of the Columbus airport. George Poullos, who arrived at the airport when the Piper departed, testified by way of deposition that he had just flown into the Columbus airport from Greeley, Colorado, approximately 20 minutes prior to the Piper's departure. Poullos heard the Piper depart approximately 3 to 5 minutes after Peterson started the engines. Poullos, an experienced pilot, testified that in his opinion this was insufficient time for Peterson to "do a complete run-up, cockpit check and allow the engines to reach normal operating temperatures."

The Piper, having failed to reach its supposed destination of Fremont, Nebraska, was reported missing in the early morning hours of November 26, 1979. A search and rescue party was formed in order to locate the airplane and its occupants. Gerald Lee Eskilsen and two other friends departed from the Fremont airport in search of the plane. After unsuccessful attempts in locating the plane between the Columbus and Fremont airports, the search plane made a low pass over runway 32. The search plane then made a right-hand turn toward Fremont, as the occupants had assumed Peterson would have done. As the search plane was in the process of the right-hand turn, the wreckage of the Piper was observed. All six occupants of the Piper were dead.

The National Transportation Safety Board (NTSB) investigative report revealed that the wreckage was found in an open field approximately 2 miles northeast of the Columbus airport. The plane crashed at a 60° nosedown position. Severe disintegration occurred at the point of initial impact, and pieces of debris were scattered over about a 150-foot diameter area. Upon a later investigation the plane's engines were disassembled and inspected. The spark plugs were clean and

serviceable, and the magnetos were capable of normal operation. Compression was found on all cylinders, and the power drives for the two engines were intact to the accessory sections. The vacuum pump drives on both engines were also intact and the pumps free to operate. In short, the investigation failed to disclose any evidence of an aircraft in flight malfunction or failure.

The NTSB report indicated that at 6:40 p.m. on November 25, 1979, surface observations at the Columbus airport showed an estimated cloud ceiling of 1,000 feet broken, 5,000 feet overcast, visibility 7 miles, temperature 34° F, dewpoint 26° F, wind 333° at 10 knots, gusting to 15. Several witnesses stated that there were misty conditions in Columbus at or about the time the Piper departed. Poullos testified that when he landed at the Columbus airport, it was very hazy, visibility was restricted, and there were areas of scud. Poullos defined scud as a localized area of clouds lying below the rest of the clouds.

The NTSB report also indicated that although an occupant of the Piper had attempted to obtain weather briefing from the Lincoln flight service station, no weather briefing was obtained because of broken radio transmissions. Peterson did not file an instrument flight rules (IFR) flight plan.

Concerning Peterson's qualifications to fly an aircraft, the NTSB report revealed that Peterson possessed a private pilot's license in which he was certified to fly single-engine and multiengine planes. The report also revealed that at one point Peterson had obtained his IFR rating. According to Peterson's pilot logbooks, he had accumulated 764 hours of total pilot experience, of which 390 hours were in the Piper. Peterson's logbooks showed 38 hours of total night flying experience, of which 1 hour and 15 minutes was in the previous 12 months. Peterson had logged a total of 10 minutes' actual instrument time in the previous 12 months. His most recent biennial flight review was dated July 7, 1977. Peterson flew an average of only 3 hours per month the year prior to the accident.

At the time the Piper departed from the airport, marginal visual flight rules (VFR) conditions existed. Poullos explained that marginal VFR conditions exist when the cloud ceiling is between 1,000 and 3,000 feet and visibility is between 3 to 5

miles. It was Poullos' belief that after the Piper was airborne Peterson initiated a right-hand turn even though the proper procedure would have been a left-hand turn. The record reveals the following:

> Q. [By Mr. Welsh] All right. Mr. Poullos, based upon your experience as a pilot and your experience in operating a Piper Aztec aircraft similar to the make and model being operated by Mr. Peterson on November 25th, 1979, and based upon your knowledge of the weather conditions as they existed in Columbus, Nebraska, on November 25th, 1979, at approximately 7:00 p.m., and further based upon your review of the NTSB report filed in connection with this accident, do you have an opinion you can state with a reasonable degree of aviation certainty as to what was the proximate cause of this accident which took place on November 25, 1979?
>
> A. It's strictly my opinion?
>
> MR. LINE: I will withdraw the objection I made at the time. You can go ahead.
>
> Q. Go ahead.
>
> A. Answer?
>
> Q. Sure.
>
> A. Based upon my experience I think spatial disorientation.
>
> Q. Okay. What do you mean by spatial disorientation?
>
> A. When you're flying VFR, the term VFR is an abbreviation for visual flight rules. You have to be legal and safe. You fly the aircraft by reference to the horizon. When you fly IFR, which is an abbreviation for instrument flight rules, you fly by reference to your instruments. When you don't have a visual — what's the phrase I want to use — When you don't have something that you can see to guide you visually, then you — obviously you have to use your instruments. The situation in Columbus is the big black hole. There's nothing to provide you with any — provide your senses with anything to use as a guide in flying. So, consequently, you have to go on instruments. The problem is that most pilots that are not trained suffer vertigo or spatial disorientation. They

> try to fly the aircraft by looking at instruments. They try to fly the aircraft with no middle ear clues as to what they're doing.
>
> So, with no visual reference whatsoever, and presuming that he did not believe his instruments, if he was looking at his instruments, I'm of the opinion he suffered vertigo, spatial disorientation.
>
> Maybe he thought the airplane was going one way and reacted the opposite direction from the reading. I did read where the aircraft impacted at a 60-degree back or 60-degree pitch down. If the aircraft stalled he perceived he was driving the stalled aircraft and it's not conceivable to me that he could physically push the aircraft into a 60-degree descent.
>
> Q. Okay.
>
> A. But, that's why it's just based on — especially the black hole. It's tough. It's very difficult. It's just about impossible to fly in that situation. It's almost impossible to fly in that situation VFR. You have to use your instruments. In that type of situation will tax some of the most proficient pilots.

The plaintiffs also called a Gary Blessing to help explain how the accident might have occurred. Blessing testified that the normal traffic pattern for an aircraft consists entirely of left-hand turns but that the Piper's point of impact was consistent with a right-hand turn. Blessing further opined that although it was possible that Peterson initiated a left-hand turn, it was not reasonable when considering the point of impact.

Blessing noted that Peterson violated several Federal Aviation Administration (FAA) regulations on the night of November 25, 1979. He testified that under an FAA regulation a pilot may not carry passengers between 1 hour after sunset and 1 hour before sunrise unless, within the preceding 90 days, he has made at least three night takeoffs and landings during that period. See 14 C.F.R. § 61.57 (1984). Blessing stated that the reason for this rule is that a pilot's depth perception changes at night for takeoffs and landings, and a pilot must be more skilled and proficient to fly safely at night.

Section 61.57 requires that no person may act as a pilot

unless, within the preceding 24 months, he has passed a flight review given to him by an appropriate certified instructor. The same regulation requires that no pilot may fly IFR, nor in weather conditions less than the minimum prescribed for VFR, unless the pilot has logged at least 6 hours of instrument time in the last 6 months. This must also include at least six instrument approaches. Another FAA regulation provides that no pilot may take off without first checking the weather. See 14 C.F.R. § 91.5 (1984).

Blessing stated that although Peterson was not legally obligated to fly IFR that night, a pilot with Peterson's limited experience and lack of currency should not have taken off from the airport in the first instance. Blessing testified that Peterson was "pretty much foolhardy to get in the airplane and even try it." He testified that Peterson completely disregarded the rules for licensing, keeping current, and maintaining proficiency.

It was Blessing's opinion, based on the NTSB report, Peterson's pilot logbooks, the depositions of the other expert witnesses, and his own training and experience, that upon taking off Peterson initiated a right-hand turn, suffered spatial disorientation, and, because of his lack of experience, lost control of the aircraft and literally drove the Piper into the ground.

It was Blessing's conclusion that a combination of numerous pilot errors, amounting to gross negligence, caused the accident.

Gregory Gorak, who also qualified as an expert witness, stated that the FAA regulations are the minimum requirements that a pilot must meet in order to fly safely. He stated that although it would have been legal to fly VFR at the time of the takeoff, a prudent pilot would have flown IFR or not at all. Gorak stated that Peterson operated the plane in a careless manner and that the cause of the accident was pilot error. The cause of the crash, in Gorak's opinion, was that Peterson

> in this climb-out encountered deteriorating weather conditions, probably entered the clouds, became spatially disoriented, really didn't know what the attitude of his aircraft was in relationship to the rest of the earth, and lost the airplane. . . . [Peterson] forgot all his training, which is

understandable simply because he refused to remain current in his training.

Gorak testified that spatial disorientation "happens most often at night to a VFR-type pilot. And it happens most often when pilots inadvertently enter clouds." He emphasized that training and frequent flying are needed to maintain proficiency in order to avoid the hazardous results of spatial disorientation. Gorak was of the opinion that because Peterson was not current in his instrument rating, not current in his night flight requirements, not current in his biennial review, and because Peterson had little flying experience in conditions similar to those existing the night of the fatal crash, Peterson was an unsafe pilot and was negligent in even attempting to depart the Columbus airport.

Throughout cross-examination Gorak remained firm in his belief that the accident was a result of pilot error. Gorak testified that he formed his opinion after reviewing the NTSB report, the FAA regulations, the operations manual for the Piper, Peterson's logbooks, the Piper's engine logbooks, and the depositions of Poullos and Blessing.

A trial court's ruling accepting or rejecting evidence will not be disturbed unless there is shown to be a clear abuse of discretion. Expert testimony 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. *Fletcher v. State*, 216 Neb. 342, 344 N.W.2d 899 (1984); *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979).

No contention is made that the plaintiffs' experts lacked the requisite qualifications to testify concerning the cause of the crash, nor that the expert testimony was not needed to assist the trier of fact to understand the evidence or determine a fact in issue. See *Oban v. Bossard*, 201 Neb. 243, 267 N.W.2d 507 (1978).

> It is a tragic characteristic of airplane crashes that the accident itself frequently destroys all evidence of the cause and kills the witnesses who might have knowledge of the event. Consequently, in litigation arising out of a plane

> crash the rights of the parties often depend upon the attitude of the court with respect to the right of the jury to draw inferences from such evidence as has survived the disaster.

*Lange v. Nelson-Ryan Flight Service, Inc.*, 259 Minn. 460, 462, 108 N.W.2d 428, 430 (1961).

All of the plaintiffs' expert witnesses testified that Peterson violated numerous FAA rules and regulations on the night of the crash. The experts testified, based on a review of Peterson's logbooks, that Peterson had gone beyond his biennial review date, had allowed his instrument rating to lapse, and was not current to carry passengers on a nighttime flight. The experts further testified, based on the NTSB report, that Peterson had violated § 91.5 in that he did not receive a preflight weather report that evening.

The appellees argue that

> [a]ny violation of a federal regulation here constituted a paper-work violation—a failure of Peterson's log to note that he had completed all flights required within a given time to maintain the currency of his instrument rating or night flying currency. Also, according to the log, Peterson was a little over two months past-due for his biennial flight review.
>
> There is no proof that Peterson had not actually completed all flights required to maintain instrument and night currency or that Peterson had not taken his biennial flight review. The plaintiffs only proved he failed to write it down.

Brief for Appellees at 20-21.

Delbert Valle, the NTSB accident investigator, testified that the purpose of a pilot's logbook, a record required by the FAA, is to ascertain whether a pilot is current or not current for the various pilot ratings. Blessing testified that his opinions were based on a review of Peterson's logbook. Nothing in the record indicates that the logbook was incomplete.

The jury could, subject of course to the defendants' rebuttal, infer that Peterson did not complete the requisite requirements to maintain currency for his biennial flight review, the IFR rating, and the passenger night flying.

The conclusions of the expert witnesses were consistent. In their opinions the cause of the crash was pilot error; the experts' main thesis being that because of Peterson's lack of currency and his inexperience in flying in conditions as they existed at the time of the departure, Peterson, upon takeoff, became spatially disorientated and lost control of the aircraft.

The experts testified that the location of impact and the angle of impact were consistent with the theory of a pilot suffering spatial disorientation and not being able to maintain control of the aircraft.

In addition to their impeccable qualifications, the expert witnesses relied on the NTSB report, Peterson's pilot logbooks, the aircraft engine logbooks, the FAA regulations for pilots, and the operations manual for the Piper Aztec. Two of the three experts also reviewed the other expert witnesses' respective depositions.

The appellees argue that because none of the experts could directly testify as to the length of the flight, speed of the climb, altitude reached, whether the plane encountered clouds, whether the weather was the cause of the accident, when and how often the plane turned, or in which direction it turned, the experts' opinions were speculative and conjectural, and, as such, the trial court was correct in striking them.

> All that plaintiff was required to do was to establish, to a reasonable probability, that the accident happened in the manner alleged in his petition, and where facts and circumstances are established from which the way the accident happened could be logically inferred, it was not error to submit that issue to the jury.

*Markussen v. Mengedoht*, 132 Neb. 472, 475, 272 N.W. 241, 243 (1937).

As previously noted, the experts were of the opinion that Peterson suffered spatial disorientation while initiating his takeoff from the Columbus airport. The point of impact and the degree of impact were consistent with this theory. The defendants' attorney had ample opportunity to fully cross-examine each expert witness. Nowhere does it appear in this cross-examination that the speed of the climb, the altitude reached, how often the plane turned, or whether the weather

was the cause were facts necessary in order for the experts to render their opinions. Unless we speculate on facts not contained in the record, something we cannot do, there is no evidence that these facts were necessary in order for the experts to render their opinions. The experts having given their opinions and the bases thereof, it then became imperative for the defendants to establish that the experts' opinions were based on insufficient underlying facts or data. This simply was not done, and, as such, we hold that the trial court abused its discretion in striking the testimony of the plaintiffs' expert witnesses. The appellees' objections relate solely to weight and credibility of the expert witnesses' testimony and not to its admissibility.

The trial court also indicated that it would have sustained the defendants' motion for directed verdict even if it had overruled the defendants' motion to strike the experts' testimony. "The mere fact that an accident happened in this case does not give rise to an inference of gross negligence on the part of Don Peterson."

Although we agree with the trial court's premise, see *Scarborough v. Aeroservice, Inc.*, 155 Neb. 749, 53 N.W.2d 902 (1952), we do not agree with the conclusion.

A directed verdict is proper only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion. *Stephen v. City of Lincoln*, 209 Neb. 792, 311 N.W.2d 889 (1981).

Viewing the evidence in the light most favorable to the plaintiffs, one of the reasonable inferences a jury could have drawn from the evidence was that Peterson was negligent in undertaking the flight in the first instance. At the time of the crash the weather was deteriorating and was categorized as marginal VFR. Peterson did not obtain a weather report before takeoff. It was a dark night. Peterson was not legal to fly the plane at night with passengers aboard. He was overdue on his biennial flight review and was not current to fly IFR. The plaintiffs' experts also testified as to numerous violations of FAA regulations, and although these violations do not constitute negligence per se, they are evidence of negligence which may be taken into consideration along with all other

evidence. *Scarborough v. Aeroservice, Inc., supra.* The evidence would seem to indicate that the crash was not the result of a mechanical malfunction of the aircraft. The testimony of the expert witnesses, if believed, could lead a jury to conclude that upon Peterson's takeoff from runway 32 he became spatially disorientated and drove the aircraft into the ground. Peterson, knowing that he lacked the requisite qualifications to fly the aircraft safely under the circumstances, apparently disregarded his limitations and flew anyway.

Viewing the evidence from this perspective, we hold that a jury question on the issue of negligence and proximate cause was created, and the trial court erred both in striking the plaintiffs' expert witnesses' testimony and directing a verdict in favor of the defendants.

The plaintiffs here were not required to eliminate all possibilities of how the accident may have happened. Plaintiffs were required only to establish a factual basis to infer negligence on the part of the pilot. The inference is clear in this case; whether the jury would have accepted this inference is yet another matter.

The appellees also assert that under the holding of *Mitchell v. Eyre*, 190 Neb. 182, 206 N.W.2d 839 (1973), they are entitled to a directed verdict because the plaintiffs did not meet their burden of proof as to who was actually flying the plane. Appellees' reliance on *Mitchell* is misplaced. *Mitchell* is easily distinguished on its facts and therefore is not controlling.

In *Mitchell* the occupants of the plane were two experienced pilots. The plane had dual controls and was in flight more than 1 hour prior to the fatal crash. This court, in holding that the trial court should have directed a verdict in favor of the defendant, stated, "Where the aircraft is equipped with dual controls and both occupants are pilots, proof as to who may have been piloting the aircraft at the time of take-off, in our judgment, should not be conclusive where, as here, the crash occurs more than an hour later." *Id.* at 186, 206 N.W.2d at 842.

In the instant case, although the aircraft was equipped with dual controls, Peterson was the only occupant who possessed a pilot's license. The plaintiffs also introduced evidence that would indicate, if believed, that Peterson was seated in the

left-hand seat of the Piper, commonly referred as to the "pilot in command seat." Although the defendants are free to introduce evidence that Peterson was not piloting the aircraft at the time of the crash, an inference could be easily drawn by the jury that Peterson was the pilot in command at all times during the flight. At best, it is a question of fact for the jury to decide who was flying the plane.

The final issue is whether the airplane guest statute, Neb. Rev. Stat. § 3-129.01 (Reissue 1983), is unconstitutional. This court in *Botsch v. Reisdorff*, 193 Neb. 165, 226 N.W.2d 121 (1975), upheld the constitutionality of the automobile guest statute. At least three judges of this court are of the opinion that the airplane guest statute as it existed during all times relevant to this action was constitutional.

REVERSED AND REMANDED FOR A NEW TRIAL.

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

I am in complete agreement with the majority in this case insofar as it concludes that the action of the trial court should be reversed and remanded. I, however, again write separately with regard to the suggestion by the majority that there are at least three members of the court who would hold the airplane guest statute, Neb. Rev. Stat. § 3-129.01 (Reissue 1983), constitutional. In 1980, writing in *Kreifels v. Wurtele*, 206 Neb. 491, 293 N.W.2d 407 (1980), I expressed my view with regard to the matter generally, concluding that Neb. Rev. Stat. § 39-6,191 (Reissue 1978), the automobile guest statute, was in violation of both the Nebraska Constitution and the U.S. Constitution. Section 3-129.01 is a mirror image of § 39-6,191, except that it applies to aircraft rather than automobiles. I repeated that view again in *Cushing v. Bernhardt*, 210 Neb. 272, 313 N.W.2d 688 (1981). I wish to indicate that my view has not been changed by the passage of time. Quite to the contrary, the action taken by our Legislature in amending § 39-6,191 in 1981 and § 3-129.01 in 1984 has only strengthened my resolve.

I am authorized to state that GRANT, J., joins in this concurrence.

BOSLAUGH, J., dissenting.

The primary issues on this appeal are (1) whether the trial

court abused its discretion in striking the testimony of the plaintiffs' expert witnesses and (2) whether the trial court erred in directing a verdict for the defendants. The plaintiffs' case is dependent upon their experts' testimony. Because the trial court did not abuse its discretion in striking that testimony, it was proper to direct a verdict for the defendants.

The majority opinion begins by setting forth the rule, "Expert testimony 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." This statement of the rule is in accord with the previous decisions of this court, including *Priest v. McConnell, ante* p. 328, 363 N.W.2d 173 (1985). However, the majority's application of the rule cannot be reconciled with this court's application of the rule in previous cases.

At trial the plaintiffs' expert witnesses were permitted to testify that, in their opinion, Peterson became spatially disoriented upon takeoff and lost control of the aircraft. Specifically, George Poullos testified by deposition: "So, with no visual reference whatsoever, and presuming that he did not believe his instruments, if he was looking at his instruments, I'm of the opinion he suffered vertigo, spatial disorientation."

In order to reach their conclusions, the expert witnesses had to assume the existence of a number of elements. Indeed, the only *facts* proven were that a twin-engine plane, allegedly piloted by Peterson, departed from runway 32 of the Columbus, Nebraska, airport at about 7 p.m. on November 25, 1979; that, 14 hours later, the plane's wreckage was found 2 miles northeast of the airport; and that the plane crashed at a 60° nosedown position while headed to the southwest. In the majority opinion, the summation is made: "The experts testified that the location of impact and the angle of impact were *consistent with the theory* of a pilot suffering spatial disorientation and not being able to maintain control of the aircraft." (Emphasis supplied.) To reach the conclusion propounded by the experts, it must be assumed that the plane crashed just after takeoff, at the position and location found, because Peterson made an improper right turn; that in doing so

he encountered a "black hole," that is, nonvisual flying conditions; that he was forced to fly according to his instruments (IFR); and that he was incapable of flying IFR. It is only at this point that spatial disorientation and its counterpart, loss of control of the airplane, become viable theories.

Although the facts known may be "consistent with" a particular theory as to how the accident happened, that will not support a finding that the accident happened in that way. Such evidence generally is not relevant, and testimony to that effect should not be received. *Priest v. McConnell, supra.* As was stated in *Priest*, and has been the underlying reason for disallowing expert testimony in prior decisions of this court, "there is a vast difference between permitting an expert to give an opinion when all the factors necessary to draw a conclusion are in evidence and in permitting an explanation based on assumptions that have no adequate foundation in the evidence." *Id.* at 355, 363 N.W.2d at 177. This rationale, for instance, was also demonstrated in *Flory v. Holtz*, 176 Neb. 531, 126 N.W.2d 686 (1964). Concluding that the factors on which the opinion sought to be elicited were based were too conjectural, this court disallowed the testimony, stating:

> We are in the realm of pure speculation. The testimony is dependent upon too many assumptions. We should not confuse inferences drawn from facts and inferences which are based upon mere assumptions. There is a vast difference between permitting an expert to give an opinion when all of the factors necessary to base an estimate of minimum speed are present and in permitting an estimate of actual speed based on assumptions that have no adequate foundation in the evidence. The apparent competency of the expert would merely aggravate the error.

*Id.* at 539, 126 N.W.2d at 692. Accord *Nickal v. Phinney*, 207 Neb. 281, 298 N.W.2d 360 (1980).

Expert testimony is permitted by Neb. Rev. Stat. §§ 27-702 and 27-703 (Reissue 1979). "However, these rules do not permit either an expert or a lay witness to render an opinion based upon obvious speculation or conjecture." *State v. Johnson*, 215 Neb. 391, 394, 338 N.W.2d 769, 771 (1983).

Furthermore, although Neb. Rev. Stat. § 27-705(1) (Reissue 1979) begins, "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data," it continues, "The expert may in any event be required to disclose the underlying facts or data on cross-examination." And this court has held that where, on cross-examination, the witness "not only did not disclose such data but affirmatively established that he had no such data," then the opinion testimony should be excluded. *Fletcher v. State*, 216 Neb. 342, 351, 344 N.W.2d 899, 905 (1984). Appropriate to the case at bar is the conclusion reached in *Fletcher*:

> 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 an opinion.

*Id.* at 352, 344 N.W.2d at 905.

The record is replete with examples in which the experts during both direct examination and cross-examination disclosed that their theory of how the accident happened was based on a series of assumptions. For instance, George Poullos testified that his theory was "based on . . . especially the black hole." However, it was further elicited on cross-examination that the defendant would have encountered a "black hole" only if he made a right turn upon takeoff. Furthermore, the only explanation Poullos gave for the defendant to have turned right was "expediency," whereas the correct flight pattern called for a left turn. The expert Gary Blessing was to later testify that the possibilities of the plane's turning right, turning left, or traveling straight were equally consistent. Furthermore, the expert Gregory Gorak testified:

> A. There is some evidence to support a partial turn, but where we got mixed up with each other is you now bring in the low altitude turn and the fact that the aircraft was heading a different heading other than runway takeoff heading, there obviously was some maneuver involved. Whether this maneuver was the result of a turn or a spatial

> disorientation, loss of control of the aircraft, I'm not quite sure which transpired. I'm leaning to the spatial disorientation, loss of control.

In fact, when asked, "Mr. Gorak, do you know whether or not the aircraft turned?" he replied, "No"; and when asked, "You agree that no one knows how this accident happened?" he answered, "No one knows."

Moreover, there was no affirmative evidence to rule out the failure of certain controls. When asked if the artificial horizon might have failed, Delbert Valle testified: "It was destroyed. . . . It was beyond the point of determining whether it failed or whether it did not fail." Similarly, no one could rule out other possible causes of the accident, including someone manipulating the dual controls of the airplane.

The cross-examination also revealed that VFR conditions existed in the entire space of the flight and that Peterson was "perfectly legal" to take off. Additionally, the experts admitted that it was impossible to know whether Peterson ever went on his instruments. Rather, Blessing affirmed that an instrument rating or currency was not required for Peterson to take off, and Poullos was unwilling to testify that Peterson's failure to have taken a biennial flight review had anything to do with the accident.

When asked if Peterson could have been an extremely proficient pilot, Blessing admitted, "He could have been anything."

Furthermore, Gorak testified that a vital part of his analysis was that the accident occurred during takeoff. He had not observed the takeoff, and there was no proof that the crash happened during takeoff. There was no evidence of the plane's climb-out speed or the altitude it reached, and Blessing admitted not having an accurate record of the time. Valle testified that the plane's clock had stopped at 2:32.

In short, the record on cross-examination demonstrates that the "facts" used by the experts to support their theory were mere assumptions. In *State v. Miner*, 216 Neb. 309, 312, 343 N.W.2d 899, 902 (1984), this court said: "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." In light of the facts, or more appropriately, the lack of facts, in the case at bar, no abuse of discretion has been demonstrated.

This conclusion necessitates a finding that the lower court's order directing a verdict for the defendants should also be affirmed.

The majority sets the tone for its opinion with a quote from *Lange v. Nelson-Ryan Flight Service, Inc.*, 259 Minn. 460, 462, 108 N.W.2d 428, 430 (1961):

> It is a tragic characteristic of airplane crashes that the accident itself frequently destroys all evidence of the cause and kills the witnesses who might have knowledge of the event. Consequently, in litigation arising out of a plane crash the rights of the parties often depend upon the attitude of the court with respect to the right of the jury to draw inferences from such evidence as has survived the disaster.

However, as we stated in *Scarborough v. Aeroservice, Inc.*, 155 Neb. 749, 762, 53 N.W.2d 902, 910 (1952), another airplane crash case:

> The defendants assert that negligence is never presumed and not to be inferred from the mere fact that an accident happened. If the cause of the accident is not ascertained except as a matter of guess, conjecture, or surmise, the defendant would then be entitled to prevail. An abundance of authorities support the above proposition.

In determining whether a directed verdict was appropriate in this case, it is necessary to consider the rule governing circumstantial evidence, which was stated recently in *Anderson v. Farm Bureau Ins. Co., ante* p. 1, 4-5, 360 N.W.2d 488, 490-91 (1985):

> The plaintiffs may establish their case by circumstantial evidence as well as by direct evidence.
>
> However, circumstantial evidence is not sufficient to sustain a verdict depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the jury is the only one that can fairly and reasonably be drawn therefrom. Mullikin v.

> Pedersen, 161 Neb. 22, 71 N.W.2d 485.
>
> The evidence must be such as to make the plaintiffs' theory of causation reasonably probable, not merely possible.
>
> In every case, before the evidence is submitted to the jury, there is a preliminary question for the court to decide, when properly raised, not whether there is literally no evidence, but whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed. Weston v. Gold & Co., 167 Neb. 692, 94 N.W.2d 380.
>
> Where several inferences are deducible from the facts presented, which inferences are opposed to each other, but equally consistent with the facts proved, the plaintiffs do not sustain their position by a reliance alone on the inferences which would entitle them to recover. Shamblen v. Great Lakes Pipe Line Co., 158 Neb. 752, 64 N.W.2d 728.
>
> Conjecture, speculation, or choice of quantitative possibilities are not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other.

Since the experts' testimony was properly stricken, the only conclusion which could be reached was that the plaintiffs failed to produce any evidence upon which a jury could properly find in their favor.

Viewing the evidence in the light most favorable to the plaintiffs demonstrates that they dispelled the possibility of mechanical failures only to the extent that an investigation would disclose them. There was evidence that Peterson had limited nighttime flying experience; that he was not current in his instrument ratings; that he had gone beyond his biennial flight review date; that he was not authorized to fly a plane at night with passengers aboard; that "marginal" visual flight rules conditions existed at the time of takeoff; and that Peterson violated an FAA rule when he did not obtain a preflight weather report. The evidence further established that he took off prior to doing a complete "run-up" and cockpit check, and prior to allowing the engines to reach normal

operating temperatures. There was no evidence as to *when* the crash occurred; whether the plane crashed on takeoff or at some later time when Peterson was returning to the airport; or as to how or why the crash occurred.

The absence of proof of the facts essential to recovery in this case is apparent. Under the standard set forth in *Anderson, supra*, the evidence of negligence was not sufficient to submit the case to a jury. As stated by the trial court: "I've listened to this testimony and the record leaves but one impression: The cause of this accident is unknown."

The judgment of the trial court should have been affirmed.

HASTINGS and CAPORALE, JJ., join in this dissent.

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LESLIE JOHNSTON, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.
PHYLLIS JOHNSTON, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.
STATE OF NEBRASKA, APPELLANT, V. PHYLLIS JOHNSTON, APPELLEE.

364 N.W.2d 1

Filed March 8, 1985. Nos. 83-965, 83-966, 84-027.

1. **Workmen's Compensation.** The Nebraska Workmen's Compensation Act, Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1984), provides the exclusive remedy by the employee against the employer for any injury arising out of and in the course of the employment.
2. **Workmen's Compensation: Tort Claims Act.** The Nebraska State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 1981), does not apply to any claim which is covered by the Nebraska Workmen's Compensation Act, Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1984).
3. **Causes of Action.** If the injured employee does not have an independent cause of action, the injured employee's spouse cannot maintain an independent cause of action.
4. **Workmen's Compensation: Appeal and Error.** In reviewing findings of fact in workmen's compensation cases, this 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.

5. **Workmen's Compensation.** A workman is entitled to recover compensation for neurosis if it is a proximate result of his injury and results in disability.

Appeals from the District Court for Lancaster County: DeWayne Wolf, Judge, and appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed and remanded with directions.

M.J. Bruckner of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellants and appellees Johnstons.

Paul L. Douglas, Attorney General, and Martel J. Bundy, for appellant and appellee State.

Krivosha, C.J., Hastings, and Grant, JJ., and McCown, J., Retired, and Warren and Blue, D. JJ., and Colwell, D.J., Retired.

Krivosha, C.J.

Pursuant to stipulation of the parties and with the consent of the court, the parties consolidated for purposes of appeal two tort cases (cases Nos. 83-965 and 83-966) and one workmen's compensation case (case No. 84-027), all arising out of the same occurrence.

On June 12, 1981, Phyllis Johnston was employed as a secretary to the Honorable Donald Brodkey, then one of the members of the Supreme Court of Nebraska. With the permission of Justice Brodkey, Mrs. Johnston took a late lunch hour and returned to her office at approximately 1:50 p.m. Upon reentering the building and before returning to her office, she proceeded to the statehouse cafeteria. The statehouse cafeteria is a facility operated by the division of rehabilitation services of the State Department of Education and is open to the general public. Mrs. Johnston proceeded to a coffee urn, where she drew in a Styrofoam cup what she thought was a cup of coffee and, after paying for the coffee, then proceeded to her office. She sat down at her desk and, while visiting with the judge's law clerk, began to drink the coffee. She suddenly realized that what she was drinking was not coffee and immediately returned to the cafeteria. It was then determined that the urn from which Mrs. Johnston had drawn the coffee had just been cleaned with urn cleaner and

that what she had ingested was not coffee but, rather, urn cleaner. After Mrs. Johnston was given some grapefruit juice, which was a prescribed antidote for the urn cleaner, she called her doctor and went to see him. Mrs. Johnston's testimony as to how the accident happened was essentially confirmed by the law clerk.

Mrs. Johnston was diagnosed by her physician as having caustic mouth and pharynx irritation. Endoscopic examinations performed by a gastroenterologist on June 19, 1981, resulted in a finding of injury caused by alkali ingestion, with minimal superficial erosions of the lower esophagus and minimal superficial erosion of the duodenal bulb.

Mrs. Johnston continued to experience difficulty and was hospitalized at St. Elizabeth Community Health Center from November 14 to 16, 1981. Because Mrs. Johnston was experiencing emotional difficulty by reason of the accident, the gastroenterologist recommended that Mrs. Johnston be seen by a psychiatrist. The psychiatrist examined Mrs. Johnston on December 14, 1981, and observed that since the ingestion of the urn cleaner, in addition to the esophageal and gastric problems, Mrs. Johnston had difficulty with panic attacks, anxiety, and subtle symptoms of depression. The psychiatrist placed Mrs. Johnston on an antidepressant called Asendin. She remained on the medication until December 29, 1981, when, unable to contact the original psychiatrist, she saw a second psychiatrist. At the trial the second psychiatrist testified that in his opinion Mrs. Johnston was suffering from a posttraumatic stress disorder caused by the accidental swallowing of the urn cleaner. As a result of his diagnosis, Mrs. Johnston was placed in a program of psychotherapy. Mrs. Johnston was seen by the psychiatrist every 2 weeks until the summer of 1982.

Shortly after Memorial Day 1983, Mrs. Johnston, on the advice of her physician, terminated her employment with the court. Testimony was produced through Justice D. Nick Caporale, Justice Brodkey's successor, that if Mrs. Johnston had not resigned, he would have been required to discharge her because the quality of her work had seriously deteriorated. She has been unemployed since that time. Subsequently, Mrs. Johnston filed a petition in the district court for Lancaster

County, Nebraska, seeking to recover for her alleged injuries pursuant to the provisions of the Nebraska State Tort Claims Act. Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 1981). Mrs. Johnston's husband, Leslie, also filed a suit in the district court for Lancaster County, Nebraska, pursuant to the State Tort Claims Act, seeking damages for medical bills and loss of companionship, comfort, and society.

While the tort cases were pending but inactive, the State of Nebraska filed a petition in the Nebraska Workmen's Compensation Court pursuant to the Nebraska Workmen's Compensation Act, Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1984), alleging that Mrs. Johnston's injuries were covered by the workmen's compensation laws of the State of Nebraska. In a bifurcated proceeding the Workmen's Compensation Court found that Mrs. Johnston's injury arose out of and in the course of her employment and was therefore covered by the Workmen's Compensation Act. On rehearing before a three-judge panel, the judgment was affirmed, with one judge dissenting.

The compensation court then proceeded to hold a hearing on the issue of damages. A single judge of the Workmen's Compensation Court held that because Mrs. Johnston had continued to work at her usual job from the time of the alleged injury through the date of the first hearing on damages, she was not entitled to any disability payments. On appeal to the three-judge panel, by which time Mrs. Johnston had terminated her employment, an award was entered in favor of Mrs. Johnston for certain medical bills and for temporary total disability. The compensation court determined that Mrs. Johnston did not suffer any disability for the first 27 months after her accident, but because she became totally disabled on September 1, 1983 (the day she resigned from her job), and would remain temporarily totally disabled for an indefinite amount of time into the future, she was entitled to receive total temporary disability until the situation changed.

In the time between the first hearing on damages in the Workmen's Compensation Court and the rehearing, the state tort claims actions in the district court for Lancaster County, Nebraska, were completed. Following trial, the district court

held that the State was liable to Mrs. Johnston in the amount of $40,000. On the same date, the district court also entered judgment for medical bills and loss of companionship in favor of Mr. Johnston in the amount of $15,227.15. Both Mrs. Johnston and Mr. Johnston have appealed those decisions, maintaining that the awards of damages in the district court were clearly inadequate and are contrary to the evidence and to the law. For reasons which we will more particularly set out hereinafter, we conclude that the district court for Lancaster County, Nebraska, was without jurisdiction in these cases and that the Johnstons could not recover under the provisions of the Nebraska State Tort Claims Act because Mrs. Johnston's exclusive right of recovery was pursuant to the Nebraska Workmen's Compensation Act.

The State, on the other hand, appeals the decision of the Workmen's Compensation Court, arguing that while the accident arose out of and in the course of Mrs. Johnston's employment, the evidence fails to disclose that she suffered any damages and, therefore, the award entered by the compensation court should be set aside. With that contention we do not agree.

The first question which we must address is whether the Nebraska Workmen's Compensation Act is the exclusive remedy available to Mrs. Johnston or whether she may accept the benefits of the Workmen's Compensation Act and, nevertheless, file suit under the State Tort Claims Act for any damages she claims to have sustained in excess of those for which she was compensated under the provisions of the Nebraska Workmen's Compensation Act. In support of that position the Johnstons argue that where an injured employee does not recover full compensation under the state workmen's compensation laws for all damages proximately caused by the employer's negligent act, the court should apply what has come to be known in a few jurisdictions as the "dual capacity" doctrine. According to the "dual capacity" doctrine, an employer may become liable to an employee in tort if, with respect to that tort, the employer occupies a position which places upon it obligations independent of and distinct from its role as an employer. See *Duprey v. Shane*, 39 Cal. 2d 781, 249

P.2d 8 (1952). Because of the language of the State Tort Claims Act, we need not reach that question.

The Nebraska Workmen's Compensation Act provides that it will be the exclusive remedy for injuries arising out of or in the course of employment. Section 48-148 provides:

> If any employee, or his dependents in case of death, of any employer subject to the provisions of sections 48-109 to 48-147 files any claim with, or accepts any payment from such employer, or from any insurance company carrying such risk, on account of personal injury, or makes any agreement, or submits any question to the court under said sections, such action shall constitute a *release* to such employer of *all* claims or demands at law, if any, arising from such injury.

(Emphasis supplied.) In *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 657-59, 228 N.W.2d 303, 305-06 (1975), this court discussed the meaning of § 48-148, saying:

> The Workmen's Compensation Act provides the exclusive remedy by the employee against the employer for *any* injury arising out of and in the course of the employment. This is the basis on which the rights of employers and employees are put in balance. The employer, by having liability imposed on him without fault, receives in return relief from tort actions. Logically, therefore, where the employer is negligent he should not be relieved of liability where compensation coverage is not provided to the employee.
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> . . . .
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> . . . The operative fact is one of coverage, not of election to file a claim for compensation. If coverage exists, even though for some reason compensation may not be payable, the Workmen's Compensation Act is *exclusive*.

(Emphasis supplied.)

Additionally, § 81-8,219, which is a part of the State Tort Claims Act under which the Johnstons sought recovery in the district court, provides in part as follows: "(1) The provisions of this act shall *not* apply to: . . . (e) Any *claim* by an employee of the state which is covered by the Nebraska workmen's compensation law." (Emphasis supplied.) It is difficult to

conceive how the Legislature could have made it any clearer that where an employee has a claim subject to the Nebraska Workmen's Compensation Act, the employee may not file suit under the State Tort Claims Act.

The Johnstons argue that § 81-8,219 means that the State Tort Claims Act does not apply to the extent that payment is received under the Nebraska Workmen's Compensation Act, but is applicable for any excess damages claimed by reason of an employer's negligence. We simply cannot agree with that view.

Had the Legislature intended the result suggested by the Johnstons, it would have been relatively simple to so provide. However, by using the word "claim" when describing the exemption under § 81-8,219(e), the Legislature has clearly indicated that the Nebraska State Tort Claims Act, §§ 81-8,209 to 81-8,235, does not apply to any claim which is covered by the Nebraska Workmen's Compensation Act, §§ 48-101 et seq. The language of both §§ 48-148 and 81-8,219(e) makes the provisions of the Nebraska Workmen's Compensation Act the exclusive remedy in this case and disposes of Mrs. Johnston's claims brought pursuant to the State Tort Claims Act. In view of the facts that the State Tort Claims Act specifically bars actions which are otherwise covered by workmen's compensation laws and the Johnstons concede that Mrs. Johnston's claim is covered by the Nebraska Workmen's Compensation Act, we believe it unnecessary to consider the arguments regarding dual capacity. The State Tort Claims Act had no application and does not provide a basis upon which Mrs. Johnston could seek to recover damages. The district court was in error in assuming jurisdiction and entering an award, and the award must be set aside and the case dismissed.

That leaves us with the question of whether Mr. Johnston can maintain a separate action against the State for his alleged losses under the State Tort Claims Act. While we have not previously decided that question in this jurisdiction, a number of other states have had occasion to do so and have generally held that if the employee-spouse's right of recovery must be brought under the state workmen's compensation law or not at all, the nonemployee spouse may not impose liability upon the

employer.

In *Balcer v. Leonard Refineries, Inc.*, 370 Mich. 531, 534-35, 122 N.W.2d 805, 807 (1963), the Michigan Supreme Court said:

> "We are not unmindful, to paraphrase Mr. Justice Frankfurter and Judge Learned Hand, that the literal words of a statute sometimes can be misleading, and that we do not stop but only begin with the words. Sometimes the words are such that the purposes of the statute and the entire statutory scheme must be taken into account. *The words must be read and interpreted as a part of the whole.* (Emphasis supplied.)
>
> "*The history of the development of statutes, such as this*, creating a compensable right independent of the employer's negligence and notwithstanding an employee's contributory negligence, *recalls that the keystone was the exclusiveness of the remedy*. This concept emerged from a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicted; incident to this both parties realized a saving in the form of reduced hazards and costs of litigation." (Emphasis supplied.)

And the Iowa Supreme Court in *Ziegler v. United States Gypsum Company*, 251 Iowa 714, 715-16, 102 N.W.2d 152, 153 (1960), said:

> These rights of recovery by the husband were all based upon the wife's right to recover for her direct injuries. Where the defendant is not guilty of a tort which would give a right of action to the wife, the husband cannot maintain an action for consequential damages. 41 C.J.S., Husband and Wife, section 401c, page 895; 27 Am. Jur., Husband and Wife, section 506, page 108; Shaw v. Boston American League Baseball Co., 325 Mass. 419, 90 N.E.2d 840; Thibeault v. Poole, 283 Mass. 480, 486-87, 186 N.E. 632; Peters v. Bodin, 242 Minn. 489, 65 N.W.2d 917; and

Naphtali v. Lafazan, 7 Misc.2d 1057, 165 N.Y.S.2d 395, 403.

And in 41 Am. Jur. 2d *Husband and Wife* § 451 at 379 (1968), the rule is stated as follows: "Generally a cause of action for loss of consortium of the wife does not exist in the husband unless the defendant would have been liable directly to the wife for her injury occasioning the loss of consortium."

And in *Peters v. Bodin*, 242 Minn. 489, 496, 65 N.W.2d 917, 922 (1954), the Minnesota Supreme Court, in rejecting a spouse's claim for loss of consortium, said:

> This instruction is in accord with the established rule that a husband's right to special damages for loss of his wife's services, or for medical and hospital expenses arising out of her injuries is derivative only, so that if she has no valid claim for such injuries, he is likewise without right to recover for such special damages.

In view of the fact that we have heretofore held that an employee's exclusive right of action for injuries arising out of and in the course of the employee's work must be brought pursuant to the Nebraska Workmen's Compensation Act, we are inclined to follow those jurisdictions which have held that if the injured employee does not have an independent cause of action, the injured employee's spouse cannot maintain an independent cause of action. Were we to hold otherwise, we would be rewriting the provision of § 48-148 which now provides that if payment is made to an employee following the filing of a claim, the employer is released from all claims. See *Vangreen v. Interstate Machinery & Supply Co.*, 197 Neb. 29, 246 N.W.2d 652 (1976). The district court should have rejected the claim of Mr. Johnston, and we must therefore reverse and remand with directions to dismiss case No. 83-965.

We are then left with the question of whether the workmen's compensation award was in error. We think not.

In commencing our review of the award, we are reminded that "[i]n reviewing findings of fact in workmen's compensation cases, this 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." *Doty v. Aetna Life & Casualty*, 217

Neb. 428, 431, 350 N.W.2d 7, 9 (1984).

The only question before us, therefore, is whether there is any evidence upon which the finders of fact could have reached their conclusion. We believe there is. There can be no question that Mrs. Johnston suffered an injury, no matter how slight, when she ingested the urn cleaner. The warning on the label made it clear that it was harmful to ingest, and, in fact, such harm did result. That Mrs. Johnston chose not to leave work immediately, but, nevertheless, continued in her employment, does not establish that she did not suffer an injury. The medical testimony was to the contrary, or at least the finders of fact could so conclude. There is further evidence in the record that as a result of the injury sustained when Mrs. Johnston drank the urn cleaner, she in fact suffered a psychological, work-related injury which prevents her from engaging in any employment. Both the gastroenterologist and the treating psychiatrist testified that the ingestion of the urn cleaner resulted in the psychological problems experienced by Mrs. Johnston. A workman is entitled to recover compensation for neurosis if it is a proximate result of his injury and results in disability. Where, as here, the evidence is sufficient to permit the triers of fact to find that the psychological injury is directly related to the accident and the employee is unable to work, the employee is entitled to be compensated. See, *Cardenas v. Peterson Bean Co.*, 180 Neb. 605, 144 N.W.2d 154 (1966); *Haskett v. National Biscuit Co.*, 177 Neb. 915, 131 N.W.2d 597 (1964); *Lee v. Lincoln Cleaning & Dye Works*, 145 Neb. 124, 15 N.W.2d 330 (1944). The State argues that one may not recover for workmen's compensation for mental injuries in the absence of a proven physical injury, citing to us *Bekelski v. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942). While the State's citation is correct, the facts are not at all similar to the facts in *Bekelski*. As we have already noted, in the instant case there is clear evidence of a physical injury occasioned when Mrs. Johnston ingested the cleaner. We believe that we are not able to say as a matter of law that there was no evidence upon which the compensation court could base its findings. Being unable to do so, we are required to affirm the decision. For that reason the decision of the Workmen's Compensation Court in case No. 84-027 is

affirmed, and the decisions of the district court for Lancaster County, Nebraska, in cases Nos. 83-965 and 83-966 are reversed and remanded with directions to dismiss.

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

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JOYCE M. ESHOM, APPELLANT, V. BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 54, THAYER AND NUCKOLLS COUNTIES, NEBRASKA, A POLITICAL SUBDIVISON OF THE STATE OF NEBRASKA, APPELLEE.

364 N.W.2d 7

Filed March 8, 1985. No. 83-972.

1. **Schools and School Districts: Teacher Contracts: Due Process.** In the contested termination of a tenured teacher, minimal procedural due process requires that the teacher (1) be advised of the cause or causes for the termination in sufficient detail to fairly enable him or her to prepare a defense, (2) be advised of the names and the nature of the testimony of witnesses who are to testify against the teacher, and (3) be accorded a timely and meaningful opportunity to be heard in his or her own defense, and (4) that the hearing be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.
2. **Appeal and Error.** The purpose of a proceeding in error is to remove the record from an inferior to a superior tribunal so that the latter tribunal may determine if the judgment or final order of the inferior tribunal is in accordance with law.
3. **Schools and School Districts: Teacher Contracts: Appeal and Error.** On appeal of teacher termination cases, this court must determine if the evidence presented at the hearing before the school board is sufficient as a matter of law to support the board's decision.
4. **Schools and School Districts: Evidence: Appeal and Error.** Evidence is sufficient as a matter of law where the record is such that on the basis of all the testimony and exhibits, the board of education could fairly and reasonably find the facts as it did.
5. **Evidence: Words and Phrases.** Evidence is "substantial" or "sufficient as a matter of law," or constitutes "some competent evidence," if a judge could not, were the trial to a jury, direct a verdict; it is something less than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions.
6. **Records: Appeal and Error.** Evidence which does not appear in the record cannot be considered by this court on appeal.
7. **Teacher Contracts.** Teacher incompetency is not measured in a vacuum nor

against a standard of perfection but, instead, must be measured against the standard required of others performing the same or similar duties.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Lyle Joseph Koenig of Germer, Koenig, Murray, Johnson & Daley, for appellant.

John F. Recknor of Barlow, Johnson, DeMars & Flodman, for appellee.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

CAPORALE, J.

Joyce M. Eshom, appellant, filed a proceeding in error to the district court from the decision of the appellee, board of education of school district No. 54 of Thayer and Nuckolls Counties, also known as the Chester-Hubbell-Byron district, terminating her employment as a teacher. The district court affirmed the action of the board. Eshom argues that she was denied due process and that the evidence is not sufficient to support the board's action. We affirm.

Eshom had been employed as a teacher by school district No. 68 of Thayer and Nuckolls Counties, also known as the Byron district, for 7 years prior to her employment with the Chester-Hubbell-Byron district. The latter district came into being as the result of a 1982 merger of the Byron district with school district No. 54 of Thayer County, then also known as the Chester-Hubbell district. In the Byron district Eshom was a tenured teacher who taught home economics, typing, and bookkeeping. She holds a baccalaureate degree in vocational homemaking from Chadron State College. She has also earned 18 graduate hours in special education, business education, and education. Eshom's only endorsed area of teaching is vocational home economics.

Following the merger, Eshom was retained as a tenured teacher by the merged Chester-Hubbell-Byron district. She signed an employment contract for the 1982-83 school year which required that she teach "classes as assigned." Eshom was assigned to teach one home economics class, three mathematics

classes, and one English class. She had not taught mathematics or English before that time.

On September 21, 1982, Eshom was evaluated by Glenn Davenport, the principal of the Chester-Hubbell-Byron district. Of 30 areas included in the evaluation, which could be rated satisfactory, marginal, or unsatisfactory, Eshom scored "satisfactory" in 28 areas and "marginal" in 2—maintenance of order and providing a learning atmosphere. The evaluation noted specifically that Eshom needed improvement in controlling her seventh grade mathematics and English classes.

On March 14, 1983, Eshom was evaluated again by Davenport. This time she was rated as marginal in 13 areas and unsatisfactory in 2 areas. The evaluation recommended "non-renewal of Mrs. Eshom's contract" unless she made significant progress in the ability to control her classes, in changing the shrillness of her voice, in using proper English and grammar, in controlling her emotionality when correcting students, and in her ability to use demonstrative instructional materials. He considered her to lack the teaching skills required to be more than a mediocre teacher. Davenport also noted, however, that Eshom was a loyal, conscientious, and pleasant employee.

Both the September and March evaluations were given to and reviewed with Eshom.

On April 12, 1983, the board notified Eshom that it had decided to consider amending or terminating her contract and detailed in that notice the deficiencies as evaluated by Davenport. Eshom then requested a hearing before the board of education, and asked that she be provided with a list of the witnesses to be called at the hearing and with the documents which were to be introduced. The board complied with these requests by listing the two witnesses who would appear and by giving her copies of the exhibits to be introduced at the hearing. Following the hearing, the board, by a 5-to-4 vote, decided to terminate Eshom's contract of employment.

Eshom's first complaint rests upon Neb. Rev. Stat. § 79-12,115 (Cum. Supp. 1984), which requires, among other things, that upon request the board provide the teacher the names of witnesses to be called and allow the teacher an

opportunity to examine any documents to be presented at the hearing.

During his testimony, Davenport referred to some informal evaluations which he had made of Eshom. She claims that since these informal evaluations had not been given to her prior to the hearing, his reference to them violated her due process rights as set forth in § 79-12,115. However, the record establishes Davenport did no more than mention that he had made informal evaluations and testified that the formal observations upon which he based his recommendation were in agreement with the observations he made on the informal occasions. In fact, the record reveals that these informal evaluations were gleaned from Davenport's short visits to various classrooms, and were not necessarily even in written form.

As indicated in *Benton v. Board of Ed. of Sch. Dist. No. 17, ante* p. 134, 361 N.W.2d 515 (1985), in the contested termination of a tenured teacher, minimal procedural due process requires that the teacher (1) be advised of the cause or causes for the termination in sufficient detail to fairly enable him or her to prepare a defense, (2) be advised of the names and the nature of the testimony of witnesses who are to testify against the teacher, and (3) be accorded a timely and meaningful opportunity to be heard in his or her own defense, and (4) that the hearing be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the charges.

The record establishes that the board fully complied with the above requirements. Consequently, the record does not sustain Eshom's first complaint.

Before we begin our analyses to determine whether the evidence presented at the hearing is sufficient to support the board's decision to terminate Eshom's contract, we must address the standard of review to be used.

We first note that as a proceeding in error, its purpose is to remove the record from an inferior to a superior tribunal so that the latter tribunal may determine if the judgment or final order of the inferior tribunal is in accordance with law. *Hollingsworth v. Board of Education*, 208 Neb. 350, 303 N.W.2d 506 (1981). We have articulated the standard of

reviewing teacher termination cases so as to make that determination in two different ways. We have often said that this court, on appeal, must determine if the evidence presented at the hearing before the school board is sufficient as a matter of law to support the board's decision. *Schulz v. Board of Education*, 210 Neb. 513, 315 N.W.2d 633 (1982); *Hollingsworth v. Board of Education, supra*; *Davis v. Board of Education*, 203 Neb. 1, 277 N.W.2d 414 (1979); *Sanders v. Board of Education*, 200 Neb. 282, 263 N.W.2d 461 (1978). We have also said that the order of an administrative body must be affirmed if it acted within its jurisdiction and there is some competent evidence to sustain its findings. *Kennedy v. Board of Education*, 210 Neb. 274, 314 N.W.2d 14 (1981).

Taken together, these statements mean that we review the record in teacher termination cases to determine whether there is sufficient evidence as a matter of law to support the board's decision. It is, then, the same standard used in determining whether the decision of an administrative agency is supported by substantial evidence. As recently described in *Beatrice Manor v. Department of Health, ante* p. 141, 362 N.W.2d 45 (1985), in order to support an agency decision, the record must be such that on the basis of all the testimony and exhibits, the agency could fairly and reasonably find the facts as it did. Stated another way, the evidence is "substantial" or "sufficient as a matter of law," or constitutes "some competent evidence," if a judge could not, were the trial to a jury, direct a verdict; it is something less than the weight of the evidence and can be such as to permit the drawing of two inconsistent conclusions.

The board concluded Eshom did not maintain the required and standard degree of control of her class, lacked teaching skills in that she did not use her voice properly, demonstrated emotionality in correcting students, used incorrect and substandard English and grammar, and used an inadequate variety of materials and individualized instruction. From these findings the board concluded that Eshom's contract should be terminated.

Neb. Rev. Stat. § 79-12,112 (Cum. Supp. 1984) provides that the contract of a permanent certificated employee may be terminated for "just cause," which, as defined in Neb. Rev.

Stat. § 79-12,107(4) (Cum. Supp. 1984), includes "incompetency." "Incompetency" is so defined as to include demonstrated deficiencies or shortcomings in teaching skills.

Eshom presents two arguments to support her position that the evidence is not sufficient as a matter of law to support the board's decision. She first contends that it was unfair to evaluate her on the basis of her performance in teaching classes which she had never taught before and which were outside her area of expertise. Davenport admitted that he based his evaluations on observations of Eshom's teaching in her mathematics and English classes and that he did not conduct a formal evaluation of Eshom in her home economics class. He explained that this was because "those were the classes in which she was having the difficulty, and I was concerned about how the instruction was being carried out, so I gave it more attention."

Davenport further testified that several other teachers were teaching outside their certificated areas, although no other teachers were required to teach four out of five classes outside their certificated areas. However, while Davenport admitted that teaching outside her area may have affected Eshom's confidence, he stated that the other teachers who were teaching outside their areas "[did so] with confidence and control and competence" and that "[w]e're not talking about so much as a matter of degree, I don't think, counselor, as we are talking about a basic, a basic ability to communicate to and control kids under any situation."

Davenport also reported that Eshom taught one fewer class than the majority of the other faculty members because "we felt that [she was] plowing new ground, as it were, and needed some more time to work on those classes." Further, Eshom admitted she was aware when she signed her contract that, in the merger situation, there might be some problem getting every teacher into his or her endorsed area of teaching.

There is nothing in the record which tells us whether the State Board of Education or the Chester-Hubbell-Byron district adopted rules or regulations pertaining to teaching outside one's endorsed area. We are therefore unable to determine whether Eshom's assignment to teach four classes outside her

endorsed area violates any rule or regulation. We have said many times that evidence which does not appear in the record cannot be considered by this court on appeal. *State v. Austin, ante* p. 420, 363 N.W.2d 397 (1985); *Mace v. Mace*, 215 Neb. 640, 341 N.W.2d 307 (1983); *Weeks v. State Board of Education*, 204 Neb. 659, 284 N.W.2d 843 (1979). While teaching outside one's area might have an effect on one's confidence about teaching that subject, the record before us does not establish that that fact was the cause of Eshom's unsatisfactory evaluations and performance. In fact, Davenport testified that Eshom lacked the basic teaching skills required to teach children, regardless of the subject area she taught. This, along with the circumstance that other teachers in the school were successfully teaching in areas with which they were not previously familiar, indicates that the evaluations of her teaching in mathematics and English classes were not so without basis as to invalidate Davenport's appraisals of her. Eshom's contention in that regard is without merit.

Eshom also contends that the assignments to unendorsed subject areas were simply a ploy aimed at achieving a reduction in force. In other words, Eshom claims the board wanted to eliminate her position with the school. However, the record reflects that the parties agreed that this case does not present a reduction in force termination. Eshom cannot take one factual position at one stage of a proceeding and then come to this court and argue an altogether different factual position.

Eshom's second argument concerning the sufficiency of the evidence is that her evaluations were made in a vacuum.

The record shows that the two evaluations made by Davenport used the same factors as were used in evaluating all of the secondary teachers, all of whom were rated during both the first and second semesters of the 1982-83 school year. Of the 10 secondary teachers evaluated, Eshom and 1 other teacher received marginal or unsatisfactory ratings for the year. No contract was given that other teacher for the following year.

The evaluation form used was explained in an item-by-item analysis by Davenport. The areas in which Davenport rated Eshom unsatisfactory were detailed, and Davenport related specific examples to support his judgment. He then compared

Eshom's performance with other secondary teachers' performances. In each of the areas which Eshom was judged to be unsatisfactory or marginal, Davenport testified that Eshom was not up to the level of the other teachers or was not up to the level that he expected.

Davenport testified that he based his observations on his 26 years of experience.

> A. The standard to which I am holding Mrs. Eshom is to that level of performance in my mind that I have arrived at through my years of experience as a classroom teacher and as administrator and by the professional training that I have had through the years and in which I continuously work on.
>
> . . . .
>
> I work for the Chester-Hubbell-Byron School District. This is my fourth year here.
>
> In that time I've had opportunity to — by my contractural [sic] duties, to observe, watch the teachers in this building do — perform as far as their level and as I think about this staff that we have and the level at which I perceive their performance, and Mrs. Eshom does not come up to that standard, to that level, so perhaps more specifically to your question, it is a standard of the teachers in this building.

Davenport described Eshom as having made a "genuine effort" to improve her performance, but nonetheless concluded that she would "not be able to arrive at the level of performance that we want."

Davenport had no opportunity to evaluate Eshom prior to the 1982-83 school year, and there were no prior evaluations from other schools in her file.

The superintendent of the district, Kenneth Mahlin, testified that he developed the evaluation form used in consultation with two of his professors as part of a project for university classes he took in educational administration.

Mahlin testified that he had not observed Eshom's teaching performance in the classroom, but had observed her in interactions with students on two different occasions. On those occasions Eshom had difficulty controlling the students.

Mahlin also stated that he thought the incidents were "significant," and he did not observe that type of problem as he walked through the other hallways of the school.

Eshom called three witnesses on her behalf. A fellow teacher testified that Eshom sought and received help from him and that he reviewed the mathematics tests Eshom gave to her students and found them satisfactory.

Two parents, a husband and wife, testified that their child was in Eshom's class and that the child liked Eshom as a teacher. Neither parent had observed Eshom in her classroom.

Eshom testified on her own behalf about helping a student solve a behavioral problem by working with Mahlin and the student on the student's problem.

In *Hollingsworth v. Board of Education*, 208 Neb. 350, 360-61, 303 N.W.2d 506, 512-13 (1981), we said: "Incompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties." In *Hollingsworth* the principal's evaluation of the plaintiff teacher was suspect because the principal failed to compare the plaintiff with other staff members' performances.

Further, in *Schulz v. Board of Education*, 210 Neb. 513, 519, 315 N.W.2d 633, 637 (1982), we stated:

> "The critical issue here is what conduct is sufficient to constitute just cause for the termination of the contract of a tenured teacher under current statutory requirements. There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts. . . ."

In *Schulz* we found that there was insufficient evidence to support a teacher's termination where the teacher received above average ratings and the record was silent as to the performance of any other teachers in the school.

In *Davis v. Board of Education*, 203 Neb. 1, 277 N.W.2d 414 (1979), we upheld a board of education determination that a teacher should be terminated. The principal in that case

testified that, based on his 10 years in the system and personal observations in the teacher's classroom, he believed termination was called for. The superintendent also testified from personal observations in the class, recommending termination. Other witnesses favored retention. We said that

> the testimony of the expert witnesses charged with the duty of evaluating the performance of the teacher was that her performance did not meet the appropriate standard. They recommended that her employment be terminated and the evidence, including the expert testimony, as a matter of law, was sufficient to support the action of the board in terminating her employment. The language in Sanders with reference to a standard of performance should not be interpreted to mean that in every hearing on termination before a board of education there must first be expert testimony establishing the appropriate and acceptable standard of performance before a board may consider whether particular conduct falls below that standard.
>
> In an error proceeding conflicting evidence will not be weighed and the order of an administrative tribunal must be affirmed if the tribunal has acted within its jurisdiction and there is sufficient competent evidence, as a matter of law, to sustain its findings and order.

*Id.* at 3-4, 277 N.W.2d at 415.

In the present case the principal made two formal evaluations of Eshom, using a form designed to objectively measure a teacher's performance in the classroom. The principal repeatedly testified about Eshom's performance in relation to her fellow teachers at the school, and concluded that although she genuinely tried to improve, she did not, and could not, meet the district's standards. The superintendent concurred with the principal's recommendation. Eshom's evidence does not contravene the evidence that she lacks the necessary skills.

Although reasonable minds might differ with the board's conclusion, the record does contain sufficient evidence as a matter of law to establish just cause to terminate Eshom's contract with the Chester-Hubbell-Byron district by reason of

incompetence.

We therefore must affirm the decision of the district court.

AFFIRMED.

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BRUCE NEAL STEINKRUGER, APPELLANT, V. KIM SUE STEINKRUGER, APPELLEE.

363 N.W.2d 399

Filed March 8, 1985. No. 84-011.

Appeal from the District Court for Franklin County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Andrew J. McMullen, for appellant.

John E. Dier of Person, Dier, Person & Osborn, for appellee.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

The instant appeal involves a domestic relations matter.

Upon de novo review we conclude that the record fails to show an abuse of discretion in regard to the division of property or the award of alimony. The judgment is therefore affirmed.

The parties shall pay their own costs and attorney fees.

AFFIRMED.

# RICHARD C. VAN PELT AND MARGARET JEAN VAN PELT, HUSBAND AND WIFE, APPELLEES, V. NILE GREATHOUSE AND ROMA GENE GREATHOUSE, HUSBAND AND WIFE, ET AL., APPELLANTS, BANNER COUNTY FARMS, INC., A DISSOLVED CORPORATION, APPELLEE.

364 N.W.2d 14

Filed March 8, 1985. No. 84-089.

1. **Deeds: Reformation: Equity.** An action to reform a deed is equitable in nature.
2. **Limitations of Actions: Laches: Equity.** Although ordinarily one has a right to bring an action within the statutory period of limitations, courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute when not to do so would work injustice in the particular case; what constitutes laches is to be determined in the light of the circumstances of the particular case.
3. **Laches.** Laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.
4. **Limitations of Actions: Abatement, Survival, and Revivor.** A statute of limitations is a period of repose designed, if asserted, to prevent recovery on stale claims; a survival statute gives life to a substantive right that but for the statute would have been destroyed.
5. **Corporations: Limitations of Actions: Abatement, Survival, and Revivor: Cases Disapproved.** Neb. Rev. Stat. § 21-20,104 (Reissue 1983) is a survival statute which destroys the capacity of former shareholders of a dissolved corporation to sue or be sued on rights entirely dependent upon and existing solely as an outgrowth of the shareholder status except within 2 years after the corporation has been dissolved. The language in *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984), which characterizes § 21-20,104 as a statute of limitations, is disapproved, as is any such suggestion which may be contained in *Barnes v. Hampton*, 198 Neb. 151, 252 N.W.2d 138 (1977).

Appeal from the District Court for Banner County: JOHN D. KNAPP, Judge. Reversed and remanded with directions to dismiss.

Brian Cook of O'Brien, Huenergardt & Cook, for appellants.

Robert W. Mullin of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees.

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

CAPORALE, J.

In this action the trial court reformed certain deeds executed by Grand View Ranch, Inc., a dissolved corporation, in which the plaintiffs-appellees, Richard C. and Margaret Jean Van Pelt, husband and wife, and defendants-appellants Nile and Roma Gene Greathouse, husband and wife, were equal shareholders. As a consequence of the decree of reformation, the Van Pelts became equal owners with the Greathouses of certain fractional oil, gas, and mineral interests formerly owned by the Greathouses. The Greathouses assign as error, among others, that the trial court failed to find the action derived from the Van Pelts' ownership of stock in a dissolved corporation and, as such, did not survive beyond 2 years after the dissolution of Grand View. We reverse and remand for dismissal.

The uncontroverted evidence establishes that the Van Pelts and the Greathouses formed Grand View, in which each of the two couples became equal shareholders and in which each of the four became an officer. The corporation then, on January 11, 1964, purchased approximately 7,560 acres of ranchland in Banner County from the Scrivens, who reserved an undivided one-half interest in the remaining minerals. Grand View then entered into the business of buying, feeding, and selling cattle. In 1970 the Greathouses purchased in their own name certain adjoining land from the Cross estate, which was later, on June 16, 1972, conveyed to Grand View. This conveyance reserved to the Greathouses all oil, gas, and mineral rights. In the early part of May 1972, Grand View, as lessor, entered into an oil, gas, and mineral lease with one Ronald Turtle on both the former Scriven and Cross lands, notwithstanding the fact that Grand View did not then own the former Cross land. Later, Turtle transferred his lease interest to Transcontinent Oil Company. On June 17, 1972, 1 day after their conveyance to Grand View, the Greathouses, unknown to the Van Pelts, entered into an oil and gas lease covering the former Cross land with Transcontinent Oil Company.

In the meantime, beginning in January of 1972, Grand View had begun to consider the sale of its land. Grand View listed its land and the former Cross land, then still titled in the

Greathouses, with various real estate brokers. In the summer of 1973, having been unable to sell its land holdings, Grand View began to consider selling only a portion of the land and dividing the rest among its shareholders, with most of the former Cross land to be conveyed to the Van Pelts. The corporate minutes concerning that discussion reflect that the Van Pelts and the Greathouses were to share equally "in all oil and mineral royalties." On December 20, 1973, Grand View sold and conveyed 3,840 acres of the former Scriven land to one Buford Carter, reserving to Grand View an undivided one-fourth interest "in and to all oil, gas, and other minerals, which GRANTOR now owns . . . ."

Following the Carter sale, Grand View disposed of its tangible personal property and conducted no business other than to pay salaries to its shareholder officers so as to deplete its assets prior to dissolution. Each couple operated the land it was to receive separately, sharing neither income nor expenses with the other couple. Corporate warranty deeds were executed by Grand View on February 5, 1976, carrying out the division of the land proposed in 1973, except that the deeds did not reserve oil, gas, or mineral rights in anyone and covenanted that the land was free from encumbrance, except easements, reservations, restrictions, rights-of-way of record, and oil and gas leases of record. The corporation was dissolved 20 days later, on February 25, 1976.

In late 1978 a son of the Greathouses, who handled the family's mineral interests, noticed that delay payments were still being made to the dissolved Grand View. It appears that up to that time the parties had not questioned the payments and simply divided them equally. Notwithstanding the fact that the Greathouses had reserved the oil, gas, and mineral rights in the former Cross land, the payments to Grand View had included payments on the former Cross land. As a result of the son's intervention, the Van Pelts and the Greathouses, on April 19, 1979, entered into a "correction agreement," which resulted in the payments being made in accordance with the title ownership of record; that is, the former Cross land was dropped from the Transcontinent Oil Company leases, each couple received an undivided one-eighth interest in the mineral interests under the

land sold to Carter, the Van Pelts were shown to own all the oil, gas, and mineral interests in the land deeded to them by Grand View, except for the part which the Greathouses had previously purchased from the Cross estate, and the Greathouses were shown to own all the oil, gas, and mineral interests in the land deeded to them by Grand View. At the same time, the parties executed other agreements with respect to the former Cross land, which, notwithstanding the titles of record and the aforedescribed "correction agreement," state that the Van Pelts own all the oil, gas, and mineral rights under the former Cross land now owned by them and that the Greathouses own all the oil, gas, and mineral rights on the small portion of the former Cross land now owned by them.

On October 25, 1979, the Greathouses sold and conveyed by warranty deed the land they had acquired from Grand View to Banner County Farms, Inc., a bona fide purchaser for value. Banner County Farms, Inc., has since been dissolved but is a defendant-appellee in this action. In their conveyance to Banner County Farms, Inc., the Greathouses reserved an undivided one-half interest in all oil, gas, and mineral rights.

In early 1982 a well drilled on the land then owned by Banner County Farms, Inc., and formerly owned by Grand View, began to produce oil. On May 19, 1982, the Van Pelts instituted this action to reform the February 5, 1976, Grand View deeds so as to reflect that the Van Pelts and the Greathouses acquired all the oil, gas, and mineral rights previously owned by Grand View, in equal shares.

With respect to the following matters, the evidence is in conflict. At trial Richard Van Pelt testified he knew when he left the offices of the corporation's attorney after the Grand View deeds were signed on February 5, 1976, that the Greathouses owned Grand View's former interest in the oil under the land they received, "plus whatever interest they had received under the Cross land." He also believed, however, from his understanding of the discussion with the Greathouses in the attorney's office, that at a later time there would be some "cross-deeding" so that the Van Pelts and the Greathouses would each end up owning an undivided one-half interest in all the oil, gas, and mineral interests under all the land conveyed to

each couple by Grand View.

No one else confirms Van Pelt's recitation of the discussion in the attorney's office. In fact, Margaret Van Pelt testified she was unaware that the mineral rights had not been divided as contemplated in 1973. Nile Greathouse testified that at the time the Grand View deeds were executed, the parties changed their 1973 position and agreed that each couple would receive the mineral rights with the land conveyed to that couple. The attorney has no recollection of what the parties discussed concerning mineral rights.

Even though Van Pelt, as he testified, thought Grand View's attorney would take care of the cross-deeding later, he talked with the attorney concerning the matter but once prior to 1980. This discussion resulted from a chance encounter at a grocery store and took place after an oil well was drilled in the area around the former Grand View land. On this occasion Van Pelt inquired as to whether the cross-deeding had been done; he was told that it had not. The Greathouses' son testified that when he discovered the erroneous delay payments previously referred to, he discussed the matter with Richard Van Pelt, who did not mention at that time that he thought he (Van Pelt) owned half of the mineral rights. Van Pelt, on the other hand, testified that it was Nile Greathouse who discussed the payment problem and that Van Pelt did tell Nile Greathouse that he (Van Pelt) did not care what was done so long as things were split 50-50.

Van Pelt testified that at one point Greathouse agreed to the cross-deeding, but the Greathouses' son objected. Nile Greathouse testified he only agreed to talk to the former corporate attorney about the matter but never agreed to cross-deed anything. Van Pelt also testified that after the correction agreement of 1979, he, "probably in 1980," placed a telephone call to the former attorney for Grand View and inquired as to whether the mineral interests were all straightened out. The attorney, apparently thinking Van Pelt was referring to the correction agreement, replied that everything had been taken care of.

The assignment of error set forth in the first paragraph of this opinion rests upon Neb. Rev. Stat. § 21-20,104 (Reissue 1983), which in pertinent part provides:

> The dissolution of a corporation . . . shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution.

Our recent decision in *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984), applying that statute, controls the disposition of this case. In *Russell* the plaintiff minority shareholder sued the dissolved corporation and others, including the corporation's shareholder president, over 2 years after the corporate dissolution, claiming that the assets had not been distributed fairly because there had been an appropriation of a corporate opportunity by the majority shareholder. In affirming the sustainment of demurrers and dismissal of the action, we said:

> Absent her status as a shareholder of York Investment, Russell would have no cause of action against any of the defendants regarding the dissolved corporation. In addition, there is no dispute that Russell's cause of action arose before dissolution of York Investment, since the suit was directed to the distribution of the assets of the corporation upon dissolution and the cash payment to be made in lieu of a distributive share of the assets of the corporation.

*Id.* at 116, 352 N.W.2d at 874.

Even though we agreed that the shareholder was asserting her personal rights, we stated:

> Nevertheless, we find that any right asserted by Russell in the present case is dependent solely upon and arises from Russell's status as a shareholder of York Investment. Asserting her right as a shareholder or her individual nonshareholder right is the same, when each such right is entirely dependent upon and existing solely as an outgrowth of Russell's status as a shareholder.

*Id.* at 117, 352 N.W.2d at 874.

The suit here, just as the suit in *Russell*, involves a shareholder dispute as to the distribution of corporate assets.

However, the fact that this is an action in equity, *Johnson v. Stover*, 218 Neb. 250, 354 N.W.2d 142 (1984), requires that we make a further analysis of the nature of the provisions contained in § 21-20,104. This is so, for if § 21-20,104 were a statute of limitations, it would not necessarily control the time within which an action in equity must be brought. Although some jurisdictions hold that statutes of limitations apply alike to legal and to equitable actions, *Simmons v. Friday*, 359 Mo. 812, 224 S.W.2d 90 (1949), and *Anderson v. Anderson*, 234 Iowa 277, 12 N.W.2d 571 (1944), in the latter actions Nebraska relies on the concept of laches. In *Campbell v. Kirby*, 195 Neb. 610, 614, 239 N.W.2d 792, 795-96 (1976), we said:

> Although ordinarily one has an undoubted right to bring an action within the statutory period, courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute when not to do so would work injustice in the particular case. [Citation omitted.] What constitutes laches is to be determined in the light of the circumstances of the particular case. [Citation omitted.]

*Campbell* also observed, as had earlier cases, that laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another. In accord, among other recent cases, is *Roadrunner Development v. Sims*, 213 Neb. 649, 330 N.W.2d 915 (1983).

If § 21-20,104 is a survival statute rather than one of limitations, not even equity could estop its application. For, while a statute of limitations is a period of repose designed, if asserted, to prevent recovery on stale claims, a survival statute gives life to a substantive right that but for the statute would have been destroyed. *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983); *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982); *Vielehr v. Malone*, 158 Neb. 436, 63 N.W.2d 497 (1954); *Canadian Ace Brewing v. Joseph Schlitz Brewing Co.*, 629 F.2d 1183 (7th Cir. 1980).

*Poliquin v. Sapp*, 72 Ill. App. 3d 477, 390 N.E.2d 974 (1979), interpreting a statute identical to Nebraska's, and applying

language in an earlier Illinois Supreme Court opinion, *The People v. Parker*, 30 Ill. 2d 486, 197 N.E.2d 30 (1964), held that the statute was one of survival and, therefore, the shareholders could not bring their derivative action more than 2 years after the date of dissolution. In accord is *Koepke v. First Nat. Bank of De Kalb*, 5 Ill. App. 3d 799, 284 N.E.2d 671 (1972), which held that the statute barred a suit in equity brought against the corporation by one shareholder on behalf of all shareholders.

Also interpreting the Illinois statute and reaching the same conclusion is *Canadian Ace Brewing v. Joseph Schlitz Brewing Co., supra*, holding that the statute applies not only to the dissolved corporation but to its shareholders and directors and that equitable estoppel could not apply to extend the 2-year time period, since the statute destroys the capacity to sue. Other cases in accord are *McGlynn v. Rosen*, 387 So. 2d 468 (Fla. App. 1980), and *MBC, Inc. v. Engel*, 119 N.H. 8, 397 A.2d 636 (1979).

We recognize that in *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984), we refer to § 21-20,104 as a statute of limitations. It must be borne in mind, however, that *Russell* was a law action in which the nature of the statute was unimportant, concerning which no issue was present, and, therefore, no analysis as to its nature was either necessary or made. Denominating the statute as one of limitations was adequate for a proper resolution of the issues presented in *Russell*. *Barnes v. Hampton*, 198 Neb. 151, 152, 252 N.W.2d 138, 139 (1977), also a law action, refers to the matter in less specific language as the "limitation period provided in" the statute. *Farmers Union Co-op Assn. v. Mid-States Constr. Co.*, 212 Neb. 147, 151, 322 N.W.2d 373, 376 (1982), by reference to other authorities, characterizes the statute as affecting the " '*incapacity* to sue or be sued.' " (Emphasis supplied.) Discussing the statute in terms of the capacity to sue appears to characterize it as one of survival.

We have held that in the absence of a statutory provision to the contrary, no action at law can be maintained by or against a dissolved corporation as a body corporate or in its corporate name. *Christensen v. Boss*, 179 Neb. 429, 138 N.W.2d 716 (1965). We also quoted therein other authorities which hold that

where a statute continues the existence of a corporation for a certain period after its dissolution for purposes of defending and prosecuting suits, no action can be maintained by or against it after the expiration of that period. In other words, while a statute of limitations relates to the remedy only and not to substantive rights, *Denver Wood Products Co. v. Frye*, 202 Neb. 286, 275 N.W.2d 67 (1979), a survival statute operates on the right or claim itself.

The language in *Russell* which characterizes § 21-20,104 as a statute of limitations rather than one of survival is disapproved, as is any such suggestion which may be contained in *Hampton*.

Section 21-20,104 is a survival statute which destroys the capacity of former shareholders of a dissolved corporation to sue or be sued on rights entirely dependent upon and existing solely as an outgrowth of the shareholder status except within 2 years after the corporation has been dissolved.

Accordingly, the decree of the district court is reversed and the cause remanded for dismissal.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

SHANAHAN, J., concurs in the result.

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ALICE A. BOLL, APPELLANT AND CROSS-APPELLEE, V. GEORGE P. BOLL II, APPELLEE AND CROSS-APPELLANT.

363 N.W.2d 542

Filed March 8, 1985. No. 84-274.

1. **Modification of Decree: Child Custody: Appeal and Error.** In actions seeking modification of the trial court's order as to the custody of children in a marriage dissolution case, the court must, on appeal, review de novo the trial court's determination with regard to whether a change of circumstances has occurred which justifies the modification of the earlier custody order.
2. **Modification of Decree: Child Custody.** In a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests of the children.
3. **Child Custody.** Orders fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person who

has custody is unfit for that purpose or that the best interests of the child require such action.

4. _____. The general rule in cases where a custodial parent desires to leave the jurisdiction for any legitimate reason is that the minor children will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the children to continue to live with that parent.
5. _____. In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof, and this policy should yield to the best interests of the child.
6. **Child Custody: Appeal and Error.** The discretion of the trial court in its determination as to whether to keep minor children within the jurisdiction of the court is subject to review, but its determination will not be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.
7. **Child Custody.** An award of custody to a parent should not be interpreted as a sentence of immobilization. A custodial parent will not be placed in a position of deciding between custody of one's child and a more successful career.

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

Bruce H. Abrahamson of Gunderson, Abrahamson & Grewe, for appellant.

Steven J. Lustgarten of Lustgarten & Roberts, P.C., for appellee.

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

WHITE, J.

This is an appeal by the petitioner, Alice A. Boll, from an order of the district court denying her petition to remove the parties' minor child from Omaha, Nebraska, to Knoxville, Tennessee. The respondent, George P. Boll II, cross-appeals on the order of the district court denying his cross-petition seeking custody of the minor child.

The marriage of the parties was dissolved on October 25, 1982. At that time petitioner was awarded custody of their minor child, George P. Boll III, subject to respondent's visitation rights. At the time of the divorce petitioner was unemployed and had no skills other than as a waitress. To better support herself and the minor child of the parties, the petitioner enrolled in the Omaha College of Health Careers and obtained

a certificate as an EEG technologist. Unable to find a position in her field in the Omaha area, the petitioner sought employment elsewhere and eventually found a position as an EEG technologist in Knoxville, Tennessee. The district court granted her permission to temporarily remove the child to Tennessee until the full hearing on the petition was held to decide the matter.

Following the full hearing, the trial court ordered that the minor child not be removed from the court's jurisdiction and that custody remain in the petitioner.

The petitioner assigns as error the finding of the district court that it would be in the best interests of the minor child to deny petitioner's application to remove the child to Knoxville, Tennessee. The respondent assigns as error in his cross-appeal the ruling by the court that it would be in the best interests of the child to remain in the custody of the petitioner. We reverse on the application to remove and affirm the custody decision.

First, we address respondent's cross-appeal on the issue of custody. In actions seeking modification of the trial court's order as to the custody of children in a marriage dissolution case, this court must, on appeal, review de novo the trial court's determination with regard to whether a change of circumstances has occurred which justifies the modification of the earlier custody order. We are required to make independent conclusions of fact without reference to the conclusion reached by the trial court, but we will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite. *Dunne v. Dunne*, 211 Neb. 636, 319 N.W.2d 741 (1982); *Haake v. Haake*, 215 Neb. 889, 341 N.W.2d 911 (1983).

Acting within that scope of review, we affirm the trial court's order denying the respondent's cross-petition seeking custody of the child.

In a modification hearing to determine who should have custody of the children, the paramount consideration is the best interests of the children. *Kuhn v. Kuhn*, 204 Neb. 363, 282 N.W.2d 43 (1979); *Dunne v. Dunne, supra*; *Haake v. Haake, supra*.

Upon reviewing the facts we find that there has not been a

sufficient change of circumstances to warrant a change of custody. It is not in the child's best interest to be placed in the custody of the respondent. The petitioner has adequately cared for their minor child. She is making an attempt to improve her standard of living so that she can provide better care for the child. Since the divorce decree the petitioner has received a certificate as an EEG technologist. She eventually found a position as an EEG technologist that paid much better than her previous employment as a waitress. Although there is evidence that she is not the perfect mother, the petitioner is not unfit to be in custody of the child. There has not been a sufficient change of circumstances to change custody. As we stated in *Dunne, supra* at 644-45, 319 N.W.2d at 745, "orders fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person who has custody is unfit for that purpose or that the best interests of the child require such action." See, also, *Haake v. Haake, supra.*

Next we address the issue of whether the trial court correctly ordered that it was not in the child's best interests to allow the petitioner to remove the child to Knoxville, Tennessee. We stated in *Jafari v. Jafari*, 204 Neb. 622, 284 N.W.2d 554 (1979), that the general rule in cases where a custodial parent desires to leave the jurisdiction for any legitimate reason is that the minor children will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the children to continue to live with that parent. In *Campbell v. Campbell*, 156 Neb. 155, 159, 55 N.W.2d 347, 350 (1952), we held: " 'In a divorce case it is generally the best policy to keep minor children within the jurisdiction of the court. However, the welfare of the child should receive the paramount consideration in the determination thereof and this policy should yield to the best interests of the child.' " See, *Jafari v. Jafari, supra*; *Haake v. Haake, supra.*

The trial court, after consideration of the facts, found that the best interests and welfare of the child would be served by denying the petitioner's request to remove the child to Tennessee. We do not agree.

The record reveals substantial evidence indicating that the petitioner had a legitimate reason to move the minor child to

Tennessee. She was attempting to improve her standard of living by obtaining a position as an EEG technologist, a career for which she had just received training. This was a considerable improvement over being unemployed or working as a waitress. The evidence indicates that she had obtained a position in Knoxville, but could not find an opening in her field in the Omaha area. Obtaining employment when unemployed and finding employment with a substantial opportunity for increased earnings are reasonable and legitimate reasons for a custodial parent to move to another jurisdiction.

The trial court found that it was in the best interests of the child to remain in the custody of the petitioner. Based on the opportunities for improvement available to the petitioner in Tennessee, we can find no valid reason why it would not be in the child's best interest to accompany his mother to Knoxville. An improved standard of living would certainly be in the child's best interests. During their temporary stay in Tennessee, the evidence shows that the petitioner found adequate living arrangements and an adequate child care facility, and the child had made friends and was adapting to the move. The respondent alleged that the child's community ties and extended family in the Omaha area were reasons to deny the application to remove the child. Although we realize community ties are important factors to be considered, they do not mandate prohibiting a custodial parent from relocating for a legitimate reason. As we stated in *Gottschall v. Gottschall*, 210 Neb. 679, 680-81, 316 N.W.2d 610, 612 (1982), "We do not feel that an award of custody to a parent should be interpreted as a sentence to immobilization." We will not place a custodial parent in the position of deciding between custody of one's child and a more successful career.

As we view the evidence, recognizing that the trial court observed the witnesses, the petitioner had a legitimate reason which was in the best interests of the child for moving to Tennessee. We therefore reverse the trial court's decision to deny the application for removal.

AFFIRMED IN PART, AND IN PART REVERSED.

# STATE OF NEBRASKA, APPELLEE, V. BRIAN KEITH PERKINS, APPELLANT.

364 N.W.2d 20

Filed March 8, 1985. No. 84-308.

1. **Confessions: Miranda Rights.** If the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease.
2. **Miranda Rights: Waiver.** In considering whether *Miranda* rights have been voluntarily waived, the court must look to the background, experience, and conduct of the accused.
3. **Confessions.** A "sympathetic" approach in an interrogation does not amount to coercion.
4. **Juries.** In order to establish a prima facie violation of the fair cross section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.
5. _____. To show a group is distinct the defendant must show that (1) the group is limited by some factor, such as race or age, (2) the group has a basic similarity in attitudes, ideas, or experience, and (3) there is a community of interest among members of the group requiring representation in the jury selection process.
6. _____. The degree of underrepresentation on a jury panel cannot be measured by census data alone.
7. **Homicide: Intent.** There need not be an intent to kill in felony murder, only an intent to commit the underlying felony.
8. _____: _____. 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.
9. _____: _____. Duress is not a defense to a charge of homicide.
10. **Jury Instructions: Appeal and Error.** Jury instructions must be read as a whole. If they fairly present the law so that the jury could not be misled, there is no prejudicial error.

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

Rodney J. Rehm of Rehm & Bartling, for appellant.

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

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

BOSLAUGH, J.

The defendant, Brian Keith Perkins, was convicted of first degree murder as the result of his participation in the December 2, 1982, robbery-murder of Gordon Robert Eno, and was sentenced to life imprisonment. He has appealed and has assigned as error the trial court's (1) failure to suppress his statements made during interrogation; (2) overruling of his motion to quash the jury panel for its underrepresentation of individuals 19 to 34 years old; (3) failure to declare the felony murder law unconstitutional; and (4) giving or refusing to give certain jury instructions.

The record shows that the defendant lived with Benita Bradford at a house rented from the victim Eno at 2268 S Street in Lincoln, Nebraska. On December 2, 1982, the rent was several months in arrears, and Benita had been served with an eviction notice. Benita decided that she would pay the rent due and telephoned Eno at around 5 p.m. on December 2 and told him to come by the house that evening and pick up the rent.

When Benita told the defendant that she intended to pay the rent, he decided to rob Eno of the rent money. The defendant asked Benita for a scarf and a knife. As Eno approached the front door, the defendant left the house through the back door.

While the rent was being paid, the defendant hid in the bushes along the side of the house.

While Eno was still at the residence, Walter Bradford arrived. He had been drinking, and wanted to talk to Eno about the possibility of Eno's getting him a job. An argument developed between Eno and Walter as they stood on the front porch of the house, whereupon Eno walked away.

As Eno was walking to his car, Walter jumped Eno from behind. Eno pushed Walter to the ground, at which time the defendant joined in and attacked Eno. Eno was knocked to the ground and a struggle between the three followed. The defendant grabbed Eno and told him this was a robbery. The defendant held Eno while Walter kicked him in the face several times and then searched his pockets. Eno gave up his wallet, but the defendant and Walter wanted his briefcase, hoping to find the rent money. The defendant claimed Walter stabbed Eno

while the defendant was searching for the briefcase. However, an eyewitness testified that Eno was first assaulted with a knife by a man wearing a red scarf. The defendant admitted that he was the one wearing a scarf over his face that night, a fact corroborated by Benita.

After Eno was stabbed the defendant claimed Walter forced him to help put Eno into Eno's car under threat of personal harm if the defendant did not cooperate. However, from the time of the supposed threat until the time Eno was fatally stabbed, the defendant had several opportunities to escape but chose not to.

The defendant and Walter Bradford put Eno into Eno's car and drove to a rural area northwest of Lincoln. Walter pulled Eno out of the car and, with the defendant's help, dragged him into a ditch, where Walter proceeded to stab Eno while the defendant watched. They left Eno in the ditch and returned to Lincoln in Eno's car. Both had blood on their clothes. Later that evening, the defendant threw liquid bleach on the bushes and yard area at the S Street residence, and later drove to Eno's parked car and doused both the interior and exterior with bleach. The knife used in the assault was left in the kitchen sink at Benita's mother's home.

The defendant was arrested on December 5, 1982, and interrogated by the Lincoln police. He gave a statement to the police at that time about his involvement in the crime, which was later played at trial. The defendant claims his motion to suppress his statement to the police should have been sustained because his actions in remaining silent during interrogation were a revocation of his waiver of his *Miranda* rights. He also claims the statement was not admissible because it was elicited by coercion.

After he had been arrested on December 5, 1982, the defendant was asked if he knew why he was arrested. When he answered "yes," the interrogating officer, James Peschong, told the defendant that he had a warrant for his arrest on some misdemeanor bicycle offenses and that he wanted to talk with him about the death of Robert Eno. The defendant responded twice, "Who is Mr. Eno?"

The *Miranda* rights were read to the defendant at 7:42 a.m. As each warning was read, the defendant waived that right. Officer Peschong then started questioning him. Shortly thereafter, the defendant slid his chair against a wall, stuck his feet out, slouched, rested his head against the wall, closed his eyes, and crossed his arms. He remained that way for about one-half hour while the officer continued to pose questions. At 8:15 a.m. the officer left the room. He returned around 8:40 a.m. and continued the interrogation by playing Benita Bradford's taped statement that had been given earlier that morning. For about 30 minutes, while the tape played, the defendant sat up, leaned forward, and held his head between his hands with his elbows on his knees. When the tape ended at around 9:10, Officer Peschong started the questioning again. At 9:25 the defendant said that he wanted to talk to Officer Sorensen.

At 9:30 a.m. Sorensen came into the room. The defendant told Sorensen that he had not killed Eno, and asked if he could talk to Benita. She was allowed in the room for 5 minutes. The defendant then said that he wanted to talk with Sorensen alone. The defendant started talking and asked if the statement could be recorded. Before taping the statement, Sorensen repeated the defendant's *Miranda* rights. The defendant again waived all of his rights and made a statement as to his involvement in the crime. The taping began at 9:42 a.m. and ended at 10:22 a.m.

The defendant claims that his silence from 7:45 a.m. until 9:25 a.m. was a revocation of his prior waiver of his *Miranda* rights. This contention is without merit.

The general rule governing revocation of a waiver of *Miranda* rights is set out in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the

> right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

*Id.* at 473-74. This court adopted that holding in *In re Interest of Durand, State v. Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980).

In *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), the U.S. Supreme Court noted that "[t]he critical safeguard identified in the passage at issue is a person's 'right to cut off questioning.' " This right must be scrupulously honored.

Here, there was no indication that the defendant wished to end the questioning. He did not say "I don't want to talk to you," and never flatly refused to answer any questions.

*Miranda* should not be read so strictly as to require the police to accept as conclusive any statement or act, no matter how ambiguous, as a sign that the suspect desires to cut off questioning. *Lamb v. Commonwealth*, 217 Va. 307, 227 S.E.2d 737 (1976); *People v. Roark*, 643 P.2d 756 (Colo. 1982) (Erickson, J., concurring in part and dissenting in part). See, also, *Vail v. State*, 599 P.2d 1371 (Alaska 1979); *State v. House*, 54 Ohio St. 2d 297, 376 N.E.2d 588 (1978).

An expert who testified for the defense admitted that there were a "myriad of possibilities" as to why the defendant remained silent and that his actions were open to multiple interpretations. The defendant possessed at least normal communication skills and could have said that he did not want to talk to the officer. Instead of refusing to answer questions, he asked to talk with Officer Sorensen.

Under the totality of the circumstances test, there is no reason to believe the defendant revoked his prior waiver or that the statement was not voluntarily made.

*Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), established that in considering whether rights have been voluntarily waived, the court must look to the background, experience, and conduct of the accused.

The defendant here had been arrested several times previously and had been through the *Miranda* procedures prior

to his questioning in this case. On one prior occasion he refused to waive his *Miranda* rights and told the police he did not want to talk to them. At another time he agreed to make a statement and sat in a position similar to the one in question. It was his normal sitting position. At this interrogation it is more likely that he was silent in order to discover what the police found out from Benita and what kind of a deal he could make. When he did speak, he chose to talk with Sorensen, an officer with whom he had previously discussed the case and a man he had known from prior encounters with the law.

The technique of interrogation used here was not threatening, coercive, or promising. Officer Peschong used what is called an "alibi" approach, in which the officer suggests that the killing might have been an accident. This "sympathetic" approach does not amount to coercion. See *Miller v. Fenton*, 741 F.2d 1456 (3d Cir. 1984). The totality of the circumstance does not suggest that the defendant revoked his waiver or that he was coerced into giving his statement.

The defendant next challenges the composition of the jury at trial. He claims there was a systematic exclusion of persons between the ages of 19 and 34 sufficient to deny him his right to a fair jury trial. The defendant failed to prove such a systematic exclusion. This assignment of error is without sufficient support on the record.

The U.S. Supreme Court in *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), set forth what a defendant must prove in order to show a prima facie violation of his sixth amendment right to a jury pool representing a fair cross section of the community.

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

*Id.* at 364.

To show the group is distinct the defendant must show that (1) the group is limited by some factor, such as race or age, (2) the group has a basic similarity in attitudes, ideas, or experience, and (3) there is a community of interest among members of the group requiring representation in the jury selection process. *Willis v. Zant*, 720 F.2d 1212 (11th Cir. 1983).

Here, the defendant failed to show any similarity between the members of the group in question other than age. Even the defendant's expert witnesses testified that within this age group there can be wide differences in attitudes, income, and interests. Age by itself is insufficient to establish a group as distinctive. "[T]here is no cognizable 'magic' about a group whose sole identifiable characteristic is that each member is in the age range of 18-34." *United States v. Potter*, 552 F.2d 901, 905 (9th Cir. 1977); *United States v. Ross*, 468 F.2d 1213 (9th Cir. 1972), *cert. denied* 410 U.S. 989, 93 S. Ct. 1500, 36 L. Ed. 2d 188 (1973).

Secondly, there was insufficient proof to establish that this group was not fairly represented in the jury venires. The defendant relied solely on the results of the 1980 census for his contention that 49 percent of the eligible jury population in Lancaster County was between 19 and 34.

A U.S. census report does not provide an accurate accounting of the number of residents in a given county. See, *State v. Davis*, 66 Neb. 333, 92 N.W. 740 (1902); *Gordon v. Lowry*, 116 Neb. 359, 217 N.W. 610 (1928). The testimony established that, basically, census packets are mailed to where people are living at the time, without close scrutiny as to whether an individual might be counted at another location. Tracking university students is particularly difficult, since a student may be counted in group housing on campus and also at his parents' residence.

The degree of underrepresentation on a jury panel cannot be measured by census data alone. Without more, the defendant has failed to establish a clear case of unfair representation.

Finally, the defendant failed to show a systematic exclusion of 19- to 34-year-olds in the jury selection process. Essentially, he is challenging the validity of using voter registration key numbers as the basis for jury selection.

He argues that the situation is analogous to *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975), and *Duren v. Missouri, supra*, in which state statutes allowed women to be excluded from jury selection upon request. The statutes were found to be unconstitutional for violating the fair cross section requirement of the sixth amendment. The defendant claims that the Nebraska system similarly results in systematic exclusion by limiting jury selection to the names of registered voters. Such tests have been shown to exclude a wide range of individuals, including young people between the ages of 19 and 34.

However, the situations are distinguishable. As pointed out by this court in *State v. Addison*, 198 Neb. 442, 443, 253 N.W.2d 165, 166 (1977):

> The Nebraska statute does not authorize the exclusion of any class from the jury list; the only exclusion is of persons found individually not to have the qualifications of jurors, and the jury commissioner is required to record all names so stricken, such list being subject to inspection by the court and by the attorneys of record. § 25-1629, R.R.S. 1943. The Nebraska system is clearly outside the ambit of Taylor v. Louisiana, *supra*.

See, also, *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980). The failure of young people to register to vote does not amount to a systematic exclusion of young people from jury venires in the context of *Taylor* or *Duren*.

Defendant next challenges the constitutionality of Nebraska's felony murder law, Neb. Rev. Stat. § 28-303 (Reissue 1979), as allowing disproportionately harsh sentences of death or life imprisonment to be imposed upon a defendant who did not kill or have the intent to kill.

This court's opinion in *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982), is dispositive. *Bradley* established that there need not be an intent to kill in felony murder, only an intent to commit the underlying felony. " 'The turpitude involved in the robbery takes the place of intent to kill . . . .' " *Id.* at 884, 317 N.W.2d at 101.

Felony murder is not on the same footing with other forms of first degree murder. Willfulness, deliberation, and

premeditation are irrelevant considerations. " 'In [felony murder] it is the particular *actus reus*, the . . . means of the murder, which we have singled out for our gravest criminal sanction and not a particular *mens rea*. . . .' " *Id.* at 885, 317 N.W.2d at 101, quoting *Evans v. State*, 28 Md. App. 640, 349 A.2d 300 (1975).

The defendant admitted he intended to rob Eno and that he and Walter Bradford joined in a concerted effort to rob Eno. They jointly assaulted Eno and, together, drove him to a rural area where he was brutalized before being killed. The defendant watched Walter stab Eno and then returned to Lincoln with Walter in Eno's car. The defendant then tried to conceal the crime.

In the present case the defendant carried out the robbery with the help of Walter Bradford. It is this *actus reus* which is punished by felony murder. Life imprisonment was not a harsh sentence for a robbery which culminated in a brutal murder. The felony murder law is not unconstitutional on this basis.

Finally, the defendant challenges the trial court's refusal to instruct the jury on duress as a defense, and the giving of instruction No. 10 as to the elements of felony murder.

The trial court did not err in refusing to instruct as to duress. As established in *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979), *supp. op.* 204 Neb. 196, 281 N.W.2d 749, duress is not a defense to a charge of homicide.

The defendant claims instruction No. 10 was erroneous in that it did not require there be a causal connection between the robbery and murder for felony murder to occur.

Instruction No. 10 provided:

> A defendant who is engaged in the perpetration of a robbery or attempted robbery who has knowledge that another has actively joined in such defendant's criminal enterprise and who continues to participate in the robbery or attempted robbery in any degree cannot escape responsibility for a homicide which occurs during the course of the robbery or attempted robbery because as a result either of fear or even of a better motive he concludes to desist from further participation or flee prior to the consummation of the robbery or attempted robbery.

The defendant claims instruction No. 10 did not clearly require that the murder had occurred within the res gestae of the crime.

Jury instructions must be read as a whole. If they fairly present the law so that the jury could not be misled, there is no prejudicial error. *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984).

Instruction No. 10 as written was sufficient to establish that the murder must flow from the course of the robbery. Any concern that it did not adequately express that the murder must occur during the res gestae of the robbery is dispelled by instruction No. 12, which provided in part:

> You are instructed that in order to establish that a homicide was committed in the perpetration of or attempt to perpetrate a robbery it is not necessary for the State to prove that the homicide was committed before or during the actual perpetration of or attempted perpetration of a robbery; *a homicide is committed in the perpetration of or attempt to perpetrate a robbery if it is committed in the res gestae of the perpetration of or attempted perpetration of a robbery; that is, if the initial crime of perpetration or of attempt to perpetrate a robbery and the homicide were closely connected in point of time, place and causal relation, and were parts of one continuous transaction.*

(Emphasis supplied.)

When read together, the instructions given fairly stated the elements of felony murder.

There being no error, the judgment is affirmed.

AFFIRMED.

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

363 N.W.2d 546

Filed March 8, 1985. No. 84-370.

**Parental Rights: Appeal and Error.** We review the matter de novo upon the record to determine if the order terminating parental rights is supported by clear and convincing evidence.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Steven Lefler and Jerry Fogarty, for appellant.

Donald L. Knowles, Douglas County Attorney, and Christopher E. Kelly, for appellee.

Pamela Hogenson Govier of Frost & Meyers, guardian ad litem.

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

WHITE, J.

This is an appeal from an order of the the separate juvenile court of Douglas County terminating the parental relationship of S.A.S., a female child born December 7, 1980, to V.S., the natural mother.

In June 1982 the police were notified of a case of possible child neglect through a call to the department's child abuse hotline. The police called the case to the attention of juvenile authorities from Child Protective Services, who upon investigation discovered that the child, S.A.S., then approximately 18 months old, was living with the mother and her husband in the cab of a truck. The husband was employed by a carnival as a driver and a ride operator. When found, S.A.S. exuded a strong body odor and suffered from severe diaper rash, but was otherwise in good health. The mother had been asked to leave the carnival and voluntarily surrendered temporary custody of S.A.S. It was the mother's plan to travel to California, but she had neither funds to accomplish the journey nor a prospective place of residence when she arrived. The husband, although not the child's natural father, expressed an interest in S.A.S. but did not possess sufficient means to care for her.

On July 7, 1982, a petition was filed alleging that S.A.S. was a juvenile who had not been provided necessary financial support and residence. The petition further alleged that S.A.S. had been left alone without supervision for prolonged periods in potentially dangerous situations and, further, that S.A.S. had been offered and given to strangers. A supplemental

petition was filed in September 1982 to further allege that the mother had absented herself from the jurisdiction and that the authorities did not know her whereabouts.

An adjudication hearing was held on November 10, 1982, and the facts alleged in the petition were found to be true. Prayer for termination of parental rights was taken under advisement. The mother was subsequently ordered by the court to participate in a plan of rehabilitation involving the securing of employment or job training, counseling, completion of parenting classes, and the establishment of a permanent residence. After numerous review hearings a request for termination was filed. At the conclusion of a hearing held on March 26, 1984, the mother's parental rights were terminated. S.A.S. had been in foster care for almost 2 years.

The mother appeals. As her assignment of error, she alleges error in the receipt of evidence relating to the charges of leaving the child unattended and offering the child to others. We review the matter de novo upon the record to determine if the order terminating parental rights is supported by clear and convincing evidence. *In re Interest of D.R. and S.B.*, 217 Neb. 883, 351 N.W.2d 424 (1984).

The assigned error relates only to the finding of neglect. As clear and convincing evidence exists apart from the disputed evidence to establish that fact, the alleged error will not be further discussed except to note that it relates to receipt into evidence of written reports of social workers who in many cases were present in court and not called to testify. The basis for the court's ruling is not explained in the record, nor is authority cited for the curious proposition in the bill of exceptions that the rules of evidence do not apply to termination cases.

Instead, we are again presented with the situation of a failed plan of rehabilitation. After 2 years of counseling, aid, and advice, the mother is not prepared to provide even the most minimally stable environment for the child. The mother (whether now divorced or not) lived with three different men, the criterion seeming to be whether they would provide for her. Successive jobs were secured and left, and false reports were made to the court representatives. At the time of the termination hearing, except for fairly regular visits to S.A.S.,

the rehabilitation plan was a failure and in a shambles.

The mother is not a vicious person, nor was she cruel to her daughter. She is simply unable or unwilling to take any responsibility. To release S.A.S., the child, to the mother's catch-as-you-can nomadic life is unthinkable, and to sentence her to a lifetime of foster care is equally unthinkable.

We have previously said that children cannot be made to await uncertain parental maturity. *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979). That statement remains the law in this state.

AFFIRMED.

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ROBERT M. ZEMANEK, APPELLEE, V. BEVERLY A. ZEMANEK, APPELLANT.

363 N.W.2d 399

Filed March 8, 1985. No. 84-396.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Jerome J. Ortman, for appellant.

Henry R. Setser of Erickson & Sederstrom, P.C., for appellee.

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

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.