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DECIDED BETWEEN

FEBRUARY 21, 1986 and JUNE 5, 1986

IN THE

Supreme Court of Nebraska

VOLUME CCXXII

DONALD C. PATTON

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By Donald C. Patton, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. BA-004: **In re Admission of Scott David Thayer.** Applicant having successfully passed the February 1986 bar exam, appeal is dismissed as moot.

No. JQ85-002: **In re Complaint Against Judge Charles F. Fisher.** By order of the court, case dismissed as moot.

No. 84-926: **Zavala v. Great Western Sugar Co.** Motion approved. Case remanded without prejudice to Nebraska Workmen's Compensation Court for consideration of lump sum settlement.

No. 85-037: **Peterson v. Hynes.** Stipulation allowed; appeal dismissed.

No. 85-203: **Gordon v. Western Outdoor Advertising Co.** Stipulation of settlement approved. Judgment is vacated and parties joint motion to remand is granted.

No. 85-222: **State v. Rogers.** Judgment affirmed; see Rule 7A.

No. 85-314: **Metropolitan Life Ins. Co. v. Barelmann.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 85-410: **In re Interest of Sorahan.** Stipulation allowed; appeal dismissed.

No. 85-480: **Raymond v. Mental Health Board of the Fourth Judicial District.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. 85-527: **Taylor v. Wakefield.** Stipulation allowed; appeal dismissed.

No. 85-559: **Wagner v. Tank.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-562: **Metropolitan Utilities Dist. v. Green.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-571: **Abbott v. Abbott.** Motion of appellee to dismiss appeal sustained.

Nos. 85-586, 85-587: **State v. Ebert.** Judgment affirmed; see Rule 7A.

No. 85-591: **State v. Sharp.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-599: **Evert v. Evert.** Motion of appellee for summary dismissal sustained; judgment summarily affirmed.

No. 85-625: **Hancock v. Universal Surety Co.** Stipulation allowed; appeal dismissed.

No. 85-631: **Farmers & Merchants National Bank v. Mills.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 85-632: **Pitkin v. Erstrom.** Stipulation allowed; appeal dismissed.

No. 85-638: **Gergen v. Olena.** Stipulation allowed; appeal dismissed.

No. 85-675: **State v. Thomas.** Judgment affirmed; see Rule 7A.

No. 85-690: **State v. Graham.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-699: **State v. Tipton.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-707: **State v. Richards.** Judgment affirmed; see Rule 7A.

No. 85-730: **Huffman v. Huffman.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 85-751: **State ex rel. Tyler v. Terry.** By order of the court, appeal dismissed.

No. 85-752: **State v. Rassman.** By order of the court, appeal dismissed.

No. 85-755: **Thompson v. Flebbe.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-756: **McCorison v. Parrish.** Stipulation allowed; appeal dismissed.

No. 85-762: **Stewart v. City of Mitchell.** Stipulation allowed; appeal dismissed.

No. 85-763: **Settles v. City of Mitchell.** Stipulation allowed; appeal dismissed.

No. 85-768: **Jordan v. Jordan.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-775: **State v. Dennis.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-780: **Clare v. Jensen.** Stipulation allowed; appeal dismissed.

No. 85-783: **State v. Coenen.** Judgment affirmed; see Rule 7A.

No. 85-785: **State v. Buschkamp.** Judgment affirmed; see Rule 7A.

No. 85-786: **Hite v. Putsky Const. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 85-789: **Sioux City Production Credit v. Beermann Bros. Dehy.** Stipulation allowed; appeal dismissed.

No. 85-796: **Northwestern State Bank v. Williams.** Stipulation allowed; appeal dismissed.

No. 85-798: **State v. Scholl.** Judgment affirmed; see Rule 7A.

No. 85-800: **State v. Rassman.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-803: **State v. Anderson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-808: **Bauer v. Bauer.** Stipulation of settlement approved; affirmed as modified by order of the court.

Nos. 85-810, 85-811: **State v. Fuestman.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-814: **Coon v. Coon.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-823: **State v. Jones.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-824: **State v. Griffin.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-828: **State v. Brown.** Judgment affirmed; see Rule 7A.

No. 85-831: **Riddington v. Welsh & Shots, Inc.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-832: **Field v. Jensen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-837: **Hammelmann v. Berkland.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 85-850: **State v. Eizenhoefer.** Judgment affirmed; see Rule 7A.

No. 85-851: **State v. Summers.** Judgment affirmed; see Rule 7A.

No. 85-852: **Reeder v. Reeder.** Stipulation allowed; appeal dismissed.

No. 85-857: **State v. Boerschig.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-864: **State v. Oellerich.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-865: **State v. Johnson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-866: **State v. Ortiz.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to

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

No. 85-867: **State v. Burket.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-868: **State v. Wert.** Judgment affirmed; see Rule 7A.

No. 85-871: **State v. Brown.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-878: **Holthaus v. Holthaus.** Stipulation of settlement approved. Affirmed as modified by order of the court.

No. 85-885: **State v. Wilson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-886: **R.D. Barr Co. v. City of Omaha.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-892: **State v. Dinkelman.** Judgment affirmed; see Rule 7A.

No. 85-893: **State v. Bentley.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

Nos. 85-895, 85-913: **State v. Manchester.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 85-898: **State v. Halferty.** Judgment affirmed; see Rule 7A.

No. 85-899: **Bernhardt v. Ficken.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No. 85-900: **Patterson v. Patterson.** Affirmed as modified by order of the court.

No. 85-902: **Supanchick v. Supanchick.** Stipulation allowed; appeal dismissed.

No. 85-903: **Kearney Convention Center v. Buffalo County Board of Equalization.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-904: **State v. Wright.** Judgment affirmed; see Rule 7A.

No. 85-905: **State v. Barnette.** Judgment affirmed; see Rule 7A.

No. 85-910: **Kelly v. Bensen.** By order of the court, case remanded to district court for Logan County for an entry of a judgment of dismissal.

No. 85-919: **Coufal v. Coufal.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-923: **State v. Otteman.** Judgment affirmed; see Rule 7A.

No. 85-926: **State v. Strouf.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 85-929: **State v. Finley.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-932: **Morris v. Morris.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-933: **Federal Land Bank of Omaha v. Scow Enterprises, Inc.** Stipulation allowed; appeal dismissed.

No. 85-941: **State v. Larson.** Judgment affirmed; see Rule 7A.

No. 85-944: **State v. Gonzales.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 85-948: **State v. Meier.** Judgment affirmed; see Rule 7A.

No. 85-949: **State v. Lanagan.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-953: **State v. Kudron.** Judgment affirmed; see Rule 7A.

No. 85-955: **McCorison v. Parrish.** Stipulation allowed; appeal dismissed.

No. 85-961: **State v. Morris.** Stipulation allowed; appeal dismissed.

No. 85-965: **State v. Willard.** Stipulation allowed; appeal dismissed without prejudice.

No. 85-966: **State v. Shuck.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-967: **Murphy v. Connor.** Stipulation allowed; appeal dismissed.

No. 85-971: **State v. Williamson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-981: **First Westroads Bank, Inc. v. Dillon International Ltd.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-982: **State v. Holmes.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-985: **Allstate Leasing Corp. v. National Transportation, Inc.** Stipulation allowed; appeal dismissed.

No. 85-987: **State v. Huls.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-989: **Elkhorn Valley Partnership v. Whiteside.** Stipulation allowed; appeal dismissed.

No. 85-990: **State v. Hurley.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-992: **State v. Thomas.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-994: **State v. Whitlow.** Stipulation allowed; appeal dismissed.

No. 85-1002: **State v. McGeorge.** Judgment affirmed; see Rule 7A.

No. 85-1004: **State v. Lysenko.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-1005: **State v. McCormick.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-1007: **Investor's Realty Inc. v. Dale Beggs Develop. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-1009: **In re Estate of Balvin.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-1010: **State v. Hiles.** Judgment affirmed; see Rule 7A.

No. 85-1012: **Foreman v. Anderson.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 86-002: **Zogg v. Zogg.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-004: **American Tile and Marble v. Wozniak.** Stipulation allowed; appeal dismissed.

No. 86-010: **State v. Lemburg.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-013: **Hazuka v. State Dept. of Roads.** Stipulation allowed; appeal dismissed.

No. 86-023: **Grauerholz v. Omeco-St. John Co.** Stipulation allowed; appeal dismissed, each party to pay own costs.

No. 86-027: **State v. Eyten.** Judgment affirmed; see Rule 7A.

No. 86-028: **State v. Graham.** Judgment affirmed; see Rule 7A.

No. 86-032: **Babbitt v. Jensen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-034: **In re Estate of Shyne.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 86-036: **Nemec v. Nemec.** Judgment affirmed; see Rule 7A.

No. 86-038: **Nemaha Realty, Inc. v. Masonic Association.** Stipulation allowed; appeal dismissed.

No. 86-039: **In re Estate of Thorley.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-040: **Bruner v. Bruner.** By order of the court, appeal

dismissed.

No. 86-044: **State v. Koenig.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-045: **O'Connor v. Bishop Clarkson Mem. Hospital.** Stipulation allowed; appeal dismissed.

No. 86-051: **Daily v. Daily.** Stipulation allowed; appeal dismissed.

No. 86-056: **Rybin v. Chief Cortland Corp.** Judgment affirmed; see Rule 7A.

No. 86-063: **State v. Wackerla.** Judgment affirmed; see Rule 7A.

No. 86-066: **State v. Denby.** By order of the court, appeal dismissed for failure to file briefs.

No. 86-067: **State v. King.** Stipulation allowed; appeal dismissed.

No. 86-070: **Montelongo v. Dobson Bros. Const. Co.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-075: **Anderson v. School District No. 1 of County of Douglas.** Stipulation allowed; appeal dismissed.

No. 86-076: **Gooch v. Friedrich.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-077: **Salman v. Ames Avenue Corporation.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-079: **State v. Brewer.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-085: **Lester's of Minnesota, Inc. v. Twidwell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-088: **Kurtz v. Marquardt.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-090: **Travelers Ins. Co. v. Larsen.** Judgment affirmed; see Rule 7A.

No. 86-092: **State v. Hoffman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-097: **State v. Simpson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to

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

No. 86-100: **Matyja v. Charvat.** Stipulation allowed; appeal dismissed.

No. 86-101: **State v. Smith.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed, see Rule 3B.

No. 86-103: **Gourlay v. Bill Morrison Realty.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. 86-105: **Larington v. Larington.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 86-106: **State v. Schneider.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-110: **Robinson v. Robinson.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 86-115: **Blocker v. Baack.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-120: **Meyer Investment Co. v. John Hancock Mutual Life Ins. Co.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

Nos. 86-123, 86-124: **State v. Harris.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-125: **State v. Ericksen.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-126: **State v. Robinson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 86-131: **North Platte National Bank v. Farmland Service Coop.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-132: **Porter v. Porter.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-135: **State v. Brooks.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-139: **Howsden v. Rolenc.** Stipulation allowed; appeal dismissed.

No. 86-140: **Bankers Life Ins. Co. v. Weatherwax Farms, Inc.** Stipulation allowed; appeal dismissed.

No. 86-146: **Tambke v. Tambke.** Affirmed as modified by order of the court.

No. 86-147: **In re Gauthier v. Clay Center Coop.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-161: **Smith v. American Baptist Homes of the Midwest.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-178: **John Deere Co. v. Heimes.** Stipulation allowed; appeal dismissed with prejudice.

No. 86-188: **State v. Shelton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-210: **Bloom v. Bloom.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-214: **State v. Sederstrom.** Stipulation allowed; appeal dismissed.

No. 86-228: **Benchmark Systems v. Datatronics, Inc.** Stipulation allowed; appeal dismissed with prejudice, each party to pay its own costs.

No. 86-231: **State v. Moore.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-244: **Castro v. IBP.** Motion of appellant to dismiss appeal without prejudice sustained; appeal dismissed.

No. 86-245: **Sitzler v. Bemis Company, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 86-249: **Krueger v. Krueger.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 86-253: **Anderson v. Anderson.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 86-255: **Howsden v. Rolenc.** Stipulation allowed; appeal dismissed.

No. 86-275: **Daniell v. McCorison.** Joint motion to dismiss appeal sustained; appeal dismissed.

No. 86-313: **In re Interest of Burden.** Stipulation allowed; appeal dismissed.

No. 86-319: **State v. Costello.** Stipulation allowed; appeal dismissed.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

LOWELL FOLAND, APPELLANT AND CROSS-APPELLEE, V. GERRY MALANDER, APPELLEE AND CROSS-APPELLANT.

381 N.W.2d 914

Filed February 21, 1986. No. 84-630.

1. **Livestock: Trespass: Liability.** The herd laws pertain to damage to property and do not alter the common-law liability for personal injuries caused by trespassing bulls.
2. **Negligence: Proof.** In order to prevail on the defense of assumption of the risk, the burden is upon the defendant to prove the voluntary character of exposure to the risk, knowledge and appreciation of the danger on the part of the plaintiff, and that the injury was a proximate result of the danger.
3. _____: _____. Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty which the law imposes on persons to protect themselves from injury. It is an affirmative defense, and the burden of proving it is on the party asserting it.
4. **Actions: Livestock: Negligence.** An action for the infliction of personal injury by a trespassing bull upon an occupier of land may be brought on a theory of negligence, but not on a strict liability theory.
5. **Negligence.** A person is not relieved of the duty to exercise ordinary care for his own safety by the fact that his own or another's property is in imminent danger of loss or injury arising from the negligence of a third person.
6. _____. When one is required to act suddenly and in the face of imminent danger, he is not required to act as though he had time for deliberation and the full exercise of his judgment and reasoning faculties.

Appeal from the District Court for Nance County: JOHN C. WHITEHEAD, Judge. Affirmed.

John H. Albin of Treadway, Bird & Albin, P.C., for appellant.

Daniel M. Placzek of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

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

WHITE, J.

This is an action brought by plaintiff for injuries he suffered when he was struck and trampled by defendant's bull. Plaintiff sought special damages for medical expenses and extra help hired during his recovery, and general damages for pain and suffering and permanent injury to his hand. Defendant denied any liability for plaintiff's injuries and affirmatively alleged assumption of risk and contributory negligence as bars to plaintiff's recovery. The trial court overruled plaintiff's motion for a directed verdict on the basis of strict liability but directed a verdict of negligence as a matter of law against defendant. The jury then returned a general verdict for defendant.

The incident giving rise to this suit occurred on December 29, 1980. On that date Gerry Malander, the defendant in this case, along with some family members and a hired hand, Sid Troxel, was driving a herd of approximately 80 cattle along a public road in Nance County. The herd included a 1,700-pound bull. The Malanders and Troxel were on horseback. As the drovers passed the land of Lowell Foland, one cow and the bull left the herd and proceeded toward Foland's corral. The bull then entered the corral by jumping over an electric gate.

Plaintiff, defendant, and Troxel discussed removing the bull from the corral. As plaintiff waited near the gate, defendant and Troxel entered the corral on horseback in an attempt to drive the bull out of the corral. They were successful in driving the bull toward the gate, but the bull was followed by several of plaintiff's calves. After the bull had cleared the gate, but before the calves had done so, plaintiff stepped approximately 15 feet behind the bull, and in front of the calves, in an attempt to direct the calves back into the corral. With his back toward the bull, plaintiff made a waving motion with his hands toward the calves. The bull then turned toward plaintiff, charged him, struck him, ran over him, and stepped on his left hand.

Testimony from the record indicates that neither defendant nor his hired hand were in a position to prevent the calves from leaving the corral. Testimony also revealed that the bull was not restrained while being driven, even though defendant had a choice of methods available to him to restrain the bull.

Plaintiff alleged the following in his petition:

> That Defendant was guilty of the following acts of negligence which were the proximate cause of the injuries and damages to Plaintiff: (a) that Defendant knew or should have known that said Simmental bull had a dangerous and vicious propensity, in that it had a propensity to attack people on numerous prior occasions, (b) that Defendant did not have said Simmental bull under proper restraint and had not taken any precautions to prevent said bull from attacking Plaintiff or other persons, (c) that Defendant permitted said Simmental bull to trespass on the Plaintiff's property where the attack on the Plaintff [sic] took place, (d) that Defendant failed to warn the Plaintiff in any manner of the dangerous and vicious propensities of said Simmental bull.

Plaintiff also alleged injuries, that the defendant owned the bull, that the bull was of a vicious nature and disposition which was known or should have been known by defendant, and that the bull was driven along the county road and was not restrained in any manner.

In his answer defendant admitted owning the bull and denied negligence. He further claimed that plaintiff assumed the risk of his actions and that plaintiff was negligent in provoking the bull by his actions.

As stated above, the trial court directed a verdict of negligence against defendant. The jury was not instructed on a theory of strict liability.

Plaintiff assigns the following as error: (1) The trial court erred in failing to order a new trial on the grounds that the verdict was not supported by the evidence and was contrary to law; (2) The trial court erred in failing to direct a verdict for the plaintiff on the basis of strict liability; and (3) The trial court erred in failing to give the jury plaintiff's proffered instructions on the rescue doctrine and strict liability.

In order to determine whether plaintiff's assignments of error have merit, it was necessary to make a historical survey of relevant cases. Cases with similar facts have been pled and decided on several theories. These include (1) liability for the trespass of an animal which is not considered dangerous, (2) liability for the trespass of an animal which is vicious, although

the class of animals is not considered vicious, and (3) liability for the trespass of an animal which belongs to a class of animals considered vicious by nature. Some of these cases have been brought under statutory strict liability, some under common-law strict liability, and others under various negligence theories. In some cases the animals were clearly trespassing on the lands of others, in others they strayed from the roadway where they were lawfully being driven, and in others they caused injuries while they were in a place where they were entitled to be.

The following statutes, known as herd laws, are relevant in this action.

> The owner of any stallion, jack, bull, buck, or boar shall restrain the same, and any person may take possession of any such animal running at large in the county in which such person resides, or in which he occupies or uses real estate. He shall give notice thereof to the sheriff or any constable in the county in which such animal is taken, who shall give notice to the owner of such animal, if known to him, by delivering a written notice to said owner, or leaving the same at his usual place of abode, giving a description of the animal so taken. If such owner does not appear within ten days after such notice to claim his property and pay costs and damages if any, then the sheriff or constable shall sell the animal so taken, at public auction to the highest bidder for cash, having given twenty days' notice of the time and place of sale, with a description of the property, by publishing the same in a newspaper of general circulation in the county, or if there is no such paper, by posting such notice in three public places in the township or precinct in which such animal was found at large. Out of the proceeds of such sale he shall pay all costs and any damages done by such animal, to be ascertained and determined by him, and the sheriff or constable shall pay the remainder, if any, into the county treasury for the use of the county. If legal proof is made to the county board by the owner of such animal of a right thereto at any time within one year of the sale, the county board shall order the proper amount to be paid to

the owner by its warrant drawn for that purpose. If the owner, or any person for him, on or before the day of sale shall pay the costs thus far made and all damages, to be determined by the sheriff or constable if the parties cannot agree, and make satisfactory proof of his ownership, the sheriff or constable shall release the animal to him; *Provided*, this remedy shall not be construed as a bar to any suit for damages sustained and not covered by the proceeds of the sale as hereinbefore provided.

Neb. Rev. Stat. § 54-304 (Reissue 1984).

Any person owning or having charge of any drove of cattle, horses or sheep, numbering one head or more, who shall drive the same into or through any county of Nebraska of which the owner is not a resident, or landowner, or stock grower, and when the land in said county is occupied, it shall be the duty of such owner or person in charge of such horses, cattle or sheep to prevent the same from mixing with the cattle, horses or sheep belonging to the occupiers. The owner shall also prevent the drove from trespassing on such land as may be the property of the actual occupier, or may be held by him under a preemption, or a leasehold right, and used by him for the grazing of animals, growing hay or timber, or other agricultural purposes, or doing injury to the ditches made for irrigation of crops.

Neb. Rev. Stat. § 54-305 (Reissue 1984).

The owners of cattle, horses, mules, swine, and sheep in this state, shall hereafter be liable for all damages done by such stock upon the cultivated lands in this state as provided by section 54-402 if the damages to the cultivated lands are not the result of negligent or willful damage to the division fence by the person claiming damages to the cultivated lands.

Neb. Rev. Stat. § 54-401 (Reissue 1984).

All damages to property so committed by such stock running at large shall be paid by the owners of such stock; and the person, whose property is so damaged thereby, may have a lien upon such trespassing animals for the full amount of damages and costs, and may enforce the

collection of the same by the proper civil action.

Neb. Rev. Stat. § 54-402 (Reissue 1984).

We will now examine selected Nebraska cases. In the case of *Glidden v. Moore*, 14 Neb. 84, 15 N.W. 326 (1883), the owner of a bull lariated the bull near a road. The owner knew the bull had attacked persons several times in the past. On this occasion the bull attacked and killed an elderly man who was traveling on the road. The bull's owner was found liable on a negligence theory. The court stated that it would have allowed evidence of contributory negligence on the part of plaintiff as a defense.

A case involving trespassing cattle considered whether furrows planted around haystacks rendered the land within the furrows cultivated land within the meaning of Nebraska statutes known as herd laws. *Brown v. Sylvester*, 37 Neb. 870, 56 N.W. 709 (1893).

Two years later, the herd laws again were raised in the Nebraska Supreme Court when this court was called upon to determine the applicability of the herd laws to cities of the metropolitan class. *Lingonner v. Ambler*, 44 Neb. 316, 62 N.W. 486 (1895).

In *Randall v. Gross*, 67 Neb. 255, 93 N.W. 223 (1903), this court considered an action in replevin for three hogs. The court interpreted the herd laws to mean that the owners of stock would be liable for damages done by such stock on cultivated lands. The court commented:

> At common law the owner of live stock was bound, at his peril, to keep his stock within his own enclosures, and was liable for injuries committed by them while trespassing upon the lands of others, and such stock were liable to be impounded damage-feasant by the owner of the lands on which they were found trespassing . . . .

Id. at 257, 93 N.W. at 223.

Another case involving the herd laws is *Angus Cattle Co. v. McLeod*, 98 Neb. 108, 152 N.W. 322 (1915). This was an action in replevin for cattle which trespassed on defendants' land. The statutes were held to apply to land which had previously been planted to corn, with the stalks of the corn being used for forage.

The case of *Fiene v. Robertson*, 184 Neb. 668, 171 N.W.2d 179 (1969), involved an action to recover for hay stacked on plaintiff's premises and consumed by defendant's cattle. The court stated:

> At common law the owner of livestock was liable for any damage done by it, while trespassing upon the lands of others, whether such lands were cultivated or uncultivated. . . .
>
> Under existing statutes such liability is limited to trespass upon cultivated lands. . . . To render the owner liable for a trespass upon uncultivated lands, a willful trespass must be alleged and proven.

Id. at 669, 171 N.W.2d at 181. The court went on to say that in this case the trespass was upon cultivated lands and it was immaterial whether the trespass was willful or negligent. The court concluded: "Under the statutes, as under the common law, the burden of restraining domestic animals is placed squarely upon the owner, and ordinarily no excuse for failure to restrain them is recognized." *Id.* at 670, 171 N.W.2d at 181.

An action for damages caused by the impregnation of plaintiff's purebred Hereford cow by defendant's trespassing purebred Angus bull was brought in *Fuchser v. Jacobson,* 205 Neb. 786, 290 N.W.2d 449 (1980). The small claims court judge found for the plaintiff, as did the district court judge. Upon the defendant's appeal we affirmed the judgment of the district court.

After reviewing earlier cases we stated: "Nebraska's statute on liability for damages to owners of trespassing animals modifies the common law liability only in that it restricts liability to trespasses on 'cultivated lands.' " *Id.* at 789, 290 N.W.2d at 451; § 54-401.

> Further, Nebraska statutes specifically provide that the owner of any bull (and other specified male animals) shall restrain the same and shall be liable for damages for failure to do so. The duty imposed by this statute is not restricted to "cultivated lands." § 54-304, R.R.S. 1943.
>
> Under the statutes, as under the common law, the

> burden of restraining domestic animals is placed squarely upon the owner and ordinarily no excuse for failure to restrain them is recognized. . . .
>
> Although, obviously, an argument might be made for strict liability in this case under the Nebraska statutes, it is not necessary to make that decision here. As previously noted, since this case was tried on very informal pleadings from Small Claims Court, no specific theory of recovery was alleged, and any theory of recovery supported by the evidence is sufficient for affirmance.
>
> The statutes in question impose a duty regarding restraint of bulls and trespassing cattle. Violation of the duty imposed by statutes is evidence of negligence and may be considered as such by the trier of facts. . . .
>
> Here, in addition to the violation of duties required by statute, there was evidence which could show negligence on the part of the defendant . . . .

205 Neb. at 790-91, 290 N.W.2d at 451-52.

Fuchser is the most recent statement of the law of this state concerning trespassing animals and, specifically, trespassing bulls. It is, however, a case involving damage to property rather than personal injury.

Plaintiff urges us to compare §§ 54-304, 54-401, and 54-402 with Iowa Code Ann. §§ 188.2 and 188.3 (West 1969). The statutes of the two states are similar, but this does not help us in settling the issue in this case.

Of the Nebraska statutes known as herd laws, legislative history is available only for a recent addition to § 54-401. The other statutes were passed in the last century, and the deliberations leading to their passage have not been preserved. The case of *Keith & Barton v. Tilford*, 12 Neb. 271, 11 N.W. 315 (1882), does, however, shed light on the question of the scope of coverage of the herd laws and their purpose. It is clear from reading this case that the act of March 8, 1871, entitled "An act for a general herd law, and to protect cultivated lands from trespass by stock," was not passed for the protection of *persons* from injury. *Id.* at 272, 11 N.W. at 315. Further, the court held that the remedy provided for in the statute was not an exclusive remedy for damages to cultivated land by trespassing stock.

We are called upon here to determine whether these statutes, particularly § 54-304, govern us in this case. Using common sense and logic, as well as the holding in *Keith & Barton*, we conclude that they do not. The statutes, called the herd laws, are interrelated; that is clear from reading them. The fact that "cultivated land" is distinguished from uncultivated land by statute and in case law is significant. Whether a trespassing animal damages property upon land that is cultivated or fenced or whether such animal merely wanders around on unimproved land is a valid distinction to make. However, it would not make sense for such a distinction to apply to personal injuries caused by a trespassing animal. If a person stands in his fenced corral, or his fenced garden behind his house, or his child's unfenced playground, or his unfenced, uncultivated meadow or field, he is lawfully in a place he is entitled to be. Further, he should be afforded just as much protection from trespassing animals which could harm him when standing in his meadow as when standing in his garden. We conclude that the herd laws pertain to damage to property and do not alter the common-law liability for personal injuries caused by trespassing bulls.

Authorities have described the development of cases of harm caused by trespassing livestock as proceeding in two distinct directions.

> That the substantive law affecting the liability of possessors of domestic animals such as livestock for harm caused by their animals has developed along two main lines, with one development taking place as a branch of the law of "trespass" under which damages caused by animals intruding upon another's premises were recoverable as an "aggravation" of the trespass under the old common-law writ of "trespass quare clausum fregit," while the other development took place under the principles surrounding the action of "trespass on the case" and allows recovery for the tort wrong, or negligence of the possessor of the offending animals, was pointed out in § 2, supra, discussing the various theories of liability upon which livestock possessors have been held answerable for injury or death caused by their animals intruding upon the property of other persons.

Annot., 88 A.L.R.2d 709, 749 (1963).

> Some cases make a distinction between actions which are brought directly for the damages sought and actions for trespass quare clausum fregit, in which the particular injuries for which recovery is sought are alleged in aggravation of the trespass, holding that scienter must be shown in the former class of actions, but not in the latter. In the latter case the breaking and entering the close is the gist of the action, and the mischief or injury resulting therefrom to the person or property of the plaintiff is alleged and recovered on by way of aggravation of the trespass. Thus, if a bull breaks into an inclosure of a neighbor, and there gores a horse or mule to death, his owner is held liable in an action of trespass quare clausum fregit, in which the value of the horse or mule is deemed to be the just measure of damages.
>
> In an action of, or upon the theory of, trespass quare clausum fregit, negligence of the owner of the animal is not a necessary element. However, the owner of a trespassing animal is liable only for proximate results, and not for all conceivable results, of the trespass.

4 Am. Jur. 2d *Animals* § 112 at 361-62 (1962).

The record in this case contains evidence establishing that the bull was being driven along the road before injuring the plaintiff. This circumstance is particularly addressed in the legal literature.

> One exception to the common law rule which the courts were compelled to recognize early was the case of animals straying from a highway on which they were being driven lawfully. While the owner would be liable for any negligence in failing to control them, or to pursue them promptly and bring them back, the privilege to make use of the highway to move them from one place to another involves, as a more or less inevitable incident, immunity as to any casual trespass on adjoining lands by the way. But the privilege extends only to property immediately abutting on the highway, and not to any lands removed from it, upon which the cattle may trespass once they have strayed from the road.

Prosser and Keeton on The Law of Torts, *Animals* § 76 at 540 (5th ed. 1984).

> While it may not be unlawful or negligent to drive domestic animals along a public highway, the person or owner doing so must use that degree of diligence and care which the nature of the animal and the circumstances require, and if, by reason of a failure to do so, the animal does any mischief, he and the owner are liable without proof of scienter.

3A C.J.S. *Animals* § 183 at 680-81 (1973).

> *c.* The privilege to drive livestock along the highway must be exercised with reasonable care. Although the rule stated in this Section protects the possessor of the livestock from the strict liability stated in § 504, it does not protect him from liability for harm resulting from an intrusion resulting from his failure to exercise reasonable care in driving his livestock or in failing to remove them from the abutting land upon which they have strayed.
>
> *d.* If the possessor fails to exercise reasonable care to prevent his livestock from straying upon land abutting on the highway or to remove them after they have so strayed, he is subject to liability not only to the possessor of the abutting land for their intrusion and for harm done to any of his legally protected interests but also to members of his household for harm done to their persons or chattels.

Restatement (Second) of Torts § 505 at 9 (1977).

In the instant case it is clear that Malander's bull strayed from land abutting on the highway when it entered Foland's fenced corral. Thus, the trespass could not be characterized a "casual" trespass.

After carefully considering the statutes and the case law, we hold that an action for the infliction of personal injury by a trespassing bull upon an occupier of land may be brought on a theory of negligence, but not on a strict liability theory. The defendant in this case drove his bull along a public road without restraining the bull in any manner. No matter how usually docile a particular bull may be, one cannot rely on it to always remain so. Although not unlawful, there are obvious dangers to driving a bull without restraint.

The plaintiff in this case clearly pled negligence on the part of the defendant. Plaintiff's assertion that the verdict was unsupported by the evidence is without merit. The jury returned a general verdict for the defendant after being instructed on the defenses of assumption of risk and contributory negligence. In order to prevail on the defense of assumption of the risk, the burden is upon the defendant to prove the voluntary character of exposure to the risk, knowledge and appreciation of the danger on the part of the plaintiff, and that the injury was a proximate result of the danger. 65A C.J.S. *Negligence* § 174(2), (3), and (4) (1966); *Schmidt v. Johnson*, 184 Neb. 643, 171 N.W.2d 64 (1969). One who assumes a risk in this manner is precluded from recovery for an injury resulting therefrom. *Hess v. Holdsworth*, 176 Neb. 774, 127 N.W.2d 487 (1964). Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty which the law imposes on persons to protect themselves from injury. 65A C.J.S. *Negligence* § 116 (1966). It is an affirmative defense, and the burden of proving it is on the party asserting it. *Cawthra v. Shackelford*, 176 Neb. 147, 125 N.W.2d 186 (1963).

The evidence in this case clearly supports a finding by 12 jurors that plaintiff assumed a risk or was contributorily negligent when he turned his back to the bull. The jurors had heard testimony that plaintiff normally kept bulls around his farm, that he normally did not turn his back on a bull, but that he did turn his back on defendant's bull in an effort to keep his calves from leaving the corral. Therefore, the trial court did not err in refusing to order a new trial.

Plaintiff's second assignment of error is that a verdict should have been directed on the basis of strict liability. Plaintiff perhaps attempted to plead strict liability when he alleged that defendant permitted the bull to trespass on plaintiff's property. We have determined that an owner of a bull is not strictly liable for the personal injuries caused another. The assignment is without merit.

Finally, plaintiff's last assignment of error is that the trial court erred in failing to give the jury plaintiff's proffered instructions on the rescue doctrine and strict liability. Strict

liability has been dealt with above. With regard to the rescue doctrine, "A person is not relieved of the duty to exercise ordinary care for his own safety by the fact that his own or another's property is in imminent danger of loss or injury arising from the negligence of a third person." 65A C.J.S. *Negligence* § 125 at 86 (1966). However, it is also a well-established rule that "when one is required to act suddenly and in the face of imminent danger, he is not required to act as though he had time for deliberation and the full exercise of his judgment and reasoning faculties." 65A C.J.S. *Negligence* § 123 at 78 (1966); *Watson Bros. Transp. Co. v. Jacobson,* 168 Neb. 862, 97 N.W.2d 521 (1959). The jury was properly instructed.

Finding no reversible error in this case, we affirm.

AFFIRMED.

HASTINGS and GRANT, JJ., concur in the result.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, APPELLEE, V. ROYAL INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLANT, MAXINE M. TODD AND JEANNE DENNISON, SPECIAL COADMINISTRATORS OF THE ESTATE OF JACK C. TODD, DECEASED, ET AL., APPELLEES.

382 N.W.2d 2

Filed February 21, 1986. No. 84-772.

1. **Motor Vehicles: Certificate of Title: Assignments.** A purchaser who receives possession of an automobile without also obtaining from the owner an assignment of the certificate of title properly notarized and duly executed in accordance with the statutes then in effect acquires no right, title, claim, or interest in or to a motor vehicle and does not thereby become the owner of the vehicle in question.
2. **Insurance: Contracts.** An insurance contract should be considered as any other contract and should be given effect according to the ordinary sense of the terms used.
3. _____: _____. When provisions of an insurance contract are ambiguous or are susceptible of two constructions, the policy must be liberally construed in favor of the insured.

4. **Attorney Fees.** It is the practice in this state to allow the recovery of attorney fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorney fees are allowed to the successful party in litigation only where such allowance is provided by statute.
5. **Judgments: Appeal and Error.** A proper judgment will not be reversed even if the trial court did not give the right reasons.

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

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

James M. Mathis of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellee State Farm.

Benjamin M. Shaver, for appellees Special Coadministrators.

BOSLAUGH, CAPORALE, and GRANT, JJ., and WOLF, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a declaratory judgment action to determine the rights and obligations of two liability insurance companies arising out of a separate pending wrongful death action brought by the coadministrators of the estate of Jack C. Todd, deceased, who died as the result of a pedestrian-auto accident. The uninsured driver of the auto, defendant Michael A. Robinson, was driving it with the permission of defendant Original Equipment Co., doing business as Aulick Truck & Trailer (Aulick), insured by Royal Insurance Company of America. Defendant Richard E. Robinson, the father of Michael, was insured by plaintiff, State Farm Mutual Automobile Insurance Company, providing liability coverage for a nonowned vehicle by a resident of his household, who was Michael. The issue is whether the auto was covered by Aulick's garage policy. The trial court found that both companies were obligated to provide coverage, but Royal's responsibility was primary. Costs were assessed against Royal, including a $7,000 attorney fee allowed to the Todd estate. Royal appeals.

> The determination of factual issues in a declaratory judgment action, which would otherwise be an action at law, will be treated in the same manner as if a jury had been waived. Hence a trial court's findings have the effect of a jury verdict and will not be set aside unless clearly wrong.

Roth v. School Dist. of Scottsbluff, 213 Neb. 545, 549, 330 N.W.2d 488, 491 (1983).

Michael was employed as a truckdriver by Aulick Leasing Corp., an unrelated enterprise not insured by Royal. Sometime after 6 p.m. on October 4, 1982, at the Aulick premises, Michael approached Shane Aulick with a request to drive a car home and to return it the next day. He had done so two or three times before. Shane, the manager of Aulick, consented to Michael's taking a 1978 International Scout (Scout) without any other restrictions. Michael left in the Scout en route to his residence, and the accident occurred shortly thereafter. Michael owned an uninsured pickup truck.

Aulick was in the business of auto sales and repair in Scottsbluff, Nebraska, insured by Royal under a garage policy, later discussed in detail. Royal denies coverage under the garage policy because the Scout was neither an "owned auto" nor a "covered auto" as provided in the policy. The trial court found that Aulick owned the Scout.

Royal assigns four errors: (1) That the court erred in finding that Royal had coverage; (2) and (3) (considered together) That the court erred in finding that Aulick owned the Scout; and (4) That the court erred in the allowance of the $7,000 attorney fee.

Errors Nos. (2) and (3) are first discussed. The policy provided that there was coverage for all owned autos. The ownership question is complicated by five separate certificate of title (title) transactions and two separate chains of car title.

1. "Colorado title." No. M 372060 issued May 11, 1978, to International Harvester Company, showing the previous title number as MSO (manufacturer's statement of origin). This title was assigned to "Aulick Truck & TLR" on September 12, 1978.

2. "Aulick 1979 title." No. 21F 44156 issued to Aulick Truck & Trailer on March 1, 1979, showing the previous title number as Co.M 372060.

3. "Chuck Meyer title." On September 8, 1980, Aulick sold the Scout to Chuck Meyer, and title No. 21F 66822 was issued to him, showing the previous title number as Ne 21F 44156 (Aulick 1979 title). The Meyer title was forthwith delivered to International Harvester Credit Corp. (IHCC) as security for a loan to Meyer. That title was still with IHCC at the time of the accident, although Meyer had traded the Scout back to Aulick on September 15, 1981.

4. "Aulick 1983 title." No. 21G 41810 issued to Aulick Truck & Trailer on November 23, 1983, after the accident, showing the previous title number as COLO M 372060 (the Colorado title). For some unexplained reason Aulick still retained the original Colorado title, which was used again to secure its 1983 title. Apparently, the county clerk had failed to retain the Colorado title when the Aulick 1979 title was issued.

5. "Haley title." Issued to Frank Haley on March 29, 1984, when Aulick sold the Scout to him.

A purchaser who receives possession of an automobile without also obtaining from the owner an assignment of the certificate of title properly notarized and duly executed in accordance with the statutes then in effect acquires no "right, title, claim, or interest in or to" a motor vehicle and does not thereby become the owner of the vehicle in question. *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 214 Neb. 226, 334 N.W.2d 168 (1983).

Title to the Scout was registered in the name of Meyer when it was sold to him on September 8, 1980, on an installment sale contract with recourse, which was noted as a lien on the title when delivered to IHCC, where the Meyer title remained at the time of the accident. When Meyer traded the Scout back to Aulick on September 15, 1981, the IHCC loan had not been paid, and no arrangements were made to get the title assigned. Shane Aulick suggested to Meyer that some paperwork would be required in the future for Meyer to assign the title to Aulick. Without resolving the authenticity of the Aulick 1983 title, we are here concerned with the Scout title at the time of the accident.

Appellees coadministrators of the estate urge that during the September 15, 1981, to November 23, 1983, period, Aulick

claimed and exercised ownership of the Scout along with its possession by using it as a utility shop car, driving it 19,776 miles, by including it in its inventory of cars owned for sale, and by holding it out for sale. At the time of the accident it bore dealer's plates. The evidence shows that both Meyer and Aulick understood and intended that Aulick should have full ownership of the Scout; however, it is noted that the same intention was present in *Fitzgerald*.

In addition to the evidence supporting Aulick's claim of ownership, it is urged that as a licensed dealer Aulick was not required to obtain a title, citing Neb. Rev. Stat. § 60-106(6) (Reissue 1978), which provides in part: "[L]icensed dealers need not *apply* for certificates of title for motor vehicles . . . in stock or acquired for stock purposes, but upon transfer of the same they shall give the transferee a *reassignment of the certificate of title* on such motor vehicle . . . ." (Emphasis supplied.) Section 60-106 describes general procedures for obtaining titles. Section 60-106(6) is a special procedure for the benefit of licensed dealers to avoid the paper formality of a dealer's obtaining a title for each vehicle held for sale. It does not avoid the requirement discussed in *Fitzgerald* and provided in Neb. Rev. Stat. § 60-105(1) (Reissue 1984), that in order for a person, which includes a dealer, to claim ownership of a vehicle, the dealer must obtain a duly executed assignment of the certificate of title for a vehicle when it is acquired as part of the stock held for sale. Thereafter, that same certificate can be reassigned, § 60-106(6), by the dealer upon sale. Aulick never acquired an assignment of the Meyer title.

Although the application of the *Fitzgerald* rule to Aulick's auto sales and auto repair business may seem impractical in an auto sales business, considering the regular daily transfer of car titles and customer use of cars, lost titles, delayed assignment and delivery of titles from customers, and other inoffice business details, nevertheless existing statutes such as § 60-105(1) must be strictly observed, and it is possible for the insured and insurer to formulate and tailor the details of insurance coverage to meet their business needs and responsibilities. *Fitzgerald* is dispositive of the ownership question; we agree with Royal that Aulick was not the owner of

the Scout at the time of the accident, and the court erred in so finding.

That leaves unanswered the first assignment of error, since Royal further contends that the policy does not cover Michael as an insured under the policy because the Scout was not a "covered auto." It was an issue at trial; however, the judge made no findings thereon. It is a key issue here.

Generally, a garage policy is designed to protect automobile dealers, garage keepers, and owners of auto service stations against loss by reason of injury to other property or persons by the use of their autos. Such policies are designed to care for the specialized needs of the particular operation. They are usually construed in the same manner as other insurance contracts, but in case of doubt the policies are to be construed most strongly against the insurance company. *Constitution Indemnity Co. v. Lane*, 67 F.2d 433 (6th Cir. 1933). See, generally, 8 Blashfield Automobile Law and Practice § 319.2 (West 3d ed. 1966).

Royal urges that the Scout was not a covered auto because its use at the time of the accident was for Michael's personal transportation, which was not "in connection with garage business," as provided in the policy.

A covered auto, as defined by the policy, is (1) any owned auto and (2) any nonowned auto "*used in connection with your garage business* described in these declarations." (Emphasis supplied.) While garage business is not defined in the policy, "garage operations" is defined as "the ownership, maintenance, or use of locations for garage business . . . . Garage operations includes the ownership, maintenance or use of the autos indicated in Part II as covered autos. Garage operations also include *all operations necessary or incidental to a garage business*." (Emphasis supplied.)

This court has consistently held that an insurance contract should be considered as any other contract and should be given effect according to the ordinary sense of the terms used. *Dairyland Ins. Co. v. Esterling*, 205 Neb. 750, 290 N.W.2d 209 (1980). However, when the provisions of the insurance contract are ambiguous or are susceptible of two constructions, the policy must be liberally construed in favor of the insured, or the construction which provides coverage must be adopted. *Safeco*

Ins. Co. of America v. Husker Aviation, Inc., 211 Neb. 21, 317 N.W.2d 745 (1982); *Hartford Acc. & Ind. Co. v. Olson Bros., Inc.*, 187 Neb. 179, 188 N.W.2d 699 (1971). The above terms of the Royal policy relating to nonowned autos are conflicting and ambiguous.

The record provides ample evidence to support a finding that Aulick's use of the Scout was covered because it was a nonowned auto used in connection with the garage business. Shane Aulick, in his deposition, testified that Aulick assumed that it had responsibility as far as insurance purposes and that it carried the Scout on its books as part of the used vehicle inventory held for resale. Shane Aulick also stated that, as an officer of Aulick Truck & Trailer, he considered that the Scout belonged to it. At the time of the accident the Scout had dealer plates attached to it which belonged to Aulick Truck & Trailer. During the time the Scout was in Aulick's possession and was held in its used car inventory, it was driven for approximately 19,776 miles. Vince Aulick testified that the Scout was used whenever transportation was needed in the operation of the garage business. These facts are contrary to Royal's contention that the Scout was not used in connection with the garage business. That leaves Royal's argument that the use of the Scout at the time of the accident was not covered by the policy.

In a similar case the Missouri Court of Appeals found that "[a]ny automobile held or owned by a dealer and actually being offered for sale, is used principally in his business. The fact that it was . . . temporarily loaned . . . is not controlling of its principal use, no more than that other automobiles in stock were temporarily 'stored' on the lot." *Rivas v. Killins*, 346 S.W.2d 698, 700 (Mo. App. 1961). An Illinois appellate court, in interpreting a garage policy, also held that it was immaterial that a loaned automobile was not owned by the repair shop and that the customer who borrowed it was using the vehicle on a social or personal mission. The insurer on the garage policy was thus held liable for damages arising from an accident the customer was involved in while driving the borrowed car. *Allstate Ins. Co. v. Urban*, 15 Ill. App. 2d 386, 146 N.E.2d 387 (1957). While on the present facts it was apparent that Michael Robinson was not a customer, the principles are still applicable,

and Michael Robinson was an insured driving a covered auto.

Royal cites *Wigington v. Ocean Accident & Guarantee Corporation*, 120 Neb. 162, 231 N.W. 770 (1930), and *Truck Ins. Exchange v. State Farm Mut. Auto. Ins. Co.*, 182 Neb. 330, 154 N.W.2d 524 (1967), in support of no coverage. Both cases are distinguishable on the facts. Likewise, its reliance on 8 Blashfield Automobile Law and Practice § 317.4 (West 3d ed. 1966), is inapplicable, since it relates to exclusions for pleasure, business, and commercial uses under personal liability policies which are not comparable in purpose to a garage policy.

Under the facts and circumstances here, Royal's narrow interpretation of the garage policy is untenable; it is an attempt to exclude coverage by interpretation rather than by plain terms in the policy that it prepared.

We conclude and find that at the time of the accident the Scout continued to be a nonowned auto incidentally used as a part of Aulick's garage business and operations and that Michael was driving the Scout with permission while he was a covered insured driver under Royal's garage policy.

The last assigned error concerns the allowance of attorney fees to defendant Todd estate.

> "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course [of] procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute."

Hawkeye Casualty Co. v. Stoker, 154 Neb. 466, 485, 48 N.W.2d 623, 634 (1951); *Quinn v. Godfather's Investments*, 217 Neb. 441, 348 N.W.2d 893 (1984).

Statutory authority is found in Neb. Rev. Stat. § 44-359 (Reissue 1984):

> In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy . . . against any company, person or association doing business in this state, the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as

> an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings . . . .

It is noted that prior to 1971 Neb. Laws, L.B. 958, the first sentence of § 44-359 provided: "In all cases where the beneficiary, or other person entitled thereto, brings an action at law . . . ." The 1971 amendment deleted "at law" from the statute.

A declaratory judgment proceeding is an action contemplated in § 44-359. *Workman v. Great Plains Ins. Co., Inc.*, 189 Neb. 22, 200 N.W.2d 8 (1972). Where the insurer brings the declaratory judgment action and the insured defendant prevails, the insured can claim an attorney fee allowance. *State Farm Mut. Auto. Ins. Co. v. Selders*, 189 Neb. 334, 202 N.W.2d 625 (1972).

The authority to bring an action under § 44-359 has long been interpreted to require that the beneficiary or other person must be entitled to bring an action on the policy at the time the suit was instituted. See *Hawkeye Casualty Co. v. Stoker, supra.* A judgment creditor of an insured is a person entitled to bring an action and recover fees. *Metcalf v. Hartford Acc. & Ind. Co.*, 176 Neb. 468, 126 N.W.2d 471 (1964).

Appellees coadministrators of the Todd estate contend that *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983), a suit on account, is authority for the allowance of attorney fees here. In that case the court noted that there was neither a statute nor a known uniform course of procedure authorizing such allowance; however, an allowance was authorized and made pursuant to the inherent powers of the trial court under certain unusual circumstances amounting to "conduct during the course of litigation which is vexatious, unfounded, and dilatory, such that it amounts to bad faith." *Id.* at 767, 336 N.W.2d at 315; annot., 31 A.L.R. Fed. 833 (1977). That rule is not applicable here, since there is a specific statute, § 44-359, and the record does not support a finding of bad faith on the part of appellant.

It is clear that the Todd estate was not a beneficiary, an insured, a judgment creditor of the insured, or a person entitled

to bring an action on the Royal policy at the time suit was commenced, as required in *Hawkeye*. At most, it was a potential judgment creditor. Accordingly, it could not claim attorney fees under § 44-359, and the trial court so found.

The trial court went on to find and allow attorney fees as a part of a "uniform course of procedure," giving these reasons here summarized: (1) The bringing of the declaratory judgment proceeding prior to resolution of the tort liability question was the decision of the insurance companies; (2) The shoddy business practices of Aulick were the cause of the insurance coverage issue; (3) As in No. 1, timing in the determination of the "person entitled" was a factor; (4) It is necessary to judicially determine that in like circumstances the inclusion of an attorney fee is a uniform course of procedure as a cost of litigation; and (5) Plaintiff provided the expense of the tort litigation and Royal delayed the orderly trial process therein. These reasons do not meet the bad faith rule in *Holt*.

The Legislature, for more than 70 years, has seen fit to provide for the allowance of attorney fees, § 44-359 (originally Rev. Stat. § 3212 (1913)), in certain cases brought on insurance policies. The Todd estate as a potential judgment creditor cannot claim such fees under the statute, and we are not aware of a uniform course of procedure to allow the same here. The allowance of a $7,000 attorney fee to the Todd estate, chargeable to Royal as part of the costs, was error, and the same is set aside.

The finding of the trial court that Aulick was the owner of the Scout was error. However, the judgment that Royal was obligated under Aulick's garage policy was correct, for other reasons heretofore discussed. It has long been the rule in this jurisdiction that a proper judgment will not be reversed even if the trial court did not give the right reasons. *Leo A. Daly Co. v. Omaha-Douglas Public Bldg. Comm.*, 212 Neb. 533, 324 N.W.2d 252 (1982).

AFFIRMED IN PART, AND IN PART REVERSED.

DEAN A. JENSEN, APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

382 N.W.2d 9

Filed February 21, 1986. No. 84-939.

1. **Implied Consent: Appeal and Error.** The findings of the trial court in an appeal from an order revoking a motor vehicle operator's license under the implied consent law are reviewed de novo as in equity.
2. _____: _____. On appeal to the district court, it is the licensee's burden to establish grounds for reversal by a preponderance of the evidence.
3. **Implied Consent: Blood, Breath, and Urine Tests.** A refusal to submit to a chemical test for purposes of the implied consent law occurs where the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and manifested an unwillingness to submit to the test.
4. _____: _____. A person is not exempted from the provisions of a refusal statute merely because he was too intoxicated to appreciate the consequences of his refusal.

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

Michael J. Lehan and William G. Latka, for appellant.

Robert M. Spire, Attorney General, and Michele M. Wheeler, Special Assistant Attorney General, for appellee.

BOSLAUGH, HASTINGS, CAPORALE, and GRANT, JJ., and BRODKEY, J., Retired.

BOSLAUGH, J.

The plaintiff, Dean A. Jensen, has appealed from the order of the district court affirming the order of the director of the Department of Motor Vehicles revoking his motor vehicle operator's license for refusing to submit to a chemical test of his blood, breath, or urine as required by the Nebraska implied consent law. Neb. Rev. Stat. § 39-669.08 (Reissue 1984).

The evidence at trial shows that on March 7, 1984, a truck operated by the plaintiff was involved in a collision with a van and a police cruiser. The accident occurred around 11 p.m. and was the result of the plaintiff's losing control of his pickup truck on an exit ramp on the Kennedy Expressway in Omaha, Nebraska. The plaintiff testified that his truck hit a patch of ice,

which caused it to careen into the van. The impact resulted in the plaintiff's being thrown against the passenger window of the truck. He testified he has little recall of events following the accident.

An Omaha police officer, Fredrick Pfeffer, testified that he contacted the plaintiff between 11 and 11:30 p.m. after being called to the scene of the accident to transport and test a possible drunk driver. Following the administration of a field breath test by another officer, Officer Pfeffer took the plaintiff to the downtown police station.

At the station the plaintiff signed an implied consent advisement form but refused to submit to a breath test and requested an opportunity to speak to his attorney. Officer Pfeffer allowed the plaintiff 15 minutes and two or three phone calls to contact his attorney. When Officer Pfeffer again asked the plaintiff to submit to the test, the plaintiff responded with threats. The plaintiff appeared to understand that he had been requested to submit to a test. After three or four requests the plaintiff still refused to submit to the test.

In response to questioning about the plaintiff's physical condition, Officer Pfeffer testified that Jensen was talkative, had bloodshot eyes but no visible injuries, and was fully conscious and responsive to questions. The plaintiff told the officer that he had been in a fight in Lincoln or Grand Island the night before, and attempted to exhibit bite marks on his stomach and legs. The plaintiff complained of no other injuries and made no request to be taken to a hospital.

Officer Pfeffer, who was confused by the plaintiff's statements, then contacted the officers at the scene of the accident to determine exactly what had happened.

Officer Richard Liddick, who made the investigation at the scene of the accident, testified that he observed no injuries to the plaintiff either at the scene or at the station. He detected a moderate odor of alcohol about the plaintiff and noted that the plaintiff's eyes were bloodshot and glassy. He testified further that the plaintiff made no requests for transportation to a hospital and was fully conscious when contacted for questioning in the early morning hours following the accident.

The plaintiff's wife, Ruby Jensen, testified that she saw the

plaintiff at the scene of the accident after being called there by a friend. She testified that she saw the plaintiff while he was seated in the back of a police cruiser and that he appeared to be drifting in and out of consciousness. She also testified that he had blood on his clothing and was holding his left arm. These observations were made through the window of the police cruiser, which she was not allowed to enter. Ruby Jensen also noted that the plaintiff was assisted to the main desk at the police station when she arrived to take him home. After taking the plaintiff home with the help of a friend, she discovered four glass-filled wounds in the plaintiff's scalp. She said that at this point she had difficulty keeping the plaintiff awake. Due to icy street conditions, she decided against taking the plaintiff to the hospital that evening because she could not get him to the car without assistance. She did, however, take photographs of the claimed injuries to his face and arm, which were received in evidence.

The plaintiff was taken to the hospital the following day. A report by the treating physician, which was received into evidence, indicated that the plaintiff had suffered a fractured left wrist, various contusions, abrasions, and muscle strain. The plaintiff testified that several weeks after the accident he was diagnosed as having a shattered disk in his neck.

The plaintiff and Ruby Jensen testified that the right side of the truck sustained considerable damage and that the interior of the truck contained bloodstains.

The plaintiff testified that he had no memory of being given a breath test at the scene of the accident, the receipt of an implied consent advisement at the station, nor a conversation with Officer Pfeffer about the fight which resulted in a bite wound to his stomach. The weekend before, the plaintiff had interceded in a husband-wife dispute which had resulted in such an injury. The plaintiff did testify, however, to recalling his request to speak with his attorney and admitted to having consumed five to six drinks in the hour to hour and a half preceding the accident.

The plaintiff makes three assignments of error on appeal: (1) That the trial court erred in failing to find that the plaintiff was incapable of refusing to submit to a chemical test; (2) That the

trial court erred in not ruling that the State should have taken a chemical test from the plaintiff; and (3) That the trial court erred in not sustaining the plaintiff's motion for new trial. The third assignment of error has not been briefed and is a general assignment and will not be considered on appeal. Neb. Ct. R. 9D(1)d (rev. 1983).

The first two assignments of error amount to a contention that the plaintiff was incapable of refusing to submit to a chemical test on the date in question due to injuries sustained in the collision.

The findings of the trial court in an appeal from an order revoking a motor vehicle operator's license under the implied consent law are reviewed de novo as in equity. *Jamros v. Jensen,* 221 Neb. 426, 377 N.W.2d 119 (1985). On appeal to the district court, it is the licensee's burden to establish grounds for reversal by a preponderance of the evidence. *Jamros v. Jensen, supra.*

Neb. Rev. Stat. § 39-669.10 (Reissue 1984) provides: "Any person who is unconscious or who is otherwise in a condition rendering him incapable of refusal, shall be deemed not to have withdrawn the consent provided by section 39-669.08 and the test may be given."

The evidence in this case regarding the plaintiff's injuries and mental capacity following the collision, at best, is in conflict. While our review is de novo, where there are conflicts in the evidence, we attach great weight to the fact that the trial court saw, heard, and observed the witnesses. *Jamros v. Jensen, supra*; *Bauer v. Peterson*, 212 Neb. 174, 322 N.W.2d 389 (1982).

In *Wohlgemuth v. Pearson*, 204 Neb. 687, 691, 285 N.W.2d 102, 104 (1979), this court, in addressing the issue of whether the appellee was incapable of a refusal within the meaning of § 39-669.10, stated: " '[A] refusal to submit to the test occurs where the conduct of the arrested motorist is such that a reasonable person in the officer's position would be justified in believing that such motorist was capable of refusal and manifested an unwillingness to submit to the test.' " (Quoting *Campbell v. Superior Court,* 106 Ariz. 542, 479 P.2d 685 (1971).) Our conclusion in *Wohlgemuth, supra* at 691, 285 N.W.2d at 104, was based on the fact that "any other result

would force the director and the trial court into a psychological guessing game as to the appellee's state of mind and his degree of capability of comprehension." In sum, we determined that if the motorist understood that he was being asked a question and manifested a refusal, he was refusing to take the test. *Wohlgemuth, supra.*

The testimony of the investigating officers indicates that, in their view, the plaintiff was capable of refusing the test and *did* in fact do so. The evidence, although conflicting as to the visibility of the plaintiff's injuries, does not indicate that the officers were unreasonable in so concluding. In their contacts with the plaintiff, he appeared to be fully conscious, he was responsive and coherent, he complained of no injuries other than the bite mark, and he did not request to be taken to a hospital.

When initially requested to submit to the Breathalyzer test, the plaintiff told Officer Pfeffer, "No, I'm not going to take the test." This occurred immediately after the plaintiff had signed the implied consent advisement form which had been read to him by the officer. This express refusal was followed by the plaintiff's request to speak to an attorney. The plaintiff was then given the opportunity to contact his lawyer, which he attempted to do. After 10 or 15 minutes the plaintiff again refused to take the test and instead responded with threats to Officer Pfeffer. The officer testified that the plaintiff appeared to understand that he had been asked to take the test.

In his brief the plaintiff contends that in addition to his broken wrist, cuts, scrapes, and bruises, he suffered a concussion as a result of the accident. The record does not support that statement, as the plaintiff's conclusory statement to that effect was stricken from the record, and the treating physician's report does not mention a concussion. The plaintiff admitted that he had five to six drinks in the hour and a half preceding the accident. From our review of the record, his intoxication is as plausible an explanation for his impaired judgment and memory regarding the circumstances of the refusal as his alleged injuries.

We have previously acknowledged the long-standing rule in other jurisdictions that "a person is not exempted from the

provisions of a refusal statute merely because he was too intoxicated to appreciate the consequences of his refusal." *Wohlgemuth, supra* at 691, 285 N.W.2d at 104.

The record does not show by a preponderance of the evidence that the plaintiff failed to understand the request to submit to a chemical test or that he was "incapable of refusal" within the meaning of § 39-669.10. His express refusal to submit to the test was not reasonable.

There being no error, the judgment of the district court is affirmed.

AFFIRMED.

PERCY L. OHAM, APPELLEE, V. AARON CORPORATION, A NEBRASKA CORPORATION, APPELLANT.

382 N.W.2d 12

Filed February 21, 1986. No. 85-235.

1. **Workmen's Compensation.** The right to and the amount of recovery in a workmen's compensation proceeding are purely statutory.
2. **Workmen's Compensation: Proof.** Upon an application to modify an award under the workmen's compensation statutes, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased, decreased, or terminated as alleged. In other words, the defendant has the burden of establishing a decrease of incapacity and the plaintiff has the burden of showing an increase of incapacity.
3. **Workmen's Compensation: Appeal and Error.** In reviewing a decision of the Nebraska Workmen's Compensation Court, findings of fact made by the Workmen's Compensation Court on rehearing have the same effect as a jury verdict in a civil case, and an order disposing of a case may not be set aside where the findings are supported by the evidence. The facts are not reweighed on appeal.
4. **Workmen's Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of the successful party, who should have the benefit of every inference that can reasonably be drawn therefrom.
5. **Workmen's Compensation: Appeal and Error.** The findings of the Nebraska Workmen's Compensation Court will not be overturned on appeal unless they

are clearly wrong.

6. **Workmen's Compensation.** As the trier of fact, the Nebraska Workmen's Compensation Court is the sole judge of the weight to be given to testimony.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

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

Thomas Blount of Garber & Blount, for appellee.

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

HASTINGS, J.

The defendant-appellant, Aaron Corporation, appeals from an order of the Nebraska Workmen's Compensation Court finding that the plaintiff remained temporarily totally disabled. We affirm.

In 1977 Percy L. Oham was employed as a laborer by the Aaron Corporation, where he placed meat in cookers to render off the grease. During the period of his employment, he contracted acute brucellosis, a bacterial disease common to certain animals.

In December of 1977 Oham filed a claim for benefits with the compensation court and, after hearing, was awarded temporary total disability benefits in the amount of $100 per week, as well as past and future medical expenses. The award was upheld on rehearing. The defendant continued to pay the benefits until July of 1981, at which time it claimed a disability no longer existed. The plaintiff filed a petition seeking to continue the payments. On rehearing, a three-judge panel found that the plaintiff had a continuing temporary total disability and ordered $100-per-week compensation, payment of arrearages, medical expenses, and an attorney fee.

In July of 1984, pursuant to defendant's motion, the plaintiff was ordered to undergo examinations by defendant's doctor. In August of 1984 the defendant petitioned the court, seeking to terminate Oham's disability award. The plaintiff cross-petitioned, seeking permanent total disability. After a hearing the plaintiff was found to have remained temporarily totally

disabled. Aaron Corporation filed an application for rehearing, and the one-judge determination was affirmed. The court ordered the defendant to pay $100-per-week disability, current and future medical bills, the cost of certain rehabilitation services, and an attorney fee. It is from this ruling that the defendant appeals.

The Aaron Corporation assigns as error: (1) The trial court's refusal to place the burden of proof, that a temporary disability existed, upon the plaintiff; and (2) The court's finding that a temporary total disability existed, in that such finding was clearly wrong and against the weight of the evidence.

This court has stated, in regard to the workmen's compensation law, that it

> is bound by the statute as enacted. It has no authority to alleviate the apparent harshness of the result by the application of equitable principles. The plain language of the workmen's compensation law must be followed by this court. The right to and amount of recovery are purely statutory.

Runyan v. Lockwood Graders, Inc., 176 Neb. 676, 682, 127 N.W.2d 186, 190 (1964). Resultingly, in order to seek a modification of an order from the compensation court, the Aaron Corporation must come within the statutory provisions.

Neb. Rev. Stat. § 48-141 (Reissue 1984) provides that the

> amount of any agreement or award payable periodically for six months or more may be modified as follows: (a) At any time by agreement of the parties with the approval of the compensation court; or (b) if the parties cannot agree, then at any time after six months from the date of the agreement or award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury or that the condition of a dependent has changed as to age or marriage, or by reason of the death of the dependent.

In applying subsection (b) we have stated that " '[u]pon an application to modify an award under the workmen's compensation statutes, the burden of proof rests upon the petitioner to establish by a preponderance of the evidence that the disability has increased, decreased, or terminated as

alleged.' " *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 731, 94 N.W.2d 492, 495 (1959) (quoting *Riedel v. Smith Baking Co.*, 150 Neb. 28, 33 N.W.2d 287 (1948)).

We further stated in *Pavel* that upon an application to modify, "the defendant has the burden of establishing a decrease of incapacity and the plaintiff has the burden of showing an increase of incapacity . . . ." 167 Neb. at 731, 94 N.W.2d at 495. Accord *Sidel v. Spencer Foods*, 215 Neb. 325, 338 N.W.2d 616 (1983).

The rule articulated in *Pavel* is directly applicable in the instant case. Aaron Corporation, in seeking to terminate its liability, petitioned the compensation court in an attempt to modify a previous order. Consequently, the burden of proof was upon Aaron Corporation, as the petitioner-defendant, to establish a decrease in incapacity. The lower court committed no error in this regard.

In reviewing a decision of the Workmen's Compensation Court,

> findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same effect as a jury verdict in a civil case, and an order disposing of a case . . . may not be set aside where the findings are supported by the evidence. The facts are not reweighed on appeal.

Cemer v. Huskoma Corp., 221 Neb. 175, 179, 375 N.W.2d 620, 623 (1985). Further,

> [i]n testing the sufficiency of the evidence to support the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he should have the benefit of every inference that can reasonably be drawn therefrom.

Wilson v. City of North Platte, 221 Neb. 90, 92-93, 375 N.W.2d 134, 137 (1985). The findings of that court will not be overturned unless they are clearly wrong. *Thompson v. Monfort of Colorado*, 221 Neb. 83, 375 N.W.2d 601 (1985).

The record demonstrates obvious differences of opinion between the experts testifying on behalf of the defendant and

the expert testifying on behalf of the plaintiff. Dr. Stark, a psychologist who examined Oham, testified that the plaintiff was suffering from hysterical neurosis and indicated the cause related back to childhood development rather than brucellosis.

Dr. Wampler, a specialist in internal medicine, also examined Oham. He testified that Oham did not have an active brucellosis infection, but was suffering from inadequately controlled diabetes, which could cause fatigue. He felt that the plaintiff's problems were functionally based rather than an organic problem. In Dr. Wampler's opinion the plaintiff was not suffering from chronic brucellosis, and he was capable of being gainfully employed.

Mr. Berlin, a registered physical therapist, testified about a series of tests he administered to the plaintiff to evaluate strength, power, and endurance of muscles. His examination indicated that Oham's muscle condition was normal and that he was physically able to carry out an average job.

In contrast, Dr. Hession, the plaintiff's treating physician since 1977, found Oham to be suffering from chronic brucellosis. The doctor had seen the plaintiff numerous times since the compensation court's second hearing in 1982. During that time, Oham has been treated for continuing muscle aches and spasms, dizziness, stiffness, and weakness. His condition has remained relatively the same for the past 3 years. He

> suffers from chronic debilitation. He cannot perform ordinary functions with any degree of predictability. He might go three or four days, a week, sometimes even two weeks feeling pretty good and doing things, and, bingo, he gets pain, he gets aches, he gets chills, he gets soreness in the joints, he feels weak, he gets dizzy.

Dr. Hession also addressed the findings of Dr. Stark. He described brucellosis as a disease which "exacerbates . . . all kinds of depressions, anxiety reactions, hypochondriacal reactions." He further indicated that brucellosis is "a horrendously debilitating disease" that is not very common and that there is no clear way to demarcate what is or is not a chronic case. From his observation of the plaintiff, Dr. Hession saw him deteriorate from a hard-working man "spitting and roaring to get back to work" to "an asthenic individual who has no drive,

no pep, no power, no ability to sustain any prolonged activity of any kind."

It was Dr. Hession's opinion that Oham is disabled and is not a reasonable candidate for employment. He testified that "Mr. Oham cannot consistently and repetitiously and with predictability function in any job parameter that I know of at this time, unless it would be something where he didn't have to work when he didn't feel well enough to work. . . . I don't know who hires anybody like that . . . ."

"As the 'trier of fact,' the Workmen's Compensation Court is the sole judge of the credibility of witnesses and the weight to be given to testimony." *Thompson v. Monfort of Colorado, supra* at 86, 375 N.W.2d at 603.

In this case the compensation court chose to give weight to the expert opinion of the plaintiff's treating physician over that of defendant's experts. That decision is supported by the evidence and is not clearly wrong. The decision of the court on rehearing is affirmed. The plaintiff is allowed an attorney fee of $1,000 in this court.

AFFIRMED.

DOUGLAS MICHAEL DELANEY, APPELLANT, V. LINDA FERN DELANEY, APPELLEE.

382 N.W.2d 16

Filed February 21, 1986. No. 85-265.

1. **Child Custody: Appeal and Error.** Custody matters are 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.
2. **Trial: Witnesses: Appeal and Error.** Where the evidence is in conflict, this court will, on its de novo review of the record, give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded with direction.

William G. Line and David G. Hartmann of Kerrigan, Line & Martin, for appellant.

John R. Bellavia, Jr., of Bellavia Law Office, for appellee.

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

PER CURIAM.

The petitioner-appellant father, Douglas Michael Delaney, appeals from that portion of the trial court's dissolution decree which places custody of the parties' minor child, Melinda, with the respondent-appellee mother, Linda Fern Delaney. We reverse and remand for the entry of a decree which places custody of the child with the father.

The parties were married at Fremont, Nebraska, on April 20, 1979. Melinda was born on November 2, 1980, making her 4 years old at the time of trial. The father was 39 years old at the time of trial and the mother 36.

The parties lived in Fremont until late 1982 when they moved to Texas. The father returned to Fremont in August of 1983; the mother moved first to one town in Colorado and then to Cripple Creek, Colorado, where she was living at the time of trial.

The father has been a truckdriver most of his adult life. At the time of trial he traveled and was able to spend only about 1 1/2 to 2 days a week at home. He testified that if he were to be awarded custody of Melinda, he would try to get work which would keep him at home more. During the time the father had Melinda's custody under a prior order of the court, from July 1984 to the time of the dissolution decree, February 19, 1985, the child lived with the father's parents at their farm. The evidence is that Melinda was happy and enjoyed being with her paternal grandparents, whom the mother characterizes as good and loving people.

The evidence establishes that beginning in 1982, the mother began to spend the nights away from the parties' home, until the early morning hours. She admits to having had three sequential sexual relationships, one in Fremont and two after the move to Texas. In fact, she moved from Texas to Colorado

to live with one of the men, whom the child calls "Daddy Don," but she left his mountain home a few weeks before the trial and moved into a two-bedroom house in town so that her two sons from a prior marriage could be nearer their school. Although at one time she thought of marrying the man with whom she had lived, she now describes their relationship as that of good friends. The mother was not employed at the time of trial but had worked from time to time as a waitress and as a barmaid. Her income at the time of trial consisted of child support payments for her two sons, food stamps, and financial help from her mother. She testified that she hoped to obtain employment at the mine in Cripple Creek or at one of the curio shops.

While there is evidence that the father at times drank to excess and mistreated the mother, the mother herself admits that he never at any time mistreated the child.

Custody matters are 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. In that review we will, where the evidence is in conflict, give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another. *Chalupa v. Chalupa*, 220 Neb. 704, 371 N.W.2d 706 (1985).

Our review convinces us that the trial court did abuse its discretion. The father has demonstrated a better ability to provide the child with a stable and wholesome environment than has the mother. It is true that placing custody with the father will likely mean the child will spend more of her time with his parents than with him. On the other hand, the mother's future employment just as likely means that neither will she be able to spend all of her time with the child.

In view of that determination we need not, and therefore do not, consider the father's other assignments of error.

The cause is remanded for the entry of a decree placing custody of the child in and with the father and giving the mother reasonable rights of visitation.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. CHARLES MENSER, APPELLANT.
382 N.W.2d 18

Filed February 21, 1986. No. 85-280.

1. **Jury Instructions.** It is the duty of the trial court to instruct the jury upon the accused's theory of the case if there is sufficient evidence to support it.
2. **Criminal Law: Self-Defense.** The exception to the duty to retreat before employing deadly force is inapplicable if the defendant has in fact retreated voluntarily from his dwelling.
3. **Jury Instructions: Appeal and Error.** It is not error to refuse instruction on any issue which is not supported by evidence.

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

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

Robert M. Spire, Attorney General, and Mel Kammerlohr, for appellee.

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

WHITE, J.

This is an appeal from felony convictions in the district court for Douglas County. Defendant, Charles Menser, was found guilty in a jury trial of first degree assault, use of a firearm to commit a felony, and possession of a firearm by a felon. He received consecutive sentences of 2 to 5 years on the assault conviction and 1 to 3 years for use of a firearm to commit a felony. He also received a sentence of 1 to 3 years for possession of a firearm by a felon, to be served concurrently with the other two sentences.

The incident precipitating the arrest and conviction of Menser occurred on May 16, 1984, when Menser shot Woodard Terrell with a pistol in front of Menser's apartment building. The shooting was the climax to an argument and scuffle between Menser and Terrell that began in Menser's apartment. Five people testified at trial concerning the events surrounding the shooting; five different versions of what happened were offered.

At approximately 9:30 p.m. on May 16, Terrell and his wife

went to Menser's apartment for a social visit. Terrell had received a dose of methadone through the Equilibria program and had had several drinks prior to the visit. His wife testified at trial that he was not drunk; other witnesses, friends of the parties who were present in the apartment, testified that he was quite drunk. Menser and Terrell argued in the kitchen of Menser's apartment. A scuffle ensued, with both parties striking each other. The witnesses disagreed at trial as to who struck the first blow. Menser and Terrell were physically separated by their friends. Some of the witnesses observed a gun on the floor of the kitchen following the scuffle; others did not. Menser testified that he picked up the gun from the floor and pocketed it, although he denied that it was his. There was agreement among the witnesses that Terrell carried a knife, which he used in his work, in a case on his belt. Menser was aware that Terrell carried a knife.

Following the altercation, Menser asked Terrell several times to leave the apartment. Terrell did not do so. Menser then left his apartment and walked outside along the sidewalk in front of the apartment building. Terrell followed and approached Menser. Menser shot Terrell, claiming at trial that he fired a shot in Terrell's direction because he thought Terrell was going to attack him. Menser then threw the gun into a nearby trash Dumpster and left the scene.

After his motion for a new trial was overruled, defendant appealed to this court. He assigns as error that the district court committed reversible error by refusing his requested instruction to the jury that an actor is not required to retreat from his dwelling.

Menser testified at trial that he did not fear for his safety until he was outside of his apartment. The only applicable law under such facts is the law of self-defense embodied in Neb. Rev. Stat. § 28-1409 (Reissue 1979), which was given to the jury as instruction No. 11. The instruction stated in part:

> The use of deadly force shall not be justifiable unless the actor believes such force is necessary to protect himself against death or serious bodily harm, nor is it justifiable if: (a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against

himself in the same encounter; or (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating.

This instruction properly encompassed the relevant statutory and common-law definitions of self-defense as warranted by the facts of this case.

Defendant requested an instruction based on § 28-1409(4)(b)(i), which provides:

> (4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if:
>
> . . . .
>
> (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:
>
> (i) The actor shall not be obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be . . . .

It is the duty of the trial court to instruct the jury upon the accused's theory of the case *if there is sufficient evidence to support it. State v. Canby*, 217 Neb. 461, 348 N.W.2d 900 (1984). We feel that the district court properly instructed the jury, refusing the defendant's requested instruction that an actor is not required to retreat from his dwelling, as this instruction was not supported by the evidence.

Neb. Rev. Stat. § 28-1406(5) (Reissue 1979) defines dwelling as "any building or structure, though movable or temporary, or a portion thereof, which is for the time being the actor's home or place of lodging . . . ." An uncontroverted fact of this case is that defendant was not in his home when he shot Terrell. The statute is limited to a dwelling or place of work. The sidewalk in front of defendant's apartment is neither of these. Regardless of where the argument started or who initiated it, the exception

to the duty to retreat before employing deadly force is inapplicable if the defendant has in fact retreated voluntarily from his dwelling.

We find no Nebraska case which has expanded the statutory meaning of the term "dwelling." The defendant's invitation to this court to do so is not accepted. It is not error to refuse instruction on any issue which is not supported by evidence. *State v. Wright*, 196 Neb. 377, 243 N.W.2d 66 (1976). The trial judge ruled properly in refusing to give an irrelevant and potentially misleading instruction. The decision of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD J. GROTZKY, APPELLANT.
382 N.W.2d 20

Filed February 21, 1986. No. 85-364.

1. **Post Conviction.** An evidentiary hearing is not required on a motion seeking post conviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1979) where the motion and the files and records of the case show that the petitioner is not entitled to such relief.
2. **Criminal Law: Right to Counsel: Effectiveness of Counsel.** A defendant in a criminal action is not only entitled to counsel but to the effective assistance of counsel.
3. **Criminal Law: Effectiveness of Counsel.** The standard for determining the effectiveness of counsel in a criminal case is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area.
4. **Criminal Law: Drunk Driving: Intent: Proof.** Neb. Rev. Stat. §§ 39-669.07 and 39-669.08 (Reissue 1984) do not require intent as an element necessary to be proved by the State to show a violation of such statutes.

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

Richard E. Gee, for appellant.

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

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

GRANT, J.

Defendant, Harold J. Grotzky, appeals from the district court's denial of his motion for post conviction relief and the denial of an evidentiary hearing thereon. The district court found that defendant was "entitled to no relief" and that "pursuant to Neb. Rev. Stat. §29-3001 . . . an evidentiary hearing in this matter is not required." We affirm.

On February 15, 1984, an information was filed in Hall County District Court charging defendant with third offense driving while intoxicated on January 23, 1984, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984), and with driving a motor vehicle while his operator's license had been permanently revoked, in violation of Neb. Rev. Stat. § 39-669.08 (Reissue 1984). On March 27, 1984, another information was filed in Hall County District Court charging defendant with third offense driving while intoxicated on March 8, 1984, and with driving while his operator's license had been permanently revoked, in violation of the same statutes.

Defendant was arraigned for the January violations on March 12, 1984, and pled guilty to both counts. A factual basis was stated by the prosecution, and the pleas were found to be voluntary and were accepted by the court. Defendant was arraigned for the March offenses on April 18, 1984. At the arraignment for the March offenses, the charge of driving while intoxicated was dismissed pursuant to a plea negotiation, in return for which defendant pled no contest to the charge of driving during revocation. A factual basis was again stated by the prosecution, and the plea was found to be voluntary and was accepted by the court.

On April 9, 1984, defendant was sentenced for the January violations. He was sentenced to 6 months' imprisonment for third offense driving while intoxicated, and to not less than 20 months nor more than 5 years for driving during revocation of his license. The sentences were to run concurrently. On April 18, 1984, defendant was sentenced to not less than 20 months nor more than 5 years for the March violation of driving during

revocation of his license. The court ordered that the sentence for the March violation be served concurrently with the sentences for the January violations.

On October 1, 1984, defendant filed a motion for post conviction relief for his January and March convictions, under the provisions of Neb. Rev. Stat. § 29-3001 (Reissue 1979). After hearing the motion the trial court denied the relief requested and denied defendant's motion for an evidentiary hearing.

In this court defendant assigns three errors of the trial court: (1) In denying an evidentiary hearing; (2) In denying post conviction relief; and (3) In finding, "as a matter of law, that the defenses of insanity and excessive intoxication were not available to the Defendant, and that he therefore was not denied effective assistance of counsel, where counsel failed to adequately investigate and advise on these defenses." The issue raised by defendant is whether he was denied the effective assistance of counsel in entering his pleas to the charges against him.

An evidentiary hearing is not required on a motion seeking post conviction relief under § 29-3001 where the motion and the files and records of the case show that defendant is not entitled to post conviction relief. *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985); *State v. Williams*, 218 Neb. 618, 358 N.W.2d 195 (1984); *State v. Meredith*, 212 Neb. 109, 321 N.W.2d 456 (1982). If the district court correctly determined that neither defense set out in assignment No. 3 was available to defendant in this situation as a matter of law, the court properly denied the motion for an evidentiary hearing. For the following reasons we conclude that the district court was correct.

With regard to defendant's right to effective counsel, we held in *State v. Pearson*, 220 Neb. 183, 185, 368 N.W.2d 804, 807 (1985), "A defendant in a criminal action is not only entitled to counsel but to the effective assistance of counsel." The standard for determining the effectiveness of counsel in a criminal case is "whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area." *Id.* at 186, 368 N.W.2d at 807. See, also, *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984).

The right to counsel is, of course, a constitutional right and, as such, may be raised in a post conviction proceeding. § 29-3001.

In examining the records with regard to the general question of adequacy of counsel, to determine if an evidentiary hearing was necessary, the trial court knew at the time of the defendant's pleas to the January 1984 charges against him that defendant had been stopped for erratic driving, that he had the odor of alcohol on his breath, that he failed several field sobriety tests, and that the results of a breath test administered to him showed that he had twenty-three hundredths of 1 percent by weight of alcohol in his body fluids. The court was also informed that defendant's Nebraska driving privileges had been revoked for life in Hall County in 1982. With regard to the March 1984 violations, the court knew that defendant had been arrested while driving his automobile and while his license had been revoked. The trial court also knew that defendant had been sentenced to the Nebraska Penal and Correctional Complex in 1956, 1958, and 1963 for criminal offenses not involving driving a motor vehicle, and had been imprisoned in the Nebraska Penal and Correctional Complex in 1977 and 1981 for separate third offense drunk driving convictions. With this background it cannot be said that defendant's counsel was generally ineffective in representing defendant and obtaining concurrent (although maximum) sentences for one additional drunk driving charge and two additional charges of driving while his driver's license was revoked.

The specific thrust of defendant's post conviction appeal is the alleged incompetency of counsel in failing to advise defendant of the possibility of pleading excessive intoxication or insanity as defenses to both the driving while intoxicated charge and the two charges of driving while under permanent revocation of his driver's license. Defendant's underlying premise for this contention is that in each instance the State must prove criminal intent before a defendant may be found guilty of such charges. We do not agree.

Defendant was charged with violating §§ 39-669.07 and 39-669.08. We find that those statutes do not require intent as an element necessary to be proved by the State to show a violation of such statutes. Section 39-669.07 provides in part:

"It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor . . . or when that person has ten-hundredths of one per cent or more by weight of alcohol in his or her body fluid . . . ." Under the language of the statute, the elements the State must prove are that the defendant was operating or in actual physical control of the motor vehicle and doing so under the influence of alcoholic liquor or with ten-hundredths of 1 percent or more by weight of alcohol in his or her body fluids. Section 39-669.08 provides in part: "Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been permanently revoked pursuant to this section shall be guilty of a Class IV felony." The language of this part of the statute does not require an intent element. The statute requires only that the State show that the defendant was operating a motor vehicle on the public streets and that the defendant's operator's license had been permanently revoked pursuant to this section when doing so.

In *State v. Jost*, 219 Neb. 162, 361 N.W.2d 526 (1985), this court was faced with a similar issue. In that case the defendant was accused "of operating a motor vehicle after and while [his] driver's license or operator's privilege had been withdrawn by proper authority." *Id.* at 168, 361 N.W.2d at 530. While a different statute was involved, its language did not include intent as an element of the State's burden of proof, and the court found that "[t]he State was required to prove by evidence beyond a reasonable doubt the elements of the offense, namely, that [defendant] did operate a motor vehicle on a public highway when [defendant's] driver's license or operator's privileges had been taken away by some lawful authority." *Id.* Violation of the statute in *Jost* did not involve an element of intent. We find *Jost* analogous and persuasive.

The same result was reached in *People v. Turner*, 64 Ill. 2d 183, 354 N.E.2d 897 (1976), where the Illinois Supreme Court held that the crime of driving a motor vehicle during suspension consisted of only two elements: (1) driving on a public road; and (2) at a time when the operator's driver's license had been suspended. See, also, *State v. Sonderleiter*, 251 Iowa 106, 99

N.W.2d 393 (1959); *State v. Merrifield*, 180 Kan. 267, 303 P.2d 155 (1956).

Since the element of criminal intent is not required to be established to prove a charge under §§ 39-669.07 and 39-669.08, the trial court was correct in determining that the defenses of excessive intoxication and insanity were not available to defendant. The district court was correct in denying defendant's petition for post conviction relief and in denying defendant's motion for an evidentiary hearing on such petition.

AFFIRMED.

WHITE, J., concurs in the result.

IN RE INTEREST OF P.F., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. S.M., APPELLANT.

381 N.W.2d 921

Filed February 21, 1986. No. 85-373.

1. **Parental Rights: Appeal and Error.** An appeal from an order terminating parental rights is reviewed in this court de novo on the record.
2. **Parental Rights.** An order terminating parental rights must be supported by clear and convincing evidence and should be issued only as a last resort where no reasonable alternative exists.
3. _____. The primary consideration in termination of parental rights cases is the best interests of the child.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed.

Patrick W. Meyer and Timothy J. O'Brien of Westergren, Hauptman, O'Brien & Wolf, P.C., for appellant.

Donald L. Knowles, Douglas County Attorney, and Elizabeth G. Crnkovich, for appellee.

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

BOSLAUGH, J.

S.M. appeals from the April 19, 1985, order of the separate juvenile court of Douglas County, Nebraska, terminating her parental rights to her daughter, P.F. On appeal S.M. claims that (1) the evidence was insufficient as a matter of law to terminate her parental rights and that (2) the court erred in basing its decision to terminate on P.F.'s refusal to have any type of contact with the appellant.

An appeal from an order terminating parental rights is reviewed in this court de novo on the record. *In re Interest of V.B. and Z.B.*, 220 Neb. 369, 370 N.W.2d 119 (1985). Such an order must be supported by clear and convincing evidence and should be issued only as a last resort where no reasonable alternative exists. *In re Interest of V.B. and Z.B., supra.* Nevertheless, the primary consideration in such cases is the best interests of the child. *In re Interest of D.*, 218 Neb. 23, 352 N.W.2d 566 (1984).

P.F. was born to S.M. and D.F. on April 1, 1968. D.F., who was P.F.'s natural father, died in 1971. In February of 1980 S.M. voluntarily placed P.F. in foster care. P.F. had been in foster care previously, from December 1972 until April 1973, when S.M. had been charged with child abuse.

On May 16, 1980, a petition seeking termination of S.M.'s parental rights was filed in the separate juvenile court of Douglas County, Nebraska. The court took immediate custody of P.F. and ordered temporary foster care placement. P.F. remained in the home of A.R., with whom she had originally been voluntarily placed.

On November 5, 1980, at an adjudication hearing, P.F. was found to be a child under 18 years of age lacking proper care by reason of the fault or habits of her mother. Neb. Rev. Stat. § 43-202(2)(b) (Reissue 1978). Jurisdiction over the appellant was based on a finding that she fell within the meaning of Neb. Rev. Stat. § 43-209(2) (Reissue 1978).

Neb. Rev. Stat. § 43-247(3)(a) (Supp. 1985) and § 43-292(2) (Reissue 1984) now contain the provisions which formerly were found in §§ 43-202(2)(b) and 43-209(2), respectively. The relevant portions of the statutes have remained substantially unchanged during the pendency of this case.

The juvenile court found evidence adduced at the November 1980 hearing to be "shocking." P.F., then 12 years of age, testified that her mother, S.M., had subjected her to physical and verbal abuse, including the infliction of a broken rib; cuts on her chin and stomach with butcher knives; bites on her fingers; pokes from keys into her arms, legs, and head; and threats to kill her, cut her up, and throw her into the river. P.F. also testified that her mother was frequently drunk and had often involved her, P.F., in the nighttime theft of large plants from homes.

S.M.'s attorney stipulated to "the background of any abuse, verbal abuse or physical abuse," and S.M. admitted in open court to three counts of abuse alleged in the State's petition. Specifically, S.M. admitted:

> A. On or about January, 1980, said child [P.F.] was physically abused by [S.M.], natural mother of said child, resulting in bruises, scratches and abrasions, with little or no provocation by said child.
>
> B. Said child has been physically abused by [S.M.], natural mother of said child, resulting in bruises, scratches and abrasions, with little or no provocation by said child; several incidents required medical treatment.
>
> . . . .
>
> D. Said child has been verbally abused, on a regular basis, by [S.M.], natural mother of said child, to wit: Retard, bitch, etc.

P.F. testified that her voluntary foster placement followed an argument between S.M. and S.M.'s mother. According to P.F., S.M. picked P.F. up from a friend's home and blamed her for the argument. S.M. bit P.F.'s fingers and twisted her hands while driving P.F. home. S.M. also threatened to kill P.F. At home, P.F. was ordered to clear the car of snow with her bare hand. Sensing a beating, P.F. fled to her grandparents' home.

P.F. testified at this initial hearing that she feared her mother and did not wish to return to her, even if her mother was able to change for the better. She also testified that S.M. did not love her and that she, P.F., wished to stay with her foster parent, A.R., because she felt safe and comfortable there, unlike at home.

The juvenile court found specifically that the child refused to return to the care and custody of the natural mother "because of the physical and verbal abuse inflicted upon her" by the natural mother.

The county attorney recommended that the prayer for termination be taken under advisement. The court advised that it would do so solely for P.F.'s sake. At the conclusion of the hearing the court specifically advised S.M. that

> the evidence is beyond a doubt sufficient to terminate your parental rights. Because of [P.F.'s] age and I feel it is in her best interest at this time, at this point it's not going to do her a lot of good at this point to disregard what happened in her life. She'll have to come to grips with it. That will also, I suppose, give you the opportunity to demonstrate any rehabilitation at future hearings.

An order was entered directing that P.F. remain in foster care, that both P.F. and S.M. undergo psychiatric and psychological testing, and denying visitation unless requested by P.F.

On January 15, 1981, following a disposition hearing, the court ordered that both S.M. and P.F. undergo therapy. S.M. was to engage in joint therapy when and if Dr. Taylor, P.F.'s therapist, recommended it. The prayer for termination was again taken under advisement. A psychiatric evaluation received into evidence indicated that S.M. had a mixed personality disorder with limited awareness about her daughter's needs and that she expected love and caring from P.F. to make herself feel better.

Subsequent to this hearing, the court held case reviews every 6 months, up to and including December of 1983. Attempts at joint therapy had adverse effects upon P.F., and by as early as the November 1981 review hearing, Dr. Taylor recommended that S.M.'s parental rights be terminated to allow P.F. to progress in her own therapy. However, at the November 5, 1981, hearing the juvenile court, for reasons that we are unable to understand, found that termination of the natural mother's parental rights would not serve the child's "long-term best interests." The prayer for termination of the natural mother's parental rights was "dismissed from the petition." As we view the record, that part of the order was contrary to the evidence,

was erroneous, and failed to consider the best interests of the child.

The evidence was clear and convincing from the very beginning that there was little or no hope of returning custody of the child to the natural mother. As time went by, although the mother appeared to be cooperating by attending counseling and parenting sessions, it became increasingly clear that she had made no real progress toward understanding her problem.

The juvenile court seems to have been more concerned with the desires of the mother than with the best interests of the child. As Dr. Taylor stated in her report of May 1, 1984: "I question keeping this child in a Court situation to meet the mother's needs."

Visitation was never specifically ordered by the court, but there was some contact between mother and daughter following P.F.'s placement in A.R.'s home. According to P.F., these contacts were accompanied by more threats and physical abuse on the part of S.M. Following a telephone call in which S.M. again threatened to cut P.F. into pieces and put her into the river, P.F. refused to accept any more visits or calls from S.M. The record is not clear as to when this call occurred. The foster mother's testimony indicates the call occurred sometime in 1982.

By June of 1982 there was some evidence that S.M. had made progress in her therapy. Nevertheless, P.F. continued to refuse any contact with her mother.

Finally, on January 11, 1985, the State filed a motion for termination of S.M.'s parental rights. At a hearing on March 7, 1985, Dr. Taylor testified that P.F.'s feeling of lack of permanency in her long-term foster care placement had created problems for her both at home and at school. Dr. Taylor recommended either a termination or relinquishment of parental rights so that P.F. could be adopted by her foster parent, A.R., in whom P.F. had placed all of her trust and loyalty. Such action would allow P.F. a sense of identity, and to do otherwise, according to Dr. Taylor, would put P.F.'s emotional development at risk.

S.M.'s therapist, Dr. Dyer, testified that S.M.'s prognosis was good and that she had shown a great deal of progress in therapy.

However, on cross-examination, Dr. Dyer admitted that P.F.'s feelings about her mother were very important in determining a disposition in her best interests and that a lack of identity for P.F. could result in "further psychiatric difficulties, emotional difficulties, difficulties in relationships. It could lead to a lot of chaos."

P.F., who was then almost 17 years old, testified that she did not love or like S.M. and that under no circumstances would she visit S.M., even in the event that she, P.F., could not be adopted.

The juvenile court found by clear and convincing evidence that P.F. fell within the meaning of § 43-292(6). This section provides for termination of parental rights when it is found to be in the best interests of the juvenile and it is shown that "[f]ollowing a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination." P.F. had previously been adjudicated a juvenile lacking proper parental care by reason of the fault or habits of her parent within the meaning of § 43-202(2)(b) (Reissue 1978), which has been succeeded by § 43-247(3)(a) (Supp. 1985).

Specifically, the court found, as alleged, that P.F. had been in foster care since April 28, 1980; had continually refused any visitation with S.M.; had continued to express an ongoing fear of S.M.; and had requested, on numerous occasions, termination of the parental relationship with S.M. An allegation that S.M. had failed to resolve her hostile attitude toward P.F. was dismissed. The court ordered termination of S.M.'s parental rights, noting that although there had been evidence sufficient to do so 5 years before, the termination had been taken under advisement solely to give P.F. the opportunity to confront the situation for the benefit of her own mental health.

We think the record shows by clear and convincing evidence that 5 years of therapy failed to improve P.F.'s relationship with her mother and that it was in P.F.'s best interests to terminate S.M.'s parental rights. The natural mother has never fully realized the extent to which she abused her daughter and that it

was her abuse of her daughter that drove them apart. The evidence supports the daughter's belief that her mother sought to regain custody for purposes of revenge.

The appellant contends that the juvenile court erred in basing its determination on the fact that P.F. refuses to have any contact with S.M. The record shows that the juvenile court terminated the parental rights of the natural mother because there is no bond whatsoever between them which might be salvaged. Throughout the entire proceeding, P.F. has maintained that she does not wish to and will not return to or even visit her mother. She has consistently maintained that she does not love her mother.

The appellant relies upon *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 115, 368 N.W.2d 474, 483 (1985), where this court held:

> For the State to now argue that the children have become so "bonded" to their foster parents as to require termination of parental rights in this case is to defy legal logic. By separating a parent from that parent's children for extraordinary lengths of time, the State could justify termination of any parental rights. This cannot be, and is not, the law.

The proposition stated above has no application in this case.

The termination in the case at bar is granted because years of abuse by the natural mother destroyed any bond that the child might ever have had with her. This was evidenced by P.F.'s testimony that she wanted no contact with S.M., regardless of the court's decision.

We have previously recognized the importance of a consistent and stable home environment. *In re Interest of McKinzie*, 212 Neb. 399, 323 N.W.2d 78 (1982). In other cases, we have acknowledged the unacceptability of indefinite foster care where the evidence suggests the need for a fixed and permanent home. *In re Interest of J. and R.*, 216 Neb. 183, 342 N.W.2d 660 (1984). See, also, *In re Interest of D.*, 218 Neb. 23, 352 N.W.2d 566 (1984).

While there is evidence that the appellant did show some progress in therapy, the evidence conclusively shows that all attempts to reunify mother and daughter have failed. There are

no prospects for future reunification. Further, the evidence demonstrates P.F.'s need for a sense of identity, which can only be satisfied by permanent placement.

Since placement with the natural mother is not possible nor advisable and further temporary foster care will not serve P.F.'s best interests, termination of the appellant's parental rights must be granted. S.M.'s efforts at rehabilitation did not and could not undo the harm previously done.

The judgment of the separate juvenile court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY B. HALL, APPELLANT.

381 N.W.2d 926

Filed February 21, 1986. No. 85-558.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Remanded for further proceedings.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

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

PER CURIAM.

Defendant's sole assignment of error is that the district court accepted his plea of nolo contendere and sentenced him to a term of imprisonment for a felony on a trial record which was totally silent concerning whether defendant had knowledge of the maximum and minimum penalties which could be imposed, and without the court's making a finding that defendant had voluntarily and intelligently waived his rights by so pleading.

The State, in effect, confesses error. Accordingly, as required

by *State v. Fischer*, 218 Neb. 678, 357 N.W.2d 477 (1984), and *State v. Curnyn*, 202 Neb. 135, 274 N.W.2d 157 (1979), we remand the cause to the district court for further proceedings as mandated by those cases.

REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM J. MCCLELLEN, APPELLANT.

382 N.W.2d 24

Filed February 21, 1986. No. 85-573.

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

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

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

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

PER CURIAM.

On October 29, 1983, at an I-80 rest area in Lincoln County, Halbert Rodriguez was found dead in his car. An autopsy disclosed that Rodriguez died from gunshot wounds. Among items of physical evidence found at the homicide scene was a spent rifle cartridge identified as the casing for the bullet which killed Rodriguez, a bullet fired from a rifle found in a pickup owned by William J. McClellen. Prospective witnesses for the prosecution placed McClellen near the scene when Rodriguez was killed.

Initially, McClellen was charged with first degree murder, see Neb. Rev. Stat. § 28-303 (Reissue 1979), but, pursuant to a plea bargain, the charges were reduced to manslaughter, a Class III felony (Neb. Rev. Stat. § 28-305 (Reissue 1979)), and use of a

firearm in commission of a felony, a Class III felony (Neb. Rev. Stat. § 28-1205 (Reissue 1979)), in exchange for McClellen's plea of nolo contendere. A Class III felony is punishable by imprisonment for a term from 1 year to 20 years, a fine of $25,000, or both such imprisonment and fine. See Neb. Rev. Stat. § 28-105 (Reissue 1979). McClellen had an extensive criminal record before his conviction in the present case, including convictions for nine felonies. The court accepted McClellen's plea of nolo contendere to the charges of manslaughter and use of a firearm in the commission of a felony.

Section 28-1205(3) provides: "[Using a firearm to commit a felony] shall be treated as a separate and distinct offense from the felony being committed, and sentences imposed under the provisions of this section shall be consecutive to any other sentence imposed." After considering an extensive presentence report, the court sentenced McClellen to imprisonment for $6^2/_3$ to 20 years on the manslaughter conviction and $6^2/_3$ to 20 years for the firearm conviction, with the latter sentence to be served consecutive to the sentence for manslaughter.

McClellen contends the mandatory consecutive sentence required by § 28-1205(3) is unconstitutional as a violation of the separation of powers, legislative and judicial, required by article II, § 1, of the Nebraska Constitution, and further contends the sentences imposed are excessive.

McClellen's argument concerning constitutionality of the mandatory consecutive sentence required by § 28-1205(3) was recently reviewed and disposed in *State v. Stratton*, 220 Neb. 854, 374 N.W.2d 31 (1985). In *Stratton* we held that "§ 28-1205(3) does not offend the distribution of powers mandated by the Nebraska Constitution." *Id.* at 860, 374 N.W.2d at 35. McClellen's contention about constitutionality of § 28-1205(3) is without merit.

"In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal." (Syllabus of the court.) *State v. Schaeffer*, 217 Neb. 4, 346 N.W.2d 701 (1984). Appellant is 53 years old. His adult criminal record includes the following: 1949—AWOL (30 days in the stockade); 1950—theft of pistol in Korea (1 year in stockade);

1951—AWOL in Texas (3 months in stockade); 1951—AWOL in Texas ("bad conduct discharge"); 1952—forgery (1 year to 18 months; NPCC); 1953—escape from custody (1 year; NPCC); 1954—violation of Federal Firearms Act (prosecution declined due to incarceration in Montana State Penitentiary); 1954—robbery (6 years; Montana State Penitentiary); 1956—escape from prison (2 years; NPCC); 1959—robbery by assault (5 to 10 years; Texas); and 1984—theft over $700 (2 years; Texas; paroled for purpose of prosecution for offenses in Nebraska—Rodriguez homicide and theft). The sentences imposed on McClellen are within the statutory limits. Given the nature of the crime committed and McClellen's background, as well as the mandatory sentence required by § 28-1205(3), the trial court did not abuse its discretion in the sentences imposed on McClellen.

AFFIRMED.

RICK W. MIDDAGH ET AL., APPELLEES AND CROSS-APPELLANTS, V. STANAL SOUND LTD., A NEBRASKA CORPORATION, AND STAN MILLER, APPELLANTS AND CROSS-APPELLEES.

382 N.W.2d 303

Filed February 28, 1986. No. 84-680.

1. **Judgments: Appeal and Error.** In an action at law where a jury has been waived, the findings of the trial court have the effect of a jury verdict on appeal. In considering the sufficiency of the evidence to sustain the judgment, the evidence will be considered in the light most favorable to the successful party, any controverted fact will be resolved in that party's favor, and the successful party will have the benefit of every inference reasonably deducible from the evidence.
2. **Landlord and Tenant.** To constitute a constructive eviction it must be shown that the premises were rendered unfit for occupancy for the purposes for which they were leased or were rendered unfit so as to deprive lessee of the beneficial use of the premises.
3. **Landlord and Tenant: Damages.** In calculating the damages due a lessee for failure of the lessor to install items required by the lease, lessee's damages are limited to the difference between the reasonable rental value of the property as it was as compared to what it was contracted to be.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed in part, and in part remanded with directions.

Patrick J. Nelson of Jacobsen, Orr & Nelson, P.C., for appellants.

William G. Dittrick of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellees.

BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

GRANT, J.

Plaintiffs-appellees, Rick W. Middagh and Donnise M. Middagh, husband and wife, filed an action for damages, as lessors under a written lease, against defendants-appellants, Stanal Sound Ltd., a Nebraska corporation, and Stan Miller, the lessees. The case was tried to the court, which awarded damages to the plaintiffs in the amount of $10,738.77. The trial court, in computing the amount of damages awarded to Middaghs, calculated the damages through October 15, 1984. The court gave Middaghs the benefit of an addendum to the original lease, which addendum permitted the Middaghs to accelerate 1 year's rental in the event of a default by lessees, and awarded certain other damages for repairs, insurance, and tax payments under the lease. In determining the damages the trial court also gave lessees credit for the rental amounts received by Middaghs under a re-lease of the premises of 17 months, a $1,625 security deposit made by lessees, and "$8,850.00 being a rent adjustment for failure of the lessor to erect fence being computed for the entire period of the lease, December 15, 1979 through and including October 15, 1984, 59 months at $150.00." Middaghs and lessees filed separate motions for new trial, both of which were overruled. Lessees appeal, and Middaghs cross-appeal.

Lessees appellants assign eight errors, which may be summarized in three categories: (1) That the trial court erred in determining that the lease was amended by the "Addendum to Lease"; (2) That the trial court erred in failing to find that Middaghs had constructively evicted lessees from the leased

premises; and (3) That the trial court erred in awarding damages to Middaghs and in determining the amount of those damages.

In their cross-appeal Middaghs assign as error the action of the court in determining that lessees were entitled to a setoff or adjustment in the rent of $8,850 because of Middaghs' failure to erect a fence; in awarding Middaghs $240 for insurance premiums paid, when the only evidence received showed the amount to be $840; and in finding the lessees were entitled to a return of their security deposit of $1,625.

We affirm the judgment of the trial court insofar as lessees' appeal is concerned, and reverse the judgment and remand the cause to the district court on Middaghs' cross-appeal to increase the amount of the judgment.

In an action at law where a jury has been waived, the findings of the trial court have the effect of a jury verdict on appeal. In considering the sufficiency of the evidence to sustain the judgment, the evidence will be considered in the light most favorable to the successful party, any controverted fact will be resolved in that party's favor, and the successful party will have the benefit of every inference reasonably deducible from the evidence. *Morfeld v. Bernstrauch*, 216 Neb. 234, 343 N.W.2d 880 (1984); *Rieschick Drilling Co. v. American Cas. Co.*, 208 Neb. 142, 303 N.W.2d 264 (1981).

The record shows the following. In the summer of 1979 plaintiff Rick Middagh was a mortgage broker operating in the Kearney, Nebraska, area under contracts with various financial institutions. At that time lessee Stanal Sound was a Nebraska corporation engaged in business in Kearney, Nebraska, and other locations, and engaged in selling, designing, engineering, and installing sound systems and providing large touring sound systems for major entertainers on a rental basis. Defendant Stan Miller was the president and a director of Stanal Sound and owned 50 percent of its stock, with the other 50 percent "in a trust and a repurchase agreement." Maurice Miller, the father of Stan Miller, was vice president and secretary of Stanal Sound and a director.

Rick Middagh was contacted by Stan Miller in the summer or fall of 1979 to find financing for Stanal Sound for purposes of

obtaining warehouse property. Rick Middagh was unable to obtain financing for Stanal Sound from banking institutions.

After he was unable to obtain institutional financing, Rick Middagh worked on private financing and looked at various properties in Kearney with the Millers. The mutual object of the looking was to find a location acceptable to the Millers (acting for Stanal Sound) which private investors could buy and lease back to Stanal Sound for a long term. Rick Middagh ultimately found property with a warehouse that he was willing to buy personally and lease to Stanal Sound. The transaction was discussed with the Millers. Rick Middagh signed an agreement to purchase the property in question on December 10, 1979. The date the purchase by the Middaghs was completed is not shown in the record. Stanal Sound went into possession of the premises at some time between December 1 and 15 of 1979. The lease involved herein was signed by Maurice Miller, for Stanal Sound, in February of 1980 and by Stan Miller, for himself personally, in May of 1980. The lease had an effective date of December 15, 1979, and was for a period of 10 years.

Although the lease had been signed by Stanal Sound and Stan Miller in February and May, respectively, of 1980, it was not until approximately October of 1980 that Rick Middagh began to make firm arrangements for the long-term financing for his purchase of the property leased to Stanal Sound. In the meantime Rick Middagh had advanced his own funds and had short-term financing with a bank.

Rick Middagh informed Maurice Miller, acting for Stanal Sound, that the financing institution would not give Middaghs the necessary long-term financing unless the lessees would cosign the necessary promissory note with Middaghs. This requirement was reflected in a November 14, 1980, commitment letter from the lending agency to the Middaghs. The Millers refused to cosign Middaghs' note. After discussions in which Rick Middagh pointed out to the Millers that he had personally borrowed the money on a short-term basis to lease the building to Stanal Sound, the Millers agreed to execute an acceleration rental clause as an amendment to the lease if that change in the lease would satisfy the lending institution. The first proposal was an acceleration clause for the entire 10-year

lease period. The Millers refused to sign such an acceleration, but did agree to sign an acceleration for a 1-year period if Middaghs would sign a buy-sell agreement, incorporated in a land contract, between Stan Miller and the Middaghs on the leased property.

An addendum to the lease was prepared. On March 6, 1981, at a meeting in Kearney, the addendum was signed by the Middaghs and by Maurice Miller as secretary of Stanal Sound. At the time of this meeting, and before Maurice Miller signed for Stanal Sound, an option agreement providing for the purchase of the leased property on a deferred basis rather than cash was prepared. In the presence of the Middaghs, Maurice Miller talked by telephone to Stan Miller in California and then signed the option agreement, over Stan Miller's typed signature, "by Maurice W. Miller." The record shows that, although there was evidence to the contrary, the addendum to the lease was signed by Stan Miller at an undetermined later date and mailed to Rick Middagh in either May or June of 1981. Confusion resulted from the fact that, at the trial, several copies of the addendum not bearing the signature of Stan Miller were received, as well as one signed copy of the addendum. There is sufficient evidence, however, to sustain the court's implied finding that the addendum was signed by Stan Miller and delivered to Rick Middagh.

The original lease, effective December 15, 1979, provided for rental of $1,562.50 per month for the first year and $1,625 per month for the remaining 9 years of the 10-year lease. That lease further provided that the Middaghs agreed to erect an 8-foot-high chain link fence, with barbed wire above it, around the premises by July 1, 1980. Among the other terms of the lease, there were provisions requiring the lessees to provide certain insurance, to pay the real estate taxes, and to make a security deposit of 1 month's rent.

The "Addendum to Lease" of March 6, 1981, provided that on lessees' default, the lessors would have the right to accelerate the rental payments due for 1 year in advance in the sum of $19,500.

It is the validity and effect of this addendum that is the subject of lessees' first assignment of error. The trial court

found that the addendum was properly executed and delivered and operated to amend the lease to permit the Middaghs to accelerate 1 year's rental on lessees' default and that the addendum bound both Stanal Sound and Stan Miller.

Lessees state that our law requires that the modification of a contract requires the assent of all parties to the contract, citing 17 Am. Jur. 2d *Contracts* § 465 (1964), and that consideration is an essential element to the validity of a contract, citing *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982), and *Omaha Nat. Bank v. Goddard Realty, Inc.*, 210 Neb. 604, 316 N.W.2d 306 (1982). We agree fully with lessees' statements of law. The dispositive facts in this case, however, are (1) that the trial court determined that there had been assent to the modification of the original December 15, 1979, lease by all parties and (2) that there was adequate consideration.

As stated above, although there was a dispute in the evidence, there was sufficient evidence to sustain the trial court's determination, inherent in the trial court's determination of liability against the lessees, that all parties assented to the addendum.

The trial court also determined there was adequate consideration. That consideration was the execution of an option agreement, giving to Stan Miller the option to buy the property in question on specific deferred terms, rather than for cash as set out in the original lease. This option was both a benefit to Stan Miller and a detriment to the Middaghs and was, therefore, adequate consideration for the execution of the addendum. *Erftmier v. Eickhoff, supra*; *Omaha Nat. Bank v. Goddard Realty, Inc., supra*. The trial court was correct in determining that the addendum modified the original lease and that the Middaghs were entitled to the benefit of the terms of the addendum upon lessees' default.

Lessees' second assignment of error is that the court erred in failing to determine that the Middaghs had constructively evicted lessees from the premises by failing to erect a fence around the property as required by the lease. It would follow, of course, that if lessees were constructively evicted by Middaghs' default, lessees would not be in default under the lease terms. On this question the evidence before the trial court,

although again conflicting, supports the following factual determinations.

The lease required Middaghs to construct a specific type of fence by July 1, 1980. In the purchase contract between Middaghs and the party from whom they were buying the property, there was a requirement that a fence be constructed, which was necessary to satisfy an obligation of the seller to construct a fence along one boundary. Rick Middagh discussed the fence requirement in his purchase contract with Maurice Miller, who questioned the utility of the type of fence and its placement on property as far as it would be of any use to Stanal Sound. Rick Middagh testified that neither Maurice nor Stan Miller had made any statements regarding a fence prior to Rick's mention of the fence in the purchase contract. Maurice did not demand any particular type of fence or a specific date for construction of the fence. The December 15, 1979, lease specified a specific type of fence and an installation date of July 1, 1980. The fence was not installed by the specified date because the Middaghs were not able to pay for the installation.

Rick Middagh informed Maurice that since Stanal Sound would not cosign for his long-term financing, he could not afford to install the fence at that time. Maurice informed Rick that the long-term financing was the priority and that the fence was not a problem. Neither Maurice nor Stan told Rick that the fence was a concern at that time. Maurice also informed Dale Ellis, another party sought by Rick to join the financing, that the fence was not of great importance because none of Stanal Sound's other storage facilities had security fences. No demands were made that the fence be installed by July 1, 1980. There was no written correspondence which discussed the fence until September of 1982. Neither of two letters written by Stanal Sound to the Middaghs, one dated February 10, 1981, and the other dated May 4, 1981, complained of the failure to construct the fence by July 1, 1980, nor indeed mentioned the fence at all.

Maurice Miller testified regarding many aspects of the case, and he was unaware of any correspondence regarding the fence or the lack thereof until the letter of September 28, 1982, when Stanal Sound informed the Middaghs that the failure to erect the fence was the justification of the lessees in considering the

lease broken. Maurice Miller knew of no security problems or break-ins and testified that none of their other facilities had security fences.

Stanal Sound made its last rent payment on October 15, 1982. The letter dated September 28, 1982, referred to above, had been sent to Rick Middagh inquiring about the fence and asserting that he was in breach of contract. Rick Middagh informed Stanal Sound that the fence would be installed by December 27, 1982. Stanal Sound, by a letter authorized by Stan and dated November 8, 1982, informed Rick that the lease was terminated.

The lease provides a right of termination to the lessors only. The fence was said to be the only reason to terminate the lease. Stanal Sound completely vacated the premises by December 1, 1982. Stanal Sound did not lease or purchase any other storage facility after it vacated the premises in question. The Middaghs relet the premises on June 1, 1983, for a period of 19 months.

The basis of lessees' contention is that they were constructively evicted from the premises. To constitute a constructive eviction it must be shown that the premises were rendered "unfit for occupancy for the purposes for which they were leased or [were rendered unfit so as to deprive] the lessee of the beneficial use of the premises . . . ." *May v. Marijo Corp.*, 207 Neb. 422, 423, 299 N.W.2d 433, 434 (1980). In this case the premises were used for the intended purpose for approximately 3 years without complaint. There was no change in the condition of the building and no change in the overall situation which would render the premises unfit. The lessees had not been deprived of the beneficial use of the leased property. There had not been any break-ins, to their knowledge. Further, none of Stanal Sound's facilities had security fences, nor did their prior storage facility. A constructive eviction is not supported by the evidence in this case. That lessees did not consider the fence vital to their operation under the lease is conclusively shown by the fact that lessees were willing to, and did, execute an addendum to the lease in the spring of 1981, when the lease itself provided for the erection of the fence by July 1, 1980.

Since defendants were not constructively evicted and since the contract did not provide defendants a right of termination,

defendants' only recourse was a suit for damages. *Hogan v. Pelton*, 210 Neb. 530, 315 N.W.2d 644 (1982). Since the lessees vacated and discontinued rental payments instead of suing for damages, defendants were in default of their obligation under the lease.

Lessees' other assignments of error concern the allowance of other damages for their default. Lessees contend that Middaghs were either not entitled to any of the other specified damages or were not entitled to them in the amounts awarded. Lessees assert that the court incorrectly interpreted a clause in the lease requiring defendants to provide insurance coverage. While the judge did not specifically state an interpretation, the order awarded plaintiffs $240 for unpaid insurance. We find that the court correctly awarded damages under the language of the clause which required defendants to insure the property. Lessees failed to fully insure, and the Middaghs paid for the coverage. In so doing the Middaghs were damaged.

Lessees also assert that the award of other damages, such as $1,465 for minor repairs and $447.57 for real estate taxes, was not justified under the evidence. With this we also disagree. Lessees do not specifically challenge the award for unpaid taxes, but they challenge the award for minor repairs, claiming that there was no competent evidence to support the award. The evidence before the trial court sustains its findings as to the damages incurred by the Middaghs.

In the remaining assignments of error, lessees contend that the Middaghs failed to mitigate their damages and are not entitled to reletting expenses. Lessees contend that the evidence supports neither finding. As stated above, the findings of the trial court's questions of fact are not reversed on appeal unless clearly wrong. We find no evidence, and lessees present no argument, to show the Middaghs' actions were unreasonable. The evidence indicates that the Middaghs found another lessee who, while refusing to pay the amount of rent which defendants paid, paid a sum that we cannot say was unreasonable as a matter of law. The evidence indicates that the subsequent lessee was the only party interested in re-leasing the premises. Further, the Middaghs advertised or listed the premises and in doing so requested an amount greater than that to which the subsequent

lessee would agree to pay. There was no basis to find the lower court clearly wrong regarding mitigation. The Middaghs were entitled to recover the remaining rent and the expenses incurred in reletting the premises. *Birkel v. Hassebrook Farm Serv.*, 219 Neb. 286, 363 N.W.2d 148 (1985).

Finally, lessees implicitly contend that the setoff allowed by the lower court was insufficient. They specifically argue that the court erred by refusing to allow a witness to testify that the rental value of the premises was reduced by 15 percent due to the absence of the fence. Upon reviewing the record, we find that the court properly excluded the witness' testimony because, as plaintiffs asserted in objecting, there was no proper and sufficient foundation upon which the witness could base an opinion as to rental values. The witness was an employee of Stanal Sound and had no knowledge of the relevant market or comparable rentals. The opinion of this witness was not based on any foundation and was properly excluded. As stated in *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 348, 370 N.W.2d 103, 106 (1985), "The trial court is given large discretion in determining whether or not a witness' qualification to state an opinion has been established, and such discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion."

Middaghs cross-appeal and argue that there was no evidence to allow the court to determine a rental adjustment of $150 per month for 59 months to be allowed as a credit on lessees' payments due under the lease. The record shows no facts to support a counterclaim or setoff formulated in this manner.

In determining the amount of damages which lessees suffered by reason of Middaghs' failure to erect a fence around the leased premises, we are governed by the general rule that in calculating the damages due a lessee for failure of the lessor to install items required by the lease, lessee's damages are limited to the difference between the reasonable rental value of the property as it was as compared to what it was contracted to be. *Master Laboratories, Inc. v. Chesnut*, 154 Neb. 749, 49 N.W.2d 693 (1951); *Partridge v. Dykins et al.*, 28 Okla. 54, 113 P. 928 (1911); *Kellogg v. Malick*, 125 Wis. 239, 103 N.W. 1116 (1905); *Noble v. Tweedy*, 90 Cal. App. 2d 738, 203 P.2d 778 (1949). See,

also, 49 Am. Jur. 2d *Landlord and Tenant* § 859 (1970). In other words, in this case lessees had paid rental (beginning July 1, 1980) for fenced property. That property was leased initially for $1,562.50 and later for $1,625 per month. Without a fence the property might have a lesser rental value. In this case, however, the only evidence suggesting a reduction in rental value was the evidence of lessees' employee, as discussed above, which was properly excluded for lack of proper and sufficient foundation. We therefore find that, on the record before us, it was error to reduce plaintiffs' recovery by $8,850 for rent adjustment. Lessees not only failed to prove an amount of reduced rental value due to the absence of a fence but they also failed to prove that there would be any reduction of rental value at all. No losses were attributable to the absence of a fence. Maurice Miller stated that he had no knowledge of any losses or damages suffered by Stanal Sound in the absence of the fence.

Middaghs also contend that there was no basis upon which to credit defendants for the security deposit. This issue is not discussed by Middaghs in their brief. Plaintiffs assert only that since the lease could not be terminated by defendants, the security deposit should not be returned. We do not agree. It was not error to credit the lessees with the amount of the security deposit to the damages assessed against lessees.

The decision of the district court is, therefore, affirmed in part and in part remanded with directions to increase the amount of the judgment by $8,850 to comply with this opinion.

AFFIRMED IN PART, AND IN PART
REMANDED WITH DIRECTIONS.

HILT TRUCK LINE, INC., AND TRUCKS, INC., NEBRASKA CORPORATIONS, APPELLANTS, V. PULLMAN, INC., A CORPORATION, APPELLEE.

382 N.W.2d 310

Filed February 28, 1986. No. 84-752.

1. **Products Liability: Strict Liability: Proof.** In order to recover in strict liability for the cost of repairs to the product, there must be proof that a sudden, violent event occurred which aggravated the inherent defect or caused it to manifest itself.
2. **Products Liability: Torts: Negligence: Strict Liability: Damages.** The purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product.
3. **Negligence: Damages.** To establish a prima facie case in negligence, a plaintiff need only establish some evidence of duty, breach, causation, and damages.

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

Michael O. Johanns of Peterson Nelson Johanns Morris & Holdeman, for appellants.

Rodney J. Rehm of Rehm & Bartling, for appellee.

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

PER CURIAM.

This is an action for damages for defects in 60 van trailers purchased by the plaintiffs-appellants, Hilt Truck Line, Inc., and Trucks, Inc., from the defendant-appellee, Pullman, Inc. The plaintiffs allege that the trailers had an inherent design defect and sought recovery on theories of strict liability and negligence. As defenses, the defendant alleged a general denial, contributory negligence, misuse of the product, assumption of the risk, and disclaimer of warranties as set out in the original contract.

At the close of all of the evidence, the trial court sustained the defendant's motion for a directed verdict in favor of the defendant and dismissed the plaintiffs' petition with prejudice.

On October 10, 1974, the parties entered into a contract for the purchase of 30 trailers to be constructed by the defendant according to base specifications, together with the additions and exceptions required by the plaintiffs. The defendant knew that the trailers were to be used in the plaintiffs' trucking businesses.

On April 8, 1975, the purchase order was doubled, with the same terms being applicable. The total purchase price for all of the trailers was $544,980. The contracts contained a warranty clause providing for a 1-year warranty and a disclaimer of all other warranties, express or implied.

The plaintiffs placed the trailers into service at different times varying from early 1975 to sometime in 1978. In 1979 the plaintiffs noticed that there were problems with some of the side posts of the trailers. The plaintiffs' shop foreman testified that at that time he noticed that the side posts were very corroded, rusted, and cracked. Also, some of the rivets holding the side posts to the bottom rail had broken loose.

Between 1981 and the date of the trial in 1984, 43 trailers were repaired. The cost of the repair was alleged to be $1,200 per trailer. The plaintiffs allege the reasonable cost of repair of all 60 of the trailers amounts to $72,000.

In sustaining the defendant's motion the trial court stated that the plaintiffs could not recover for damage to the product itself because there was no evidence that the damage resulted from a sudden, violent event. The plaintiffs contend that the trial court was in error in holding that recovery for damage to the product required proof of a sudden, violent event, and, in any event, there was sufficient evidence of a sudden, violent event to require that the case be submitted to the jury.

Generally, a motion for a directed verdict should be sustained if one of two situations exists: (1) if there is insufficient evidence to create a question of fact for the jury to consider; or (2) under the theories of recovery alleged by the plaintiff, the plaintiff cannot recover as a matter of law. *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979). Upon review, where a motion for a directed verdict has been sustained, this court views the evidence in the light most favorable to the losing party, and evidence produced by the prevailing party is disregarded. *Koch*

v. Secretary of the Dept. of Health, Ed. & Welfare, 590 F.2d 260 (8th Cir. 1978).

In product liability litigation it is necessary to examine the allegations concerning the defective product in light of the theory of recovery alleged by the plaintiff. *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983). In the present case the plaintiffs allege there was an inherent design defect and seek recovery under theories of both strict liability and negligence. Thus, in order to recover, the plaintiffs must present sufficient evidence to establish the elements of a strict liability claim or a negligence claim or both. If the plaintiffs did in fact provide evidence concerning the elements of any theory of recovery, then the case should have been submitted to the jury on the cause of action as to which there were questions of fact on which reasonable minds could differ.

As to the strict liability claim, the plaintiffs generally alleged that at the time the trailers were delivered they were defective and posed an unreasonable risk of harm. The specific defects alleged were that (1) the defendant failed to use materials to separate steel and aluminum surfaces and (2) the defendant failed to install a sufficient number of side posts so that the trailers would be strong enough to carry the commodities hauled by the plaintiffs. The plaintiffs then claim that there was an "unreasonable danger of injury to the trailers from corrosion and stress," which caused the "unroadworthiness" of the trailers. The plaintiffs were damaged because they were required to repair the trailers.

From a review of the record it is apparent that even if the plaintiffs established that the product was unreasonably dangerous, there was causation, and there were damages as a result of the defective product, their strict liability claim must fail as a matter of law. In Nebraska, in order to recover in strict liability for the cost of repairs to the product, there must be proof that a sudden, violent event occurred which aggravated the inherent defect or caused it to manifest itself. *Nerud v. Haybuster Mfg., supra*; *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983). Without proof of a violent occurrence, there can be no recovery in strict liability.

It is clear from the record that there is no evidence that the damages claimed were the result of a sudden, violent event. The plaintiffs' expert witness on corrosion testified that the process was gradual and continuous. Robert Hilt, president of the plaintiff Hilt Truck Line, Inc., described the failure of the trailers as follows:

> Well you have this corrosion that's going on, and at some point it weakens the stake to the point where the stake breaks or starts to crack, and then the trailer starts to disintegrate and in some cases the trailer actually disintegrated to the point where we had freight in it where it dropped freight right down to the tires.

Hilt, however, could not pinpoint where or when the bottom dropped out of any trailer, nor could any of the plaintiffs' other witnesses.

It was not error to direct a verdict as to the cause of action on strict liability.

As to the cause of action on negligence, there is no requirement, at least in Nebraska, that damages, such as are claimed in this case, result from a sudden, violent event. *National Crane Corp. v. Ohio Steel Tube Co., supra*, involved a claim for *economic loss*. The case did not involve the 15 incidents in which a failure had actually occurred. As stated in that case:

> The great majority of courts which have considered the issue have held that the purchaser of a product pursuant to contract cannot recover economic losses from the manufacturer on claims based on principles of tort law, in the absence of property damage or personal injury from the use of the product. See *Jones & Laughlin Steel v. Johns-Manville Sales*, 626 F.2d 280 (3d Cir. 1980), and cases and authorities there cited.
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> . . . .
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> We hold that the purchaser of a product pursuant to contract cannot recover economic losses from the seller manufacturer on claims in tort based on negligent manufacture or strict liability in the absence of physical harm to persons or property caused by the defective product.

Id. at 786, 790, 332 N.W.2d at 42, 44.

In order to establish a prima facie case in negligence, a plaintiff need only establish some evidence of duty, breach, causation, and damages. See *Morris v. Chrysler Corp.*, 208 Neb. 341, 303 N.W.2d 500 (1981).

In the present case there was ample evidence that the product was physically damaged. If the plaintiffs' witnesses were believed, the damages were the result of corrosion of the materials used in the construction of the trailers, and the defendant knew that, unless protected, the metals used would corrode, leading to a potentially dangerous situation. If defendant's witnesses were believed, the trailers were damaged as a result of overloading or misuse by the plaintiffs, and the defendant took sufficient precautions to prevent a corrosion problem by painting the side posts with a rust inhibiting primer. The record contains sufficient evidence as to controverted facts concerning material issues essential to the plaintiffs' negligence claim to require that the case be submitted to the jury on the cause of action in negligence.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

CASS CONSTRUCTION COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT, V. TIM BRENNAN AND JIM ASMUSSEN, APPELLEES.

382 N.W.2d 313

Filed February 28, 1986. No. 84-867.

1. **Accord and Satisfaction: Pleadings.** An answer sufficiently pleads accord and satisfaction when it contains or presents all of the elements of an accord and satisfaction, even if it does not use the terms accord and satisfaction and even if it could have been more technically or artfully drawn.
2. **Uniform Commercial Code: Accord and Satisfaction.** The language of Neb. U.C.C. § 1-207 (Reissue 1980) and its history, purpose, and policy do not alter the common-law principles of accord and satisfaction.
3. **Statutes.** We will, if possible, discover the legislative intent from the language of the statute and give it effect. We will not read a statute as if open to construction

as a matter of course.

4. **Summary Judgment.** A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law.
5. _____. The requirements to sustain the motion are the same whether one party or both parties have moved for summary judgment.
6. **Accord and Satisfaction.** An indispensable element of accord and satisfaction is an actual and substantial difference of opinion. One must assert the validity of his claim and the other must in good faith deny all or part of it. His denial cannot be fabricated for use as a pretext to evade the discharge of an obligation. Disclaimer must be bona fide and based upon real faith that the demand is not meritorious.
7. **Summary Judgment.** On a motion for summary judgment, the moving party bears the burden of proving that no genuine issue as to any material fact exists and that the movant is entitled to judgment as a matter of law. The movant may discharge this burden by showing that if the case proceeded to trial, the opponent could produce no competent evidence to support a contrary position.

Appeal from the District Court for Antelope County: MERRITT C. WARREN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Robert E. Wheeler of Stowell & Wheeler, P.C., for appellant.

Donna M. Farrell of Peebles, Smith & Farrell, for appellee Asmussen.

John M. Gerrard of Domina & Gerrard, P.C., for appellee Brennan.

William B. Brandt and Robert J. Hallstrom of Brandt, Horan, Hallstrom & Sedlacek, for amicus curiae Retail Merchants Association of Nebraska, Inc.

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

PER CURIAM.

This appeal presents the question of whether Neb. U.C.C. § 1-207 (Reissue 1980) has altered the common-law doctrine of accord and satisfaction as applied to checks tendered in full payment of a disputed obligation. The issue was before the district court on cross-motions for summary judgment. The

trial court sustained the defendants' motions for summary judgment and dismissed the plaintiff's petition.

On approximately March 1, 1980, Cass Construction Company, Inc. (Cass), and Tim Brennan and Jim Asmussen, acting on behalf of A & B Land Company, entered into an oral agreement in which Cass agreed to do certain dirt-moving work on the defendants' property in Antelope County, Nebraska, for $5,600.

During the time that Cass was performing the work, Brennan contacted John Hruby, an employee of Cass, concerning additional dirt-moving work not included in the $5,600 bid. Apparently, the parties orally agreed that the additional work would be billed on an hourly basis, depending upon the time spent and equipment used. Cass completed the additional work and subsequently submitted an itemized statement for $18,125.

On June 2, 1980, Cass received a check from A & B Land Company for $1,408.25, accompanied by a letter from defendant Asmussen expressing dissatisfaction with the work done and stating that the $1,408.25 was in "final settlement of the bill." In a letter to Asmussen dated June 2, 1980, counsel for Cass explained that while it accepted the $1,408.25 as partial payment on the debt, the defendants still owed $16,716.75 to Cass and that if the bill was not paid or a compromise settlement reached by June 16, 1980, a lien would be filed against the real estate and "appropriate legal action will be taken, if necessary." Cass then negotiated and deposited the check.

Cass sued for the remaining balance after A & B Land Company made no further payment. In its amended petition Cass asserted that it had fully performed its obligations under the oral agreement, entitling it to the remaining $16,716.75, plus interest since June 2, 1980. The defendants answered, claiming that the oral agreement was unenforceable as violative of the statute of frauds and that Cass had breached any contract that may have existed due to its failure to perform the work in an acceptable, workmanlike manner according to standard practices in the industry. The defendants also claimed that by cashing the check for $1,408.25, Cass had compromised any

right it may have had to pursue the additional amount. In its reply Cass contended that it had performed the work in accordance with industry standards and that it had cashed the check with full reservation of rights, as indicated in the June 2 letter to Asmussen. The parties then moved for summary judgment.

In its order issued October 29, 1984, the Antelope County District Court sustained the defendants' motions for summary judgment, overruled the plaintiff's motion, and dismissed the plaintiff's petition. The court specifically found that the parties had reached an accord and satisfaction when Cass deposited the check for $1,408.25 which the defendants had tendered in full settlement of a bona fide dispute. Further, the court found that § 1-207 does not abolish or alter the common-law principle of accord and satisfaction. The court concluded that since Cass had accepted the check for $1,408.25, it accepted it on the defendants' terms, that is, that the payment was in full satisfaction of the defendants' debt to Cass. This appeal by Cass followed.

Cass first assigns as error the district court's implicit finding that the defendants sufficiently pled accord and satisfaction as an affirmative defense. Cass asserts that the defendants' answers do not adequately allege the affirmative defense of accord and satisfaction because they fail to plead facts constituting a bona fide dispute.

Neb. Rev. Stat. § 25-811(2) (Reissue 1979) requires that a defendant's answer contain "a statement of any new matter constituting a defense . . . in ordinary and concise language . . . ." Neb. Rev. Stat. § 25-812 (Reissue 1979) further provides that a defendant may set forth in its answer as many grounds of defense as it may have. Such defenses must be "separately stated and numbered, and they must refer in an intelligible manner to the cause of action which they are intended to answer."

If a party intends to plead accord and satisfaction as a defense, the answer must contain allegations showing such intent, and the facts relied upon to establish the defense must be pled. See, *Long v. Weiler*, 395 S.W.2d 234 (Mo. App. 1965); 1 C.J.S. *Accord and Satisfaction* § 72 (1985). An answer

sufficiently pleads accord and satisfaction when it contains or presents all of the elements of an accord and satisfaction, even if it does not use the terms accord and satisfaction and even if it could have been more technically or artfully drawn. *Wood v. Yancey Brothers*, 135 Ga. App. 720, 218 S.E.2d 698 (1975). At a minimum, the defense of accord and satisfaction requires nothing more be pled than the payment and acceptance, on a mutual agreement, express or implied, of a certain sum of money in full settlement of a preexisting and previously disputed obligation. *B. & W. Engineering Co. v. Beam*, 23 Cal. App. 164, 137 P. 624 (1913).

Brennan and Asmussen filed separate answers. In paragraph 3 of Brennan's answer, he alleges that Cass breached any contract that may have existed when it failed to perform the dirt-moving work in a timely and workmanlike manner. Brennan goes on in paragraph 4 to state that Cass settled any claims it may have had against the defendants when it cashed the conditional check. Asmussen's answer is essentially the same as Brennan's.

The defendants' answers sufficiently alleged the affirmative defense of accord and satisfaction as required by §§ 25-811 and 25-812. While it is true that the language in the answers does not incorporate the precise terminology of an accord and satisfaction, it is also true that parties are not required, and in fact are not encouraged, to plead legal conclusions. See *Johnson v. Radio Station WOW*, *supp. op.* 144 Neb. 432, 14 N.W.2d 666 (1944), *rev'd on other grounds* 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945). It is not necessary to state a defense in any particular form so long as the facts supporting the assertion are stated. *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984).

Cass next contends that the district court erred when it determined that § 1-207 does not alter or abolish the doctrine of accord and satisfaction. At common law a debtor could tender to its creditor an amount less than that claimed by the creditor by a check that clearly indicates that it is in full settlement of a bona fide dispute. The tender is considered to be an offer by the debtor to compromise the disputed claim. The creditor may accept the conditioned offer by cashing the check or reject it by

destroying the check or returning it to the debtor. See *High-Plains Cooperative Assn. v. Stevens*, 204 Neb. 664, 284 N.W.2d 846 (1979). The actual, subjective intent of the creditor does not matter. *Les Schwab Tire Centers v. Ivory Ranch*, 63 Or. App. 364, 664 P.2d 419 (1983). If the creditor cashes a "full payment check," the creditor is agreeing to the debtor's condition that the amount tendered is in full satisfaction of the debt. See, e.g., *High-Plains Cooperative Assn. v. Stevens, supra*; *Growers Cattle Credit Corp. v. Swanson*, 184 Neb. 612, 169 N.W.2d 692 (1969).

Cass argues that § 1-207 alters the common-law principle of accord and satisfaction. Section 1-207 provides that "[a] party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice', 'under protest' or the like are sufficient." Cass and its amicus posit that this section abrogates the doctrine of accord and satisfaction and allows creditors to cash conditional checks while retaining the right to sue for any unpaid balance. They base their arguments on the language of § 1-207 and on policy considerations underlying the free flow of commerce. We conclude that the language of § 1-207 and its history, purpose, and policy do not alter the common-law principles of accord and satisfaction.

First, the language of § 1-207 does not fit the circumstances of an accord and satisfaction. Section 1-207 requires that the creditor "assents to performance in a manner demanded or offered by the other party . . . ." Where a debtor offers a compromise through an accord and satisfaction, the creditor, such as Cass, is not assenting to performance in a manner offered by the debtor; rather, the creditor is refusing to assent to the essential condition of the offer. *Les Schwab Tire Centers v. Ivory Ranch, supra*; *Jahn v. Burns*, 593 P.2d 828 (Wyo. 1979). The creditor's act of bringing suit for the unpaid balance bespeaks its intent to dissent from the debtor's conditioned offer. Cf. *Chancellor, Inc. v. Hamilton Appliance Co.*, 175 N.J. Super. 345, 418 A.2d 1326 (1980).

Further, according to its language and comments, § 1-207

appears to be confined to those transactions in which the parties intend performance along the lines of the original contract. Comment 1 to § 1-207 states that the section "provides machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute . . . ." Similarly, Comment 2 provides that § 1-207 "merely provides a specific measure on which a party can rely as he makes or concurs in *any interim adjustment in the course of performance*." (Emphasis supplied.)

This language suggests that § 1-207 was not designed to alter the law of accord and satisfaction with respect to conditional checks but, rather, was intended to allow parties to a contract to proceed with performance without risking waiver of their rights. In other words, "the provision was designed to deal with problems of waiver, election of remedies, and estoppel rather than with attempted accord and satisfaction." McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. Pa. L. Rev. 795, 828 (1978).

As discussed earlier, an accord and satisfaction involves a *new* contract, not the contemplated performance of the original contract. By its specific terms § 1-207 applies not in situations involving a conditional check but, rather, in circumstances where, for example, a buyer makes an installment payment under a contract which it believes the seller has breached, or where a buyer accepts delivery of goods that it believes do not conform to the contract, or where the seller goes ahead with its performance in spite of anticipatory repudiation by the buyer. One commentator has put it this way:

> [S]ection 1-207 was meant to apply only where one party's acquiescence in the other's performance or demand might, *by operation of law*, result in a waiver or other basis for prejudicing his rights; section 1-207 would give the acquiescing party a means of protecting himself against having to pay an often unfair penalty for turning the other cheek. Under this interpretation, section 1-207 would not apply where the challenge was *expressly* communicated, as in a check offered in satisfaction of an obligation on a clear take-it-or-leave-it basis.

Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 Colum. L. Rev. 48, 63-64 (1978). See, also, Comment, *Does U.C.C. Section 1-207 Apply to the Doctrine of Accord and Satisfaction by Conditional Check?* 11 Creighton L. Rev. 515 (1977); Comment, *Accord and Satisfaction: Conditional Tender by Check Under the Uniform Commercial Code*, 18 Buffalo L. Rev. 539 (1969). Permitting a creditor to reserve its right to sue under § 1-207 would not result in performance along the lines of the contract as contemplated by the statute. Rather, it would allow a creditor to disregard the specific terms of the new contract in its attempt to enforce those of the old. The plain language of the statute forecloses such a result. We have repeatedly held that in considering the meaning of a statute, we will, if possible, discover the legislative intent from the language of the statute and give it effect. We will not read a statute as if open to construction as a matter of course. *Uttecht v. Norwest Bank of Norfolk*, 221 Neb. 222, 376 N.W.2d 11 (1985). Cass may not "have its cake and eat it too" under the plain language of § 1-207. See, e.g., *Pillow v. Thermogas Co. of Walnut Ridge,* 6 Ark. App. 402, 644 S.W.2d 292 (1982); *Eder v. Yvette B. Gervey Interiors, Inc.,* 407 So. 2d 312 (Fla. App. 1981); *Dep't of Fisheries v. J-Z Sales Corp.,* 25 Wash. App. 671, 610 P.2d 390 (1980).

We, finally, note that Neb. U.C.C. § 1-103 (Reissue 1980) and its official Comment state that common-law principles of law and equity are not displaced by particular code provisions unless done so specifically. Nowhere in § 1-207 is there reference to the statute's displacing the common-law doctrine of accord and satisfaction.

That § 1-207 was designed to apply in circumstances unrelated to an accord and satisfaction is also evident in the history of the statute. Nebraska's provision is as originally proposed by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and it is identical to § 1-207 of the 1950 proposed final draft of the U.C.C. At that time § 1-207 coexisted with another provision of the code, U.C.C. § 3-802(3) (Official Draft 1952), that codified and expanded the doctrine of accord and satisfaction.

Section 3-802(3) provided: "Where a check or similar payment instrument provides that it is in full satisfaction of an obligation the payee discharges the underlying obligation by obtaining payment of the instrument unless he establishes that the original obligor has taken unconscionable advantage in the circumstances." Section 3-802(3) expanded the common law by permitting accord and satisfaction when the obligation was undisputed and liquidated. Because the section might have been "open to abuse," it was deleted in the 1957 official draft. American Law Institute, National Conference of Commissioners on Uniform State Laws, Supplement 1 to the 1952 Official Draft of Text and Comments of the Uniform Commercial Code 25 (1955); U.C.C. § 3-802 (1957). Thus, accord and satisfaction was left entirely to the common law.

The significance of § 3-802(3) is that it existed entirely without reference to § 1-207. The Comments to neither section referenced the other. See U.C.C. §§ 1-207 and 3-802(3) (Official Draft 1952). Similarly, the Comment to U.C.C. § 3-112(1)(f) (Official Draft 1952), which speaks of the negotiability of checks tendered as payment in full, omits reference to § 1-207 and instead cross-references only § 3-802(3). This background indicates that the drafters of §§ 1-207 and 3-802(3) probably did not intend to write overlapping sections regarding accord and satisfaction but, rather, conceived of them as unrelated. See, Rosenthal, *supra* at 58-63; Case Comment, *Accord and Satisfaction Under Uniform Commercial Code Section 1-207: Scholl v. Tallman,* 38 Ohio St. L.J. 921 (1977). See, also, *Chancellor, Inc. v. Hamilton Appliance Co.,* 175 N.J. Super. 345, 418 A.2d 1326 (1980); *Brown v. Coastal Truckways,* 44 N.C. App. 454, 261 S.E.2d 266 (1980). We conclude that, like its language, the history of § 1-207 simply does not comport with the appellant's belief that the statute abrogates the common-law doctrine of accord and satisfaction.

Finally, the appellant and its amicus make much of policy considerations that should be weighed in deciding this issue. As stated in the amicus' brief at 4:

> The vast array of circumstances under which a "conditional check" may be issued leads Amicus to

> seriously question the continued validity of the doctrine of accord and satisfaction. In today's world of ever-increasing commercial transactions, marked by a corresponding increase in the use of checks for account payments, merchants no longer have the luxury of closely scrutinizing each and every check that comes into their possession. Disregard of the provisions of *Neb. U.C.C.* §1-207, and exclusive application of the doctrine of accord and satisfaction to "conditional check" transactions will open the door to legal blackmail of creditors and will greatly increase the likelihood of overreaching and unscrupulous debtors looking for a "freebie", to routinely make partial payments on the condition that they be accepted as full settlement of their account.

Because the common-law doctrine contains sufficient protections for creditors from overreaching debtors, we do not share the appellant's concern about the unfairness of accord and satisfaction. First, accord and satisfaction applies only in circumstances where the debt is unliquidated and in dispute. Second, the dispute must be in good faith. See 6 A. Corbin, Corbin on Contracts §§ 1276-1292 (1962). Third, the creditor must have reasonable notice that the amount is in dispute and that the check is tendered in full satisfaction of the debt. Sufficient notice is normally a question of fact. *Rosenberg v. Lincoln Fed. Sav. & Loan Assn.*, 219 Neb. 689, 365 N.W.2d 809 (1985). Fourth, where a creditor mistakenly sends a bill for an amount less than what is actually owed, payment of that amount will not operate as full satisfaction, even if the debtor endorses the check "for balance in full." *Whitt v. Leath*, 213 Ala. 309, 104 So. 796 (1925). Finally, as with any other contract, an accord can be set aside or reformed and enforced on grounds of fraud or mistake. 6 A. Corbin, *supra* § 1292. Creditors are well protected under the common law.

The appellant's construction of § 1-207 would also lead to an unduly complicated situation in which debtors would have to add to the customary term "payment in full" a further statement that endorsement of the check also constitutes an agreement to forgo the reservation of rights under § 1-207. J. White & R. Summers, Handbook of the Law Under the

Uniform Commercial Code § 13-21 (2d ed. 1980). A new "battle of the forms" would thus be created. See Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 Colum. L. Rev. 48, 71-74 (1978). Obviously, those with the most to lose would be those least informed regarding the formalities and intricacies of the U.C.C. This result is inconsistent with the code's purpose of "simplify[ing] [and] clarify[ing] . . . the law governing commercial transactions," Neb. U.C.C. § 1-102(2)(a) (Reissue 1980), and it fails to promote the policy of permitting "the continued expansion of commercial practices through . . . agreement of the parties," § 1-102(2)(b). Finally, the appellant's interpretation of § 1-207 negates or certainly complicates a convenient and valuable means of settling disputes informally.

We decline to tamper with a principle that was meant to be left alone. The language, history, and policy of § 1-207 do not support the appellant's interpretation of the statute. Accordingly, the trial court was correct in its determination that § 1-207 does not abrogate the common-law doctrine of accord and satisfaction.

Cass finally assigns as error the district court's finding that no issue of genuine fact existed regarding the defense of accord and satisfaction. Specifically, Cass claims that a genuine issue of material fact existed with respect to whether there was a bona fide dispute. In its brief, Cass bases its argument on the wide variance between the amount it claims and the amount the defendants paid. This fact alone, Cass argues, is enough to raise a genuine issue of material fact and make summary judgment inappropriate.

A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law. *Gilbert v. City of Tekamah,* 221 Neb. 614, 379 N.W.2d 758 (1986). The burden is on the movant to show that no issues of material fact exist, and unless that party can conclusively do so, the motion must be overruled. *Id.* In considering a motion for summary judgment, the court

examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists. *Allan v. Massey-Ferguson, Inc.*, 221 Neb. 528, 378 N.W.2d 664 (1985). In determining whether a genuine issue of material fact exists, the court views the evidence in the light most favorable to the party against whom it is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn therefrom. *Pfeifer v. Pfeifer*, 195 Neb. 369, 238 N.W.2d 451 (1976). Finally, the requirements to sustain the motion are the same whether one party or both parties have moved for summary judgment. *Juergens & Anderson v. Redding*, 198 Neb. 289, 252 N.W.2d 291 (1977).

In its amended petition Cass stated that it had fully performed its obligations under the contract. In their separate answers the defendants alleged that Cass had breached the agreement by failing to perform the work in a workmanlike and timely manner. The defendants also claimed that Cass had waived any right it may have had to recover the balance it now claims when it cashed the check for $1,408.25. In its reply Cass countered that it had performed the work in a workmanlike and timely manner and that it had cashed the check with full reservation of rights.

At the October 1, 1984, hearing on the parties' cross-motions for summary judgment, all parties offered the same three exhibits in support of their motions. Exhibit 1 is an affidavit of the attorney who notified the defendants in the June 2, 1980, letter of Cass' acceptance of the check as partial payment. Exhibit 2 is the affidavit of defendant Brennan, in which he asserts that the sum of $1,408.25 was paid "for the reason that no additional work having a value over and above the sums of [$1,408.25] had been authorized by A & B Land Co. Furthermore, no such work had been performed satisfactorily, properly or in a workmanlike manner by Plaintiff." Exhibit 3 is defendant Asmussen's affidavit, in which he states that he never made any agreement whatsoever with Cass and that in early May of 1980, A & B Land Company issued a check to Cass in full settlement of the account. Exhibit 3 also contains Asmussen's letter to Cass in which he states that "we were not fully paid on our crop share, due to the faulty dirt work. We do

not feel that we should have had any additional charges incurred on the original dirt work done in 1979."

That a dispute existed between Cass and the defendants is obvious from the record; that the dispute was bona fide, however, is not so clear. "Bona fide" literally means "good faith"; "honestly, openly, and sincerely; without deceit or fraud." Black's Law Dictionary 160 (5th ed. 1979). "Good faith" has been defined as "an intangible and abstract quality with no technical meaning or statutory definition." *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259 (1954). It encompasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud or to seek an unconscionable advantage: "An individual's personal good faith is a concept of his own mind . . . and, therefore, may not conclusively be determined by his protestations alone." *Id.* at 260. Neb. U.C.C. § 1-201(19) (Reissue 1980) defines good faith as honesty *in fact* in the conduct or transaction concerned.

A bona fide dispute serves as the necessary consideration underlying the new agreement in an accord and satisfaction. This form of consideration is based on the theory that if the amount due is disputed or unliquidated, the forbearance from suit and the willingness to compromise is in itself valuable consideration, even if an ultimate factual showing may later establish that the claim or defense was invalid in whole or in part. Restatement (Second) of Contracts § 74 (1981).

With regard to good faith in an accord and satisfaction, one court has defined it as follows:

> An indispensible element contributing to the establishment of this defense consists in an actual and substantial difference of opinion. One must assert the validity of his claim and the other must in good faith deny all or part of it. His denial cannot be fabricated for use as a pretext to evade the discharge of an obligation. Disclaimer must be *bona fide* and based upon real faith that the demand is not meritorious.

Schuttinger v. Woodruff, 259 N.Y. 212, 216, 181 N.E. 361, 362 (1932). Another court put it this way: "A person cannot create a dispute sufficient as a consideration for a compromise by a mere refusal to pay an undisputed claim. That would be

extortion, and not compromise. There must in fact be a dispute or doubt as to the rights of the parties honestly entertained." *Demars v. Musser-Sauntry Land Co.*, 37 Minn. 418, 419, 35 N.W. 1, 2 (1887). See, also, *Kelly v. David D. Bohannon Organization*, 119 Cal. App. 2d 787, 260 P.2d 646 (1953).

In *Connecticut Printers v. Gus Kroesen, Inc.*, 134 Cal. App. 3d 54, 184 Cal. Rptr. 436 (1982), the court held that although § 1-207 does not abrogate common-law accord and satisfaction, that doctrine applies only to *bona fide* disputes. Because the record could not support the lower court's determination that a bona fide dispute existed, the court reversed the decision for determination of this fact question.

We believe that summary judgment was inappropriate in the case at hand. The scant record reveals no pleadings, affidavits, or depositions introduced by either party which conclusively establish the lack of a genuine issue of material fact with respect to the bona fide nature of the dispute.

On a motion for summary judgment, the moving party bears the burden of proving that no genuine issue as to any material fact exists and that the movant is entitled to judgment as a matter of law. The movant may discharge this burden by showing that if the case proceeded to trial, the opponent could produce no competent evidence to support a contrary position. *Hanzlik v. Paustian*, 211 Neb. 322, 318 N.W.2d 712 (1982).

> "A prima facie showing by the movant for summary judgment—*i.e.*, the production of enough evidence to demonstrate such party's entitlement to a judgment if evidence were uncontroverted at trial—shifts the burden of producing evidence to the party opposing the motion. Summary judgment should be granted to the movant unless the opposing party offers competent evidence . . . that there is a genuine issue as to a material fact."

Id. at 328, 318 N.W.2d at 716 (quoting *Nader v. de Toledano*, 408 A.2d 31 (D.C. 1979)).

Here, the record indicates that while the parties presented evidence of a dispute in their motions for summary judgment, none presented evidence of a bona fide dispute, or in Cass' case, the lack thereof. Thus, the movants failed to meet their burdens of establishing a prima facie showing that no genuine issues of

material fact existed. The district court's order granting summary judgment to the defendants was in error. Accordingly, the cause is reversed and remanded for trial.

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

GRANT, J., concurring in part and in part dissenting.

I concur in part and dissent in part. I agree with the court's opinion in every respect except in the court's holding that while defendants "presented evidence of a dispute in their motions for summary judgment, none presented evidence of a bona fide dispute . . . ." I believe that the requirements of Neb. Rev. Stat. § 25-1332 (Reissue 1979) have been met and that the "pleadings . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The "material fact" in question here is whether there was a bona fide dispute between plaintiff and defendants—not the details of, or the validity of, the contentions of the two sides of that dispute. The definition of bona fide dispute, as set out in *Doyle v. Gordon*, 158 N.Y.S.2d 248, 259-60 (1954), and cited in the majority opinion, is expanded in the succeeding sentence in the *Doyle* opinion at 260: "The existence of defendants' good faith as a substantive fact, therefore, necessitates an examination and evaluation of external manifestations as well."

I agree with the statement in *Schuttinger v. Woodruff*, 259 N.Y. 212, 216, 181 N.E. 361, 362 (1932), as set out in the majority opinion, that "[o]ne [party] must assert the validity of his claim and the other must in good faith deny all or part of it." I also agree with the statements from *Demars v. Musser-Sauntry Land Co.*, 37 Minn. 418, 419, 35 N.W. 1, 2 (1887), that a denial of a claim must not amount to "extortion" or a "mere refusal to pay an undisputed claim."

The pleadings and affidavits in this case, however, do not lead to such characterizations as the above. In its amended petition plaintiff stated that it agreed with defendants to do certain dirt-moving work for $5,600; that it overran such bid by $1,685, which it credited to defendants on the $5,600 bid; and that it then contracted to do additional work at an hourly rate.

Plaintiff attached a detailed bill which shows hourly work done between March 8 and 18, 1980, in a total sum of $21,280, and allowing credits. In an affidavit filed in connection with the summary judgment motion, plaintiff's attorney stated that plaintiff had accepted defendants' check in the amount of $1,408.25 "as a partial payment," and admitted that the check had been tendered by defendants in full payment.

In his answer and in his affidavit, defendant Asmussen alleged the plaintiff's work was unsatisfactory, and incorporated a letter from defendant Asmussen, acting for both defendants, to plaintiff, stating in part:

> As I explained, we were not fully paid on our crop share, due to the faulty dirt work. We do not feel that we should have had any additional charges incurred on the original dirt work done in 1979.
>
> Due to the fact that we were short #2025 bushels of corn because of severe slopes hindering the operation of the irrigation equipment we feel that you owe us $4191.75.
>
> You did bid us $5600 to do the water drainage work and agreed to level the slopes as per your original agreement in 1979.
>
> I am enclosing a check for $1408.25 as final settlement of the bill.

In my opinion there is in this case far more than "a mere refusal to pay," and there is no showing of any "extortion" by defendants. In specific detail, the position of defendants is that plaintiff so performed the work it agreed to do that defendants suffered a loss of 2,025 bushels of corn on account of "faulty dirt work." Plaintiff admits it overran its first bid by $1,685, but alleges that it did additional work on an hourly basis agreed upon with defendants. Defendants say "au contraire," and that any additional work was done to correct the work plaintiff had contracted to do in the first place. I therefore cannot agree with the statement in the majority opinion that "[a]pparently, the parties orally agreed that the additional work would be billed on an hourly basis . . . ." That is the crux of the dispute.

In my opinion there are numerous "external manifestations" of a dispute which, on examination, shows the undisputed existence of the fact in question—that there is a bona fide

dispute. Nothing in the record suggests any "mere refusal to pay," or any "extortion," but affirmatively shows defendants' firm position in an ordinary business dispute.

I would affirm the judgment of the trial court in its entirety.

BOSLAUGH, J., joins in this concurrence and dissent.

VANESSA L. LENZ, APPELLANT, V. HAROLD E. LENZ, APPELLEE.

382 N.W.2d 323

Filed February 28, 1986. No. 84-870.

1. **Child Support: Modification of Decree: Appeal and Error.** In the review of applications to modify child support orders, matters are initially entrusted to the sound discretion of the trial court, and the trial court's order will be affirmed on appeal in the absence of an abuse of the trial court's discretion.
2. **Judgments.** A judgment must be sufficiently certain in its terms to be able to be enforced in a manner provided by law.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Jerry L. Pettit, for appellant.

Steven J. Lustgarten of Lustgarten & Roberts, P.C., for appellee.

BOSLAUGH, HASTINGS, and GRANT, JJ., and BRODKEY, J., Retired, and RIST, D.J.

GRANT, J.

This is an appeal by Vanessa L. Kiersz, formerly Vanessa L. Lenz, from the district court for Douglas County, Nebraska, where the district court denied all relief sought in her "Application to Modify Decree" rendered in an earlier dissolution of marriage case. Vanessa timely appealed to this court. She assigns as error that the trial court (1) failed to enforce and determine the arrearage due under paragraph (j) of the decree that requires the appellee, Harold E. Lenz, to pay "all of the expenses for the minor child's special schooling" and

(2) failed to increase child support. For the reasons set forth hereinafter, we affirm.

A decree was entered in Douglas County District Court on May 13, 1976, dissolving the marriage of Harold and Vanessa Lenz. There was one child born of the marriage, Dana, born October 3, 1973, who suffers from a profound hearing loss. Vanessa received custody of Dana. In addition to paying $175 a month in child support, the decree also required Harold to pay all expenses of the minor child's special schooling. The pertinent provision of the decree states: "(j) That respondent [Harold] shall pay all of the expenses for the minor child's special schooling; however, with the exception that any monies which the Petitioner [Vanessa] shall receive from the Easter Seal organization, shall be applied by Petitioner to said minor child's special schooling."

At the time of the decree, Dana was enrolled in and attended the Omaha Hearing School for Children. Tuition at the school was approximately $1,150 per year, most of which was paid by Harold. Harold was also involved in the decision to place Dana at the school.

Dana progressed well at the Omaha Hearing School, and at the recommendation of the director of the school and Dana's tutors, both Vanessa and Dana moved to Denver, Colorado, to enroll Dana in Doreen Pollack's program at Porter Memorial Hospital. Prior to the move, Vanessa obtained a court order dated August 24, 1976, allowing her to remove Dana from the State of Nebraska. This order did not change any other part of the decree, and was consented to by Harold. Harold later moved to Denver, in November of 1976, because he wanted to be closer to his daughter.

Harold testified that Vanessa consulted with him before Dana was enrolled in the Pollack school in Denver. He further testified that he "pretty well knew what it [the program] would basically cost per month or per session." Vanessa testified that Harold did not object to her enrolling Dana in this school.

Vanessa also testified that during the 3 years Dana was enrolled in school in Denver, she (Vanessa) incurred no out-of-pocket costs with regard to this program. Vanessa had applied for and received a grant from the Listen Foundation.

The tuition at the Denver school was about $150 per month. The grant from the Listen Foundation paid for a majority of the program along with a Montessori program that Dana was enrolled in. Harold testified that he eventually paid about $900 to the Denver school, which amount represented the part of tuition not paid by the Listen Foundation. In September 1979 Dana reached school age, and she was placed in the Denver public school system. Vanessa testified that even though the school system had special classes for hearing-impaired children, Dana's language became sloppy, she could not keep up in the classroom, and she regressed. Dana spent only 2 months in the public school.

The Denver hearing school authorities and the director of the Denver public school system advised Vanessa to enroll Dana in the St. Joseph Institute for the Deaf, in St. Louis, Missouri. St. Joseph's is a program similar to the Omaha Hearing School and Doreen Pollack's program at Porter Memorial Hospital in Denver. All three utilize an oral program, rather than signing, in communicating. St. Joseph's is a boarding school which costs about $5,400 per year, including tuition, board, and room. Vanessa testified that she wanted to review the program at St. Joseph's and discussed this matter with Harold. With regard to meeting the financial commitments of St. Joseph's, Harold testified that Vanessa told him "not to worry about that, that it was her decision."

Harold and Vanessa met a second time, after Vanessa had taken Dana to St. Joseph's to be tested. Vanessa indicated that everything had gone well and that she wanted to enroll Dana as soon as possible. She further testified that Harold had "many, many questions" about how the tuition was to be paid. She also testified that she "knew what the tuition would be," that Harold "indicated he would help," but that "[h]e didn't give me an amount." Harold testified Vanessa told him that "it was her [Vanessa's] problem and her decision to send Dana to this school . . . ." No court order was sought in connection with this proposed move, with the increased expenses to be incurred.

Dana was, in fact, enrolled in St. Joseph's, and she stayed there from 1979 through 1984. Vanessa claims that she incurred total out-of-pocket expenses in special schooling costs

amounting to $12,570. Harold has not paid anything to St. Joseph's, and the balance due the school, after crediting scholarship amounts awarded by the United Way of St. Louis, is $8,144.46. Vanessa and Dana have since moved to Ralston, Nebraska, where the Ralston Public School District is presently paying the entire cost for Dana to attend the Central Institute for the Deaf in St. Louis.

An action to modify a decree of dissolution is equitable in nature. We review matters involving domestic relations de novo on the record. In such cases the matters are initially entrusted to the sound discretion of the trial court, and the trial court's order will be affirmed on appeal in the absence of an abuse of the trial court's discretion, taking into account and giving weight to the fact that the trial court observed and heard the witnesses and accepted one version of the facts rather than another. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). We have applied that standard to the review of cases involving appeals in modification of child support. *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985).

In her first assignment of error, Vanessa contends that the doctrine of res judicata bars any readjudication on the issue of the enforceability of paragraph (j), which requires Harold to pay "all of the expenses for the minor child's special schooling." Vanessa contends res judicata is applicable in this case because there has been a final judgment on the merits by a court of competent jurisdiction, and, as such, prior litigation is conclusive upon the parties in any subsequent litigation concerning the same cause of action, citing *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W.2d 678 (1976).

Vanessa also urges that while a court may, on its own motion, modify the decree to delete the specific provision and refuse to give it future effect, it cannot, ex post facto, deny giving effect to the provision in the original decree. In the alternative, Vanessa contends that the special schooling costs are in the nature of child support. That being the case, this court may not forgive or modify past-due child support but may modify the amount of child support that becomes due in the future. *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980).

We hold that these contentions, while generally correct, do not control the disposition of this case. The trial court made a specific finding in its order concerning the "special schooling costs" provision and the arrearages Vanessa claims she is due. The order states in part as follows: "If and when reasonably necessary special schooling requires substantial outlays from the parents, a concrete controversy may be presented to the court for resolution in the context of all the circumstances." The trial court's position apparently was that it could not correct the decree with regard to past occurrences but stood ready to review the decree for any future changes that might be necessary.

At the time the decree was entered, Dana was enrolled at the Omaha Hearing School at a cost of approximately $1,150 per year. Dana was 3 years old at the time. By the time Dana started at St. Joseph's, she was 6. The cost per year was approximately $5,400, including room and board.

In her first request for relief, Vanessa requested the trial court in her application to modify the decree "to calculate the Respondent's [Harold's] arrearage under said Decree for expenses he was ordered to pay for the special schooling required by the minor child of the parties." It is Vanessa's position that once the divorce decree became final, the amount due under this provision became a judgment against Harold in much the same way as child support becomes a judgment against a debtor as it accrues. Thus, Vanessa's request to enforce this provision along with determining the amount due is akin to a creditor's seeking to enforce a judgment.

It is well established that a judgment must be sufficiently certain in its terms to be able to be enforced in a manner provided by law. It must be in such a form that a clerk is able to issue an execution upon it which an officer will be able to execute without requiring external proof and another hearing. A judgment for money must specify with definiteness and certainty the amount for which it is rendered. *Bishop v. Bishop*, 151 S.W.2d 553 (Mo. App. 1941); 49 C.J.S. *Judgments* §§ 72 and 76 (1947); 46 Am. Jur. 2d *Judgments* § 81 (1969). See, also, Annot., 55 A.L.R.2d 723 (1957).

In *Cockle v. Cockle*, 204 Neb. 88, 281 N.W.2d 392 (1979),

this court held that a judgment of the superior court of California awarding the wife a percentage of the husband's military retirement pay was not for an amount certain and, therefore, could not be registered. In *Cockle* we said that in order for a foreign judgment to be enforceable, it must create a definite and absolute indebtedness and be rendered by a court having jurisdiction of the parties and the subject matter. We see no reason to deviate from this rule regarding judgments rendered by Nebraska courts.

In *Loomstein v. Mercantile Trust National Ass'n*, 507 S.W.2d 669 (Mo. App. 1974), the Missouri Court of Appeals affirmed an order granting a motion to quash an execution and garnishment on a judgment against a father who was required, pursuant to a stipulation made part of the divorce decree, to "pay all sums necessary for his daughter's college and graduate school tuition, books, room and board." *Id.* at 670. The court held that the execution was improper because of the lack of definiteness and certainty in the amounts required to be paid. The court also held that since no specific sums for the college education or method to compute such sums had been included in the decree, the decree was not subject to execution because the amount owed by the father could not be ascertained without going beyond the record.

Similarly, *Rodden v. Rodden*, 527 S.W.2d 41 (Mo. App. 1975), held a judgment ordering the father to "pay all extraordinary medical expenses" of his noncustodial son to be unenforceable. The court stated: "A judgment for money must specify with definiteness and certainty the amount for which it is rendered, and a judgment incapable of enforcement because of indefiniteness is void." *Rodden v. Rodden, supra* at 43.

In *Jewell v. Jackson & Whitsitt Cotton Co.*, 331 So. 2d 623, 625 (Ala. 1976), the court held a judgment "must be conclusive and certain in itself. [Citations omitted.] All matters should be decided; damages should be assessed with specificity leaving the parties with nothing to determine on their own."

The rationale behind a rule requiring a judgment to be definite and certain is that the rights and liabilities of the parties to the action must be able to be determined, and the unsuccessful party may readily understand and be capable of

performing that which he is ordered to do, from the judgment itself. Additionally, a sheriff or other executing officer must know how much money or property to seize in order to satisfy the debt. If the decree or judgment is silent or ambiguous as to the amount, execution would not be proper.

Therefore, we hold that the part of the divorce decree in this case which ordered the payment of "all of the expenses for the minor child's special schooling" is indefinite, uncertain, and incapable of enforcement. For these reasons it is fatally defective and cannot be enforced. There is simply no definite amount as to what Harold would be required to pay if this provision were enforced.

We find nothing in the record before us which would aid in ascertaining with definiteness and certainty the amount due under the special schooling provision in the decree in this case. An order, such as the provision in this case, cannot be construed to constitute carte blanche authority in Vanessa to send the child anywhere, at any expense, and to assess the costs against Harold. Vanessa's first assignment of error is without merit.

Vanessa's second assignment of error is that the trial court erred in failing to increase the child support award of $175 per month. The trial court found on this issue that "in the present circumstances respondent's payments of $175.00 per month cover these [costs incidental to the child's schooling] and other expenses of the child to the extent of his [Harold's] reasonable liability to contribute." In our de novo review of the record, we cannot say that the trial court abused its discretion in so finding. The order refusing to modify the child support order was correct.

AFFIRMED.

AETNA CASUALTY & SURETY COMPANY, A CORPORATION, APPELLANT, V. DON NIELSEN AND VELMA NIELSEN, APPELLEES.

382 N.W.2d 328

Filed February 28, 1986. No. 85-167.

1. **Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding expert testimony will be reversed only when there has been an abuse of discretion.
2. **Expert Witnesses.** It is not possible to establish an exact standard for determining the qualifications of expert or skilled witnesses.
3. **Trial: Evidence.** Neb. Rev. Stat. § 25-1220 (Reissue 1979) permits comparisons between known genuine writing and the disputed writing to be made by a jury either with or without the aid of experts.
4. **Expert Witnesses.** The weight to be given expert testimony is for the trier of fact.

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

Gary L. Dolan of Knudsen, Berkheimer, Richardson & Endacott, for appellant.

James P. Fitzgerald of McGrath, North, O'Malley & Kratz, P.C., for appellees.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

PER CURIAM.

Appellant, Aetna Casualty & Surety Company, sued appellees, Don and Velma Nielsen, husband and wife, on a guaranty which the Nielsens deny they executed. Aetna appeals from the judgment of dismissal entered pursuant to the jury's verdict, assigning as error the rulings of the trial court which permitted a witness to testify as an expert concerning the authentication of signatures. We affirm.

This appeal results from the retrial mandated by *Aetna Cas. & Surety Co. v. Nielsen*, 217 Neb. 297, 348 N.W.2d 851 (1984), *overruled in part, First Nat. Bank v. Bolzer*, 221 Neb. 415, 377 N.W.2d 533 (1985), because of a faulty jury instruction bearing on the genuineness of the Nielsens' signatures.

At that retrial the Nielsens, to countervail the opinion of Aetna's expert that they had signed the guaranty in question, adduced the testimony of a university professor of history.

During his 25 years of teaching, the witness had made a study of deciphering "difficult" handwriting, had examined approximately 200,000 pages of documents, and had worked with others in the field of handwriting. At the time of trial he was engaged in writing a book for the National Endowment for the Humanities on deciphering writing which is hard to read. He testified that deciphering such writing is related to the task of authentication because one cannot authenticate that which he cannot read correctly. In the course of his career, he had compared and authenticated "dozens" of signatures and documents. He listed the characteristics one studies to determine the genuineness of writing as including the slant, alignment, spacing, pen lifts, and feathering used in forming letters and words. He testified further that one also looks for the presence or absence of line wavers found in tracings of writing but not in spontaneous writing. The witness expressed no opinion as to whether the questioned signatures were in fact those of the Nielsens. Rather, in response to whether there were things that came to his mind bearing on the authenticity of the Nielsens' signatures on the guaranty, the witness compared for the jury the Nielsens' questioned signatures on the guaranty with samples of their genuine signatures and pointed out a number of variations between the characteristics of the questioned and genuine signatures.

Aetna contends that the trial court abused its discretion in allowing this witness to so testify, as, Aetna claims, he was not qualified by knowledge, skill, experience, training, or education in the field of signature authentication. In essence, Aetna's argument is that one skilled in deciphering writing which is hard to read is not by that fact qualified to authenticate disputed signatures.

The operative rule, as Aetna recognizes in its brief, is that a trial court's ruling in receiving or excluding expert testimony will be reversed only when there has been an abuse of discretion. See, *Priest v. McConnell*, 219 Neb. 328, 363 N.W.2d 173 (1985); *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984); *Herman v. Lee*, 210 Neb. 563, 316 N.W.2d 56 (1982); *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971). The specific question therefore becomes whether it can

be said that the trial court's rulings are so untenable as to have unfairly deprived Aetna of a just result. See, *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986); *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985).

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."

The trial court's rulings under that statute must be viewed in light of the judicially recognized fact that it is not possible to establish an exact standard for determining the qualifications of expert or skilled witnesses. See, *Herman v. Lee, supra*; *Mathine v. Kansas-Nebraska Nat. Gas Co., Inc.*, 189 Neb. 247, 202 N.W.2d 191 (1972).

Further, Neb. Rev. Stat. § 25-1220 (Reissue 1979) provides: "Evidence respecting handwriting may be given by comparisons made, by experts or by the jury, with writing of the same person which is proved to be genuine." It has been held that § 25-1220 permits comparisons between known genuine writing and the disputed writing to be made by a jury either with or without the aid of experts. *First Nat. Bank & Trust Co. v. Cutright*, 189 Neb. 805, 205 N.W.2d 542 (1973); *Grand Island Banking Co. v. Shoemaker*, 31 Neb. 124, 47 N.W. 696 (1891); *Huff v. Nims*, 11 Neb. 363, 9 N.W. 548 (1881). Section 25-1220 appears to be a legislative acknowledgment of the fact that there is no generally recognized formal means of acquiring "knowledge, skill, training, or education" in the field of authenticating disputed signatures. There is no generally recognized testing and certification of one as a "handwriting expert."

The controlling question thus becomes whether the trial court abused its discretion in concluding, pursuant to the requirements of § 27-702, that such specialized knowledge as the witness had would assist the jury to understand the evidence. The trial court did not err in so concluding. The witness had studied handwriting, did have experience in authenticating signatures, and was experienced in what to look

for in performing that task.

Aetna's argument really goes to the question of what weight the witness' testimony should be given, not whether the testimony was admissible. The weight of expert testimony is for the trier of fact, in this case the jury. *Person v. Red Lion Inn*, 217 Neb. 745, 350 N.W.2d 570 (1984); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979). The jury resolved that issue in favor of the Nielsens, and they have a right to keep the benefit of that verdict. *Vacek v. Ames*, 221 Neb. 333, 377 N.W.2d 86 (1985).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN P. LIEBERMAN, APPELLANT.
382 N.W.2d 330

Filed February 28, 1986. No. 85-296.

1. **Trial: Pleadings: Evidence.** The overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve the error.
2. **Effectiveness of Counsel.** The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
3. **Criminal Law: Trial: Attorney and Client.** The decision to object or not to object is part of trial strategy, and this court gives due deference to defense counsel's discretion in formulating trial tactics.
4. **Criminal Law: Effectiveness of Counsel.** To maintain a claim of ineffective assistance of counsel, the record must affirmatively support the defendant's position.
5. **Trial: Effectiveness of Counsel.** It is a well-established rule in this state that a decision to call or not to call a witness, made by counsel as a matter of trial strategy, even if the choice may prove to be incorrect, does not, without more, sustain a finding of ineffectiveness of counsel.
6. **Motions for New Trial.** New evidence offered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a new verdict.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

James C. Stecker, for appellant.

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

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

WHITE, J.

Steven P. Lieberman appeals from his conviction on charges of conspiracy, robbery, and use of a firearm in the commission of a felony. In an amended information Lieberman was also charged with being a habitual criminal, in violation of Neb. Rev. Stat. § 29-2221 (Reissue 1979). A jury found Lieberman guilty on counts I, II, and III.

Following a hearing at which the district court adjudged Lieberman to be a habitual criminal, the trial judge sentenced Lieberman on count I, conspiracy, to 15 years' imprisonment in the Nebraska Penal and Correctional Complex; on count II, robbery, to 15 years' imprisonment, to be served concurrently with the sentence imposed on count I; and on count III, use of a firearm in the commission of a felony, to 10 years' imprisonment, to be served consecutively to the sentences imposed in counts I and II.

On February 17, 1984, at approximately 8:30 p.m., two masked men, one carrying a bag and the other a gun, entered the Holiday Liquors store in Columbus, Nebraska, and demanded money. The store employee on duty emptied the currency contents of the cash register into the bag and the pair fled.

During the investigation that same evening, Columbus police officers discovered footprints leading toward the store, which officers traced to a house rented by a Tim Johnson. Johnson, Chris Landin, also known as Chris Keller, Randy Arnone, and defendant Lieberman were at the house when police arrived. Landin subsequently confessed and thereafter named a number of parties as participants in the robbery. After naming three

different accomplices, Landin implicated Lieberman as a participant in the robbery. Lieberman was arrested and charged with the offenses of which he was later convicted.

Lieberman filed a motion in limine to limit testimony concerning a prior conviction of robbery in 1979. The district court overruled the motion.

At trial Chris Landin testified for the State. On direct examination he stated that Steve Lieberman had been convicted in 1979 of robbing a fast-food restaurant in Columbus and had spent time in the state penitentiary for the crime. Landin also testified that he, Landin, had been charged with and convicted of robbing the Holiday Liquors store. Tim Johnson also testified that Lieberman had been convicted in the 1979 robbery and that he, Johnson, had already been convicted and sentenced for his participation in the Holiday Liquors store robbery. Lieberman's counsel did not object to the State's questioning of either Landin or Johnson on these matters. Landin and Johnson identified Lieberman as a participant in the robbery.

The jury found Lieberman guilty on all counts. Lieberman filed a motion for new trial on July 25, 1984, and requested the court to appoint new counsel. New counsel was appointed.

At an enhancement hearing on August 17, 1984, for the purpose of determining whether Lieberman was a habitual criminal, the court found that, based upon the records of prior convictions presented by the State, Lieberman was a habitual criminal as defined by § 29-2221. On December 21, 1984, the court sentenced Lieberman to enhanced sentences on each of the three counts.

At the March 1, 1985, hearing on his amended motion for new trial, Lieberman presented affidavits which he claimed, in the aggregate, constituted significant newly discovered evidence entitling him to a new trial. The trial court overruled the motion, and this appeal followed.

In his first assignment of error, Lieberman claims that the trial court erred when it overruled his motion in limine and allowed Johnson's and Landin's testimonies about Lieberman's prior conviction and their own status as convicted felons.

In *State v. Harper*, 215 Neb. 686, 340 N.W.2d 391 (1983), we

held that the overruling of a motion in limine does not eliminate the need to object to the introduction of evidence in order to preserve the error. *State v. Harper* is dispositive of Lieberman's first assignment of error. Lieberman's counsel failed to object at trial when the State questioned Landin and Johnson on direct examination. Because there is no objection in the record, there is no question to be examined by this court on appeal. The district court's order denying the motion in limine is not an appealable order. *State v. Harper, supra* (citing *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983)).

Lieberman asserts trial counsel's failure to object to the testimony of Landin and Johnson as the partial basis for his next assignment of error. Lieberman claims that this act, along with counsel's failure to call certain witnesses, constituted ineffective assistance of counsel, in violation of guarantees of the sixth amendment of the U.S. Constitution.

In *State v. Robinson*, 218 Neb. 156, 352 N.W.2d 879 (1984), and again in *State v. Harper*, 218 Neb. 870, 359 N.W.2d 806 (1984), we set out in some detail the standards by which effective assistance of counsel is measured. In *Robinson* we assessed the validity of the defendant's claim according to the two-part test set forth by the U.S. Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Quoting *Strickland,* we said in *Robinson* at 159-60, 352 N.W.2d at 881:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
>
> . . . .
>
> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were

> outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Further quoting *Strickland*, we said in *Robinson* at 160-61, 352 N.W.2d at 882:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> . . . .
>
> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . .
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would

reasonably likely have been different absent the errors.

The record shows that Lieberman's trial counsel did not object when the State elicited testimony from Landin and Johnson concerning their status as convicted felons. Chris Landin related on direct examination his participation in the Holiday Liquors store robbery and his subsequent conviction. Tim Johnson testified, on direct examination, that he was a convicted felon and, on cross-examination, that he had received a 1-year sentence for his participation in the Holiday Liquors store robbery, the reduced sentence being part of his plea agreement. Johnson also testified that his agreement to testify at Lieberman's trial was a condition of the plea bargain.

The trial court specifically instructed the jury that evidence received which shows that a witness has been convicted of a felony can be considered only as affecting his credibility. Further, the court gave a cautionary instruction regarding the credibility of an accomplice and the need for the jury to know of the possible motives, biases, or interests of such a witness.

Lieberman bases his claim on our decision in *State v. Robertson*, 219 Neb. 782, 790, 366 N.W.2d 429, 434 (1985), in which a majority of this court held that "where two or more persons are charged with the same criminal offense but are tried separately, the fact that one defendant has pleaded guilty or has been convicted is inadmissible against the defendant." Lieberman contends that this rule forecloses the introduction of any evidence of a coparticipant's conviction, while the State counters that the rule applies only when a coparticipant's conviction is offered as substantive proof of the defendant's guilt. When, as here, the evidence is offered only to impeach the witness, the State contends that *Robertson* does not foreclose the introduction of a coparticipant's conviction.

We need not reach the issue of the proper interpretation of *Robertson*, because we believe that, on its face, the record fails to support Lieberman's claim that his counsel's actions unfairly prejudiced him.

After the State elicited from Tim Johnson the fact that he was a convicted felon and that he had been convicted and sentenced in the instant crime, the defendant's attorney on cross-examination took this evidence and, to the defendant's

advantage, emphasized the possibility of Johnson's motive to fabricate evidence against the defendant. That Johnson had received a reduced sentence in return for his testimony was made clear to the jury by Lieberman's attorney. With respect to Chris Landin, he did not receive a reduced sentence in return for his testimony against Lieberman, so Lieberman's attorney could not similarly raise the issue of Landin's biases and motives. Evidence of Landin's felony conviction could be seen as further impeaching the credibility of a witness who had repeatedly changed his mind about the identity of his accomplice.

Lieberman also argues that his attorney was ineffective when he failed to object to the State's introduction of evidence of Lieberman's 1979 robbery conviction.

This trial was a finger-pointing contest, with Lieberman implicating Johnson, and Johnson and Landin implicating Lieberman. Since credibility was critical, defense counsel introduced testimony of Johnson's bad reputation for truth and veracity and of Lieberman's good character. Anticipating cross-examination, Lieberman's attorney asked a character witness on direct examination whether he was aware that Lieberman had been in trouble with the law. The witness said that he knew of Lieberman's 1979 conviction but that this did not change his opinion of the defendant.

These actions by Lieberman's counsel were legitimate trial tactics under the circumstances of the case. Counsel could anticipate that evidence of Lieberman's good character opened the door for the State to introduce Lieberman's prior conviction, for impeachment purposes. To object to evidence that later would be produced by the defendant himself or adduced by the State on proper cross-examination cannot as a matter of law be said to constitute ineffective assistance of counsel. Neb. Rev. Stat. § 27-608(2) (Reissue 1979).

We have often held that the decision to object or not to object is part of trial strategy and that this court gives due deference to defense counsel's discretion in formulating trial tactics. See, e.g., *State v. Sayers*, 211 Neb. 555, 319 N.W.2d 438 (1982); *State v. Auger*, 206 Neb. 666, 294 N.W.2d 379 (1980); *State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977). To maintain a

claim of ineffective assistance of counsel, the record must affirmatively support the defendant's position. *State v. Herren*, 212 Neb. 706, 325 N.W.2d 151 (1982). Further, the effectiveness of counsel will not be judged by hindsight. *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984), *cert. denied* 469 U.S. 873, 105 S. Ct. 226, 83 L. Ed. 2d 156. We conclude that Lieberman has failed to support adequately his claim of prejudice in counsel's decision not to object to this testimony.

Lieberman also argues that his counsel's failure to call certain witnesses constitutes ineffective assistance of counsel. Specifically, Lieberman asserts that James Christie and Amy Westra, friends of the defendant, should have been called to testify on his behalf. Christie's affidavit stated that if called to testify, he would state that Tim Johnson, rather than the defendant, committed the Holiday Liquors store robbery with Landin. Evidence in the record also indicates that Christie, if put on the stand, was subject to impeachment due to his pending trial on charges in an unrelated robbery.

It is a well-established rule in this state that a decision to call or not to call a witness, made by counsel as a matter of trial strategy, even if the choice may prove to be incorrect, does not, without more, sustain a finding of ineffectiveness of counsel. *State v. Brown*, 220 Neb. 305, 369 N.W.2d 639 (1985). Whatever good Christie's testimony may have done for Lieberman was overshadowed by his susceptibility to impeachment. Furthermore, the record indicates that both Christie's and Westra's testimony would have been cumulative at best.

Considering the totality of the evidence that was before the jury, we cannot say that counsel's failure to object and failure to call certain witnesses so undermined the proper functioning of the adversarial process that the trial cannot be relied on as producing a just result. Nor can we say that had an objection been made or another witness called, there is a reasonable probability that the result of the proceedings would have been different. There is simply no evidence in the record with which Lieberman can carry his burden of establishing that counsel's actions constituted a miscarriage of justice. Accordingly, this assignment of error is without merit.

Lieberman next contends that the trial court erred when it overruled his motion for a new trial based on newly discovered evidence. That evidence was described in an affidavit by Steven Hansen, stating that he had overheard a conversation in the Platte County jail between Lieberman and Landin, after Lieberman had been convicted, where Landin admitted that he had lied at trial. Hansen claims that Landin told Lieberman that he would now change his story if Lieberman could secure a new trial.

However, the State introduced Landin's affidavit, wherein he admitted that such a conversation took place but stating that he had never told Lieberman of a willingness to change his story. In his affidavit Landin also reaffirmed the truth of his trial testimony.

New evidence offered in support of a motion for new trial must be so potent that, by strengthening evidence already offered, a new trial would probably result in a new verdict. *State v. Bideaux*, 219 Neb. 718, 365 N.W.2d 830 (1985). Lieberman's new evidence does not meet this standard. At most, it is cumulative and serves only to reactivate the finger-pointing contest. Chris Landin's testimony was repeatedly impeached at trial. The jury was aware that Landin had named at least four coparticipants in the robbery, and the jury evaluated Landin's testimony with knowledge of his inconsistencies. The new evidence was cumulative impeachment, particularly in light of the State's rebuttal evidence. This assignment of error is, therefore, also without merit.

Lieberman's final assignment of error concerns the district court's finding that Lieberman is a habitual criminal as defined by § 29-2221 and the court's sentencing Lieberman in accordance with this finding. In *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983), a majority of this court held that § 29-2221 requires that the prior convictions relied upon by the State, except for the first conviction, "be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense." *Id.* at 176, 333 N.W.2d at 394. The court further held: " ' "It is the *commission* of the second felony *after conviction* for the first,

and the *commission* of the *third* felony *after conviction* of the second that is deemed to make the defendant an incorrigible." ' . . ." *Id.* at 176, 333 N.W.2d at 394.

The record shows that Lieberman was not a habitual criminal, at least not in the statutory sense. Evidence adduced at the habitual criminal hearing established that Lieberman committed the offenses of robbery and use of a firearm in the commission of a felony in Platte County, Nebraska, on March 29, 1979. On June 15, 1979, he committed the felony offense of escape from lawful custody in Lancaster County. On September 14, 1979, Lieberman was sentenced to 1 year's imprisonment on the conviction for escape. On October 5, 1979, he was sentenced in Platte County District Court to imprisonment for 1 year on each count of robbery and use of a firearm. Thus, Lieberman had not been convicted of a first felony when he committed the second, nor was he convicted of the first prior to the conviction of the second.

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

STATE OF NEBRASKA, APPELLEE, V. CHARLES GALVAN, APPELLANT.

382 N.W.2d 337

Filed February 28, 1986. No. 85-319.

1. **Post Conviction.** A defendant is entitled to post conviction relief only when there has been a denial or infringement of his constitutional rights so as to render the judgment void or voidable.
2. _____. The defendant bears the burden of establishing the basis for relief, and in order to state a cause of action the application must allege facts which, if proved, constitute a denial of his constitutional rights.
3. _____. Allegations which are conclusory are not grounds for post conviction relief, nor do they require the court to grant an evidentiary hearing.
4. _____. The trial court may properly deny an evidentiary hearing when the records and files in the case affirmatively establish that the defendant is entitled to no relief.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Charles Galvan, pro se.

Robert M. Spire, Attorney General, and Dale D. Brodkey, for appellee.

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

BOSLAUGH, J.

The defendant, Charles Galvan, has appealed from the order of the district court denying his motion for post conviction relief pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). The court, after reviewing the files and records in the case, denied the motion without an evidentiary hearing. The defendant has appealed from that order.

On May 7, 1984, the defendant was charged with two counts of robbery and two counts of use of a firearm in the commission of a felony arising out of robberies at a Taco Bell restaurant in Omaha, Nebraska, on March 15 and May 1, 1984. The defendant pleaded guilty to the robbery charges in exchange for the dismissal of the firearm charges.

On August 22, 1984, the defendant was sentenced to imprisonment for 2 to 4 years on the first robbery count and to 3 to 5 years on the second robbery count, the sentences to run consecutively.

A defendant is entitled to post conviction relief only when there has been a denial or infringement of his constitutional rights so as to render the judgment void or voidable. § 29-3001. The defendant bears the burden of establishing the basis for relief, and in order to state a cause of action the application must allege facts which, if proved, constitute a denial of his constitutional rights. See, *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984); *State v. Glasenapp*, 212 Neb. 99, 321 N.W.2d 450 (1982). Allegations which are conclusory are not grounds for post conviction relief, nor do they require the court to grant an evidentiary hearing. See, *State v. Glasenapp, supra*; *State v. Stranghoener*, 212 Neb. 203, 322 N.W.2d 407 (1982); *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982).

The trial court may properly deny an evidentiary hearing when the records and files in the case affirmatively establish

that the defendant is entitled to no relief. *State v. Webb*, 218 Neb. 238, 352 N.W.2d 624 (1984); *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985); *State v. Meredith*, 212 Neb. 109, 321 N.W.2d 456 (1982). This court upon review will not disturb the findings of the district court unless they are clearly erroneous. *State v. Pearson*, 220 Neb. 183, 368 N.W.2d 804 (1985).

Upon direct appeal the judgments were affirmed pursuant to Neb. Ct. R. 3B (rev. 1983). *State v. Galvan*, 218 Neb. xxxii (cases Nos. 84-671, 84-672; Nov. 21, 1984). The disposition of a case pursuant to rule 3B is a disposition on the merits, and the court considers not only errors discussed in the brief in support of the motion but also any possible error which can be determined from the record. *State v. Sanders*, 220 Neb. 308, 369 N.W.2d 641 (1985). Generally, matters which were or which could have been raised on direct appeal are not a basis for post conviction relief. *State v. Pope*, 218 Neb. 361, 355 N.W.2d 216 (1984).

The defendant alleged two grounds for relief in his motion: (1) Defendant's guilty plea was unlawfully induced and involuntarily made; and (2) Defendant was denied effective assistance of counsel in that his court-appointed counsel was directed to represent contemporaneously the interests of both defendants.

As to the defendant's first contention, it is clear from the record that the defendant's pleas were voluntary. The defendant was charged with four felony counts. The sentences for two of the four counts were required by statute to be imposed consecutively to any other sentence imposed. Neb. Rev. Stat. § 28-1205 (Reissue 1979). The plea bargain which resulted in the firearm charges being dismissed avoided additional consecutive sentences which might have been imposed.

The defendant was fully advised of his right to refuse the plea bargain and stand trial. Yet, he knowingly and intelligently waived that right in open court. The trial court asked the defendant four times if he understood the consequences of a plea of guilty, and each time the defendant replied, "Yes." The judge also asked if the defendant had been threatened or promised a lighter or lenient sentence in exchange for his guilty

plea, and the defendant replied, "No." The record demonstrates that the defendant's guilty pleas were not involuntary or unlawfully induced.

The defendant was represented by the same counsel who was appointed to represent the accomplice in the second robbery. The record shows that the defendant waived any right he might have had to the appointment of separate counsel. A defendant can waive the right to the appointment of separate counsel if the waiver is made voluntarily and intelligently. *State v. Turner*, 218 Neb. 125, 354 N.W.2d 617 (1984).

The record shows that the trial court was aware of a possible conflict of interest and advised the defendant that he had a right to have a separate attorney appointed. The court also advised the defendant that he could waive this right. The defendant, in response, stated that he understood what the court was saying and that he wished to waive his right to have another attorney appointed.

The record sustains the denial of the motion for post conviction relief without an evidentiary hearing, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARY K. WILKENING, ALSO KNOWN AS MARY ANDERSON, APPELLANT.

382 N.W.2d 340

Filed February 28, 1986. No. 85-404.

1. **Criminal Law: Convictions: Circumstantial Evidence: Proof.** 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.
2. **Criminal Law: Verdicts: Appeal and Error.** After a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustained some rational theory of guilt.
3. **Verdicts: Appeal and Error.** The verdict of 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 Douglas County: KEITH HOWARD, Judge. Affirmed.

Bruce H. Abrahamson of Gunderson, Abrahamson, Grewe & Miller, for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Mary K. Wilkening, was charged in the district court for Douglas County, Nebraska, with three counts of acquiring or obtaining or attempting to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge in violation of Neb. Rev. Stat. § 28-418(1)(c) (Reissue 1979). Following trial, the case was submitted to a jury which, on April 3, 1985, returned a verdict of guilty against Wilkening on all three counts. On May 17, 1985, the district court entered judgment in conformity with the verdict of the jury and sentenced Wilkening to incarceration in the county jail for a period of 4 months on each count, the sentences to run concurrently. Wilkening has now appealed to this court, maintaining that the evidence was insufficient as a matter of law to sustain a verdict and that the district court improperly submitted to the jury an instruction on "aiding and abetting." We believe that the district court did not commit error and that the judgment and sentences should be affirmed.

On December 8, 1983, Joseph A. Novita, a licensed pharmacist at Beaton Drug, 1218 South 119th Street, Omaha, Nebraska, filled a prescription for the narcotic analgesic Percodan, which was ordered by prescription for a "Mary Anderson" by a Dr. Gerald C. O'Neil. After filling the prescription Mr. Novita noticed that Dr. O'Neil was a pediatrician and became somewhat suspicious. Shortly thereafter, he phoned Dr. O'Neil's home and was informed that the doctor had been retired for several months. The state drug inspector was therefore notified by Beaton Drug.

Based upon the information received from Mr. Novita

regarding the apparently forged prescription for Percodan filled on December 8, 1983, a drug investigator for the state Department of Health began a search for similar prescriptions in the Omaha, Douglas County, area. A search through numerous pharmacies throughout the city of Omaha revealed many prescriptions for Percodan reportedly ordered for Mary Anderson, Mary K. Wilkening, or Bob Anderson by Dr. O'Neil. The drug inspector was also able to ascertain that the appellant, Mary K. Wilkening, had worked for Dr. O'Neil as a nurse for approximately 8 years preceding his retirement in August of 1983 and in an administrative capacity subsequent thereto until approximately September 21, 1983. The record also shows that Wilkening's maiden name was Anderson.

At trial Mr. Novita identified Wilkening as the person for whom he filled the prescription on December 8, 1983, though, on cross-examination, he admitted that his identification could be mistaken. Dr. O'Neil testified that he wrote no prescriptions during the months of September, November, or December of 1983, the dates on the three prescriptions made out to Mary Anderson and involved in this case.

The handwriting on these prescriptions was then compared by a questioned documents expert to exemplars and samples obtained from Dr. O'Neil, Mary K. Wilkening, and her husband, Rod Wilkening. The expert testified that the signature of Dr. O'Neil on each of the prescriptions was a simulated signature, i.e., a forgery. While the handwriting expert could not identify the actual author of these simulated signatures, he did testify that he believed that there was only one author for all of these simulated signatures. There was, however, other writing on the prescriptions, specifically on the line indicating for whom the prescription was to be filled. The expert testified that the name on each of these prescriptions which indicated for whom the prescription was ordered was authored by the same person and, in his opinion, that person was the appellant, Wilkening.

At the conclusion of the trial the case was submitted to the jury, and the court, over the objection of Wilkening's counsel, instructed the jury, among other matters, that in order to convict the defendant the State must prove beyond a reasonable

doubt that Wilkening "either alone or by aiding and abetting another, acquired or obtained possession of a controlled substance, percodan," on the three dates in question. The court further instructed the jury that it was not necessary that the State prove that Wilkening herself committed the unlawful act because anyone who aids, abets, or procures another to commit any offense may be prosecuted as if she were the principal offender. The court further instructed the jury that "[w]here a crime requires the existence of a particular intent an alleged aider or abettor cannot be held as a principal unless it is established that the aider knew that the perpetrator of the act had the required intent, or that the aider herself possessed the required intent."

Turning first to the question of whether the evidence was sufficient to convict Wilkening of the charges, we believe the evidence was sufficient. In *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981), we declared that 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. We said in *Buchanan, supra*, that the State is not required to disprove every hypothesis but that of guilt. See, also, *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983). We have further held that after a jury has considered all of the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence if the evidence sustained some rational theory of guilt. *State v. Evans, supra.* And, further, in *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984), we held that the verdict of the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. See, also, *State v. Kakela*, 218 Neb. 843, 359 N.W.2d 786 (1984).

Exhibits 1, 2, and 3, on their face, set out that on December 8, 1983, November 14, 1983, and September 30, 1983, a prescription order for Percodan for Mary Anderson, purportedly signed by Dr. Gerald C. O'Neil, was presented to a pharmacy. As to the prescription order labeled exhibit 1, the pharmacist was able to make a tentative identification of Wilkening as the one who presented the prescription to him to be filled on December 8, 1983. As to the prescription orders

labeled exhibits 2 and 3, these documents were placed into files kept by the pharmacies. While there was no evidence introduced at trial as to who presented exhibits 2 and 3 to be filled, nevertheless the connecting link between all of these prescriptions was the fact that the words "Mary Anderson" on each of the prescriptions were written by Wilkening without the knowledge or consent of Dr. O'Neil. We cannot say as a matter of law that the jury could not believe that Wilkening, while employed by Dr. O'Neil, acquired the prescription forms and signed her maiden name on each of the prescriptions, as suggested by the handwriting expert. This, coupled with the fact that the jury could have reasonably believed the testimony of Mr. Novita that Wilkening was the individual who presented the December 8, 1983, prescription to be filled, certainly amounted to enough evidence to sustain some rational theory of guilt. Wilkening's assignment of error to the effect that there was insufficient evidence to sustain a verdict of guilty, thus, is simply without merit.

That leaves us, then, with the question of whether the trial court erred in submitting to the jury an instruction on aiding and abetting. The State was unable to produce evidence to establish without question that Wilkening had herself presented the prescriptions to the respective pharmacies in counts II and III and, therefore, could not establish that in fact she was the individual who had obtained or attempted to obtain the drug. What is clear, however, is that there was sufficient circumstantial evidence for a jury to conclude that Wilkening had obtained the prescription forms and had at least affixed her maiden name to the prescriptions on the line "For." Additionally, there was evidence, which the jury could believe, that whoever affixed the name to the "For" line also signed the prescriptions. This, then, would be sufficient evidence of aiding and abetting an attempt to procure the drug, even though the evidence did not establish that Wilkening herself presented the prescriptions for filling. There was sufficient evidence presented for the jury to believe that either Wilkening presented the prescriptions herself, in which case she was guilty as the principal, or someone else did so after being assisted by Wilkening, in which case she was guilty of aiding and abetting.

There was no other evidence as to how the prescriptions could have been received by the various pharmacies and the prescriptions filled and placed in the filled file. The aiding and abetting instruction was therefore supported by the evidence in this case. See *State v. Garza*, 193 Neb. 283, 226 N.W.2d 768 (1975).

For these reasons the judgment of the district court entered following a jury verdict is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES E. LACHAPPELL, APPELLANT.

382 N.W.2d 343

Filed February 28, 1986. No. 85-421.

1. **Search and Seizure.** Determinations of whether one has been seized and whether such a seizure was reasonable are questions of fact.
2. **Motions to Suppress: Appeal and Error.** This court will not overturn the trial court's factual findings when determining the correctness of the latter's rulings on the suppression of evidence unless those findings are clearly wrong.
3. **Search and Seizure.** One who voluntarily accompanies the police for questioning has not been seized.
4. _____. One's initially consensual encounter with the police may be transformed into a seizure or detention by subsequent events.
5. _____. A seizure takes place if the circumstances of an involuntary encounter with the police are so intimidating as to demonstrate that a reasonable person would have believed himself not free to leave.
6. **Search and Seizure: Probable Cause.** Probable cause to seize an individual exists at the moment the collective knowledge and trustworthy information of all the police officers engaged in a common investigation are such as to warrant a conclusion by a prudent person that the individual seized committed a felony.
7. **Search and Seizure: Probable Cause: Proof.** It is not required that an officer see the commission of the felony, nor does the finding of probable cause require the same specific evidence of each element of the offense as would be needed to support a conviction.
8. **Confessions: Miranda Rights.** Once an individual in custody indicates in any manner, at any time prior to or during questioning, that he or she wishes to remain silent, interrogation must cease, for at this point the individual being interrogated has shown that he or she intends to exercise his or her fifth amendment right to remain silent.

9. **Confessions: Miranda Rights: Waiver.** Once the right to remain silent has been invoked, there is a strong presumption against its subsequent waiver.
10. **Confessions: Miranda Rights.** The police are not required to accept as conclusive any statement or act, no matter how ambiguous, as a sign that a suspect desires to cut off questioning.

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

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

Robert M. Spire, Attorney General, and Bernard L. Packett, for appellee.

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

CAPORALE, J.

Defendant, Charles E. LaChappell, appeals his manslaughter conviction, following a bench trial, on the ground that certain statements he made to the police were improperly received in evidence. We affirm.

At 2:30 p.m. on September 10, 1984, Penny Fortner left the care of her 5-month-old daughter with defendant, her boyfriend, while she went out to do some shopping. The infant was teething and therefore irritable, but was sleeping when Fortner left. Fortner told her sister, Connie Buck, who lived next door, that the infant was with defendant, but asked her to check as well.

Approximately 5 minutes after Fortner's departure, Buck sent her boyfriend, Royce Maloney, next door to check. No one responded to Maloney's knock on the door, and he returned to Buck's house. Five minutes later, defendant ran up Buck's stairway, yelling and carrying the infant, who was unconscious and blue, and explained that she had choked on her bottle. Maloney held the infant upside down with one hand while shaking her up and down and patting her on the back in an attempt to dislodge any obstruction. While efforts were being made to revive the infant, defendant went next door to call an ambulance, and he then accompanied the infant to the hospital.

Fortner returned to her home at about 4 p.m., learned her

daughter was in the hospital, and went there. Defendant remained at the hospital for about half an hour after Fortner's arrival and then returned to the latter's house. At approximately 11 p.m. the police arrived at the hospital to question Fortner.

At approximately 1:30 a.m. Paul Wade, a police officer in the homicide and assault unit, received telephone instructions from Sgt. Verlyn Sieh to go to the hospital and investigate the assault on Fortner's daughter.

Between 2:30 and 3 a.m., Wade asked Fortner to call defendant and ask him to come to police headquarters so the police could talk to him. Fortner telephoned defendant, who replied he did not want to come to headquarters, since he was sleeping. Fortner, however, told him that the police would come and get him. According to Fortner, Wade never talked to defendant over the telephone, but Wade said he did when it became clear that defendant was questioning Fortner. Wade told defendant they had a number of questions they wanted to ask him and wondered if he would come to police headquarters. Defendant replied he had no transportation, and Wade offered to pick him up, to which defendant agreed. Wade drove to Fortner's residence, and defendant came out of the house and got into the front seat of the police car. From that point on, defendant did not feel he was free to leave.

Upon arriving at headquarters a few minutes later, Wade took defendant to an 8- by 10-foot windowless room on the fourth floor. Between 3 and 3:15 a.m., Wade and Sieh entered the interrogation room to question defendant. At this time the police were aware that the infant had a serious head injury, but, according to Wade, defendant was not yet a suspect and was not then under arrest; therefore, he was not given the *Miranda* warnings. Defendant told the two officers that he had given the infant a bottle and that she suddenly had a seizure and stopped breathing.

Wade then left the room to ask Fortner some further questions. Upon returning to the room, Wade informed defendant that the infant was suffering from a severe head injury. After defendant replied that the infant had not hit her head while he had been alone with her, Wade, at 4:28 a.m., gave

defendant the *Miranda* warnings. According to Wade, defendant was nonetheless still free to leave at that time.

Upon further questioning, defendant said perhaps the infant had hit her head on a railing at Buck's house when he ran up the stairs with her. Defendant then gave the police a taped statement in which he stated that 20 minutes after Fortner left, he laid the infant down in her crib. She began fussing, so he brought her back into the living room and gave her a bottle. About 15 minutes later she arched her back and stopped breathing. He tried to revive her by performing mouth-to-mouth resuscitation, but realizing he did not know the proper procedure, ran next door to Buck's house, carrying the infant under his left arm with her head pointed forward. As he ran up Buck's steps, the infant hit her head on the railing. According to defendant, he had not mentioned this before, even though he had been told the infant had a severe head injury, because he did not think the contact with the railing was that hard.

After talking with Sieh outside the interrogation room, Wade asked Officer Subby Salerno to subject defendant to a polygraph examination. Salerno wanted to wait a day or two before conducting such an examination so that he could review the reports and so that defendant would be better rested. However, Wade convinced Salerno to proceed at that time, since, in Wade's view, enough evidence to show that a crime had been committed did not exist. Wade feared that if defendant were to leave, the police might have difficulty getting him back. Defendant agreed to the polygraph examination, and at 7:15 a.m. Wade turned defendant over to Salerno.

At 7:30 a.m. Salerno had defendant execute a "Polygraph Rights Advisory Form" which, among other information, contained the *Miranda* warnings. Defendant claims he was told if he passed the test, he could then leave. Defendant stated that after he was asked six or seven questions, he removed the apparatus from his fingers and from around his waist, told Salerno "the test was over," and refused the request to submit to a further polygraph examination. According to Salerno, the questions asked during the polygraph examination included inquiries into whether defendant knew how the infant sustained

injury to her head, whether the infant really hit her head on a railing, whether the injury was sustained while in Fortner's residence, whether defendant intentionally injured the infant, and whether defendant was purposely attempting to withhold information. Salerno agreed that the polygraph examination was incomplete, as only one set of questions was posed to defendant. Usually, if but one set of questions is used, it is because the subject refused to answer a second set. Salerno therefore agreed that defendant may have refused to complete the examination, but did not have a specific recollection to that effect. Salerno was with defendant in the polygraph examination room for less than half an hour.

Defendant also claims Salerno told him he had failed the examination and continued to question him about the incident. Salerno, on the other hand, could not remember whether he told defendant he had failed the examination, but did think defendant was being deceitful. Salerno did not recall questioning defendant further after he refused further participation in the polygraph examination. However, defendant did orally admit to Salerno that the infant had become unruly and that he had shaken her to stop her from crying. Salerno took defendant back to the original interrogation room and at approximately 8:40 a.m. informed Wade of defendant's foregoing admission.

Defendant was again given the *Miranda* warnings, after which he first orally repeated to Wade the admission he first made to Salerno and then restated it once again so that it could be tape recorded. In the recorded admission defendant added that he had reached underneath the infant's arms and shaken her for 10 to 15 seconds, during which the infant's head bobbed back and forth. When he laid her down, she stopped breathing.

According to Wade, defendant requested an attorney for the first time after he gave the aforesaid recorded admission. Defendant, on the other hand, claims he asked for an attorney when the police first began questioning him. The testimony is also in conflict as to whether the door to the interrogation room was locked. Salerno testified he did not know whether the door was locked, and Wade testified that neither he nor Sieh ever locked the door. However, defendant stated he tried to open the

door after first being placed in the interrogation room and at various other times and always found it locked.

The infant died as the result of brain damage due to vigorous shaking, but not as a consequence of Maloney's efforts to revive her. The police learned of the infant's death between 11 and 11:30 a.m. on September 11, 1984.

The trial court found that defendant was the focus of the police investigation at least by the time he was given the *Miranda* warnings at 4:28 a.m., specifically finding that the door to the interrogation room had been locked by that time. The court then found that as of 4:28 a.m., defendant was "under arrest and that the arrest was not legal." Nonetheless, the trial court received in evidence, over a motion to suppress, all the statements defendant made to the police except for the oral and recorded admissions he made to Wade after his first admission to Salerno that he had shaken the infant when she became unruly.

The first issue to be resolved is whether there was a seizure and, if so, whether it was unreasonable. These are both factual questions. *State v. Beard,* 221 Neb. 891, 381 N.W.2d 170 (1986); *Wilson v. Gutschenritter,* 185 Neb. 311, 175 N.W.2d 282 (1970). In reviewing the trial court's determinations with respect thereto, we are bound by the rule that this court will not overturn the trial court's factual findings when determining the correctness of the latter's rulings on the suppression of evidence unless those findings are clearly wrong. *State v. Beard, supra.*

It has been determined that one who voluntarily accompanies the police for questioning has not been seized. It has also been said, however, that one's initially consensual encounter with the police may be transformed into a seizure or detention by subsequent events. A seizure takes place if the circumstances of an involuntary encounter with the police are so intimidating as to demonstrate that a reasonable person would have believed himself not free to leave. *State v. Beard, supra.*

The trial court's finding that defendant was seized, that is, that a reasonable person would not have believed himself free to leave, by 4:28 a.m. at the latest is supported by the evidence and is not clearly wrong.

The trial court's finding that the seizure was unreasonable, that is to say, without probable cause at that time, is, however, another matter.

Probable cause to seize an individual exists at the moment the collective knowledge and trustworthy information of all the police officers engaged in a common investigation are such as to warrant a conclusion by a prudent person that the individual seized committed a felony. See, *State v. Harrison*, 218 Neb. 532, 357 N.W.2d 201 (1984); *State v. Hack and Callans*, 212 Neb. 406, 322 N.W.2d 806 (1982). It is not required that an officer see the commission of the felony, nor does the finding of probable cause require the same specific evidence of each element of the offense as would be needed to support a conviction. *State v. Hack and Callans, supra*. By the time of the seizure as found by the trial court, the police knew that defendant had been alone with the child, that during that period of time something took place which, according to the defendant, caused the infant to stop breathing and caused the defendant to become sufficiently concerned about the infant's well-being to run with her to the Buck home, that the infant had some type of head injury, and that the defendant's explanation that the infant had choked on her milk was apparently false. There was at that time, therefore, probable cause to believe that at the very least defendant had committed an act of child abuse in violation of Neb. Rev. Stat. § 28-707 (Cum. Supp. 1984), a felony if committed knowingly and intentionally.

The fact that Wade did not appear to appreciate the fact that probable cause to seize defendant existed does not alter the reality of the situation. The trial court's finding that the seizure was unreasonable is clearly wrong.

The question thus becomes not whether the one incriminating statement received in evidence, defendant's admission to Salerno that he had shaken the child when she became unruly, was the result of an unreasonable seizure but, rather, whether it was obtained as the result of impermissible incustody interrogation.

Once an individual in custody indicates in any manner, at any time prior to or during questioning, that he or she wishes to remain silent, interrogation must cease, for at this point the

individual being interrogated has shown that he or she intends to exercise his or her fifth amendment right to remain silent. *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985); *In re Interest of Durand. State v. Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980); *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Moreover, once the right to remain silent has been invoked, there is a strong presumption against its subsequent waiver. *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984). However, the police are not required to accept as conclusive any statement or act, no matter how ambiguous, as a sign that a suspect desires to cut off questioning. *State v. Perkins, supra.*

The trial court found that while defendant terminated the polygraph examination, he did not terminate his conversation with Salerno. We cannot say that finding of fact is clearly wrong. By his own words the defendant said not, "I am through talking," or "I am through answering questions," but that "the *test* was over." (Emphasis supplied.) The best that can be said from defendant's point of view is that his utterance is ambiguous as to whether he meant that he did not wish to say anything else at all. That ambiguity, however, was resolved against him by the trier of fact, and, thus, the incriminating admission defendant made to Salerno that he shook the infant was properly admitted in evidence.

The record failing to sustain defendant's assignment of error, the judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID C. ROTH, APPELLANT.
382 N.W.2d 348

Filed February 28, 1986. No. 85-459.

1. **Statutes.** Repeals by implication are not favored. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. A construction of a statute which, in effect, repeals another statute will not be adopted unless such construction is made necessary by the evident intent of the Legislature.
2. **Criminal Law: Homicide: Motor Vehicles.** Manslaughter can be committed

when someone causes the death of another unintentionally while operating a motor vehicle in violation of the law.

3. **Statutes: Appeal and Error.** With respect to questions about a statute, our role is limited to interpretation and application of statutes, irrespective of our personal agreement or disagreement with a particular legislative enactment, so long as a questioned statute does not violate a constitutional requirement. Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial task of construing or applying a statute.
4. **Sentences: Homicide: Motor Vehicles.** The maximum penalty of confinement that may be imposed upon a person convicted of manslaughter resulting from his operation of a motor vehicle is 6 months' imprisonment in the county jail.
5. **Statutes.** 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.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed in part, and in part reversed and remanded.

Anthony S. Troia and James E. Riha, for appellant.

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

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

KRIVOSHA, C.J.

The single issue presented by appellant, David C. Roth, to this court is whether one who has caused the death of another with a motor vehicle must be charged with committing the crime of motor vehicle homicide in violation of Neb. Rev. Stat. § 28-306 (Reissue 1979) or, at the discretion of the prosecution, may be charged with committing the crime of manslaughter in violation of Neb. Rev. Stat. § 28-305 (Reissue 1979). Roth argues that where the death is caused by a motor vehicle, the defendant must be charged with motor vehicle homicide and may not be charged with manslaughter. We believe that Roth is in error in that regard.

The facts of the case are essentially without dispute. On Friday, December 28, 1984, Roth and two of his friends were drinking at a bar in Omaha, Nebraska. Also present at the bar was the decedent, Helen Schroer. Accompanying Schroer at the

bar were Emily Swendroski, John Swendroski, and Richard Corum. During the course of the evening, Roth's two friends played a game of pool with Corum and John Swendroski. While playing pool, one of Roth's friends verbally harassed Corum and John Swendroski. Sometime later, Roth and his two friends left the bar and were standing outside when Helen Schroer and her friends also left the bar. Rodney Kroupa, one of Roth's friends, walked up behind Corum and hit him on the side of the head while John Andrysik, Roth's other friend, made obscene comments to Schroer. At this point John Swendroski ordered Schroer and the others into his car. As he drove off, he sideswiped Andrysik with his car. Roth and Andrysik jumped into Roth's truck, with Roth driving, and began to pursue the Swendroski car. During this approximately 1.1-mile chase, the car and truck ran several red lights, traveling at speeds between 35 and 55 m.p.h., clearly in violation of law. While going approximately 55 m.p.h. in a residential area, the Roth truck struck the rear of the Swendroski car, causing it to swerve. Swendroski then accelerated, tried to pass another car, went over the curb, went down an embankment, and struck a tree, where the car finally stopped. Schroer suffered severe injuries in the crash and died several hours later. Roth was charged with manslaughter in violation of § 28-305.

The district court instructed the jury that it could find Roth guilty of either manslaughter in violation of § 28-305 or the lesser-included offense of motor vehicle homicide in violation of § 28-306. The jury, following deliberation, returned a verdict finding Roth guilty of manslaughter. Roth now argues that motor vehicle homicide is not a lesser-included offense of manslaughter and that the adoption of § 28-306 (motor vehicle homicide) impliedly repealed § 28-305 (manslaughter) with regard to deaths caused by motor vehicles. As we have already indicated, we are unable to accept that argument. The language of the two statutes simply does not justify such a conclusion.

Nebraska's manslaughter statute, § 28-305, provides in part: "A person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another *unintentionally while in the commission of an unlawful act*." (Emphasis supplied.) The Nebraska motor vehicle

homicide statute, § 28-306, provides in part: "A person who causes the death of another *unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or in violation of any city or village ordinance* commits motor vehicle homicide." (Emphasis supplied.)

There is nothing in the legislative history of either § 28-305 or § 28-306 to indicate that the Legislature intended to bring about the result urged by Roth, nor are the statutes repugnant to each other so as to cause the type of conflict which requires a court to consider that a statute has been repealed by implication.

As we noted in *American Fed. S., C. & M. Emp. v. County of Lancaster*, 200 Neb. 301, 303, 263 N.W.2d 471, 473 (1978):

> Repeals by implication are not favored. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. A construction of a statute which, in effect, repeals another statute, will not be adopted unless such construction is made necessary by the evident intent of the Legislature.

See, also, *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985).

It is not uncommon for an act to constitute a violation of more than one crime, some of which may be lesser-included offenses and some of which may be separate and distinct. The former is the case with regard to manslaughter, where death is caused by the use of a motor vehicle, and motor vehicle homicide.

In *State v. Kelley*, 211 Neb. 770, 320 N.W.2d 455 (1982), we analyzed an argument not dissimilar to that made by Roth herein, and in rejecting the argument said at 775, 320 N.W.2d at 458:

> Since both crimes [manslaughter and motor vehicle homicide] require that the person charged cause the death of another unintentionally while in violation of the law, motor vehicle homicide is a lesser-included offense of manslaughter. Manslaughter can be committed when someone causes the death of another unintentionally while operating a motor vehicle in violation of the law.

See, also, *State v. Hardin*, 212 Neb. 774, 326 N.W.2d 38 (1982);

State v. Rice, 198 Neb. 758, 255 N.W.2d 282 (1977).

The evidence is more than sufficient to permit a jury to find that Roth caused the death of Schroer unintentionally while in the commission of an unlawful act. At the minimum, he violated Neb. Rev. Stat. § 39-629 (Reissue 1984), which provides that the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, and such driver shall have due regard for the speed of such vehicles and the traffic upon and the condition of the roadway. Also, the evidence establishes that Roth violated Neb. Rev. Stat. § 39-662 (Reissue 1984), which provides that no person shall drive through a residential district at a speed in excess of 25 m.p.h., as well as operating his motor vehicle in either a careless, reckless, or willful reckless manner, in violation of law. Additionally, there is no question that Roth committed a number of nontraffic offenses, including, at least, assault in the third degree in violation of Neb. Rev. Stat. § 28-310 (Reissue 1979). On that basis Roth was guilty of either manslaughter or motor vehicle homicide.

This is simply a situation wherein a set of facts is sufficient to constitute the violation of one of several crimes. In such a case the prosecutor is free to choose under which crime he will seek a conviction. As we said in *State v. Loschen*, 221 Neb. 315, 318, 376 N.W.2d 792, 795 (1985): "Where a single act violates more than one statute, a prosecutor is free to prosecute under any statute he chooses, so long as the selection is not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." See, also, *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981).

Having answered the only assignment of error raised by Roth adverse to his contention, normally we would have no alternative but to affirm the conviction and sentence. However, there is plain error in the sentence which requires us to vacate the sentence and remand the case to the district court for further sentencing. Neb. Rev. Stat. § 25-1919 (Reissue 1979); *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974).

The Legislature, prior to the enactment of § 28-305, had

adopted Neb. Rev. Stat. § 39-669.20 (Reissue 1984), which prescribes the *specific* penalty which may be imposed when a person is convicted of manslaughter resulting from his operation of a motor vehicle. Section 39-669.20 specifically provides:

> Any person, convicted of manslaughter or mayhem resulting from his operation of a motor vehicle, or of motor vehicle homicide, shall be (1) fined in a sum not exceeding five hundred dollars, (2) imprisoned in the county jail for not to exceed six months, or (3) both so fined and imprisoned.

While it may very well be that the conflict between § 39-669.20 and the penalty for manslaughter as prescribed in § 28-305 is as a result of an oversight by the Legislature, this court is bound to follow the law as provided by the Legislature in criminal matters.

As we observed in *Anderson v. Peterson*, 221 Neb. 149, 156-57, 375 N.W.2d 901, 906 (1985):

> With respect to questions about a statute, our role is limited to interpretation and application of statutes, irrespective of our personal agreement or disagreement with a particular legislative enactment, so long as a questioned statute does not violate a constitutional requirement. Whether a court considers particular legislation as wise or unwise is irrelevant to the judicial task of construing or applying a statute.

See, also, *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985).

We are not at liberty to impose a sentence greater than that provided by the Legislature even if we believe that the crime deserves a greater penalty. The language of § 39-669.20 could not be any clearer. The maximum penalty of confinement that may be imposed upon a person convicted of manslaughter resulting from his operation of a motor vehicle is 6 months' imprisonment in the county jail. In the instant case the district court, believing that Roth, having been convicted of violating § 28-305, was guilty of a Class III felony, sentenced him to not less than 3 nor more than 7 years in the Nebraska Penal and Correctional Complex. This was in excess of the maximum permitted by § 39-669.20.

One may argue that the adoption of the Nebraska Criminal Code repealed by implication § 39-669.20. Such a conclusion is legally incorrect. As we have already observed, repeals by implication are not favored and will only be considered when the repugnancy between the new provision and the former statute is plain and unavoidable. The conflict between § 28-305 (manslaughter) and § 39-669.20 as it pertains to the penalty for manslaughter caused by a motor vehicle does not fall into that category. Section 28-305 is a general statute, while § 39-669.20 is a specific statute. We have frequently held that 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 (1960); *State ex rel. Strom v. Marsh*, 162 Neb. 593, 77 N.W.2d 163 (1956).

For that reason we are without any choice in this matter. If the Legislature did not intend this result, it must consider what to do about § 39-669.20 as it relates to manslaughter. However, based upon the applicable statute, the sentence imposed upon Roth must be vacated and the cause remanded to the district court for the imposition of a proper sentence, not to exceed the provisions of § 39-669.20.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

BOSLAUGH, J., dissenting.

A legislative act which is complete in itself, and is repugnant to or in conflict with a prior law, repeals the prior law by implication to the extent of the repugnancy or conflict. *American Fed. S., C. & M. Emp. v. County of Lancaster*, 200 Neb. 301, 263 N.W.2d 471 (1978).

The Nebraska Criminal Code, which was enacted in 1977, was a comprehensive revision of Nebraska criminal laws. See L.R. 39, 80th Leg., 1969 Leg. J. 1589 (Apr. 22, 1969). See, also, Committee Statements, L.B. 38, L.B. 39, L.B. 40, and L.B. 41, Judiciary Committee, 85th Leg., 1st Sess. (Feb. 2, 1977).

L.B. 38, 1977 Neb. Laws, which enacted the code, was an act complete in itself. It contains provisions defining and punishing

manslaughter and motor vehicle homicide. Neb. Rev. Stat. §§ 28-305 and 28-306 (Reissue 1979).

Neb. Rev. Stat. § 39-669.20 (Reissue 1984), last amended in 1972, provides that the penalty for manslaughter resulting from the operation of a motor vehicle or for motor vehicle homicide shall be a fine of not to exceed $500, imprisonment in the county jail for not to exceed 6 months, or both. Sections 28-305 and 28-306 conflict with § 39-669.20, and are repugnant to it, in that they prescribe a greater maximum penalty for manslaughter and motor vehicle homicide.

The opinion of the court seeks to avoid this conflict by construing § 39-669.20 to be a special statute and § 28-305 a general statute. This, of course, does not avoid the conflict between §§ 28-306 and 39-669.20 because both sections relate to the same crime, motor vehicle homicide. It seems obvious that § 28-306 repealed by implication the provisions in § 39-669.20 relating to motor vehicle homicide because the sections prescribe different penalties for the same crime.

If the majority opinion is correct, the maximum penalty for manslaughter resulting from the operation of a motor vehicle now is less than the maximum penalty for motor vehicle homicide under the 1977 criminal code. I do not believe the Legislature intended such a result.

HASTINGS, J., joins in this dissent.

DWIGHT BARTUNEK, APPELLEE, V. KIM BECKER, DOING BUSINESS AS BECKER BODY SHOP, APPELLANT.

382 N.W.2d 300

Filed February 28, 1986. No. 85-574.

1. **Workmen's Compensation.** It is clear from both Neb. Rev. Stat. § 48-106(2) (Reissue 1984) and the cases that it is the nature of the employer's business which determines the exemption, and not the work performed by the employee.
2. _____. The fact that the employer or employers are engaged in farming does not remove from the coverage of the statute other businesses or occupations carried on by the employer which are otherwise in the coverage of the statute.
3. _____. One employer may engage in two separate businesses, one subject to the

workmen's compensation law and one exempt from that law, and the employer's actions with regard to the business which is subject to the workmen's compensation law do not affect the employer's business which is statutorily exempt from the compensation law.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Ted S. Griess, for appellant.

Denzel R. Busick of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and GRANT, JJ., and BUCKLEY, D.J.

KRIVOSHA, C.J.

This appeal presents the question of whether an employee injured while working in an auto body shop is barred from recovery under the Nebraska workmen's compensation law because the body shop is located upon a farm site and the injured employee works both for the body shop and as a farmhand. On rehearing before three members of the Workmen's Compensation Court, the initial order of dismissal entered by a single judge of the Workmen's Compensation Court was reversed, and the three-judge panel found that the employee, Dwight Bartunek, had sustained an injury arising out of and in the course of his employment, for which he was entitled to compensation. In effect, the Workmen's Compensation Court further found that at the time of the injury Bartunek was not a farm laborer and therefore was not barred from recovery by reason of the provisions of Neb. Rev. Stat. § 48-106(2) (Reissue 1984). We believe that the three-judge panel was correct, and we affirm.

The three-judge panel found the following to be the facts. The appellant, Kim Becker, doing business as Becker Body Shop, owns and operates a body shop business located on a farm site in which Kim Becker and his father, Walter Becker, have an interest. The father coordinates the farming operations but has no interest in the body shop. The father does not charge the son any rental for the body shop's being located upon the farm site, nor does he in any way attempt to give directions

regarding its operations. None of the employees of the father work in the body shop, although employees of the body shop work on the farm when so directed. The three-judge panel further found that Bartunek was employed by the son to work in the body shop but had worked on the farm in the harvests of 1982 and 1983. After the 1983 harvest was completed Bartunek worked in the body shop, returning to the fields in April of 1984. He nonetheless continued to work in the body shop when the weather was inclement. The three-judge panel further found that regardless of where Bartunek worked, most of his wages were paid from the body shop. The evidence indicates that the father and son maintain separate checking accounts, one for the farm business and one for the body shop, the latter in which the father has no interest.

On May 22, 1984, wet conditions prevented Bartunek from doing fieldwork, and as a consequence he was assigned by Kim Becker to work in the body shop. While assisting with putting fenders on a customer's car in the body shop, at the direction of Kim Becker, Bartunek sustained a back injury. As we have already indicated, the single question presented to us is whether Bartunek was covered by the workmen's compensation law of Nebraska or, by reason of the fact that he performed both covered work in the body shop and exempt work in the field, was not entitled to compensation for his injuries sustained while working in the body shop.

In beginning our analysis of this matter, we must keep in mind that findings of the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong. *Brown v. Leavitt Lane Farm,* 215 Neb. 522, 340 N.W.2d 4 (1983). While it is true that § 48-106(2) generally exempts from workmen's compensation law "employers of farm or ranch laborers," the sole fact that one may be an employer of farm or ranch laborers does not answer the question. In *Leppert v. Parker,* 218 Neb. 63, 67, 352 N.W.2d 180, 182 (1984), we said: "It is clear from both the statute and the cases that it is the nature of the employer's business which determines the exemption, and not the work performed by the employee."

The question, then, turns on the nature of Kim Becker's

business. It appears to us that he is engaged in two businesses, one a farming operation which is exempt under the law and the other an auto body shop which is not exempt. That an employer may be engaged in two businesses is not unique or unheard of in the law. It has long been recognized in this jurisdiction. In *Kaplan v. Gaskill*, 108 Neb. 455, 459-60, 187 N.W. 943, 945 (1922), we said:

> The fact that the employer, in this instance, was engaged in the business of buying and selling junk and in dealing in second-hand automobiles has no controlling influence upon the question of whether or not he was engaged in the regular business or vocation of renting houses. The act does not contemplate that a person can be engaged in only one regular business. He may be engaged in several. The question, then, of whether or not he was engaged in a regular business occupation in the holding and handling of the properties in question, and whether or not the employee was engaged in the usual course of the duties which were within the scope of that business, must be determined entirely aside from the question of whether or not the employer was engaged in any other kind or nature of business, as well as aside from the question of whether the employment was casual.

(Emphasis omitted.)

Moreover, we have recognized that it is not uncommon or strange for one to be engaged in both a farming operation exempt under the law and a nonfarming operation covered by the law. In *Campos v. Tomoi*, 175 Neb. 555, 557, 122 N.W.2d 473, 475 (1963), we specifically said: "The fact that the employer or employers are engaged in farming does not remove from the coverage of the statute other businesses or occupations carried on by the employer which are otherwise in the coverage of the statute." In *Campos, supra*, the employer was generally engaged in the farming industry but also conducted a hay-grinding business. When the employee was injured while operating the hay grinder, we found without difficulty that he was covered under the Workmen's Compensation Act and entitled to compensation. And, recently, in the case of *Brown v. Leavitt Lane Farm, supra*, we again reaffirmed our stand that

one may be engaged in more than one business, saying at 527, 340 N.W.2d at 8:

> "In accordance with the general rule . . . that an employer may be engaged in a number of separate businesses and occupations, some within the compensation act and some not, the fact that an employer is engaged in farming does not remove from the coverage of the statute another business or occupation carried on by the employer which is otherwise within the coverage of the statute, nor does it subject the farming business to the statute."

We concluded in *Brown, supra* at 527-28, 340 N.W.2d at 8:

> We hold that one employer may engage in two separate businesses, one subject to the workmen's compensation law and one exempt from that law, and that the employer's actions with regard to the business which is subject to the workmen's compensation law do not affect the employer's business which is statutorily exempt from the compensation law.

In the instant case the reverse must be true.

There can be little or no question that if this injury had occurred in town, everyone would acknowledge that the auto body shop was an industry covered under the workmen's compensation law of Nebraska. That it was located on the farm does not change that position. Bartunek, an employee of the body shop, was injured while working in the body shop. The fact that he was also compensated for doing farm labor which was exempted from the act does not change the coverage. The three-judge panel was correct in its findings, and its judgment must be affirmed. Appellee is awarded the sum of $1,000 for the services of his attorney in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES L. DILLON, APPELLANT.

382 N.W.2d 353

Filed February 28, 1986. No. 85-595.

1. **Effectiveness of Counsel.** One alleging ineffective assistance of counsel has the burden of establishing incompetency of counsel and, further, demonstrating in what manner inadequacy of counsel was prejudicial.
2. **Rules of Evidence: Sentences.** As a result of Neb. Evid. R. 1101(4)(b) the Nebraska Evidence Rules do not apply at a sentence hearing. Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1979).
3. **Sentences: Affidavits.** Use of an affidavit for the purpose of sentencing is not objectionable, provided the affidavit contains information relevant to a sentence to be imposed.
4. **Sentences: Appeal and Error.** In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.

Appeal from the District Court for Nuckolls County: ORVILLE L. COADY, Judge. Affirmed.

Terrance A. Poppe of Hecht, Sweet, Alesio & Morrow, P.C., for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

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

SHANAHAN, J.

On his plea of nolo contendere, Charles L. Dillon was convicted in the district court for Nuckolls County on a charge of first degree sexual assault and was sentenced to imprisonment for a term of 16 to 49 years. Dillon appeals his sentence, claiming ineffective assistance of counsel at the sentence hearing and an excessive sentence. We affirm.

The complaint filed in the county court for Nuckolls County charged Dillon with commission of four felonies—attempted first degree murder (Neb. Rev. Stat. §§ 28-201 and 28-303 (Reissue 1979)), first degree forcible sexual assault (Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1979)), arson in the first degree (Neb. Rev. Stat. § 28-502 (Reissue 1979)), and burglary (Neb. Rev. Stat. § 28-507 (Reissue 1979)). Attempted murder, first

degree forcible sexual assault, and arson are Class II felonies punishable by imprisonment for 1 to 50 years, and burglary is a Class III felony punishable by imprisonment for 1 to 20 years, a fine of $25,000, or by both such imprisonment and fine. See Neb. Rev. Stat. § 28-105(1) (Reissue 1979).

After a preliminary hearing, Dillon was bound over to district court for trial on the four felony charges. However, as the result of a plea bargain, Dillon entered his nolo contendere plea to the charge of first degree forcible sexual assault, and the State dismissed the other felony counts in the information—attempted murder, arson, and burglary. The district court accepted Dillon's plea of nolo contendere and ordered a presentence investigation and report.

As reflected in the presentence report, the victim and her friends met Dillon at the Sweetwater Lounge in Superior on the evening of October 31, 1984. The victim did not know Dillon before that evening, and participated in casual conversation with Dillon and her friends at the Sweetwater. Around 1 a.m. on November 1, the victim left the Sweetwater and drove alone to her rural home located approximately 8 miles from Superior. During her drive home, the victim noticed that a car had been following her from Superior, but that automobile drove past the victim's house when the victim turned her vehicle into the residence's driveway. The victim went to bed, fell asleep, and was awakened by a noise around 2:30 a.m. While the victim was investigating the noise, Dillon "kicked in" the kitchen door of the victim's house and entered the home, where he brutally and sexually assaulted the victim. The victim's last recollection of that event was Dillon's choking her until she lost consciousness.

A motorist en route to work at 3:30 a.m. saw flames coming from the victim's house. After knocking on a door of the victim's house without response, the passerby went to a neighboring farm, from which the fire department was called. The neighbor and the motorist returned to the victim's burning house, searched, and discovered the victim inside the smoke-filled house, still unconscious. The neighbor and the motorist removed the victim from the burning building, and the fire department arrived. The victim was transported by ambulance to a local hospital, where she regained

consciousness and was confined for 7 days.

The State Fire Marshal's office investigated the fire and concluded that the fire was not accidentally caused but was "intentionally set" and was "arson." Further investigation disclosed that telephone lines into the victim's house had been "jerked out" or cut and confirmed that the kitchen door of the victim's residence had been forcibly opened.

Dillon was arrested on November 1 and was found to be in possession of a 16-gauge shotgun belonging to the victim and in the victim's house at the time of the assault. In his conversation with the probation officer who prepared the presentence report, Dillon mentioned being at the scene of the fire and "pulling the firehose off the road so that the ambulance could get by when it left." A clinical psychologist and a psychiatrist, at the district court's request, examined Dillon and reported that he was not a mentally disordered sex offender. See Neb. Rev. Stat. §§ 29-2911 to 29-2915 (Reissue 1979).

Dillon, 36 years old and unmarried, appeared for sentence by the district court which had reviewed the presentence report. Dillon had a seventh-grade education, had worked as a laborer on oil rigs and in construction work, and had been previously convicted of the crime of burglary and sentenced to 1 year in the Nebraska Penal and Correctional Complex. At the sentence hearing Dillon's lawyer objected to part of the presentence report, namely, an affidavit from a Kansas woman who stated that, in August 1983, she was forcibly sexually assaulted by Dillon. Regarding that affidavit, Dillon's lawyer objected as follows:

> One thing I do object to, Your Honor, is the inclusion in the presentence report of an affidavit from [the Kansas woman] that's with regard to another matter about a year and a half ago, I believe. Mr. Dillon categorically denies that the facts in that affidavit are true as presented to the court.

When asked whether he had anything to say about the woman's affidavit, Dillon responded: "[T]here ain't a god damn bit of truth in that." After considering the presentence report, the court sentenced Dillon to imprisonment for 16 to 49 years in the Nebraska Penal and Correctional Complex.

As an alleged error, Dillon claims ineffective assistance of counsel in reference to inclusion of the Kansas woman's affidavit in the presentence report considered by the court in determining the sentence imposed on Dillon. See, U.S. Const. amend. VI; Neb. Const. art. I, § 11. Before disposing of Dillon's allegation of ineffective assistance of counsel at the sentence hearing, we note that the Nebraska Evidence Rules do not apply at a sentence hearing. See Neb. Evid. R. 1101(4)(b) (Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 1979)).

One alleging ineffective assistance of counsel has the burden of establishing incompetency of counsel and, further, demonstrating in what manner inadequacy of counsel was prejudicial. *State v. McNitt*, 216 Neb. 837, 346 N.W.2d 259 (1984).

In *State v. Goodpasture*, 215 Neb. 341, 344-45, 338 N.W.2d 446, 449 (1983), this court observed:

> "It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion in the sourse [sic] and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. In gaining this information, the trial court may consider reports of probation officers, police reports, affidavits, and other information including his own observations of the defendant. A presentence investigation has nothing to do with the issue of guilt. The rules governing due process with respect to the admissibility of evidence are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue. . . ."

Citing and quoting from *State v. Rose*, 183 Neb. 809, 164 N.W.2d 646 (1969).

In *State v. Porter*, 209 Neb. 722, 723, 310 N.W.2d 926, 927 (1981), we stated:

> By the very nature of a presentence investigation report, it is necessary to rely to a great extent upon hearsay

> information. Furthermore, § 29-2261(3) provides in part that a presentence investigation and report shall include "any other matters that the probation officer deems relevant or the court directs to be included." We have held on numerous occasions that before pronouncing sentence a trial judge has broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute.

The district court was informed in a diplomatic and not so diplomatic manner concerning the nature of Dillon's objection to the affidavit as a part of the presentence report. In view of the objection to the affidavit, an objection which we construe to be directed to the relevancy of the affidavit, we conclude that Dillon's counsel protected Dillon's interests and rights attendant to a sentence hearing. Moreover, use of an affidavit for the purpose of sentencing is not objectionable, provided the affidavit contains information relevant to a sentence to be imposed. See *State v. Goodpasture, supra*. Whether the affidavit in the present case contained irrelevant information, we need not decide, for there is no indication that the sentencing judge considered the affidavit in determining the sentence imposed on Dillon. We believe, based on analogous application of a principle long established in Nebraska, the district court disregarded irrelevant information, if any, contained in the affidavit in question. Cf. *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985) (appellate application of the principle or "presumption" that a trial court considers only relevant and admissible evidence in a bench trial). Cf., also, *State v. Tomes*, 218 Neb. 148, 352 N.W.2d 608 (1984). Dillon's claim of ineffective assistance of counsel is without merit.

Dillon's next assignment of error is that the court abused its discretion by imposing an excessive sentence of imprisonment. At the sentence hearing Dillon's lawyer remarked that Dillon "did assist in some small way with moving the fire hoses or something else while [the victim] was being moved from the house." During oral argument before this court, counsel reiterated Dillon's assistance in curtailing the conflagration and commented: "I think there is also evidence in the record that

Mr. Dillon stayed near the house afterwards . . . he assisted the fire department and did assist the ambulance personnel that did arrive." Given the nature of the circumstances surrounding the sexual assault, such as Dillon's forcible entry into the victim's home in the middle of the night, his choking the victim until she lost consciousness and leaving the unconscious and injured victim alone in an isolated and burning house, and his Nero-like conduct in fiddling around while the home burned with the victim inside, we cannot say that the district court abused its discretion in sentencing Dillon to imprisonment for the term specified. The brief glimmer of Dillon's civic assistance in moving a firehose is minuscule, when measured against the enormity of the crime committed by Dillon and its surrounding circumstances. The atrocity annihilates assistance as any availing aspect affecting the extent of the sentence to be imposed in this case. The sentence imposed on Dillon, imprisonment for 16 to 49 years, is within the statutory limits. This court has consistently held that, in the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal. See *State v. Last*, 212 Neb. 596, 324 N.W.2d 402 (1982). We find no abuse of discretion regarding the sentence imposed in this case. Dillon's contention that the sentence is excessive is meritless.

AFFIRMED.

CONAGRA, INC., APPELLEE AND CROSS-APPELLANT, V. CARGILL, INCORPORATED, CARGILL HOLDINGS, INCORPORATED, AND MBPXL CORPORATION, APPELLANTS AND CROSS-APPELLEES.

382 N.W.2d 576

Filed March 7, 1986. No. 83-849.

1. **Corporations.** A corporate director must act in the best interests of shareholders and is obligated to the duties of fidelity, good faith, and prudence with respect to the interests of security holders, as well as the duty to exercise independent judgment with respect to matters committed to the discretion of the board of directors and lying at the heart of the management of the corporation. These

duties are applicable to a director's acts in recommending a proposed merger.

2. _____. In the context of a proposed merger, a director has a duty under Del. Code Ann. tit. 8, § 251(b) (rev. 1974), to act in an informed and deliberate manner.
3. _____. A director's duty to inform himself or herself in preparation for a decision derives from the fiduciary capacity in which he or she serves the corporation and its shareholders.
4. _____. Since a director is vested with the responsibility for the management of the affairs of the corporation, he or she must execute that duty with the recognition that he or she acts on behalf of others. Such obligation does not tolerate faithlessness or self-dealing.
5. _____. Even if the board of directors enters into a contract containing a lockup provision, the agreement must not infringe on the voting rights of shareholders or chill the bidding process.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with directions.

Fredric H. Kauffman and David R. Buntain of Cline, Williams, Wright, Johnson & Oldfather, for appellants.

John E. North and Leo A. Knowles of McGrath, North, O'Malley & Kratz, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, SHANAHAN, and GRANT, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

This appeal from the district court for Douglas County arises out of a corporate takeover battle between the plaintiff, ConAgra, Inc., and the defendant Cargill, Incorporated, to acquire a "target company," MBPXL Corporation. The following facts surrounding this litigation are uncontroverted by the parties. Further facts will be discussed in greater detail as they are applicable to individual assignments of error.

The plaintiff, ConAgra, is a publicly owned corporation with its stock listed on the New York Stock Exchange. Cargill and its wholly owned subsidiary, Cargill Holdings, Incorporated, are privately held corporations. Prior to its acquisition, the target company, MBPXL, was also a publicly held corporation with its stock traded on the New York Stock Exchange. All three corporate parties are corporations organized under the laws of the State of Delaware.

In July 1978 ConAgra and MBPXL management representatives met to discuss a potential stock merger between the two companies. On August 11, 1978, management representatives of MBPXL and ConAgra signed a "letter of intent" proposing a merger of the two companies. On August 16, 1978, the board of directors of MBPXL rejected this letter of intent. A second letter of intent, approved by the respective boards of ConAgra and MBPXL and setting forth the terms of the proposed merger, was executed by the presidents of MBPXL and ConAgra on September 28, 1978. From September 28 through October 17, 1978, representatives of ConAgra and MBPXL conducted negotiations of the proposed merger. In September 1978 representatives of Cargill met with MBPXL representatives to discuss a possible acquisition of the company by means of a cash purchase of MBPXL stock. On October 11 and 12, 1978, Cargill representatives toured MBPXL's major plant facilities. On October 16, 1978, ConAgra's board of directors, pursuant to its resolution, approved an "Agreement and Plan of Reorganization and Merger." On October 17, 1978, the board of directors of MBPXL approved the agreement, and a copy was duly executed by both parties.

On November 14 Cargill Holdings entered into 14 separate agreements with certain shareholders of MBPXL, who included Messrs. Howard N. Marcus and Jerome D. Marcus, officers and directors of MBPXL. Pursuant to these contracts, Cargill Holdings acquired outright 21.9 percent of MBPXL's outstanding shares of common stock and agreed to acquire another 4.5 percent on January 3, 1979. On November 16 and 27, and December 5, 1978, the board of directors of MBPXL met to discuss the ConAgra merger agreement, the proposed Cargill tender offer, and related matters. On December 7, 1978, Cargill Holdings commenced its tender offer in which it agreed to begin purchasing shares on December 27, 1978. By January 24, 1979, Cargill had acquired approximately 92.5 percent of the outstanding MBPXL common stock. Upon the merger's becoming effective the separate corporate existence of Cargill Holdings terminated. On March 1, 1979, Cargill Holdings was merged into MBPXL corporation and has since operated as a

wholly owned subsidiary of Cargill, Incorporated.

The record reveals that on November 21, 1978, ConAgra commenced an action in equity to restrain Cargill and Cargill Holdings from alleged tortious interference with the ConAgra-MBPXL merger agreement. On that same day the district court judge entered a temporary restraining order against the defendants. Following a full hearing on the matter, the district court entered a preliminary injunction enjoining the defendants "from tortiously interfering with the contractual relations between the Plaintiff and MBPXL Corporation." Nothing in the temporary injunction prevented the defendants from proceeding with a proposed tender offer for the stock of MBPXL; however, the district court enjoined the defendants from "selling, disposing of, encumbering or otherwise transferring said stock, until further order of this Court."

ConAgra later amended its petition, joining MBPXL as a party defendant and alleging that MBPXL was part of a conspiracy to interfere with the merger agreement and that MBPXL had breached that agreement. The defendants demurred to the amended petition on the grounds of improper joinder of contract and tort claims and parties defendant. The defendants' special demurrers were overruled.

Following extensive discovery, in November of 1979 the parties moved for partial summary judgment with respect to the issue of liability. After examining the pleadings, voluminous depositions, and exhibits, the district court, on April 10, 1980, concluded that no genuine issue of fact with respect to liability existed, entered a partial summary judgment in favor of the plaintiff, and denied the defendants' motion for partial summary judgment. The defendants subsequently moved the court to reconsider or make specific findings of fact, which motion was overruled. On September 30, 1981, the court determined that the case should proceed to trial as an equitable action, thereby denying the defendants' request to transfer the case to the law docket. Prior to trial, the case was transferred to a different district court judge, and the defendants renewed their motion to vacate the partial summary judgment or make specific findings of fact. These motions were again denied. Beginning on August 16, 1982, the district court held a 4-week

trial on the issues of proximate cause and damages. On October 3, 1983, the district court entered its decree and judgment against the defendants Cargill and MBPXL and awarded ConAgra $15,996,000 in damages. The defendants' subsequent motion for new trial was overruled on October 21, 1983.

The defendants appeal to this court and have assigned numerous errors relating to the pretrial rulings, partial summary judgment, and final decree rendered by the district court. For our purposes we need only discuss whether the district court was in error when it found that the respective corporations were liable to ConAgra because of MBPXL's failing to use its best efforts to bring about the proposed merger with ConAgra.

The "target" of two corporate bidders in this case was MBPXL, an integrated slaughterer and fabricator of beef products and byproducts. The corporation was formed in 1974 through the merger of Missouri Beef Packers, Inc., of Amarillo, Texas, and Kansas Beef Industries, Inc., of Wichita, Kansas. Since the merger of these two companies with their combined slaughter and fabrication facilities, MBPXL grew to be the second largest processor in the boxed beef industry, behind Iowa Beef Processors, the recognized leader in this highly competitive industry.

ConAgra is an Omaha-based, diversified, basic foods company with both domestic and international operations. As of its fiscal year ending May 29, 1977, ConAgra and its subsidiaries had total assets of $143,259,373, and stockholders' equity of $66,136,678. The consolidated net earnings of ConAgra for its fiscal year ending May 29, 1977, were $12,831,140.

Cargill is headquartered in Minneapolis, Minnesota, and is a privately held company engaged principally in the warehousing, transporting, merchandising, and processing of agricultural commodities. As of its fiscal year ending May 31, 1978, Cargill and its subsidiaries had total assets of approximately $3,252,315,000 and stockholders' equity of approximately $1,177,763,000. For the fiscal year ending May 31, 1978, the consolidated net income of Cargill was approximately $121,429,000.

ConAgra and Cargill are competitors. Approximately 90 percent of ConAgra's products are in competition with those of Cargill. In 1978, after careful study and evaluation, both ConAgra and Cargill concluded that MBPXL was the most attractive merger candidate for entrance into the boxed beef industry. In early 1978 ConAgra began contemplating entrance into the boxed beef industry and retained Lehman Brothers Kuhn Loeb, Incorporated, an investment banking firm, to discover potential merger candidates. However, it was not until July 1978 that officials from ConAgra initially met with representatives of MBPXL to discuss the possibility of a merger with ConAgra. Following this meeting, Messrs. Charles M. Harper and David La Fleur, the respective presidents of ConAgra and MBPXL, met again in Omaha.

On August 9, 1978, Messrs. Harper and La Fleur, along with Messrs. Melvin Rolf and Erving Priceman, the chairman and vice chairman of the board of MBPXL, held another meeting and agreed to meet in Kansas City within a few days with their lawyers and investment bankers to attempt to draw up an agreement in principle. On August 10, 1978, the executive committee of MBPXL's board of directors met and authorized Messrs. Rolf, La Fleur, and Priceman "to continue discussions with Con Agra" toward reaching such agreement. On August 11, 1978, an initial letter of intent was signed by Messrs. Harper and La Fleur, outlining the terms of agreement in principle. Under this initial agreement each shareholder of MBPXL was to receive, in exchange for one share of MBPXL common stock, seven-eighths of one share of ConAgra common stock plus one thirty-second of one share of ConAgra preferred stock. On August 14, 1978, the proposed merger was publicly announced by the parties.

On August 16, 1978, the board of directors of ConAgra met and approved the "Letter of Understanding" executed on August 11, 1978, between ConAgra and MBPXL. That same day, the board of directors of MBPXL also met and resolved "that MBPXL Corporation not pursue further negotiations with ConAgra, Inc. and to terminate any and all such merger negotiations immediately," and that the company would publicly announce the same.

Since November 1976, Cargill had been studying the U.S. beef processing industry. Cargill became particularly interested in MBPXL after the publicity that ensued following the breakdown in negotiations between ConAgra and MBPXL. On August 24, 1978, two internal memos were circulated among top Cargill executives, expressing an interest in acquiring MBPXL and recommending possible contact with the company through its lead bank, Chase Manhattan, to Mr. Samuel Marcus, a retired former officer and director of MBPXL.

However, in mid-August and early September 1978 negotiations began again between ConAgra and MBPXL. Pursuant to these revived negotiations, ConAgra increased its offer for MBPXL and proposed an exchange offer of MBPXL common stock one-for-one for ConAgra stock.

On September 14, 1978, the merger and acquisitions committee of MBPXL met and agreed to recommend to the corporation's executive committee that an investment banking firm be hired to determine the comparative value of the corporation were it to be sold in its entirety. Following this recommendation, the executive committee met the same day and resolved to retain the investment banking firm of Blyth Eastman Dillon & Co., Incorporated (hereafter referred to as BEDCO).

On September 21 representatives of BEDCO contacted Cargill and inquired whether it would be interested in MBPXL. In the notes of Mr. Benjamin S. Jaffray, vice president-finance and treasurer of Cargill, it appears that the September 21 conversation with BEDCO was in response to Cargill's inquiry of MBPXL's bank, Chase. During the conversation, it was conveyed to Mr. Jaffray that MBPXL was "not for sale" but that its president, Mr. La Fleur, considered it his responsibility to talk with anyone who might be interested in the company. Mr. Jaffray's notes also indicate that he was informed that the MBPXL board of directors would be meeting in a week, apparently to discuss the ConAgra proposal, and that if Cargill was truly interested, it would have to act quickly. Notes from the conversation also evince that certain MBPXL shareholders would be amenable to a "cash deal."

On September 25 BEDCO representatives again talked with

Mr. Jaffray and indicated that it would be better if Cargill officials met with MBPXL prior to September 28. Accordingly, on September 26, 1978, Cargill officials met in Wichita with Messrs. La Fleur and Rolf of MBPXL and Mr. Stanton of BEDCO. At that meeting Cargill officials expressed their interest in the boxed beef industry, and the parties generally discussed its strengths and weaknesses. During the meeting, the parties apparently discussed "what Cargill would do for MBPXL or could do for MBPXL," but Cargill officials "left that meeting with no real feeling about whether or not it would be appropriate or even possible for Cargill to proceed with any kind of attempted acquisition." Again, before the conclusion of the meeting, Mr. Stanton told Cargill officials that if they were interested, they should take action before September 28, the scheduled date of MBPXL's next board meeting.

On September 27 Messrs. Jaffray and Stanton had another phone conversation about the possible acquisition of MBPXL. Mr. Stanton indicated that Mr. La Fleur was favorably impressed with Cargill but that a $27- to $30-per-share cash tender offer "won't fly," versus a "$25 stock tax free transaction."

That same day, MBPXL officials met informally with their BEDCO advisers. Although not all the MBPXL directors were present, those present, including Messrs. Howard Marcus and Jerome Marcus, were informed of the meeting with Cargill and of that company's possible interest in MBPXL.

However, as stated earlier, on September 28, 1978, ConAgra and MBPXL entered into a second letter of intent, confirming "the general understanding reached concerning the possible combination" of ConAgra and MBPXL. The letter was executed jointly by Mr. Harper, ConAgra's chief executive officer, and Mr. La Fleur, president of MBPXL, and contemplated the further negotiations of a "Definitive Agreement and Plan of Reorganization and Merger." The second letter of intent was duly approved by both boards of directors. The signing of the second letter of intent was also well publicized.

Following the signing of the second letter of intent, however, Cargill's interest in MBPXL did not abate. On September 28

Mr. Nau from BEDCO telephoned Mr. Jaffray. Mr. Nau indicated at that time that Mr. Stanton had been unable to delay MBPXL board action and that if BEDCO were to do anything on Cargill's behalf, any offer by Cargill would have to be above $25 per share.

In late September or early October, Cargill retained both the investment banking firm of The First Boston Corporation and the New York law firm of Skadden, Arps, Slate, Meagher & Flom for financial and legal advice concerning the possible acquisition of MBPXL.

On October 5, 1978, Cargill's interest in MBPXL was formalized through a letter from Mr. Cargill MacMillan, Jr., Cargill's senior vice president, to Mr. La Fleur. The letter was evidently a followup to a phone conversation the two men had had earlier that day. During their phone conversation, Mr. La Fleur told Mr. MacMillan that, in his opinion, an offer of $27 per share would not "draw flies" and also that he felt that because MBPXL had signed a letter of intent with ConAgra, the company had an obligation to carry it out. Mr. MacMillan's letter stated that he and Cargill's president, Mr. M.D. McVay, were prepared to recommend to Cargill's board of directors that it approve the acquisition of MBPXL at $27 per share in cash if Mr. La Fleur indicated to Cargill that the MBPXL board would support the proposal. The letter further indicated that if there was mutual interest, Cargill would expect to be in a position to make a formal proposal no later than October 17, 1978, and also requested a tour of MBPXL facilities.

In the meantime, on October 5, 1978, a memo was circulated among MBPXL and ConAgra officials setting forth the timetable for the merger. The memo set the date of October 17, 1978, for distribution of the merger agreement to MBPXL's and ConAgra's directors.

By October 5, 1978, both ConAgra and Cargill were keenly aware of the other's interest in MBPXL. An internal memo circulated at Cargill on October 5 to its board of directors indicates that Cargill was aware of the ConAgra-MBPXL agreement. This memo also indicated that, in Cargill's view, MBPXL could be acquired based on a competing offer of $27 to $30 per share. Another internal memo, captioned "MBPXL

Tactics," was circulated at Cargill on October 10, 1978, outlining the presumed ConAgra selling points to MBPXL and detailing Cargill's counterpoints. A portion of this memo was specifically entitled "Strategy to cause Con Agra to drop out of the bidding." In part the memo stated: "The range of any competing offer on our part is so narrow that presumably we will only be able to make one bid. As a consequence, it should be high enough to force Con Agra out of the bidding, but should be no more than necessary to get the job done."

Throughout early October, ConAgra and MBPXL engaged in negotiations concerning the language of the merger agreement. Of particular concern to MBPXL in the drawing of the final agreement was the language concerning the right of MBPXL to consider other offers of more substance if they were to appear. The initial draft prepared by ConAgra's counsel and presented to MBPXL's general counsel contained language which "appeared to obligate the MBPXL Board to recommend a merger with ConAgra, irrespective of whether MBPXL received any other offer to merge or be acquired." Concerned about this language, Mr. Williams, MBPXL's counsel, consulted with a law firm in Houston, Texas, experienced with similar merger agreements, for suggestions on possible language which would achieve MBPXL's purpose. Using modifying language suggested by the Houston firm, Mr. Williams sent the following proposed provisions to ConAgra's counsel:

> From the date hereof until the effective time of the merger, MBPXL will not, without the prior written consent of ConAgra, approve or recommend to the holders of any shares of its capital stock, any merger, consolidation, disposition of all or substantially all of its business properties or assets, any tender offer, acquisition, or other business combinations, or furnish or cause to be furnished any information concerning its business properties or assets to any party in connection with any tender offer or 'other takeover' transaction involving it, except insofar as may be required by law, *or necessary in the opinion of its counsel, Messrs. Vincent,* [sic] *Elkins, Houston, Texas, to avoid possible liability of its directors*

or officers to the holders of its capital stock.

(Emphasis supplied.) Messrs. La Fleur and Harper discussed this language and agreed that the emphasized provision be deleted so as not to make MBPXL's obligations rest on the determination of the Houston law firm.

Around October 14, 1978, ConAgra's counsel prepared another draft, which contained the following "no merger" clause:

> No Merger. From the date hereof until the Effective Time of the merger, MBPXL will not, without the prior written consent of ConAgra, approve or recommend to the holders of any shares of its capital stock, any merger, consolidation, disposition of all or substantially all of its business, properties or assets, any tender offer, acquisition or other business combination, or furnish or cause to be furnished any information concerning its business, properties or assets to any party in connection with any tender offer or other "takeover" transaction involving it, except insofar as may be required by law.

This provision was inserted because of ConAgra's desire to avoid becoming involved in a "bidding contest" for MBPXL. However, by deleting the emphasized language, the revised provision completely altered MBPXL's purpose in seeking to avoid binding its directors in the event a better offer appeared.

During the afternoon of October 16, Mr. Williams met with Messrs. Olson and Bacon of MBPXL's counsel, Shook, Hardy & Bacon. The three gentlemen agreed that the "no merger" clause was unacceptable to MBPXL. Mr. La Fleur was informed of his counsel's opinion and related it to Mr. Harper. The next day, negotiations between ConAgra and MBPXL continued. ConAgra's counsel ultimately agreed to delete the "no merger" clause and substitute instead a "best efforts" clause which read in part:

> Best Efforts. The respective Boards of Directors and principal officers of each of ConAgra and MBPXL shall take all such further action as may be necessary or appropriate in order to effectuate the transactions contemplated hereby including recommending to their respective shareholders that the merger be approved;

> provided, however, *nothing herein contained shall relieve either Board of Directors of their continuing duties to their respective shareholders.*

(Emphasis supplied.) After these changes were made in the draft of the agreement, Mr. Williams went into a specially convened MBPXL board meeting. Following some discussion, the MBPXL board unanimously approved the definitive merger agreement. After the meeting Messrs. Williams and La Fleur flew from MBPXL headquarters to Omaha, where the final agreement was signed and executed.

Besides this change, the final agreement further provided:

> The Board of Directors of MBPXL will duly call and use its best efforts to cause to be held a special meeting of the shareholders of MBPXL on December 15, 1978, or the earliest practicable date thereafter, and has directed that this Agreement and the Merger Agreement be submitted to a vote at such meeting, and will recommend that the shareholders of MBPXL vote in favor of approval of this Agreement and the Merger Agreement.

During the negotiations leading up to the signing of the merger agreement, Cargill remained interested in MBPXL. On October 11, 1978, several Cargill officials toured a part of MBPXL's plant facilities. Cargill also had several discussions with its investment bankers, First Boston, regarding the acquisition. Basically, Cargill developed two strategies by which to acquire MBPXL: (1) negotiate with the major groups of MBPXL's shareholders (e.g., Marcus, Fulton, and Brown); or (2) make a cash tender offer for any and all outstanding shares.

On or about October 16, 1978, Mr. Stanton of BEDCO informed Cargill that it should be prepared to make an offer within the next 2 days, before the merger agreement with ConAgra was signed. Cargill representatives, through Mr. Weiksner, conveyed a proposal to Mr. Stanton of $30 per share if MBPXL would assume the liability, if any, for pending antitrust litigation.

This proposal, along with the October 5 letter of Mr. MacMillan to Mr. La Fleur, was considered by MBPXL's board at the October 17 special meeting. However, on the advice of Mr. Stanton and legal counsel, the board concluded that at that

time it had no firm offer from Cargill to consider.

On October 18, 1978, BEDCO released its opinion to the MBPXL board of directors that the terms of exchange for MBPXL common stock as set forth in the agreement and plan of reorganization and merger were fair and equitable to MBPXL's stockholders. On October 20 an internal memo was circulated among Cargill directors outlining "key considerations of acquiring an interest in MBPXL Corporation." The memo set forth a timetable by which Cargill would approach the major shareholders to purchase their shares; help them with potential tax problems; inform MBPXL's board, through a letter, of Cargill's interest; and shortly thereafter make a public announcement of the proposed tender offer. The memo does not, however, mention the signing of the MBPXL-ConAgra merger agreement, although it does mention as a variable to be considered in its own offer a "price which realistically preempts a competing bid by Con Agra."

Nevertheless, on October 23, 1978, Cargill's board of directors met and decided to "make no effort to acquire MBPXL at this time." This decision was not communicated to MBPXL.

Meanwhile, that same afternoon, Mr. Howard Marcus, a director and stockholder of MBPXL, called Mr. Cargill MacMillan and left a message indicating that he was a "stockholder of MBPXL." When Mr. Marcus later reached Mr. MacMillan, he told him that he was calling in his capacity as a stockholder and inquired whether Cargill still had any continuing interest in "acquiring MBPXL." Mr. Howard Marcus, his father, Samuel, and brother, Jerome, aside from their respective roles as officers and directors, were significant shareholders in MBPXL.

While Mr. MacMillan testified that, during their phone conversation, Mr. Marcus said he was representing the Marcus family, Mr. Marcus himself maintained that he was only speaking for himself and for no other member of the family. In deposition testimony Howard Marcus did not recall indicating to Mr. MacMillan that a definitive agreement between MBPXL and ConAgra had been executed. However, Mr. Marcus did agree that the merger agreement was "public knowledge."

Further, Mr. MacMillan's notes, taken during the conversation, contain a notation that read, "60 day Mid to late Dec." According to Mr. MacMillan, this note referred to "the date or the time when the ConAgra MBPXL merger would be completed." Mr. Marcus then suggested that the two get together. The purpose of such a meeting, according to Mr. MacMillan's deposition, was Cargill's acquisition of MBPXL.

Their interest in MBPXL now rekindled, four Cargill representatives met on November 1 in Wichita, Kansas, with Messrs. Howard, Jerome, and Samuel Marcus and their attorney. At this meeting Cargill's general counsel announced that the sole purpose of the meeting with the Marcus family members was "as shareholders" and not in their capacity as directors or officers of MBPXL. The Marcuses indicated that this would not present any problems inasmuch as they apparently believed the proviso to the "best efforts" clause allowed them to enter into such discussions. The parties then discussed, according to Mr. Howard Marcus, "the attributes of MBPXL as a company and the direction we were going and why we thought *the company* was worth buying." (Emphasis supplied.) The parties also discussed a selling price for the shares of stock held by the Marcuses and the possible ramifications of that price in the antitrust litigation pending against MBPXL. At the conclusion of the meeting, Cargill's representatives said they would take this latest information back to their board for further discussion.

Meanwhile, throughout late October and early November, the ConAgra-MBPXL merger continued on schedule. On October 25, 1978, MBPXL's board met to determine its representatives on the combined board of directors. From October 25 through October 29, MBPXL representatives, including Messrs. Howard and Jerome Marcus, toured ConAgra plants in Alabama and Puerto Rico as part of the "due diligence" investigation. On October 26, 1978, however, ConAgra's board, still concerned about competition, authorized the purchase of MBPXL common stock "as a hedge against a cash tender offer by a third party."

On November 7 Messrs. Calvin Anderson and Heinz Hutter of Cargill phoned Mr. Howard Marcus and said that Cargill

had "agreed in principle" to make an offer in the lower range of the price figures discussed on November 1. On November 8 a telephone conversation was held between Mr. Anderson and Mr. Blaes, the Marcus family attorney, with Mr. James Moe, counsel for Cargill, present but not participating in the conversation. During this conversation, Cargill representatives questioned Mr. Blaes about whether Mr. Howard Marcus was "uneasy about being emissary to get major shareholders together." Mr. Blaes responded affirmatively.

On November 10 attorneys for the Marcuses and Cargill met to draft agreements for the sale of MBPXL stock by the Marcuses, their relatives, and close associates. On November 13 Cargill received a copy of a list of MBPXL shareholders from the Marcuses' attorney.

On November 14 the board of directors of Cargill Holdings, Incorporated, authorized its officers to execute contracts for the purchases of MBPXL stock at $27 a share. On that same day 13 individuals, including the Marcus families, Mr. Joe Kirk Fulton, another MBPXL director, and several of their associates met with Cargill representatives and executed agreements for either the immediate or deferred purchase of their shares of MBPXL. Through these agreements, Cargill acquired outright 21.9 percent of MBPXL's outstanding shares and agreed to acquire another 4.5 percent on January 3, 1979. Cargill was prevented from acquiring through purchase agreements the entire 26 percent of stock due to limitations imposed by federal law under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. See 15 U.S.C. § 18a. (1982). The purchase agreements provided in part that Cargill would "use its best efforts to make, as promptly as practicable and in accordance with all applicable laws, a tender offer (the 'proposed tender offer') for any and all MBPXL Common not then owned by Cargill, at a price of $27.00 per share, net to the Seller in cash."

On the evening of November 14, Messrs. McVay and La Fleur met, at which time Mr. La Fleur expressed his commitment to pursue the agreement between MBPXL and ConAgra. On November 15 Cargill publicly announced the stock purchase transaction and its intention to make a tender

offer to acquire the balance of MBPXL stock.

The following day, November 16, the MBPXL board of directors met in Wichita. At this meeting the board ratified its executive committee's appointments of members to a proxy committee for the stockholders' meeting to be held concerning the ConAgra merger. The board further decided to consider Cargill's announced intention to make a $27-per-share tender offer, and toward that purpose retained BEDCO for an analysis of the two proposals. By an 11-to-1 vote the board also suspended the Marcus brothers "of all duties and responsibilities as . . . officer[s] and employee[s] of the Corporation . . . pending further investigation of their participation in activities regarding the Merger Agreement with ConAgra, Inc. and the recent proposed tender offer by Cargill, Inc."

On November 20 MBPXL representatives met with Cargill representatives and generally discussed Cargill's intent regarding the future of MBPXL, its management, and control. On November 21, as previously stated, ConAgra commenced legal action against Cargill.

On November 27 the MBPXL board met again. Mr. Stanton of BEDCO advised the board that, in his opinion, the $27 offer from Cargill was superior to the ConAgra proposal. At the direction of one of the MBPXL attorneys, the board reviewed its various options:

> 1) proceed to recommend ConAgra, Inc. merger; 2) recommend Cargill, Inc. proposed tender offer; 3) proceed with proxy, etc. and shareholders meetings and present facts of both proposals; 4) a no action position by not proceeding with the ConAgra, Inc. merger and make no recommendation regarding the Cargill proposed tender offer at this time; 5) a continued review of the Cargill, Inc. proposed tender offer because of the financial and legal advice now before the Board and in view of the present market situation.

MBPXL's board decided to pursue the fifth option.

The board also discussed its potential liability under the merger agreement to ConAgra. Following this meeting, MBPXL's officers and directors were advised by their legal

counsel not to communicate with ConAgra unless the discussions concerned an increased offer from ConAgra. Mr. La Fleur called Mr. Anderson of Cargill that day and informed him that MBPXL had "agreed to more positively pursue Cargill offer."

On November 29, just prior to the full hearing on ConAgra's request for a preliminary injunction, Cargill's investment bankers and legal advisers met with MBPXL representatives Dods, Olson, and Stanton in Minneapolis. Notes taken at this meeting reveal that the participants discussed stock options, management positions, expansion of operations, the Marcus family, indemnification, the upcoming MBPXL board meeting on December 5, and the defense of lawsuits brought by ConAgra against the Marcuses and Cargill.

On December 1 these individuals again met with Messrs. McGrory and Anderson of Cargill. The Cargill memo of this meeting stated: "Again, at the end of the discussions it was reiterated that Cargill had not made an offer nor negotiated any type of agreement with MBPXL but had merely advised the gentlemen representing MBPXL of Cargill policies and practices with respect to a number of issues."

As previously stated, on December 4, 1978, a temporary restraining order was issued against Cargill, Incorporated, and Cargill Holdings, Incorporated. Also on December 4, Mr. Harper met with MBPXL representatives to discuss ConAgra's offer vis-a-vis that of Cargill. This same day, BEDCO issued its opinion to MBPXL that the Cargill offer was superior to ConAgra's and that "the proposed tender offer of $27.00 per share affords a higher present financial benefit to MBPXL shareholders than do the proposed merger terms offered by ConAgra."

On December 5, 1978, the MBPXL board of directors met and, upon further consideration of the options presented by legal counsel, unanimously approved the following resolutions:

> "RESOLVED, that as a result of the intensive investigation undertaken by management and its financial and legal advisors and in view of the fiduciary obligation of this Board to its shareholders, this Board of Directors cannot recommend to its shareholders that they vote in

favor of the proposed merger with ConAgra, Inc.;

"FURTHER RESOLVED, that in view of this decision that the shareholders meeting originally scheduled for December 15, 1978 be cancelled;

"FURTHER RESOLVED, that management and legal counsel be authorized to negotiate with ConAgra and its legal counsel a mutual termination of the Merger Agreement dated as of October 17, 1978;

"FURTHER RESOLVED, that this Board of Directors recommend to its shareholders that they accept the offer of $27.00 per share net to seller which Cargill, Inc. has indicated it would make in the immediate future, subject to the approval of the final terms of this offer being acceptable to a committee of the Board consisting of Messrs. Rolf and La Fleur with legal consultation."

Messrs. Howard and Jerome Marcus participated in this vote. The remaining pertinent facts are as stated in the introduction of this opinion.

To determine whether the district court correctly found the defendants MBPXL and Cargill liable to ConAgra for breach of contract or tortious interference with a contract, or both, we must, at the threshold, determine what obligation, if any, a board of directors has pursuant to a merger agreement prior to its approval by the shareholders. The resolution of this question turns upon a delicate interplay of principles of both contract and corporate law, neither wholly controlling the outcome.

The appellants assert that ConAgra has no claim to the "benefits" of the bargain because consummation of the merger agreement was dependent upon and subject to the approval of the shareholders of MBPXL and ConAgra. Applicable Delaware law provides that "[t]he board of directors of each corporation which desires to merge . . . shall adopt a resolution approving an agreement of merger or consolidation" and that the agreement adopted "shall be submitted to the stockholders of each constituent corporation . . . for the purpose of acting on the agreement." Del. Code Ann. tit. 8, § 251(b) and (c) (rev. 1974). Appellants further assert that the merger agreement was an executory contract "specifically drafted to permit the MBPXL Board to fulfill its fiduciary duty to the company's

shareholders." Brief for Appellants at 16. We believe that the appellants are correct in that regard.

A corporate director must act in the best interests of shareholders and is obligated to the duties of "fidelity, good faith, and prudence with respect to the interests of security holders, as well as the duty to exercise independent judgment with respect to matters committed to the discretion of the board of directors and lying 'at the heart of the management of the corporation.' " *Gt. West. Prod. v. Gt. West. United*, 200 Colo. 180, 186, 613 P.2d 873, 878 (1980). These duties are applicable to a director's acts in recommending a proposed merger. See *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). In the context of a proposed merger, a director has a duty under Del. Code Ann. tit. 8, § 251(b), to act in an informed and deliberate manner.

In *Jewel Companies v. Pay Less Drug Stores Northwest*, 741 F.2d 1555, 1564 (9th Cir. 1984), the court of appeals recognized that "after the merger agreement is signed a board may not, consistent with its fiduciary obligations to its shareholders, withhold information regarding a potentially more attractive competing offer." See, also, *Finklea v. Carolina Farms Co.*, 196 S.C. 466, 13 S.E.2d 596 (1941).

The Securities Exchange Act of 1934 places affirmative disclosure obligations on directors in a case such as this. See, e.g., 15 U.S.C. §§ 78j(b) and 78n(d) (1982) (commonly §§ 10(b) and 14(d)).

This court should not sanction "agreements which have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters." *Abercrombie, et al. vs. Davies, et al.*, 35 Del. Ch. 599, 611, 123 A.2d 893, 899 (1956), *rev'd on other grounds* 36 Del. Ch. 371, 130 A.2d 338 (1957). See, also, *Chapin v. Benwood Foundation Inc.*, 402 A.2d 1205 (Del. Ch. 1979). A danger inherent in a merger agreement which prevents submission of competing offers to the shareholders pending submission of a merger proposal is that a director might feel "bound to honor a decision rendered under the Agreement even though it was contrary to his own best judgment." *Abercrombie, supra*, 35 Del. Ch. at 610, 123 A.2d at 899.

The MBPXL board recognized the difficulty in such an agreement when it insisted upon replacing ConAgra's "no merger" clause with its own "best efforts" clause which was intended to allow MBPXL to consider competing offers. Specifically, the "best efforts" clause read:

> The respective Boards of Directors and principal officers of each of ConAgra and MBPXL shall take all such further action as may be necessary or appropriate in order to effectuate the transactions contemplated hereby including recommending to their respective shareholders that the merger be approved; provided, however, *nothing herein contained shall relieve either Board of Directors of their continuing duties to their respective shareholders.*

(Emphasis supplied.)

While the language before the proviso and the language after the proviso may be somewhat in conflict, it is clear that the parties recognized that there was a continuing fiduciary duty owed by each board of directors to its respective shareholders which could not be contracted away. In that regard we cannot imagine a greater duty owed to shareholders than advising them of the existence of a higher offer for their stock before asking them to approve a lower offer. The directors of MBPXL could not agree to assist ConAgra by pledging their best efforts if by doing so the directors of MBPXL violated their legal duties to the MBPXL shareholders. See *Gt. West. Prod., supra.* To hold otherwise would be to place innocent shareholders of a company at the mercy of corporate directors whom the shareholders rely upon for candor and fair dealing.

A director's duty to inform himself or herself in preparation for a decision derives from the fiduciary capacity in which he or she serves the corporation and its shareholders. See *Lutz, et al. vs. Boos, et al.*, 39 Del. Ch. 585, 171 A.2d 381 (1961). Since a director is vested with the responsibility for the management of the affairs of the corporation, he or she must execute that duty with the recognition that he or she acts on behalf of others. Such obligation does not tolerate faithlessness or self-dealing. See *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). Even if the board of directors enters into a contract containing a lockup provision, the agreement must not infringe on the voting rights

of shareholders or chill the bidding process. See *Thompson, et al. vs. Enstar Corp., et al.*, No. 7641, slip op. (Del. Ch. June 20, 1984, rev. July 5 & Aug. 16, 1984) (Hartnett, V.C.).

Whether the directors of MBPXL may have breached an enforceable agreement between ConAgra and themselves which might result in their personal liability to ConAgra is a matter we do not decide. That matter is not before us. But the directors could not enter into an agreement to violate their fiduciary obligations to their shareholders and then render the company and ultimately the shareholders liable for failing to carry out an agreement in violation of the directors' duty to the shareholders. To so hold, it would seem, would be to get the shareholders coming and going.

When the MBPXL board resolved to cancel the shareholders' meeting at which the ConAgra merger proposal was to have been submitted and instead recommended shareholder acceptance of the cash-out Cargill offer, that was not a breach of the ConAgra merger agreement. Once the directors of MBPXL learned of the competing Cargill offer, the "best efforts" clause in the ConAgra proposal could not relieve the MBPXL directors of their duties to act in the shareholders' best interests. They had an obligation at that point to investigate the competing offer, and if, in the exercise of their independent good faith judgment, they found that the Cargill offer was a better offer for the MBPXL shareholders, they were bound to recommend the better offer. *Gt. West. Prod. v. Gt. West. United*, 200 Colo. 180, 613 P.2d 873 (1980).

The MBPXL board's decision to investigate the Cargill tender offer was not a ratification of the Marcuses' acts as independent shareholders in seeking a better price for their shares. The board was obligated by its fiduciary duties to the shareholders to investigate the Cargill tender offer. *Gt. West. Prod., supra.*

The MBPXL board was without statutory power to bind the corporation to the proposed ConAgra merger absent shareholder approval. Del. Code Ann. tit. 8, § 251(c). Several courts have held that analogous agreements are without binding legal effect absent shareholder approval. In *Finklea v. Carolina Farms Co.*, 196 S.C. 466, 13 S.E.2d 596 (1941), the

court denied specific performance of an option agreement, which was subject to shareholder approval, to purchase the defendant company's land. The shareholders indicated that they would not approve the plaintiff's offer after they received information of a better offer from the defendant company's management. The court denied relief after concluding that the option agreement was not binding absent shareholder approval and that the agreement had not relieved management of its fiduciary obligation to inform the shareholders of a better offer.

Similarly, in *Masonic Temple, Inc., et al. v. Ebert*, 199 S.C. 5, 18 S.E.2d 584 (1942), the court denied specific performance to the plaintiff corporation which had contracted to sell substantially all of its property to the defendant, subject to shareholder approval. The defendant sent a letter canceling the transaction prior to the shareholder meeting, after learning that misrepresentations had been made about the property. Shareholder approval of the sale was obtained nevertheless. The court held that absent shareholder approval the agreement was a mere offer to sell, and the defendant, therefore, had a right to withdraw the offer until a contract was formed by shareholder acceptance. See, also, *American Cyanamid Co. v. Elizabeth Arden Sales Corp.*, 331 F. Supp. 597 (S.D.N.Y. 1971); *Smith vs. Good Music Station, et al.*, 36 Del. Ch. 262, 129 A.2d 242 (1957).

In holding that the plaintiff had enforceable rights in the October 17 agreement even without shareholder approval, the appellee relies on *Mid-Continent Telephone Corp. v. Home Telephone Co.*, 319 F. Supp. 1176 (N.D. Miss. 1970). The *Mid-Continent* court held that the merger agreement between the plaintiff and the defendant was valid and binding. Damages for breach of the contract were awarded. The *Mid-Continent* case is, however, distinguishable. The court in *Mid-Continent* recognized that the defendant corporation was closely held and that informal shareholder approval had been obtained. In effect, the court held that the formal requirements had been waived by the shareholders. Also, none of the conditions which the defendant claimed were precedent to the formation of a binding contract involved shareholder approval. In the present

case the ConAgra merger agreement was never formally or informally approved by the shareholders.

Under the circumstances in this case, the MBPXL board's fiduciary duties obligated it to withdraw its recommendation of the ConAgra proposal. *Gt. West. Prod., supra.*

Furthermore, it would appear that the evidence, such as it is, would have required the trier of fact to engage in speculation regarding the question of whether any action not taken by the board of directors of MBPXL could have been the proximate cause of any loss sustained by ConAgra. It is difficult to imagine that, presented the facts, the stockholders of MBPXL would have accepted the offer. Because, however, we have determined there was no liability, we need not address that issue further.

The plaintiff's motion for summary judgment should have been overruled, the defendants' motion for summary judgment sustained, and the petition dismissed.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissenting.

The majority opinion ignores basic principles of contract law which, if properly integrated with statutory corporate law, would have resulted in a partial affirmance of the district court's order. A "suitor" corporation now has no contractual rights with respect to actions by the board of a "target" corporation, despite agreements, as here, pledging only that the target's board of directors will use its best efforts to promote the merger with its shareholders. Because I do not agree with the majority's selective application of the law, I dissent.

At the height of negotiations between ConAgra and MBPXL, the latter proposed a "best efforts" clause for inclusion in the agreement. This clause reads:

> The respective Boards of Directors and principal officers of each of ConAgra and MBPXL shall take all such further action as may be necessary or appropriate *in order to effectuate the transactions contemplated hereby including recommending to their respective shareholders that the merger be approved*; provided, however, nothing herein contained shall relieve either Board of Directors of their continuing duties to their respective shareholders.

(Emphasis supplied.)

The agreement also states:

> The Board of Directors of MBPXL will duly call and use its best efforts to cause to be held a special meeting of the shareholders of MBPXL on December 15, 1978, or the earliest practicable date thereafter, and has directed that this Agreement and the Merger Agreement be submitted to a vote at such meeting, and will recommend that the shareholders of MBPXL vote in favor of approval of this Agreement and the Merger Agreement.

The MBPXL Corporation breached the promises contained in both paragraphs. The majority holds that the promisee is afforded no relief for those breaches. The majority mentions an inconsistency between the language before and after the proviso in the "best efforts" clause; however, a balanced application of contract and corporate law yields no inconsistency, and it respects the viability of both the business judgment rule and the duty of due care.

The language of the agreement allows the boards of both corporations seeking to merge or reorganize to enter into a binding contract governing the conduct of the parties pending submission of the agreement to the shareholders for approval. To view the language as the majority does circumscribes the role of corporate boards of directors in contravention of their traditional management function, the exercise of their business judgment. There is nothing unique about the decision to enter into a negotiated merger transaction that would warrant its removal from the realm of ordinary business affairs of the corporation, the management of which is entrusted to the board of directors. Indeed, consistent with its fiduciary duties, a board of directors is in the best position to provide guidance for shareholders of a corporation considering a buy-out or merger.

To adhere to the majority's position also ignores principles of contract law. A contract of this sort is properly interpreted as a binding agreement indicating a present undertaking, with the parties contemplating the satisfaction of certain further conditions before a duty to perform arises. *Mid-Continent Telephone Corp. v. Home Telephone Co.*, 319 F. Supp. 1176

(N.D. Miss. 1970). The critical distinction between this interpretation and that of the majority is the difference between a condition precedent which must be performed before the agreement of the parties becomes a binding contract and one which must be fulfilled before the duty to perform an existing contract arises. *Mid-Continent, supra.* See, also, *Omaha Public Power Dist. v. Employers' Fire Insurance Co.*, 327 F.2d 912 (8th Cir. 1964); Restatement (Second) of Contracts §§ 224-226 (1981).

The majority's interpretation does not agree with the language of the agreement at issue. Paragraph 9 of the "Agreement and Plan of Reorganization and Merger" provides:

> Conditions Precedent to Obligation of ConAgra. The obligation of ConAgra to perform and observe the covenants, agreements and conditions hereof to be performed and observed by ConAgra at or before the Effective Time of the Merger, and to effect the Merger, shall be subject to the satisfaction of the following conditions, which conditions may be waived in writing by ConAgra: . . . .

One of the conditions listed below this clause was the following: "MBPXL Shareholder Approval. . . . [T]he Merger Agreement shall have been approved by the shareholders of MBPXL as provided in the Delaware General Corporation Law." I interpret the conditions precedent in this agreement to mean those conditions which must be satisfied before the duty to perform on an existing contract arises, and not as conditions which must be satisfied before a binding contract exists at all.

The majority relies on case law either quoted out of context or entirely inapposite to the facts and law at issue. The majority uses *Gt. West. Prod. v. Gt. West. United*, 200 Colo. 180, 613 P.2d 873 (1980), in support of the proposition that a corporate director must act in the best interests of shareholders and is obligated to the duties of "fidelity, good faith, and prudence with respect to the interests of security holders, as well as the duty to exercise independent judgment with respect to matters committed to the discretion of the board of directors and lying 'at the heart of the management of the corporation.' "

Gt. West. Prod., supra at 186, 613 P.2d at 878. The majority also relies on that case for the proposition that directors of a target company cannot agree to assist the suitor company by pledging their best efforts if by doing so the directors of the target company violate their legal duties to target's stockholders. Finally, the majority asserts that *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), makes these duties applicable to a director's acts in recommending a proposed merger.

In *Gt. West. Prod., supra*, the Supreme Court of Colorado was required to interpret the obligations imposed by a "best efforts" clause. Great Western Producers Co-operative had agreed to buy all the stock of Great Western Sugar Company, a wholly owned subsidiary of Great Western United Corporation. Pursuant to lengthy negotiations, United and the co-op executed a purchase agreement, which was unanimously approved by United's board of directors. Because the sugar company was United's major asset, Delaware law required that the sale be approved by the corporation's stockholders. A clause in the agreement stated that "United will use its best efforts to obtain the approval of its shareholders and debentureholders whose approval is solicited." *Gt. West. Prod., supra* at 182, 613 P.2d at 875.

During the interval between the execution of the agreement and the shareholders' meeting, the price of sugar, the seller's principal commodity, rose dramatically. Considering the effect of this price change on the value of the corporation, United's board of directors informed its shareholders that it could no longer recommend the sale at the agreed price. The shareholders' meeting was held, and the sale failed due to insufficient votes. The co-op then sued for breach of the "best efforts" clause.

The Colorado Supreme Court concluded that the parties

> did not intend that the "best efforts" clause would impose on United's board of directors any obligation which would conflict with the directors' legal duties to the corporation's security holders. These duties include fidelity, good faith, and prudence with respect to the interests of security holders, as well as the duty to exercise independent judgment with respect to matters committed to the

> discretion of the board of directors and lying "at the heart of the management of the corporation."

(Citations omitted.) *Gt. West. Prod. v. Gt. West. United*, 200 Colo. 180, 186, 613 P.2d 873, 878 (1980). The court affirmed the decision of the state court of appeals, which had held:

> (1) the purchase agreement required United to exercise only its "best lawful efforts" to obtain security holder approval of the sale of the Sugar Company; (2) both federal and state law obligated United and its board of directors "to inform the security holders that, because of the change of circumstances [*i.e.*, the increases in sugar prices and profits and the corresponding increase in the value of the Sugar Company], they believed the terms for the sale of the Sugar Company were no longer fair and equitable"; and (3) the September 14, 1974, reversal in the recommendation of United's board of directors to its security holders could not therefore constitute evidence of a breach of the "best efforts" clause.

Id. at 184-85, 613 P.2d at 877. In determining that United's board of directors had not breached the "best efforts" clause, the Colorado Supreme Court reasoned:

> The "best efforts" obligation required that United and its board of directors make a *reasonable, diligent, and good faith effort to accomplish a given objective, viz.*, security holder approval of the purchase agreement. The obligation, however, must be viewed in the context of unanticipated events and the exigencies of continuing business development and cannot be construed to require that such events and exigencies be ignored or overcome at all costs. In short, the "best efforts" obligation was tempered by the directors' overriding duties under sections 141(a) and 271(a) of the "General Corporation Law of the State of Delaware."

(Emphasis supplied.) *Id.* at 186-87, 613 P.2d at 878-79. The court further found that the directors had "inquired into changed circumstances and determined, pursuant to the exercise of their independent good faith judgment, that the terms of the purchase agreement were no longer in the security holders' best interests." *Id.* at 187, 613 P.2d at 879.

Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), is inapposite on its facts alone. Van Gorkom was a corporate director engaged in negotiating a merger agreement without the knowledge or participation of the other board members. After the buy-out, which was recommended by the board and approved by a majority of the shareholders, the shareholders brought a class action suit, originally seeking rescission of the merger. The class sought alternative relief in damages against individual members of the board, the new corporation, and owners of the parents of the new corporation.

At issue in *Van Gorkom* was the liability of individual directors who failed to inform themselves and the stockholders of all information available and relevant to the proposed merger. The directors relied on the business judgment rule to validate their actions. Nevertheless, the court found that, under the circumstances, the directors were individually liable because they failed to inquire into the particulars of Van Gorkom's merger and because they failed to disclose, and in fact were not able to disclose, all material information that a reasonable stockholder would consider important in deciding whether to approve the offer. In an exacting look at the business judgment rule, the court determined that the directors had not fulfilled their fiduciary duty of due care and had failed to satisfy virtually every element of the business judgment defense.

A board of directors blindly following the lead of one director to the ultimate detriment of all shareholders is a far cry from the facts in this case. *Van Gorkom* dealt with a board wholly uninformed and apparently uninterested in the terms of the merger agreement. Nevertheless, it recommended the merger to the shareholders, and the shareholders followed the advice.

In this case all MBPXL directors were aware of the ConAgra proposal and participated in constructing the final agreement. The MBPXL board deprived its shareholders of the opportunity to decide which was the superior offer when it canceled the promised shareholders' meeting. Had the MBPXL board used its best efforts to hold the meeting, then, as required by Delaware law, the shareholders could have compared the merger terms and selected the superior arrangement. Indeed,

even if the MBPXL directors, pursuant to their fiduciary duties and statutory obligation to determine in an informed and deliberate manner whether to recommend the merger before submitting the proposal to stockholders, Del. Code Ann. tit. 8, § 251(b) (rev. 1974), had ultimately recommended Cargill's terms over ConAgra's, the board still would have been adhering to the terms of the "best efforts" clause.

This was precisely the situation in *Gt. West. Prod. v. Gt. West. United*, 200 Colo. 180, 613 P.2d 873 (1980), and in another case cited by the majority, *Jewel Companies v. Pay Less Drug Stores Northwest*, 550 F. Supp. 770 (N.D. Cal. 1982), *rev'd* 741 F.2d 1555 (9th Cir. 1984). In *Jewel* the plaintiff, Jewel Companies, Inc., and its subsidiary, Jewel Acquisition Corporation, entered into a merger agreement with Pay Less Drug Stores of Oakland, California (Pay Less Oakland). The agreement in *Jewel*, as in the instant case, provided for a tax-free exchange of stock and for the directors of Pay Less Oakland to use their "best efforts" to complete the merger. After the Jewel-Pay Less Oakland agreement was publicly announced, Pay Less Drug Stores Northwest (Pay Less Northwest) sought to acquire Pay Less Oakland through a competing cash tender offer. Because the Pay Less Northwest offer was worth more per share, $24 versus $14.75, Pay Less Oakland signed an agreement with Pay Less Northwest. Jewel failed to increase its offer, and Pay Less Oakland's board of directors unanimously recommended to its shareholders that they accept Pay Less Northwest's tender offer. The board's recommendation was placed before its shareholders along with a complete history of the two offers and relevant factors in the board's decision. Jewel then brought an action against Pay Less Northwest for tortious interference with contract.

The federal district court rejected the plaintiff's claims and granted the defendant's motion for summary judgment, commenting:

> While it is true that the Oakland Board of Directors agreed to use their best efforts to complete the merger, it is also true that Jewel and its shareholders did not have then, and do not have now, an unequivocal right to the benefits of the merger. The power to approve the merger rested

> with the Oakland shareholders, and the Jewel agreement imposed no duty on those shareholders to ratify the merger agreement.

Jewel, supra, 550 F. Supp. at 772. The court went on to find that the merger agreement itself was not a binding contract, since the shareholders, as offerees, were the only parties with the power to accept the contract. *Jewel, supra*, 550 F. Supp. 770. The court further commented that "[t]he marketplace is the proper forum to resolve competing tender offers." *Jewel, supra*, 550 F. Supp. at 773.

The ninth circuit reversed the holding of the district court in *Jewel*. In its decision the court of appeals first held that under the California Corporate Code the boards of directors of two corporations seeking to merge or reorganize "may enter into a *binding merger agreement governing the conduct of the parties pending submission of the agreement to the shareholders for approval*." (Emphasis supplied.) *Jewel, supra*, 741 F.2d at 1561. California's corporate code is quite similar in this regard to that of Delaware, the only difference being that board approval of the agreement need not necessarily precede shareholder approval. Cal. Corp. Code § 1001(a)(2) (West 1977). See Del. Code Ann. tit. 8, § 251.

The ninth circuit also held that, pending shareholder approval, a board may bind itself in limited areas to exert its best efforts to consummate a merger. Without delineating the full scope of a board's "best efforts" obligation, the court determined that the term does "include at a minimum a duty to act in good faith toward the party to whom it owes a 'best efforts' obligation." *Jewel, supra*, 741 F.2d at 1564 n.11. According to the court:

> The board can bind the corporation temporarily with provisions . . . which essentially require the board of the target firm to refrain from entering any contract outside the ordinary course of business or from altering the corporation's capital structure. Such provisions are intended, essentially, to preserve the status quo until the shareholders consider the offer.

Jewel, supra, 741 F.2d at 1564 n.12.

Like Cargill and MBPXL, the appellees in *Jewel* argued that

any contractual obligations a board of directors may have are always subject to its higher fiduciary duties to the shareholders of the corporation. The district court in *Jewel* had held that California corporate law mandated that corporate directors observe high standards of fiduciary duty with respect to shareholders, and when presented with another offer, the directors had a duty to compare the two offers and recommend the more attractive offer to the shareholders. *Jewel, supra*, 550 F. Supp. 770. However, the district court specifically reserved the question of whether the board of directors' fiduciary obligation required it to "*affirmatively* seek out other offers." *Jewel, supra*, 550 F. Supp. at 773 n.1.

In reversing the district court's decision, the ninth circuit acknowledged the validity and importance of fiduciary duties but concluded that a board may bind itself in a preapproval merger agreement without violating those duties. At the outset the circuit court recognized that a corporate board of directors "may not lawfully divest itself of its fiduciary obligations in a contract." *Jewel, supra*, 741 F.2d at 1563 (citing *Gt. West. Prod. v. Gt. West. United*, 200 Colo. 180, 613 P.2d 873 (1980)). The court also acknowledged the fact that "[e]ven after the merger agreement is signed a board may not, consistent with its fiduciary obligations to its shareholders, *withhold* information regarding a potentially more attractive competing offer." (Emphasis supplied.) *Jewel, supra*, 741 F.2d at 1564 (citing *U.S. Smelting, Refining, and Mining Co. v. Clevite Corp.*, [1969-1970 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,691 (N.D. Ohio 1968)). The circuit court also recognized:

> The shareholders retain the ultimate control over the corporation's assets. They remain free to accept or reject the merger proposal presented by the board, to respond to a merger proposal or tender offer made by another firm subsequent to the board's execution of exclusive merger agreement, or to hold out for a better offer.

Jewel, supra, 741 F.2d at 1564. Nevertheless, the circuit court concluded that, consistent with its fiduciary duties and pending shareholder approval, a board may bind itself in limited areas to exert its best efforts to consummate a merger.

The majority further suggests that the record would not

support an award of damages to ConAgra in any event because there was no evidence of proximate cause. ConAgra brought its cause of action against Cargill under a theory of tortious interference with the ConAgra-MBPXL contract, an intentional tort. To find Cargill liable for intentionally interfering with the ConAgra-MBPXL merger agreement, it must be shown that the actions of Cargill caused the interference and the loss. Prosser and Keeton on the Law of Torts, *Economic Relations* § 129 (5th ed. 1984) (interference with contractual relations). Causation with respect to intentional torts does not involve considerations of foreseeability or reasonableness, as is the case with proximate cause. See Restatement (Second) of Torts § 870, comments *c.* and *d.* (1979). As a general principle, liability for intended consequences will be found if the conduct of the party who intentionally causes the injury or loss is generally culpable and not justifiable under the circumstances. The Restatement, *supra* § 870.

Whether a defendant's actions will be considered the legal cause of a plaintiff's loss turns on more than the mere fact that the defendant has reaped the advantages of the broken contract. The defendant must have played a material and substantial role in causing the plaintiff to lose the benefits of the contract. Prosser and Keeton, *supra*. A defendant is considered to have actively participated in causing the breach of contract and the resulting damages when the defendant holds out to the third party incentives suggesting a better price or better terms. *Pure Milk Ass'n v. Kraft Foods Co.*, 8 Ill. App. 2d 102, 130 N.E.2d 765 (1955); *Cumberland Glass Mnf'g Co. v. DeWitt*, 120 Md. 381, 87 A. 927 (1913), *aff'd* 237 U.S. 447, 35 S. Ct. 636, 59 L. Ed. 1042 (1915).

Normally, it is a question of fact whether a defendant has played a material and substantial role in causing a plaintiff's loss of benefits of a contract. Prosser and Keeton, *supra*. Following the district court's entry of the partial summary judgment, a pretrial conference was held, and the district court concluded that the question of causation was among those issues remaining for trial.

The evidence presented at trial on this issue is enlightening,

considering that it consisted in part of testimony from Cargill's own expert witness. When asked by plaintiff's counsel to assume that the merger agreement had been executed and recommended by the boards and that no other party had made an intervening tender offer, whether the merger agreement would have gone through, Cargill's expert responded, "In my opinion it would have been overwhelmingly approved and would have gone through."

This testimony is consistent with that of ConAgra's expert witness, Mr. Peter Kennedy, and MBPXL's president, Mr. David La Fleur. Mr. Kennedy testified that, in his opinion, had the MBPXL shareholders been presented in December 1978 with the choices of tendering their shares for $27 each, exchanging their shares for shares of ConAgra stock pursuant to the agreement, or retaining their stock and doing nothing, the stockholders would have opted for ConAgra's terms because they offered the highest economic value. Similarly, Mr. La Fleur testified that, in his independent judgment, ConAgra's terms were better than Cargill's, in part because of tax ramifications of a cash deal. Mr. La Fleur also testified that in his discussions with other board members, none seemed to believe that Cargill's cash arrangement was worth more to MBPXL shareholders than the ConAgra shares would be after the merger with MBPXL.

In a de novo review where evidence is in conflict, this court gives weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts over the other. *Chalupa v. Chalupa*, 220 Neb. 704, 371 N.W.2d 706 (1985). Here, there is ample evidence to support the district court's finding that Cargill's interference in the contractual relations of ConAgra and MBPXL caused the breach and ConAgra's damages.

Based upon the majority's sweeping declaration of a board's fiduciary duties to its stockholders, it now appears that merger agreements, no matter how carefully drawn, are at best mere formalities, with no legal effect.

I agree with the statement in *Jewel Companies v. Pay Less Drug Stores Northwest*, 741 F.2d 1555, 1568-69 (9th Cir. 1984), which reads:

It is nowhere written in stone that the law of the jungle must be the exclusive doctrine governing sorties into the world of corporate mergers. The legitimate exercise of the right to contract by responsible boards of directors can help bring some degree of much needed order to these transactions.

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

IN RE ESTATE OF ARTHUR H. LIENEMANN, DECEASED. ARTHUR H. LIENEMANN, DECEASED, BY ARTHUR F. LIENEMANN, PERSONAL REPRESENTATIVE, APPELLANT AND CROSS-APPELLEE, V. DONALD H. LIENEMANN, APPELLEE AND CROSS-APPELLANT.

382 N.W.2d 595

Filed March 7, 1986. No. 84-496.

1. **Decedents' Estates: Joint Accounts: Intent.** Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. Neb. Rev. Stat. § 30-2704(a) (Reissue 1979).
2. **Banks and Banking: Joint Accounts.** As a general rule, it is not necessary that a donee or beneficiary have knowledge about creation of a joint account, sign a signature card, or either deposit or withdraw funds from the account in order to establish a valid joint tenancy in a bank account.
3. **Decedents' Estates: Joint Accounts: Intent.** In determining the effect of a joint account agreement regarding Neb. Rev. Stat. § 30-2704(a) (Reissue 1979), the significant consideration is the intent of the depositor.
4. _____: _____: _____. Where an individual creates and funds a bank account, naming that individual and another or others as parties to such account, only the intent of the individual creating and funding the account is relevant under Neb. Rev. Stat. § 30-2704 (Reissue 1979) in determining the nature of the account, that is, whether there is right of survivorship pertaining to an account.
5. **Trusts: Fraud.** Generally, a court, sitting in equity, will not impose a constructive trust and constitute an individual as a trustee of the legal title for property, unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to property by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.

6. **Trusts.** Mere receipt of a benefit by a confidant, as the result of a transaction in which the confidant has participated on behalf of or in concert with the entrusting individual, does not, itself, furnish a basis for imposition of a constructive trust on property acquired by or benefiting the confidant as a consequence of the transaction.
7. **Agency: Principal and Agent.** Because the power of attorney creates an agency relationship, the authority and duties of an attorney in fact are governed by the principles of the law of agency, including the prohibitions against an agent's profiting from the agency relationship to the detriment of his principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal.

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

Jeffrey L. Stoehr of McGrath, North, O'Malley & Kratz, P.C., for appellant.

Richard A. DeWitt and Michael M. Hupp of McGill, Koley, Parsonage & Lanphier, P.C., for appellee.

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

SHANAHAN, J.

The controversy involved in this case arose from three bank accounts initially in the name of Arthur H. Lienemann. Arthur opened a savings account at The Packers National Bank (PNB) on April 17, 1970; acquired a certificate of deposit from PNB on May 28, 1971; and opened a savings account with Commercial Federal Savings and Loan Association (CFSL) on March 11, 1974. Each of those accounts was funded entirely by Arthur and stood in Arthur's name alone.

In 1975 Arthur showed signs of "deteriorating mental health" and began relying on his sons for assistance in handling his business and personal matters, especially his son Donald, who lived within a block of Arthur, and another son, Arthur F., who took care of his father's farming operations. Donald and his wife had cared for Arthur for over 15 years, preparing meals, keeping house, and maintaining farm buildings on an 80-acre tract of land owned by Arthur. In 1978 the senior Arthur's children began discussing the possibility of "setting up something to take care of [their] father." On May 15, 1978,

Arthur executed a power of attorney in favor of Donald, conferring power "to handle all checks, drafts, notes, claims and accounts receivable; to sign checks, endorse checks and drafts and make bank deposits." After execution of the power of attorney, however, Arthur continued to attend to his financial affairs, such as personal visits to PNB and CFSL and telephone conferences with bank personnel regarding his accounts.

On January 8, 1979, Arthur came to PNB with Donald, spoke with a bank employee, Helene Lesac, regarding a change in his savings account, and requested that Lesac transfer the balance of his savings account, $13,981.27, to a certificate of deposit which, according to Arthur's instruction, was to be put "in my name and in Don's." As instructed by Arthur, Lesac prepared a certificate of deposit and an accompanying agreement which was signed only by Donald. The certificate of deposit was made payable to "A. H. Lienemann or D. H. Lienemann" under the terms "of a joint type of account." The "contract" signed solely by Donald pertaining to the certificate of deposit stated that the certificate belonged to the depositors "as joint tenants with right of survivorship." Donald also signed a withdrawal slip necessary for transfer of funds from Arthur's savings account and placed his own and Arthur's signatures on a signature card prepared by Lesac. Donald never requested that his name be added to the certificate as a joint tenant.

On May 29, 1979, Arthur again contacted Lesac, requesting that PNB transfer funds from his certificate of deposit purchased on May 28, 1971, into a joint certificate of deposit in the names of Arthur and Donald. In response to Arthur's request Lesac prepared documentation necessary to transfer the $1,658.03 of Arthur's solely owned certificate into a new certificate payable to "A. H. Lienemann or D. H. Lienemann." Again, Donald was the sole signatory of the certificate of deposit "contract" which provided: "This is a Joint Account as defined in and governed by the Nebraska Probate Code [and] payable . . . upon the death of any depositor to any survivor(s) with survivorship rights continuing if there are more than one survivor."

On March 13, 1980, Donald, at Arthur's request, appeared at CFSL to withdraw Arthur's savings account and purchase a new $10,000 money market certificate. Joan Willhun, a CFSL employee, in preparing a document to reflect closing of Arthur's savings account, utilized CFSL's computer and prepared a money market certificate in the names of "A. H. Lienemann and/or Don H. Lienemann; As Joint Tenants WROS."

In addition to the three joint accounts created in 1979 and 1980, Arthur also had a savings account at the Springfield Bank, as well as seven certificates of deposit and one passbook account at CFSL. Donald had also participated in the formation of some of those accounts and, at Arthur's request, periodically reviewed the accounts to ensure that Arthur was receiving the highest possible rate of interest payable on such deposits. Although Donald arranged for Arthur's bank statements to be sent to a separate post office box held in Donald's name and actively exercised his power of attorney on Arthur's behalf, Donald consulted with Arthur "at length" regarding Arthur's financial matters, and, notwithstanding his infirmities, Arthur, not Donald, made the ultimate decisions for disposition of bank accounts.

Donald's involvement in Arthur's financial matters caused some tension among Arthur's children, leading to numerous family meetings and discussions about the possibility of a guardianship or conservatorship for Arthur. On December 17, 1980, by order of the county court for Sarpy County, Herbert H. Lienemann was appointed guardian and conservator of Arthur H. Lienemann. In his capacity as a conservator collecting Arthur's assets, Herbert learned about the certificates in the joint names of Arthur and Donald. When Herbert, as conservator, demanded delivery of the certificates in December 1981, Donald refused.

On January 8, 1982, Arthur, by Herbert as guardian and conservator, filed suit against Donald, alleging that Arthur was the "sole contributor and source of all funds" for the certificates issued in the joint names of Arthur and Donald. See Neb. Rev. Stat. § 30-2703(a) (Reissue 1979) (ownership of a joint account during the lifetime of all parties). Arthur also

alleged that Donald's name as a payee on the certificates was inserted without Arthur's authorization during existence of the power of attorney given to Donald and that Arthur was the absolute owner of the certificates. Arthur died on January 13, while his suit was pending against Donald, and Arthur F. Lienemann was appointed personal representative of the estate of Arthur H. Lienemann, deceased. Pursuant to the personal representative's motion, without objection, the plaintiff in the lawsuit against Donald was by substitution designated as "Arthur H. Lienemann, deceased, by Arthur F. Lienemann, Personal Representative." In an amended petition the personal representative renewed the allegation concerning the power of attorney given Donald and, further, alleged that Donald's action regarding the certificates was "a breach of trust of a fiduciary, trusted relationship between Arthur H. Lienemann and Donald H. Lienemann."

At trial the evidence primarily centered on circumstances surrounding issuance of the three joint certificates of deposit. Helene Lesac of PNB had some difficulty recalling whether the request for joint names as payees on the two PNB certificates was made during Arthur's personal visit to the bank or in a telephone conference with Arthur. Also, Lesac was somewhat uncertain about the source of funds for the certificates. Joan Willhun of CFSL testified she prepared the certificate as a joint account. When the Lienemann account number for the previous account was "poked" into CFSL's computer, the terminal's display screen, Willhun testified, showed "A. H. Lienemann, Don Lienemann, the address [and] I believe it said WROS." Consequently, according to Willhun, the same form of account ownership was used in the new certificate as had been indicated for the previous savings account. Another witness, Debra Estes, CFSL's deposit services manager and custodian of CFSL's records, referred to yearly earnings reports generated by the computer, that is, reports showing that throughout the years 1977, 1978, and 1979 the savings account was owned by Arthur either solely in his own name or in reference to the power of attorney given to Donald. Earnings reports pertaining to Arthur's other CFSL accounts also stated that Arthur was the sole owner of those accounts. Based upon

such reports, Estes concluded that if she had been issuing the certificate of March 13, 1980, she "would have issued it as an individual account." Donald also testified and attempted to clarify his participation in the creation of the accounts, acknowledging that he assisted Arthur in obtaining the new certificates and signed documentation relative to the certificates. Donald, however, persisted in asserting that he "did not know anything about the titling" of the accounts.

The district court found "[t]hat it was not the intention of the parties of the account" to place the CFSL account "in the joint names of Arthur H. Lienemann and Donald H. Lienemann" but that "[i]t was the intention of Arthur H. Lienemann" to place the two PNB accounts "in joint ownership with Donald H. Lienemann"; found that Arthur H. Lienemann was the sole owner of the CFSL account; ordered a constructive trust imposed on the CFSL account for the benefit of the estate of Arthur H. Lienemann, deceased; and declared Donald as the owner of the PNB accounts.

The estate contends the district court erred in (1) finding that Arthur intended that his PNB accounts be transformed into joint accounts with the right of survivorship in Donald; (2) disregarding Donald's claimed ignorance and, therefore, lack of intent bearing on the application of Neb. Rev. Stat. § 30-2704 (Reissue 1979); and (3) failing to impose a constructive trust on the proceeds of the PNB accounts on the theory that Donald improperly transformed Arthur's accounts into joint accounts in the names of Arthur and Donald. In his cross-appeal Donald maintains that the court improperly applied the provisions of § 30-2704 in determining the CFSL certificate was not a joint account but was owned by Arthur alone, and, thus, erred in holding that Donald did not acquire the CFSL account by right of survivorship.

Section 30-2704(a) in part provides: "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created."

On appeal to the Supreme Court, an equity action is a trial of factual questions de novo on the record, subject to the rule that,

where credible evidence is in conflict on material issues of fact, the Supreme Court will consider the fact that the trial court observed the witnesses and accepted one version of facts over another. See, Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Kleager v. Schaneman*, 212 Neb. 333, 322 N.W.2d 659 (1982).

Under § 30-2704, at the death of a party to a joint account, funds in such account belong to the surviving party or parties, unless the deceased party's estate can show, by clear and convincing evidence, that the intention at creation of the account was other than the intention that all funds belong to the surviving party or parties to the account. Consequently, Arthur's estate had the burden to show that Arthur had an intention different from that reflected by the words found on the face of the certificates of deposit and in the agreement regarding the accounts and that such different intention was established by "that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984) (meaning of "clear and convincing" evidence).

Lesac testified that Arthur specifically requested that both PNB accounts be opened and certificates issued in the joint names of Arthur and Donald. Although Lesac faltered somewhat in her testimony concerning the paperwork pertaining to issuance of the new certificates, Lesac's testimony does not negative the statutory consequence of a presumption that a joint bank account belongs to the surviving party pursuant to § 30-2704. Donald's signing all documents regarding the accounts was consistent with the unassailed power of attorney given by Arthur authorizing such action. Donald's conduct pursuant to the power of attorney does not evidence any intent counteracting the statutory presumption and disposition of a joint bank account.

Next, the estate contends that § 30-2704 requires examination of the intent of all parties to a statutory joint account to determine whether "there is clear and convincing evidence of a different intention at the time the account is created." In the present case the evidence shows Donald's lack of knowledge that the certificates were joint accounts, and,

thus, Donald could not have intended that the PNB certificates be joint accounts with right of survivorship.

As a general rule, it is not necessary that a donee or beneficiary have knowledge about creation of a joint account, sign a signature card, or either deposit or withdraw funds from the account in order to establish a valid joint tenancy in a bank account. See, *Estate of Barnhart v. Burkhardt*, 194 Colo. 505, 574 P.2d 500 (1978); *Karlen v. Karlen*, 89 S.D. 523, 235 N.W.2d 269 (1975); *In re Estate of Stamets*, 260 Iowa 93, 148 N.W.2d 468 (1967). Even where a surviving party has not known that another has created a joint account involving the survivor, nevertheless the survivor acquires ownership of the funds in the bank account under normal survivorship principles of joint tenancy. See *Estate of Barnhart, supra*. Section 30-2704, in particular, obviously contemplates a situation where one uses a joint bank account as a means to dispose of personal property upon such individual's death. See, Comment to § 30-2704 (the underlying assumption is that most persons using joint accounts want the survivor or survivors to have the balances remaining at death); Comment to § 30-2703 (the theory of these sections is that "the account operates as a valid disposition at death rather than a present joint tenancy"). In construing Idaho's statutory scheme, similar to the Nebraska Probate Code, the Idaho Court of Appeals stated that "[i]n determining the effect of a joint account agreement, the significant consideration is the intent of the depositor." *Erhardt v. Leonard*, 104 Idaho 197, 201, 657 P.2d 494, 498 (1983). See Idaho Code § 15-6-103 (1979). See, also, *In re Estate of Dembiec*, 321 Pa. Super. 515, 468 A.2d 1107 (1983) (under statute substantially similar to § 30-2704, court focuses solely on the intent of the depositor). See Pa. Cons. Stat. Ann. tit. 20, § 6304 (Purdon Cum. Supp. 1985). We conclude that where an individual creates and funds a bank account, naming that individual and another or others as parties to such account, only the intent of the individual creating and funding the account is relevant under § 30-2704 in determining the nature of the account, that is, whether there is right of survivorship pertaining to an account.

In the present case only Arthur opened or created and

funded the accounts in question. Donald's involvement was only as a conduit to effect the express intent of Arthur, namely, that the accounts should stand in the joint names of Arthur and Donald. Under the circumstances the status on Donald's intent, as the ultimately surviving party, was irrelevant in determining whether the accounts in question were joint accounts with right of survivorship within the purview of § 30-2704. The district court was correct in disregarding Donald's intent, or lack thereof, at the time the joint accounts were created.

Finally, the estate argues a constructive trust should have been imposed for its benefit regarding the PNB accounts on the theory that Donald abused a confidential relationship with Arthur or breached a fiduciary duty resulting from the power of attorney executed in 1978. The estate does not contend that Donald in any manner unduly influenced, coerced, or improperly induced Arthur to create the joint accounts but, rather, argues that Donald violated a fiduciary duty and abused a relationship of confidentiality by being the beneficiary of a banking arrangement effected by exercise of the power of attorney conferred on Donald.

Generally, a court, sitting in equity, will not impose a constructive trust and constitute an individual as a trustee of the legal title for property, unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to property by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained. See *Musil v. Beranek*, 160 Neb. 269, 69 N.W.2d 885 (1955). Donald's connection with his father's daily and financial affairs is sufficient to produce a confidential relationship between Donald and Arthur. See *Schaneman v. Schaneman*, 206 Neb. 113, 126, 291 N.W.2d 412, 420 (1980) (a confidential relationship exists if one person has " 'gained the confidence of the other and purports to act or advise with the other's interest in mind' "). The estate, however, has presented no evidentiary basis from which anyone could reasonably find that Donald caused creation of the joint accounts through fraud or

misrepresentation. Also, the circumstances surrounding the accounts and the relationship between Donald and Arthur do not establish an abuse of a confidential relationship for which equity and good conscience preclude Donald's retaining ownership of the accounts in question. Contrary to the proposition advanced by the estate, mere receipt of a benefit by a confidant, as the result of a transaction in which the confidant has participated on behalf of or in concert with the entrusting individual, does not, itself, furnish a basis for imposition of a constructive trust on property acquired by or benefiting the confidant as a consequence of the transaction. See *Ford v. Jordan*, 220 Neb. 492, 499, 370 N.W.2d 714, 719 (1985) ("[s]uch circumstances may certainly raise in reasonable minds a question as to whether" the confidant acted properly, but "they fall short of meeting the quantum of evidence required" to establish the basis for establishing a constructive trust).

The estate further contends that the power of attorney conferred on Donald created a principal-agency relationship between Arthur and Donald, imposing upon Donald the specific fiduciary duties of an agent, including the duty to avoid using his agency status to obtain economic advantage. According to the estate, Donald's actions in using the power of attorney to create the joint accounts constituted a breach of the specific fiduciary duty and justify equitable relief.

A power of attorney is an instrument in writing authorizing another to act as one's agent. The agent holding the power of attorney is termed an "attorney in fact" as distinguished from an attorney at law. See *Matter of Estate of Mehus*, 278 N.W.2d 625 (N.D. 1979). Because the power of attorney creates an agency relationship, the authority and duties of an attorney in fact are governed by the principles of the law of agency, see *Matter of Estate of Mehus, supra*, including the prohibitions against an agent's profiting from the agency relationship to the detriment of his principal or having a personal stake that conflicts with the principal's interest in a transaction in which the agent represents the principal, see *Johnson v. First Nat. Bank*, 253 Ga. 233, 319 S.E.2d 440 (1984).

The problem with the estate's position is that the PNB accounts were created at Arthur's specific direction without any

formative instruction from Donald. While his condition may have been deteriorating toward ultimate appointment of a guardian or conservator, Arthur, nevertheless, actively handled his financial affairs, notwithstanding the power of attorney conferred on Donald. Although Donald's claim that he was ignorant of the nature of the accounts is somewhat suspect in the light of his involvement in creating the accounts, the evidence that the accounts were created at Arthur's specific direction negatives any contention that Donald breached a fiduciary duty owed to Arthur. Cf., *Johnson v. First Nat. Bank, supra* (attorney in fact deposited $5,000 of her father's assets into a joint checking account without the father's consent); *Matter of Estate of Mehus, supra* (evidence established that attorney in fact created joint account by unduly influencing the principal).

We conclude, therefore, that the district court did not err in its judgment that the funds on deposit in the two PNB accounts were the sole property of Donald by right of survivorship according to the terms of the certificates of deposit, joint accounts pursuant to § 30-2704.

With regard to Donald's cross-appeal, there is no question that the CFSL 1980 money market certificate was issued as a joint account and, thus, entitled to the statutory presumption of intent for the right of survivorship in favor of Donald. See § 30-2704(a). Donald contends that the estate failed in its burden to adduce clear and convincing evidence that there was a "different intention" at creation of the account, namely, an intention that funds on deposit would not belong to Donald as the surviving party to the account.

In contrast with the PNB accounts, the CFSL account was established without any instruction or direction from Arthur. Joan Willhun testified that Arthur's savings account was, at March 13, 1980, already designated a joint account, but such fact was contradicted by Debra Estes, custodian of CFSL's records. Although the Estes testimony was not itself conclusive on the point, the testimony of Debra Estes strongly suggests that the CFSL account was never a joint account before March 13, 1980. The district court observed the witnesses and was entitled to accept the version of events recited by the custodian,

Debra Estes. See *Kleager v. Schaneman*, 212 Neb. 333, 322 N.W.2d 659 (1982). Whether the result of computer error or clerical misinterpretation of data from the computer, the fact remains that transformation of the account standing in Arthur's name alone into a joint account was unilaterally erroneous on the part of the depository and done without reference to any intent on the part of the depositor. From all this there is one reassuring revelation: machines, in making mistakes, are becoming human. We find no error in the district court's conclusion that the CFSL account was solely owned by Arthur, because the estate satisfied its burden of establishing by clear and convincing evidence that Arthur did not intend to transform his savings account at CFSL into a joint account for Donald and himself.

The errors assigned by both parties are without merit. The judgment of the district court is correct in all respects and is, therefore, affirmed.

AFFIRMED.

BARBARA W. BRYAN, APPELLANT, V. GEORGE A. BRYAN, APPELLEE.

382 N.W.2d 603

Filed March 7, 1986. No. 84-501.

1. **Alimony: Property Division: Appeal and Error.** Awards of alimony and the division of marital property are matters which are initially entrusted to the discretion of the trial court and will not be disturbed on appeal unless the record establishes that the trial court has abused its discretion.
2. **Divorce: Appeal and Error.** While a divorce case is to be tried de novo on the record, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite.
3. **Expert Witnesses: Corporations: Valuation.** A trial court is free to assess expert opinion and determine the fair market value of a closely held corporation in light of the expert testimony regarding the type of business done, the fixed and liquid

assets of the business at actual or book value, the business' net worth, the market for the shares, the past earnings, future losses, and earning potential of the business.

4. **Corporations: Valuation: Stock.** The trial court is not required to accept any one method of stock valuation as more accurate than another accounting procedure.
5. **Corporations: Valuation.** A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle.
6. **Alimony: Property Division.** There is no mathematical formula by which awards of alimony and division of property can be precisely determined.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

John J. Hanley, for appellant.

Joseph J. Skudlarek of Schumacher & Gilroy, for appellee.

BOSLAUGH, HASTINGS, and GRANT, JJ., and BRODKEY, J., Retired, and RIST, D.J.

PER CURIAM.

Barbara W. Bryan appeals to this court from a decree entered in a dissolution of marriage proceeding in the district court for Douglas County, Nebraska. In that action Barbara was the petitioner and her husband, George, was the respondent. The parties were married in Clearwater, Florida, in 1974, at which time Barbara was employed as a cocktail waitress and George was employed as a waiter in the same restaurant and lounge. Neither of the parties brought substantial assets into the marriage. There were no children born of the marriage.

Shortly after they were married, the parties moved to Scottsbluff, Nebraska, to assist George's parents, Rex and Gladys Bryan, who at that time were running a retail water bed store which was named, after subsequent incorporation, Easyrest Flotation Sleep Systems, Inc. (hereinafter referred to as Easyrest). Although Barbara and George were not issued any stock in Easyrest initially, shortly after incorporation both were given shares by Rex Bryan, George's father. At the time of the dissolution of marriage hearing, Barbara owned 5,555 shares of Easyrest stock, which constituted 25.66 percent of the total stock issued, and George owned 14,860 shares, or 68.66 percent. The remainder of the stock was owned by Gladys and Rex. Furthermore, at the time of the hearing, the water bed

company, which in fact had commenced business as a single retail store in Scottsbluff, Nebraska, had expanded to eight stores located in Nebraska, Missouri, and Kansas. The hearing for the dissolution of marriage was commenced on April 17, 1984, and evidence was adduced; the hearing was continued to April 18. During the hearing held on April 17, testimony was adduced from two certified public accountants with reference to the valuation of Easyrest, in order to determine the value of the respective stock owned by the parties herein. The certified public accountant who testified on behalf of Barbara stated that the value of the business was $619,455. The method of valuation used by him is referred to as the "multiple of earnings" method. The certified public accountant testifying on behalf of George stated that, in his opinion, Easyrest was worth $40,445. The method of valuation used by him is commonly referred to as the "book value" method. There is testimony in the record that the two methods of valuation referred to are among many that are commonly employed in the accounting profession for the valuation of businesses and stock in corporations.

The district court for Douglas County, in its decree of May 4, 1984, found that the marriage between the parties was irretrievably broken and ordered it dissolved. The court awarded Barbara the 5,555 shares of Easyrest stock which she owned prior to the dissolution, and George was awarded the 14,860 shares he owned prior to the dissolution. In its decree the court gave Barbara the option to sell her shares of stock to George, and further provided that if she exercised this option, George was ordered to pay her $150 per month as alimony for a period of 5 years. If she did not exercise this option, he was ordered to pay her $350 per month as alimony until the total sum of $9,000 was paid. In its decree the court also found that the value of Easyrest was $40,445, using the "book value" method of valuation. The court also ordered a townhouse, jointly owned by the parties, sold, with the balance, after payment of two mortgages on the property, to be divided equally between the parties. In addition, both Barbara and George were awarded assorted household goods and furnishings.

On June 4, 1984, the parties entered into certain stipulations between them, which were approved and adopted by order of the court on that same day. In said stipulations the parties agreed, and the court ordered, that George should pay Barbara the sum of $1,026 per month as support and that this money should be credited as payments against the $9,000 alimony previously awarded to Barbara in the original decree.

The parties also stipulated that the townhouse in which Barbara resided should be put up for sale immediately and that Barbara should make available for pickup on or before June 8, 1984, all the household goods awarded to George. Further, the parties stipulated, and the court so ordered, that if, during an appeal of this case, Easyrest should file voluntary bankruptcy or have an involuntary bankruptcy petition filed against it, and was eventually adjudicated bankrupt, Barbara was to tender her stock to George and would receive no monetary or other compensation for said stock. This stipulation was to be effective even after a final determination by the Nebraska Supreme Court on appeal of this matter.

The issues before this court on appeal, as set out in Barbara's assignments of error, are as follows: The district court erred (1) in its distribution of Easyrest's stock to the litigants, (2) in valuing the stock in Easyrest at book value, and (3) in its allowance of alimony.

Under the established law in this state, we review the case de novo on the record and reach conclusions without reference to the conclusions reached by the trial judge. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Gleason v. Gleason,* 218 Neb. 629, 357 N.W.2d 465 (1984). However, where the evidence is in conflict, this court gives weight to the fact that the trial court saw and heard the witnesses and accepted one version of the facts rather than another. *Guggenmos v. Guggenmos,* 218 Neb. 746, 359 N.W.2d 87 (1984); *Witcig v. Witcig,* 206 Neb. 307, 292 N.W.2d 788 (1980). Awards of alimony and the division of marital property are matters which are initially entrusted to the discretion of the trial court and will not be disturbed on appeal unless the record establishes that the trial court has abused its discretion. *Ford v. Ford,* 219 Neb. 13, 360 N.W.2d 495 (1985); *Guggenmos v. Guggenmos, supra; Lockwood v. Lockwood,*

205 Neb. 818, 290 N.W.2d 636 (1980). The ultimate test for the division of property and awards of alimony is "reasonableness" as determined by the facts of each case. *Sonntag v. Sonntag,* 219 Neb. 583, 365 N.W.2d 411 (1985); Neb. Rev. Stat. § 42-365 (Reissue 1984).

A review of the record convinces us that the trial court did not abuse its discretion in its distribution of stock to the parties. The facts are undisputed that Rex Bryan, the donor, gave the shares of stock to Barbara and George individually and, in the initial distribution, at a different time and in different amounts. There were no joint gifts of stock. It is clear from the record that Barbara did not put any of her own money, that is, money which she had earned before her marriage or had inherited before or during her marriage, into the business; and although she put time and effort into the growth of the corporation, it appears that at all times she was compensated for her efforts and drew a substantial salary. The trial court was correct in awarding the respective shares of stock individually.

Barbara's second assignment of error is that the trial court erred in its valuation of the stock in question. She contends that the value of the corporation should be $619,455 (multiple of earnings) and not $40,445 (book value). As previously indicated, there was conflicting evidence at the dissolution hearing with reference to the proper method of valuing Easyrest. From our review of the record we conclude that the $40,445 value which the court accepted and assigned to Easyrest was reasonable and was not an abuse of discretion. In *Boroff v. Boroff*, 204 Neb. 217, 218, 281 N.W.2d 760, 761 (1979), we stated that "[w]hile in a divorce action the case is to be tried de novo, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of facts rather than the opposite." In making its determination the trial court was required to balance the conflicting testimony of the parties' experts and weigh their credibility.

> A trial court is free to assess expert opinion and determine fair market value in light of testimony regarding: the nature of the business, the corporation's fixed and liquid assets at the actual or book value, the corporation's net

> worth, the marketability of the shares, past earnings or losses and future earning potential.

Dean v. Dean, 87 Wis. 2d 854, 876, 275 N.W.2d 902, 912 (1979). A trial court "is not required to accept any one method of stock valuation as more accurate than another accounting procedure." *Id.* at 875-76, 275 N.W.2d at 912. Thus, we will affirm a trial court's valuation of a closely held corporation if we find that such method of valuation used has an "acceptable basis in fact and principle." *Castonguay v. Castonguay*, 306 N.W.2d 143, 147 (Minn. 1981). See *Lockwood v. Lockwood, supra* (upholding the trial court's valuation of a closely held corporation, for purposes of property division in a dissolution of marriage case, where the value was within the range of values each party introduced into evidence at trial). We conclude that the action of the trial court in accepting the valuation of Easyrest submitted in evidence pursuant to the "book value" method had an "acceptable basis in fact and principle" and therefore was not an abuse of discretion.

Barbara's third assignment of error is that the district court erred in its allowance of alimony. We have frequently said that there is no mathematical formula by which awards of alimony or division of property in an action for dissolution of marriage can be precisely determined. They are to be determined by the facts of each case, and the court will consider all pertinent facts and reach an award that is just and equitable. *Cole v. Cole*, 208 Neb. 562, 304 N.W.2d 398 (1981); *Chrisp v. Chrisp*, 207 Neb. 348, 299 N.W.2d 162 (1980). See § 42-365. We conclude that the amount of alimony awarded to Barbara by the trial court was not an abuse of discretion and must therefore be affirmed.

Each party shall pay his and her own costs.

AFFIRMED.

ROBERT W. WERNER ET AL., APPELLEES, V. RALPH H. SCHARDT ET AL., APPELLANTS.

382 N.W.2d 357

Filed March 7, 1986. No. 84-610.

1. **Equity: Appeal and Error.** Our review of appeals in equity actions requires us to reach an independent conclusion as to disputed facts. However, where there is an irreconcilable conflict on material factual issues, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
2. **Easements: Proof.** In order to obtain rights in the real property of another by prescriptive easement, a claimant must show that his use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
3. **Easements: Proof: Presumptions.** A use is adverse and under a claim of right if the claimant proves uninterrupted and open use for the necessary period. Once the claimant has established this presumption, it will prevail unless the owner of the land proves by a preponderance of the evidence that the use was by license, agreement, or permission.
4. **Easements: Words and Phrases.** Exclusive, in reference to a prescriptive easement, does not mean that there must be use only by one person but, rather, means that the use cannot be dependent upon a similar right in others.
5. **Easements: Proof.** The nature and extent or scope of the easement claimed by prescription must be clearly established.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed as modified.

Daniel L. Werner of McKernan & Werner, for appellants.

Lyle Joseph Koenig of Germer, Koenig, Murray, Johnson & Daley, for appellees.

BOSLAUGH, HASTINGS, and GRANT, JJ., and BRODKEY, J., Retired, and RIST, D.J.

HASTINGS, J.

This is an appeal from a judgment of the district court holding that a prescriptive easement was established by the plaintiffs on the land of the defendants.

In March of 1967 the plaintiffs, Robert W. and Stephen D. Werner, acquired title to a 300-acre tract of land in Thayer County. Access to the land could be accomplished through a hilly pasture from the north or by a dirt road from the east. This road was located on a portion of the farm of the defendants,

Ralph H. and Hulda Schardt, which farm is described as the west half of the southeast quarter, the southeast quarter of the southeast quarter, and the east half of the southwest quarter, all in Section 19, Township 3 North, Range 3 West of the 6th P.M., in Thayer County, Nebraska. Specifically, the road followed a line on defendants' property described as commencing at the southwest corner of the northeast quarter of the southwest quarter of said Section 19, and running on a straight line generally in an easterly direction to the northeast corner of the southeast quarter of the southeast quarter, all in said Section 19.

In 1967 and 1968 the plaintiffs gained access to the farmland primarily from the north, but in 1969 began using their neighbors' farm road. The plaintiffs bought larger machinery in 1969, changing from four-row equipment to eight-row. From that time on, the road was used almost exclusively to gain entrance to the farmland.

Robert Werner testified that from 1969 on he used the road a minimum of 20 times a year. He stated that the land was disked, fertilized, disked again, planted, cultivated, and hilled, with each activity requiring approximately six trips to the field. Additionally, the crops were irrigated for a month to a month and one-half, requiring twice a day attention, and, finally, the crops were harvested, which required numerous trips for the grain truck. This use remained substantially the same from 1969 through 1983. It was unrebutted that the plaintiffs never asked for nor received permission to use the road.

The defendant Ralph Schardt testified that the plaintiffs did not begin using the farm road until 1973, when they drove through his standing wheat crop. He stated unequivocally that he observed the Werners and their help reaching the farm through the pasture from the north prior to 1973. In November of 1982 Schardt barricaded the east entrance to his farm road and dug a ditch across it.

"Our review of appeals in equity actions requires us to reach an independent conclusion as to disputed facts. However, where there is an irreconcilable conflict on material factual issues, this court will consider the fact that the trial court observed the witnesses and their manner of testifying." *Hadley*

v. Ideus, 220 Neb. 878, 882, 374 N.W.2d 231, 234 (1985).

In reviewing the testimony and giving weight to the trial court's determination, we find that the Werners' use of the defendants' road began in 1969 and continued until the road was barricaded. In order to obtain rights in the real property of another by prescriptive easement, a claimant "must show that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period." *Simacek v. York County Rural P.P. Dist.*, 220 Neb. 484, 485, 370 N.W.2d 709, 710 (1985).

We have stated that a use is adverse and under a claim of right if the claimant proves uninterrupted and open use for the necessary period. Once the claimant has established this presumption, it will prevail unless the owner of the land proves by a preponderance of the evidence that the use was by license, agreement, or permission. *Biegert v. Dudgeon*, 213 Neb. 617, 330 N.W.2d 897 (1983).

The Werners established the presumption by showing their use of the farm road to bring their machinery and trucks to their farm numerous times every year for more than 10 years. While on the farm road, the vehicles passed within a quarter of a mile of the Schardts' home and traveled right across their farm. Such use by the Werners, within plain view of the defendants, constitutes open and notorious conduct. Consequently, the burden then shifted to the defendants to demonstrate the existence of a license, agreement, or permission. The Schardts presented no evidence of a permissive use of the road.

Further, it is clear that the plaintiffs' use was exclusive within the meaning of the law. "The word *exclusive* in reference to a prescriptive easement does not mean that there must be use only by one person but, rather, means that the use cannot be dependent upon a similar right in others . . . ." *Plettner v. Sullivan*, 214 Neb. 636, 641, 335 N.W.2d 534, 538 (1983). See, also, *Biegert v. Dudgeon, supra*; *Jurgensen v. Ainscow*, 155 Neb. 701, 53 N.W.2d 196 (1952). Our conclusion is that the plaintiffs have established an easement by prescription across the land of the defendants along the line earlier described.

However, the trial court's ruling that the easement is at least

20 feet wide, and a wider use may be made by the Werners so long as no damage is done to the real estate, cannot stand. The nature and extent or scope of the easement must be clearly established. *Stricker v. Knaub*, 215 Neb. 372, 338 N.W.2d 757 (1983).

Although there was some testimony that the roadway at certain points was as wide as 33 feet, the record supports a regular adverse use of no more than 20 feet. The decree of the district court is accordingly modified to limit the easement to 20 feet in width along the line earlier described, i.e., commencing at the southwest corner of the northeast quarter of the southwest quarter and running on a straight line generally in an easterly direction to the northeast corner of the southeast quarter of the southeast quarter, all in said Section 19.

AFFIRMED AS MODIFIED.

HAHN & HUPF CONSTRUCTION, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. HIGHLAND HEIGHTS NURSING HOME, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

382 N.W.2d 607

Filed March 7, 1986. No. 84-624.

1. **Judgments: Directed Verdict: Appeal and Error.** On appeal from a decree of the trial court dismissing an action at the close of plaintiff's evidence, this court must determine whether the cause of action was proved, and must accept as true plaintiff's evidence and any reasonable conclusions deducible therefrom.
2. **Conspiracy.** The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another.
3. **Corporations: Fraud: Liability.** An individual director cannot escape liability for fraudulent corporate action taken under authorization affirmatively approved by him merely by asserting his ignorance of facts he had a duty to know and should have known. Where fraud is committed by a corporation, it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacities.
4. **Corporations: Liability.** Where the duty of knowing facts exists, ignorance due to neglect of duty on the part of a director creates the same liability as actual knowledge and a failure to act thereon. This must involve a breach of a fiduciary relationship.

5. **Corporations: Debtors and Creditors.** Directors of a corporation occupy a fiduciary relation to the corporation and its stockholders. However, as a general rule, such relation does not extend to general creditors of the corporation.
6. **Fraud: Proof.** In order to sustain an action for fraud and false representation, the plaintiff must, in substance, prove (1) that a representation was made as a statement of fact; (2) that it was false; (3) that the party making the representation knew it was false, or else made it without knowledge as a positive statement of known fact, i.e., recklessly made; (4) that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; (5) that the party hearing the false statement had a reasonable basis to rely on the statement and did in fact rely on it and was damaged thereby; and (6) the amount of the damage.
7. **Corporations: Fraud: Liability.** A director who misrepresents a material fact to another to induce the latter to enter into a financial relation with a corporation, to that person's detriment, may be liable to such other person for fraud and misrepresentation. Where that same director makes a representation which at the time is believed to be true, but later on he or she finds that it is false, and that other person continues to rely on the original representation to that person's detriment, that director may be personally liable, depending on the circumstances of the case.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Whelan Foote & Scherr, P.C., for appellants.

Jerry C. Stirtz of Martin, Stirtz & Martin, for appellee Nolte.

Arthur R. Langvardt, for appellees Plum et al.

BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

HASTINGS, J.

The plaintiffs, all contractors, in a suit arising out of the breach of construction contracts by the owner, Highland Heights Nursing Home, Inc., a bankrupt corporation, sought recovery from the individual directors.

The theory of plaintiffs' recovery was (1) false and fraudulent representations made by the directors individually to the plaintiffs; (2) acts committed by the individual directors in permitting the plaintiffs to proceed with construction when the directors knew, or should have known, the corporation was

insolvent, amounting to misfeasance and malfeasance in the breach of a fiduciary duty, thus permitting a piercing of the corporate veil; and (3) conspiracy on the part of each director to defraud the plaintiffs.

Default judgments were entered against Highland Heights and director Mike McGrath without comment by the trial court. Motions of all other defendant directors for dismissal made at the close of plaintiffs' case were sustained. Plaintiffs have appealed, assigning as error generally the court's rejection of the three claims set out above.

For some time Vera Plum had been interested in building and operating a nursing home. She began talking with her banker, Ramon Nolte, in the late 1960s or early 1970s about the financial feasibility of such a project. She discovered that financing was not readily available, so she continued to make inquiries until the summer of 1973.

As a result of contacts made with administrators at a care facility convention, she met a person by the name of Mike McGrath, who told her that money would be available for her project. He informed Mrs. Plum that he represented an enterprise known as Community Development of Glenwood, Iowa (Com-Dev).

On September 11, 1973, Com-Dev entered into a written agreement with Mrs. Plum regarding the construction of a nursing home. By the terms of that agreement Mrs. Plum represented that she had an administrator's license to operate a home and would furnish 8 acres of land as a site for the proposed facility. Com-Dev represented that it had the financial strength to assist in the financing of the home and that a joint venture would be formed whereby Vera Plum and Com-Dev each would own 50 percent of the stock.

At an earlier date, May 4, 1973, the Nebraska Department of Health had issued a letter approving the application of Mrs. Plum to build the nursing facility. This is sometimes called a certificate of need. The application had been supported, in part at least, by a letter dated February 6, 1973, written by Ramon Nolte, president and cashier of the Adams County Bank. In that letter, among other things, Nolte represented that "[h]aving the platted area available for the erection and the

necessary resources, the funds should readily be available for the project."

Articles of incorporation were duly adopted and recorded on September 27, 1973. Twelve directors were elected, including Mike McGrath and Ramon Nolte. Vera Plum and her husband deeded the 8 acres of land to the corporation as agreed. Stock was issued in the amounts of 10,000 shares to Merle and Vera Plum and 10,000 shares to Com-Dev. Two deposits of $5,000, two of $2,500, and one of $150 were made in the corporate bank account.

At Vera Plum's request Harold Friborg drew up some preliminary designs for the nursing home in 1971. In 1973 the newly formed corporation hired Friborg's architectural firm to finalize the design drawings, prepare contracts, solicit and receive bids, and check the construction while the project was being built. Near the end of February 1974, Vera Plum signed contracts on behalf of Highland Heights Nursing Home engaging various plaintiffs as contractors and subcontractors.

Harold Hahn of Hahn & Hupf Construction, Inc., was originally in touch with Mrs. Plum in 1968 or 1969 when she approached him to make a preliminary estimate on some plans she had for a nursing home. In May of 1972, at her request, he updated his estimate. At that time Mrs. Plum informed him that she was trying to get financing for the project.

Finally, in September 1973 she asked Hahn for a "turn key" price on a nursing home and said that he could pick up the plans from Harold Friborg. However, it was not until after the first of the year, 1974, that detailed drawings were available, and Hahn submitted a written bid dated February 26, 1974.

In dealing with Harold Friborg, Hahn stated that he inquired about financing, whether "they had financing," and was told by Friborg that he was sure they did, that he (Friborg) had been paid. Friborg himself testified that when Hahn inquired about where the money was coming from, he, Friborg, relayed the information that he received from Mrs. Plum, that it was coming from a group of backers in Iowa. Hahn also claimed that Friborg told him, "What are you worrying about? There are two bankers on the board."

Hahn & Hupf Construction commenced working on the

project shortly after the middle of March. That firm received payment on its initial application about April 29. The second application for payment was dated April 30, 1974, and the third application May 30, 1974. Payment on neither of these applications was ever received. Hahn talked to Mrs. Plum on May 30, and she assured him that he would be paid. Within the next day or so Hahn received a letter from Vera Plum, as president of Highland Heights Nursing Home, dated May 31, advising that all work on the project should be stopped because funds still had not been obtained to complete the project.

Plaintiffs argue that the certificate of need issued by the health department to Mrs. Plum was based, in part at least, on the representations of Ramon Nolte as to Mrs. Plum's financial worth. Therefore, they insist, anyone dealing with that certificate would infer that proper financial resources were available. However, the testimony of Harold Hahn does not bear this out. He stated that at the time of his dealings with the Highland Heights project, he did not even know about the financial aspects of a certificate of need, nor did he know Ramon Nolte.

Vera Plum testified that she was aware of the fact that on March 19, 1974, Com-Dev surrendered its stock in Highland Heights. She also knew that the reason the stock was surrendered was because Com-Dev could not get financing, but she insisted that Mike McGrath was still calling her, telling her that financing would be available. There is no indication in the record that any of the other directors were aware of these developments.

The testimony of Vera Plum also indicates that at an April 24, 1974, board meeting at which only she, her husband, Marjorie Pfeil, Roger Stacy, Jerry Foy, and Lee Mingo were present, it was discussed "by Roger Stacy if the work could be stopped on Highland Heights. The answer was no." She said she was the one who gave the "no" answer, and it was because McGrath continued to insist that the money would be coming.

It was not until May 30, according to the testimony of Mrs. Plum, that she knew for certain there would be no money coming to finance her project. This was when two men from Iowa came over and conveyed this information. She

immediately went to Nolte's office, where the letter stopping work was drafted. Highland Heights Nursing Home, Inc., has since been discharged in bankruptcy.

The record does not disclose the trial court's reasoning in granting the various motions of the defendants to dismiss this action. However, on appeal from a decree dismissing an action at the close of plaintiff's evidence, this court must determine whether the cause of action was proved, and must accept as true plaintiff's evidence and any reasonable conclusions deducible therefrom. *Hrabik v. Gottsch*, 198 Neb. 86, 251 N.W.2d 672 (1977); *Armbruster v. Stanton-Pilger Drainage Dist.*, 165 Neb. 459, 86 N.W.2d 56 (1957).

We deal first with plaintiffs' claim that they should have been permitted to recover on the theory of a conspiracy. The principal element of a conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. *Davidson v. Simmons*, 203 Neb. 804, 280 N.W.2d 645 (1979). The record in this case utterly fails to reveal one instance of an understanding arrived at to make false representations in order to cause harm or injury to any of the plaintiffs.

What remains is an action for fraud. Plaintiffs claim Vera Plum misrepresented the financial stability of the defendant corporation in order to induce the plaintiffs to undertake the building contracts. They further insist that the remaining directors are liable for failing to take steps to prevent these misrepresentations.

> An individual director cannot escape liability for fraudulent corporate action taken under authorization affirmatively approved by him merely by asserting his ignorance of facts he had a duty to know and should have known. Where the duty of knowing facts exists, ignorance due to neglect of duty on the part of a director creates the same liability as actual knowledge and a failure to act thereon.
>
> . . . [W]here fraud is committed by a corporation it is time to disregard the corporate fiction and hold the persons responsible therefor in their individual capacities.

Fowler v. Elm Creek State Bank, 198 Neb. 631, 638-39, 254

N.W.2d 415, 419 (1977).

There is no evidence of actual misrepresentations made by any director other than Vera Plum, and, of course, Mike McGrath. The most that can be said of the others is that, knowing of the precarious financial position of their corporation, they failed to speak out to prevent detrimental reliance on the part of the plaintiffs. This might amount to constructive fraud, but liability on that basis must involve a breach of a fiduciary relationship. *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975).

It is true that directors of a corporation occupy a fiduciary relation to the *corporation* and its *stockholders*. *Davis v. Walker*, 170 Neb. 891, 104 N.W.2d 479 (1960). Directors may be held liable to the *shareholders* even in those cases where, by their negligence, they fail to inform themselves in any appreciable degree on matters of utmost importance to the shareholders whereby the latter suffer damage. *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36 (1979).

Apropos of the situation involved here is the following quotation from 18B Am. Jur. 2d *Corporations* § 1830 at 682-83 (1985):

> There is much loose language describing directors or officers of corporations as trustees or fiduciaries for the benefit of creditors, but this is to be understood to be limited to cases wherein the assets of the corporation are involved [citing *Hill v. Lumber Company*, 113 N.C. 173, 18 S.E. 107 (1893)] or the corporation is being dissolved and its assets or capital stock are considered a trust fund for creditors, and is not to be taken to be true in a technical or general and unlimited sense.

Hill, incidentally, involved a preference made by the directors in favor of a director-creditor of the corporation to the prejudice of other general creditors.

We believe that the trial court was correct in directing a verdict as to all defendants other than Vera Plum.

It is quite apparent that Vera Plum was, in reality, the corporation. She made all of the decisions. She was the one who ordered plans from the architect. She was the one who dealt with the contractor Hahn & Hupf Construction. She was the

one who failed to order a construction stoppage when plans for financing had all but evaporated.

In order to sustain an action for fraud and false representation, the plaintiff must, in substance, prove (1) that a representation was made as a statement of fact; (2) that it was false; (3) that the party making the representation knew it was false, or else made it without knowledge as a positive statement of known fact, i.e., recklessly made; (4) that it was made with intent to deceive and for the purpose of inducing the other party to act upon it; (5) that the party hearing the false statement had a reasonable basis to rely on the statement and did in fact rely on it and was damaged thereby; and (6) the amount of the damage. *Bellairs v. Dudden*, 194 Neb. 5, 230 N.W.2d 92 (1975); *Allied Building Credits, Inc. v. Damicus*, 167 Neb. 390, 93 N.W.2d 210 (1958).

Vera Plum wanted to build and operate a nursing home. This had been a longtime dream of hers. She had tried without success to obtain conventional financing through her personal banker. Without reservation, she placed her financial trust in Mike McGrath, whom she had only recently met, and on the guarantee of a corporation, Com-Dev, about which she knew nothing. She had no reasonable assurance of financing. Yet she contracted on behalf of a newly formed, hopelessly undercapitalized corporation, with local contractors, to construct a half-million-dollar facility.

She knew as early as March 19, 1974, that her corporation backer had divested itself of stock in her company because it, Com-Dev, could not get financing. She continued to rely on vague and illusory promises of Mike McGrath. She knew on April 24 that the executive officer of Com-Dev, Highland Heights director Roger Stacy, and others, felt that construction should be stopped because of a lack of financing. Yet she continued to rely on the never-documented promises of Mike McGrath of a "pot of gold." Not once did it occur to her to notify the plaintiffs, who were daily expending time and money on her project, that there was no money to pay them.

A director who misrepresents a material fact to another to induce the latter to enter into a financial relation with a corporation, to that person's detriment, may be liable to such

other person for fraud and misrepresentation. Where that same director makes a representation which at the time is believed to be true, but later on he or she finds that it is false, and that other person continues to rely on the original representation to that person's detriment, that director may be personally liable, depending on the circumstances of the case. *English v. Bruin Engineering, Inc.*, 201 Neb. 791, 272 N.W.2d 753 (1978); *Ashby v. Peters*, 128 Neb. 338, 258 N.W. 639 (1935).

Accepting as true plaintiffs' evidence and any reasonable conclusions deducible therefrom, which we must do in this case in the posture in which we find it, we cannot say as a matter of law that defendant Vera Plum was entitled to have the action dismissed as to her. A question of fact was presented as to whether plaintiffs were entitled to recover in light of the rules of law set forth in this opinion. Accordingly, we reverse the judgment of the district court rendered in favor of Vera Plum and remand the cause for further proceedings consistent with this opinion. The balance of the judgment is affirmed.

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

CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT, V. OMAHA POLICE UNION LOCAL 101, APPELLEE.

382 N.W.2d 613

Filed March 7, 1986. No. 84-643.

Commission of Industrial Relations: Appeal and Error. The review of a decision of the Commission of Industrial Relations is restricted to considering whether the decision is supported by substantial evidence, whether the commission acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed.

Herbert M. Fitle, Omaha City Attorney, and Kent N. Whinnery, for appellant.

Bruce G. Mason of Ross & Mason, P.C., for appellee.

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

COLWELL, D.J., Retired.

This appeal follows a decision of the Commission of Industrial Relations (CIR) denying the petition of the City of Omaha to remove the rank of police captain from the bargaining unit represented by the Omaha Police Union Local 101.

Central to the appeal is a brief review of Neb. Rev. Stat. § 48-816 (Reissue 1984). It was amended in 1969 to authorize public employers to recognize employee organizations, to negotiate collectively, and to enter into written agreements with them. In *City of Grand Island v. American Federation of S. C. & M. Employees*, 186 Neb. 711, 185 N.W.2d 860 (1971), this court set aside the CIR's determination that the captains and lieutenants of the Grand Island fire division should be included in the same bargaining unit as the rest of the firefighters. The rationale behind the decision was that the captains' and lieutenants' duties were *supervisory* in nature, thus different from the duties of the firefighters.

In 1972 the Legislature responded to that decision with this amendment to § 48-816 (Cum. Supp. 1972):

> All firemen and policemen employed in the fire department or police department of any municipal corporation in a position or classification subordinate to the chief of the department and his immediate assistant or assistants holding authority subordinate only to the chief, *shall be presumed to have a community of interest* and may be included in a single negotiating unit represented by an employee organization for the purposes of this act. Public employers *shall* be required to recognize an employee's negotiating unit composed of firemen and policemen holding positions or classifications *subordinate to the chief of the fire department or police department* and his immediate assistant or assistants holding authority subordinate only to the chief when such negotiating unit is designated or elected by employees in the unit.

(Emphasis supplied.)

The constitutionality of the amendment was approved in *Local Union No. 647 v. City of Grand Island*, 196 Neb. 693, 244 N.W.2d 515 (1976), holding that because of the different and unusual duty circumstances of firefighters and police officers, it was lawful to classify them differently from other public employees.

The dispute here arose when defendant refused to remove police captains from its membership after all captains had made such a request. Plaintiff contended that this was in violation of an agreement with defendant. Defendant denied such an agreement and further contends that removal of police captains was not a recognized proposal for their ongoing contract negotiations.

The review of a decision of the CIR is restricted to considering whether the decision is supported by substantial evidence, whether the CIR acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. *American Assn. of University Professors v. Board of Regents*, 198 Neb. 243, 253 N.W.2d 1 (1977); *IBEW Local 1536 v. City of Fremont*, 216 Neb. 357, 345 N.W.2d 291 (1984). It is not for the Supreme Court to resolve conflicts in the evidence. Credibility of witnesses and the weight to be given to their testimony are for the administrative agency as the trier of fact. *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983).

In denying the petition the CIR found that, although there had been some change in the duties of the captains, the job descriptions and functions had remained essentially the same, and the evidence was insufficient to rebut the legislative policy mandating the inclusion of the captains in the unit.

Appellant claims three errors: (1) The CIR erred in finding that the evidence failed to establish that there was an agreement between the city and the union to the effect that if all captains requested withdrawal from the bargaining unit, the union would allow them to do so; (2) The CIR erred in finding that the police captains had been subjected to pressure to withdraw from the bargaining unit; and (3) The CIR erred in finding that the evidence presented was not sufficient to overcome the

statutory presumption of the existence of a community of interest between the police captains and all subordinate officers.

In April of 1983 the Omaha chief of police issued an order assigning personal parking stalls to police captains in the police parking garage. In September 1983 a similar order was issued concerning police lieutenants. Defendant objected to both orders. In August 1983 eight of the nine police captains requested a meeting with the city and the union to discuss their removal from the union. At the meeting on September 23, 1983, the subject of removal was discussed, but no formal agreement was reached. The city claims that there was an agreement, described as a consensus, that if all police captains agreed to be removed, the union would remove them. The union denies an agreement. Negotiations between the parties for their 1984 contract began at a meeting held on October 18, 1983, where it was agreed that at the next meeting both sides would present their proposals for negotiation and that thereafter no new proposals would be considered.

The next meeting was held on November 7, 1983. No proposals were presented by either party concerning the withdrawal of the captains, and the minutes do not show any discussion on the subject. On December 23, 1983, the city requested the union to remove the captains. On December 28, 1983, the captains, in writing, requested information from the city on whether unanimous consent was required, whether they would have a voice in the removal, if January 1, 1984, was a deadline, and whether a letter to the union signed by all captains would be sufficient. On December 30, 1983, all of the captains, by letter, requested their removal from the union. On January 6, 1984, the matter came to a head when the union refused removal. The city claimed an agreement with the union for removal of captains if all captains agreed; the union countered that there was no such agreement and, further, that it was a procedural matter, being a proposal outside of those items presented for negotiation at their November 7, 1983, meeting. The city then filed its petition with the CIR.

Concerning the first assigned error, both parties agree that there was no written agreement, memorandum, or information

supporting the city's claim. Some witnesses attending the September 23 meeting testified that it was their understanding that there was an agreement, although no specific contractual details were given. The city describes this understanding as a consensus that an agreement existed. At this meeting the representatives of both the city and the union were not in continuous attendance. Until December 30 the removal intentions of all captains were tentative and conditional. Although the parties continued to discuss the captains' removal after September 23, the city made no effort to secure from the union a firm commitment to the removal terms; the city's explanation that a formal agreement was unnecessary, since the parties had already mutually agreed, is not supported in the evidence. The silent minutes of the November 7 meeting support the union's claim of no agreement. There was substantial evidence supporting the CIR's finding of no agreement.

The second error relates to two areas. (1) A tentative plan suggested by the chief of police that captains and lieutenants be assigned police cars on a 24-hour loan basis to decrease response time, increase availability, and improve community relations. The plan was known to the police staff; however, it was never implemented. (2) The April 1983 assignment of parking stalls in the police garage to captains for their personal cars. The chief explained that this was a privilege that enhanced captains' leadership and ability to discharge discipline duties. This evidence supports the CIR's finding.

Appellant's final claimed error is an attempt to use *Local Union No. 647 v. City of Grand Island*, 196 Neb. 693, 244 N.W.2d 515 (1976), as authority establishing guidelines for rebutting the statutory presumption of a community of interest, § 48-816(3) (Cum. Supp. 1982), particularly referring to this language:

> They are primarily responsible for the protection of life and property. They are on a perpetual emergency basis. Their memberships are closely knit and in working together their lives are often dependent on fellow members. A close kinship between the members and their officers develops. This closeness and a recognition of the

> elements mentioned promotes efficiency and a willingness to work together.

196 Neb. at 695, 244 N.W.2d at 517.

We disagree. First, that language related only to the special duty circumstances of firefighters and police officers as a basis authorizing constitutional classification of public employees, which was the only issue in that case. That is not to say that evidence in those areas would not be relevant to the issue of a presumption of community interest. Second, that argument is a return to the "supervisor" argument in *City of Grand Island v. American Federation of S. C. & M. Employees*, 186 Neb. 711, 185 N.W.2d 860 (1971), which was later removed by the 1972 amendment, now § 48-816(3), with the blessing of a presumption of a community of interest.

Appellant's evidence emphasizes the supervisory character of the captains' duties, amounting to a reworking of the *City of Grand Island v. American Federation of S. C. & M. Employees, supra*, ground, and contrary to the 1972 amendment. The CIR properly found that there was little change in the police department organization plan and the duties of a captain and that the appellant failed to overcome the presumption of a community of interest.

From a full review of the record, the decision of the CIR was supported by substantial evidence, and it was not arbitrary, capricious, or unreasonable.

AFFIRMED.

KRIVOSHA, C.J., participating on briefs.

PATRICK G. BEAN, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

382 N.W.2d 360

Filed March 7, 1986. No. 84-645.

1. **Tort Claims Act: Highways: Negligence.** The State's conduct in maintaining its highways falls squarely within the purview of the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981).

2. **Tort Claims Act: Appeal and Error.** Findings of fact made by the trial court in an action brought under the State Tort Claims Act have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
3. **Proximate Cause.** Proximate causation is a question of fact.

Appeal from the District Court for Harlan County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Donald R. Witt of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Robert M. Spire, Attorney General, and John R. Thompson, for appellee.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and GRANT, JJ., and BUCKLEY, D.J.

CAPORALE, J.

Plaintiff, Patrick G. Bean, appeals from the dismissal of his action brought pursuant to the provisions of the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), against the defendant, State of Nebraska. He assigns as error, in summary, (1) the rejection of certain evidence claimed to bear on the State's negligence and (2) the finding that the State was not negligent. We affirm.

During the dark hours of November 11, 1977, at approximately 8:30 p.m., plaintiff was riding as a passenger in a pickup truck driven by his brother, Michael, in a westerly direction on Nebraska Highway 4. The driver failed to negotiate the sharp, 92° right turn at the junction of Highway 4 and combined U.S. Highways 6 and 34 near Oxford. As a result, the pickup truck rolled over one and a half times, causing injuries which rendered the plaintiff a quadriparetic.

The evidence discloses that at a point 3,705 feet from the junction of the highways, a westbound driver on Highway 4 encounters a railroad crossing sign, the crossing itself being 2,826 feet from the junction. Such a driver next encounters a junction sign placed 2,362 feet from the junction, followed by a no-passing-zone sign located 2,260 feet from the junction. A reverse curve sign posting a 15-m.p.h. speed limit was located 1,880 feet from the junction, after which a driver approaches rumble strips located 1,330 and 1,210 feet from the junction. A

stop ahead sign was located 1,150 feet from the junction, and 400 feet beyond that was another junction sign. Beneath that junction sign, 750 feet from the junction itself, were 90° turn arrows and a sign indicating that Highway 4 ends. Five black posts, each with an orange reflector, were located between 130 and 740 feet from the junction on the south side of the highway. At locations 130 feet and 97 feet from the junction, on the outside of the 90° curve, were signs displaying a yellow and black arrow with a diamond-shaped set of nine reflectors underneath. The stop sign was placed 54 feet from the junction.

Plaintiff remembers nothing about the accident. However, the driver remembered crossing railroad tracks and then seeing a left-curve sign. Upon seeing a stop ahead sign, the driver slowed to approximately 40 m.p.h. by letting up on the gas pedal. After going through a slight curve to the left, an arrow sign came into his view on the right side of his headlights, and he then saw that the road curved abruptly to the right. He thereupon applied his brakes, thereby locking his wheels, and yelled at plaintiff to hold on, after which the truck rolled over. The driver admitted he did not see the 15-m.p.h. speed plate on the reverse curve sign and that had he seen it, he would have reduced his speed. The investigating safety patrol corporal found that the driver left 115 feet of skid marks.

There was evidence that the signs in place did not conform to the State's own signing plans or with the standards specified by the U.S. Department of Transportation in its Manual on Uniform Traffic Control Devices for Streets and Highways (1971). Specifically, the original signing plan called for a 30-inch right turn sign with a 15-m.p.h. speed plate placed ahead of the curve, which was later modified to require a 36-inch sign. Further, the aforedescribed manual requires a right turn sign where the recommended speed on a turn is 30 m.p.h. or less. The safe speed at the curve in question ranged from 10 to 18 m.p.h. As the foregoing recitation of the evidence concerning the signs actually in place demonstrates, no right turn sign had been installed.

Plaintiff offered to impeach the testimony of a witness for the State, that the signs actually in place were an appropriate alternative to the manual's requirements, by showing that the

State changed the signs after the accident in question. He also offered to prove that there had been other accidents at the site prior to the change, but none since. The trial court rejected these offers of proof.

An expert witness called by the plaintiff opined that a driver would have to be aware of the sharp curve at least 500 feet in advance of encountering it in order to make the necessary maneuver and that the signing in place was a contributing cause of the accident, but he could not say the accident would not have occurred had a right turn sign been in place. The investigating safety patrol corporal was also of the opinion that the "road conditions," presumably the signing or the abrupt nature of the curve itself, contributed to the accident.

The trial court, however, found that plaintiff had failed to prove by a preponderance of the evidence that the State was negligent and that any act of the State was the proximate cause or a proximately contributing cause of the accident, and determined that the sole proximate cause of the accident was the conduct of plaintiff's driver.

The State's conduct in maintaining its highways falls squarely within the purview of the State Tort Claims Act, §§ 81-8,209 et seq. *Fletcher v. State*, 216 Neb. 342, 344 N.W.2d 899 (1984). The findings of fact made by the trial court in such an action have the effect of a jury verdict. As such, they will not be disturbed on appeal unless clearly wrong. *Oldenburg v. State*, 221 Neb. 1, 374 N.W.2d 341 (1985); *Shepard v. State of Nebraska*, 214 Neb. 744, 336 N.W.2d 85 (1983); *Wakenight v. State*, 212 Neb. 798, 326 N.W.2d 52 (1982).

For purposes of our analysis, we assume, but do not decide, that the trial court erred in rejecting plaintiff's offers of proof, and further assume, but do not decide, that the trial court erred in concluding that the State was not negligent. That leaves us the task of determining whether it can be said the trial court was clearly wrong in finding that the sole proximate cause of the accident was the negligence of plaintiff's driver. If that finding is not clearly wrong, the judgment of the trial court must be affirmed, for proximate causation is a question of fact. See, *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985); *Brown v. State*, 205 Neb. 332, 287 N.W.2d 676 (1980).

A review of two recent cases is instructive. The latest and most relevant is *Fletcher v. State, supra*, a tort claim action. Therein, a passenger sued the State to recover for personal injuries sustained when the pickup truck in which he was riding was driven into a bridge abutment. The trial court entered judgment in favor of the passenger, but this court reversed that decision and dismissed the suit. In so doing it was noted that "[i]n support of his position that defendant was negligent, plaintiff had the burden of proving that the installation of the guardrail would have prevented his injury and that the failure to install such a guardrail was therefore the proximate cause, or a proximately contributing cause, of his injuries." 216 Neb. at 348, 344 N.W.2d at 903. The plaintiff had failed to prove such because there were no underlying facts or data to support the expert's conclusion that the presence of guardrails would have diverted the pickup back into its proper lane of travel with no injury to the passenger.

Brown v. State, supra, another bridge case in which guardrails were absent, affirmed the trial court's conclusion that the sole proximate cause of the collision was the negligence of the driver. *Brown* noted that while there was evidence as to the purpose and function of guardrails, the record contained "nothing which would indicate conclusively that had the guardrails been in position at the time of the accident the resulting accident and death of the decedent would not have occurred." 205 Neb. at 337, 287 N.W.2d at 680. The *Brown* court concluded that the trial court's finding concerning the sole proximate cause of the collision was not clearly wrong, since there was evidence that the driver, while not exceeding the posted speed limit, was traveling at an excessive speed under the weather conditions and was operating the automobile in an unsafe manner, failing to retain proper control.

Like the situation in *Fletcher*, there is nothing in the case before us which compels a conclusion that the accident would not have occurred had the right turn sign called for by the plans and manual been in place. And like the situation in *Brown*, the plaintiff's driver, having failed to see the 15-m.p.h. speed limitation, was driving at an excessive speed when he reached the curve. Therefore, the trial court's finding that the

negligence of the plaintiff's driver was the sole proximate cause of the accident cannot be said to be clearly wrong.

Accordingly, the trial court's judgment of dismissal is affirmed.

AFFIRMED.

B. T. ENERGY CORP., WANAJA FARM, AND JACK VANBERG, APPELLANTS AND CROSS-APPELLEES, V. BETTY G. MARCUS, APPELLEE AND CROSS-APPELLANT, THE KNIGHTS OF AK-SAR-BEN, AND THE NEBRASKA STATE RACING COMMISSION, APPELLEES.

382 N.W.2d 616

Filed March 7, 1986. No. 84-826.

1. **Administrative Law: State Racing Commission.** The State Racing Commission is an administrative agency as defined in Neb. Rev. Stat. § 84-901(1) (Reissue 1981).
2. **Administrative Law: Final Orders: Limitations of Actions.** The power of an administrative agency to reconsider its decision exists only until the aggrieved party institutes judicial review or the statutory time for such review has passed, and any such agency reconsideration does not operate to extend the statutory time for judicial review.

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

James P. Fitzgerald and William F. Hargens of McGrath, North, O'Malley & Kratz, P.C., and Brown, Todd & Heyburn, for appellants.

Edmund D. McEachen and John P. Heil of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee Marcus.

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

GRANT, J.

This case arises out of a dispute as to whether the filly Brindy Brindy (owned by appellants B. T. Energy Corp. and Wanaja

Farm, and trained by appellant Jack VanBerg) or the filly Halo Dotty (owned by appellee Betty G. Marcus) won the ninth race at Ak-Sar-Ben racetrack in Omaha, Nebraska, on July 23, 1983. The winner of that race was entitled to the first-place purse of $59,895, and the other horse was entitled to the second-place purse of $21,780.

Brindy Brindy came across the finish line first and Halo Dotty immediately thereafter. Upon the completion of the race a steward's inquiry was made by the official stewards at the racetrack, and a claim of foul was made by the jockey riding Halo Dotty. Both the inquiry and foul claims were based on the alleged interference of Brindy Brindy with Halo Dotty during the race. After conferring with one another immediately after the race, the stewards withdrew their inquiry and disallowed the claim of foul. The unofficial order of finish of the race, as set out above (that is, Brindy Brindy first and Halo Dotty second) was declared official. Payments were made to parimutuel bettors at the track, based on that result. Those payments are final and are not the subject of this appeal. The activities of all participants were governed by rules and regulations adopted by the State Racing Commission (hereinafter Commission).

Appellee Marcus, as owner of Halo Dotty, appealed from the orders of the stewards to the Commission. After a hearing before the Commission, held in Omaha, Douglas County, Nebraska, the Commission reversed the order of the official stewards and upheld the appeal of the owner of Halo Dotty. By its order of reversal, dated August 3, 1983, and served on appellants on August 4, the Commission declared Halo Dotty the winner of the race and thus entitled to the winner's purse.

Appellants, by letter dated August 8, 1983, sought a rehearing of that order before the Commission. Appellants then requested a continuance of the date for hearing on the motion for rehearing, which the Commission had set for August 16. The Commission set the hearing for September 15, 1983, in Lincoln, Lancaster County, Nebraska.

After that hearing the Commission affirmed its earlier decision, and appellants appealed from that order denying rehearing to the district court for Douglas County. The district court affirmed the order of the Commission. For the reasons

set out hereinafter, we dismiss the appeal.

In their appeal appellants assign seven errors. Appellee Marcus cross-appeals, assigning six errors. The first of appellee's assignments of error sets out that the court erred in applying the provisions of Neb. Rev. Stat. § 84-917 (Reissue 1981), in that the district court reviewed the action of the Commission after a hearing which was not authorized in the Nebraska statutes, and thus the district court had no jurisdiction. Since that assignment is dispositive of the case, we do not reach the other contentions of any of the parties.

Our examination of the record shows that the district court had no jurisdiction to enter any order in the purported appeal to that court. As set out above, a hearing was held before the Commission on August 3, 1983. The record of that hearing shows that the executive secretary of the Commission sent notice of the hearing to Betty G. Marcus, owner of Halo Dotty, and to Jack VanBerg, trainer of Brindy Brindy, and Wanaja Farm and B. T. Energy Corp., owners of Brindy Brindy.

Jack VanBerg, a prominent horseman but not a lawyer, appeared at the hearing and announced to the Commission that "I'm here for Wanaja Farm and B.T. Energy" and that there was no reason the Commission could not go forward with the hearing. Betty G. Marcus and Howard Tesher, trainer of Halo Dotty, appeared at the hearing with counsel. A full hearing was conducted by the Commission, reflected in 103 pages of testimony. Evidence was adduced from the riders of both fillies and from the official stewards at the race. Various films of the race were shown to the Commission, and the hearing was concluded. On August 3, 1983, the Commission made its final order, in writing, as follows:

> The objection, protest, and appeal of Betty G. Marcus, owner of racing rights in HALO DOTTY is upheld. The official order of finish for the 9th race, July 23, 1983, is hereby ordered as follows: lst HALO DOTTY; 2nd BRINDY BRINDY; remaining positions are unchanged. Purse money for the race is to be distributed accordingly. This decision in no way effects [sic] the mutuel disbursement.

On August 8, 1983, appellants filed a letter with the

Commission, seeking a rehearing of the Commission's order of August 3. The hearing on the motion for rehearing was set by the Commission for August 16, 1983. On August 12, 1983, appellants sought a continuance. The Commission ultimately set the hearing for September 15, 1983. On that date the hearing was held before the Commission at the State Capitol Building in Lincoln, Nebraska. At that hearing one of the owners of Brindy Brindy and appellant Jack VanBerg appeared with counsel. Appellee Marcus appeared by counsel. Additional evidence was adduced which, together with counsel's remarks, generated an additional 139 pages of record. On September 29, 1983, the motion for rehearing was overruled. On October 4, 1983, appellants filed a petition for review of the Commission's action in the district court for Douglas County. The district court dismissed appellants' petition for review on September 28, 1984. This appeal was then taken.

The Commission was created by Neb. Rev. Stat. § 2-1201 (Reissue 1983), and is an administrative agency as defined in Neb. Rev. Stat. § 84-901(1) (Reissue 1981). The dispute between the parties in this action constituted a contested case as defined in § 84-901(3). The Commission had adopted rules and regulations as required by § 84-901, and those rules and regulations have been made a part of the record herein. Appeals from the rulings of the Commission are governed by Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1981). Section 84-917(2) provides in pertinent part: "Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency."

In this case the final decision of the Commission was served on appellants on August 4, 1983. Appellants chose to file a motion for rehearing and a motion for a continuance. As set out above, the motion for rehearing was heard by the Commission on September 15, 1983, and was denied on September 29, 1983—56 days after the "final decision by the agency."

Appellants' appeal to the district court, of course, is premised as an appeal made within 30 days after the Commission's decision on the motion for rehearing before the

Commission. In *Morris v. Wright,* 221 Neb. 837, 843, 381 N.W.2d 139, 143 (1986), in connection with an appeal from a ruling of the state Department of Health, we stated:

> Section 71-3823 made no provision for reconsideration of the board's denial such as to toll the time within which Dr. Morris was to institute a judicial challenge. Thus, the board lost any power it may have had to reconsider its decision once Dr. Morris filed her district court petition challenging the board's denial.

Similarly, § 84-917 makes no provision for reconsideration of the State Racing Commission's final decision so as to toll the 30-day appeal time within which appellants had the opportunity to avail themselves of a judicial challenge of the Commission's decision.

In *Bockbrader v. Department of Insts.*, 220 Neb. 17, 24, 367 N.W.2d 721, 727 (1985), in connection with an appeal from an administrative agency, we held: "The power [of an agency] to reconsider exists until the aggrieved party files an appeal or the statutory appeal period has expired." In that case the agency's first consideration had ended in a tie vote. We held that the tie vote was not a decision and thus not a final agency action and that a later dispositive vote was the final action that could be appealed from within 30 days.

We hold that the power of an administrative agency to reconsider its decision exists only until the aggrieved party institutes judicial review or the statutory time for such review has passed, and any such agency reconsideration does not operate to extend the statutory time for judicial review.

In the case at bar the final agency action was taken on August 3, 1983, and the order served on appellants on August 4. Neither the Commission nor the parties had authority to extend the time for seeking judicial relief beyond 30 days from the final order.

Since the district court had no jurisdiction when it entered its order, this court has acquired no jurisdiction to review the district court's action. This ruling, of course, means that the Commission's ruling of August 3, 1983, remains binding on the parties.

APPEAL DISMISSED.

CAPORALE, J., not participating.

JON W. ANDERSON, APPELLANT, V. KATHLEEN D. ANDERSON, APPELLEE.

382 N.W.2d 620

Filed March 7, 1986. No. 84-849.

1. **Property Division: Alimony: Appeal and Error.** In actions for legal separation the adjustment of property and the award of support 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 modified only in the event of an abuse of that discretion.
2. _____: _____: _____. In the de novo review of the adjustment of property or award of support in an action for legal separation, the Nebraska Supreme Court, where the evidence is in conflict, 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.
3. _____: _____: _____. There are no mathematical formulas by which property adjustments or awards of support can be precisely determined; ultimately, the test is whether the property adjustment and support award are reasonable under the facts of each case.
4. **Alimony: Pensions.** It is proper to consider retirement benefits in determining whether support should be awarded to a spouse.

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

Vincent P. Sutera of Sutera & Sutera, for appellant.

Robert C. Wester of Schirber Law Offices, P.C., for appellee.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and GRANT, JJ., and BUCKLEY, D.J.

CAPORALE, J.

The petitioner-appellant husband, Jon W. Anderson, takes issue with the property adjustment ordered by the trial court's decree of legal separation and with the amount of support awarded to the respondent-appellee wife, Kathleen D. Anderson. We affirm.

By analogy, we apply to this decree of legal separation the same standards as are applied for reviewing property divisions and alimony awards in decrees of dissolution. That is, both the adjustment of property and the award of support 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 modified only in the event of an abuse of that discretion. See, *Rezac v. Rezac*, 221 Neb. 516, 378 N.W.2d 196 (1985); *Ford v. Ford*, 219 Neb. 13, 360 N.W.2d 495 (1985); *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). In our de novo review we, where the evidence is in conflict, 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. See *Guggenmos v. Guggenmos, supra.* There are no mathematical formulas by which such awards can be precisely determined. Ultimately, the test is whether the property adjustment and support award are reasonable under the facts of each case. See, *Rezac v. Rezac, supra*; *Sonntag v. Sonntag*, 219 Neb. 583, 365 N.W.2d 411 (1985).

This action involves a marriage of approximately 17 years' duration which produced two children who, at the time of trial, were 13 and 10 years old.

The husband first makes a generalized complaint that the division of the items of household goods and furnishings and allocation of the parties' debts are erroneous. The evidence as to who generated the debts and what their purposes were is in conflict, and we cannot say the trial court abused its discretion in making the allocation it did. There are also inconsistencies in the evidence concerning the value of the household goods and furnishings. Again, we cannot say the trial court abused its discretion in adjusting the personal property as it did.

The husband also takes issue with the fact that the trial court awarded the real estate which had constituted the parties' dwelling to them as tenants in common, with possession to be in the wife until the youngest child becomes emancipated or the house is sold as earlier agreed upon by the parties. During the time she has possession, the wife is to make the mortgage payments, keep the house insured and in repair, and pay the real estate taxes. Upon sale the wife is to receive an amount equal to the reduction of the mortgage principal attributable to her mortgage payments; the remaining net proceeds of the sale are to be divided equally between the parties. Such an adjustment of the parties' interest in the real estate is fair and reasonable and in no sense constitutes an abuse of discretion.

This brings us to the support award. The husband is a career Air Force officer. He has 16 years of service and has achieved the rank of major. His gross income is $3,823.53 per month, leaving him with a disposable income after deductions for taxes and insurance of $3,055.21 per month, from which he is obligated to pay $600 per month in child support, custody of the children having been awarded to the wife. In addition, the decree obligates him to pay the wife $500 per month for her support as described in greater detail later in this opinion. Thus, the husband has $1,955.21 to spend on himself each month. The record shows that his expenses are such as to leave him with approximately $275.21 per month of uncommitted funds. The evidence also demonstrates that his prospects for promotion and increased earnings are good.

The wife is an elementary schoolteacher holding a bachelor's and a master's degree and is currently working on a doctorate. She has a gross monthly income of $1,549.67 per month and a disposable income from her earnings of $1,127.79 per month after deductions for taxes, insurance, and pension. With the support payments from the husband, the wife has a monthly spendable income of $2,227.79, which just meets her expenses. It is not anticipated that her earnings will increase substantially, even with a doctorate.

The trial court ordered the husband to pay the wife support in the sum of $500 per month until she dies or remarries (an event which would need to be preceded by dissolution of the still existing marriage), or until the husband begins receiving retirement benefits in accordance with his military pension plan. At such time as the husband begins to receive such benefits, he is to pay the wife $500 per month until the death of either party or the "further order of the Court." The husband was awarded all the interest "the parties may have" in said pension plan, subject to his obligation to pay support money to the wife.

The evidence is that if the husband were to complete 20 years of service with the Air Force and retire at the end of that time, he would receive retirement benefits of $1,323.50 per month. Sixteen-twentieths, or $1,058.80, of that potential benefit was acquired during the time the parties lived together as husband

and wife. Use of the husband's retirement benefit, if and when it comes into existence, as a source from which to support the wife in a sum equal to approximately half of the benefit acquired before entry of the decree herein cannot be said to be an abuse of discretion. See *Raley v. Raley*, 218 Neb. 644, 357 N.W.2d 470 (1984), which notes our prior holdings that it is proper to consider retirement benefits in determining whether alimony should be awarded, and took into account the military retirement benefits which were being paid to the obligor husband, as well as postal retirement benefits which, although not being paid at the time, would become available upon retirement from that employment.

The record failing to sustain the husband's assignments of error, the decree of the trial court is affirmed. The wife is awarded the sum of $750 to apply to the services of her attorney in this court.

AFFIRMED.

K & K PHARMACY, INC., A NEBRASKA CORPORATION, APPELLANT, V. JAMES R. BARTA, APPELLEE.

382 N.W.2d 363

Filed March 7, 1986. No. 85-021.

1. **Contracts.** Generally, in negotiating a contract the parties may impose any condition precedent, a performance of which is essential before the parties become bound by the agreement.
2. _____. Where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed.
3. **Contracts: Proof.** The party seeking to enforce a contract containing a condition precedent bears the burden of proof as to the occurrence of the condition.
4. **Contracts.** If the agreement leaves no doubt that honest satisfaction and no more is meant, the condition does not occur if the obligor is honestly, even though unreasonably, dissatisfied.

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

H. Daniel Smith of Stehlik, Smith, Trustin, Schweer & Ruder, for appellant.

Ray C. Simmons of Simmons & Schneider, P.C., for appellee.

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

BOSLAUGH, J.

This case arose out of a controversy concerning a contract for the sale of the Millard Pharmacy. The business was located on leased premises in the Millard Shopping Center.

On June 8, 1983, the plaintiff, K & K Pharmacy, Inc., entered into a written contract with the defendant, James R. Barta, for the sale of the pharmacy to the defendant. The contract contained the following provision regarding a new lease of the premises to be obtained by the defendant: "13. New Lease. This Agreement shall be contingent upon Buyer's ability to obtain a new lease from Larsen Enterprises, Inc., for the premises presently occupied by Seller. In the event Buyer is unable to obtain a new lease satisfactory to Buyer, this Agreement shall be null and void."

The defendant owned a number of full-line pharmacies and employed a specific marketing strategy which he intended to use in the operation of the pharmacy to be purchased from the plaintiff. The defendant carried high-traffic grocery items, such as bread, milk, and coffee, and sold those items at a low price in order to generate volume traffic into the drugstore.

Early in the negotiations for the sale of the pharmacy, the defendant advised the agent of the seller that the defendant would require the right or privilege to sell foodstuffs in the pharmacy. However, prior to signing the contract, the defendant did not know that Millard Food Mart, a grocery store located in the same shopping center as plaintiff's pharmacy, had a lease giving it the exclusive right to sell grocery items in the shopping center.

The record also shows that after signing the purchase

agreement, the defendant entered into negotiations with the owner of the shopping center and other interested parties for the purpose of agreeing upon a satisfactory lease. At the first meeting of the parties, the grocer, who had the exclusive right to sell grocery items, indicated that he also used high-traffic items such as milk and bread as loss leaders to attract traffic into his store, that the exclusive right to sell groceries was important to him, and that he was not willing to give up any of his rights under his lease. Although lease negotiations continued, the grocer never agreed to allow Barta to carry any food items.

The original agreement provided for the closing of the sale on or about June 24, 1983. On the 24th of June the parties added an addendum to the agreement providing that the defendant would take possession of the pharmacy beginning June 25 and operate the pharmacy until the anticipated closing on Monday, June 27. The defendant did go into possession on the 25th and operated the business until June 30, at which time he ceased operations in the drugstore because he had not been able to obtain a satisfactory lease.

This action was commenced on January 26, 1984, to recover damages resulting from the defendant's alleged breach of the contract. On November 19, 1984, the trial court sustained the defendant's motion for summary judgment and dismissed the action. The plaintiff has appealed.

The case turns on the meaning and effect of the "New Lease" provision in the contract. Generally, in negotiating a contract the parties may impose any condition precedent, a performance of which is essential before the parties become bound by the agreement. *Metschke v. Marxsen*, 176 Neb. 240, 125 N.W.2d 684 (1964). The provision entitled "13. New Lease" was clearly a condition precedent to the existence of binding contractual obligations between the parties. The contract was *contingent* upon the defendant's obtaining a new lease *satisfactory* to him. This court has held that "where a contract is executed but its effectiveness is dependent upon the fulfillment of an agreed condition before it can become a binding contract, such contract cannot be enforced unless the condition is performed." *Coyle v. Janssen,* 212 Neb. 785, 789, 326 N.W.2d 44, 47 (1982).

The party seeking to enforce a contract containing a

condition precedent bears the burden of proof as to the occurrence of the condition, and if there is no evidence of the occurrence of the condition, the contract is not binding and cannot be enforced. See, *Coyle v. Janssen, supra*; *Kadner v. Shields*, 20 Cal. App. 3d 251, 97 Cal. Rptr. 742 (1971). In the present case the plaintiff had the burden to prove that the condition precedent contained in the contract had been met before the contract was enforceable.

The lease provision in the contract was not only a condition precedent but it was also a satisfaction clause. However, its terms were not ambiguous, and a reading of the plain language shows that the contract depended upon the buyer's satisfaction with a new lease. This court has stated that "[i]f the agreement leaves no doubt that honest satisfaction and no more is meant, the condition does not occur if the obligor is honestly, even though unreasonably, dissatisfied." *Nebraska Panhandle Community Action Agency, Inc. v. Strange*, 189 Neb. 83, 84-85, 200 N.W.2d 23, 25 (1972). While a mere statement of dissatisfaction is not conclusive, the evidence need only show honest dissatisfaction and no more. *Nebraska Panhandle, supra*.

This court has also stated that, ordinarily, such a question of honest satisfaction is one of fact. See, *Nebraska Panhandle, supra*; *Melson v. Turner*, 125 Neb. 603, 251 N.W. 172 (1933). However, summary judgment is an appropriate remedy when there is no genuine issue as to any material fact. Neb. Rev. Stat. § 25-1332 (Reissue 1979).

In the present case summary judgment was correctly granted if the pleadings and depositions show that there was no genuine issue as to the defendant's satisfaction with a new lease. The plaintiffs do not allege any bad faith or dishonest dissatisfaction on the defendant's part, but merely allege a breach of contract which would require proof that the condition precedent occurred. There simply is no evidence to support that contention.

Assuming the truth of all of the evidence offered by the plaintiff, there is no evidence of performance of the condition precedent which was necessary before the contract could be enforced against the defendant. The evidence is undisputed that

the defendant was not able to obtain a lease satisfactory to him. The defendant was not able to obtain a lease allowing him to employ his established marketing policy. Further, there is no evidence that defendant was anything but honestly dissatisfied with the lease. This was not a case where the party who had some obligation as to the condition precedent refused to make a good faith effort to perform the condition. See, *Quinn v. Godfather's Investments*, 213 Neb. 665, 330 N.W.2d 921 (1983); *Empfield v. Ainsworth Irr. Dist.*, 204 Neb. 827, 286 N.W.2d 94 (1979).

The record shows there was no genuine issue as to performance of the condition precedent in the contract and that the defendant was entitled to judgment as a matter of law. The judgment of the district court dismissing the petition of the plaintiff is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DOUGLAS C. KLINGELHOEFER, APPELLANT.

382 N.W.2d 366

Filed March 7, 1986. No. 85-442.

1. **Arrests: Probable Cause.** The test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.
2. **Trial: Arrests: Blood, Breath, and Urine Tests: Evidence.** Where no issue as to the propriety of an arrest is raised and the evidence of the preliminary breath test is relevant only for the limited purpose of establishing probable cause to require the driver to submit to a test of his or her blood, urine, or breath under Neb. Rev. Stat. § 39-669.08 (Reissue 1984) and thereby make the results of the second test admissible in evidence for the purpose of seeking to convict a driver for operating a motor vehicle while under the influence of alcohol, the admissibility of the preliminary breath test is a question of law and should therefore be admitted into evidence out of the presence of the jury.
3. **Evidence: Appeal and Error.** If properly admitted evidence exists to establish

that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal.

4. **Evidence: Jury Instructions: Appeal and Error.** An error in the admission of evidence may, under appropriate circumstances, be cured by an instruction from the court.
5. **Implied Consent: Miranda Rights: Blood, Breath, and Urine Tests.** There is no requirement that *Miranda* warnings be given prior to a request to submit to a chemical analysis of blood, breath, or urine under the Nebraska implied consent law.
6. **Implied Consent: Blood, Breath, and Urine Tests: Right to Counsel.** Under the implied consent law a driver is not entitled to consult with an attorney before submitting to a chemical test, nor is a delay in the test required due to a driver's request to consult with an attorney.
7. **Implied Consent: Police Officers and Sheriffs: Blood, Breath, and Urine Tests.** Neb. Rev. Stat. § 39-669.09 (Reissue 1984) does not require the officer to inform the person to be tested of his privilege to request an independent test.

Appeal from the District Court for Buffalo County: DeWayne Wolf, Judge. Affirmed.

John S. Mingus of Mingus & Mingus, for appellant.

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

Krivosha, C.J., Boslaugh, White, Hastings, Caporale, Shanahan, and Grant, JJ.

Per Curiam.

The appellant, Douglas C. Klingelhoefer, was charged in the county court for Buffalo County, Nebraska, with driving while intoxicated, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984), and with refusing to submit to a chemical test of his breath, in violation of Neb. Rev. Stat. § 39-669.08 (Reissue 1984). Following trial to a jury, a verdict of guilty on both counts was returned. Upon appeal the district court for Buffalo County, Nebraska, affirmed. Klingelhoefer now appeals to this court, maintaining that his convictions must be set aside for one or more of the following errors: (1) The county court erred in failing to find that Klingelhoefer was entitled to receive *Miranda* warnings prior to being requested to submit to a chemical test for alcohol; (2) The county court erred in failing to find that Klingelhoefer had a right to counsel before being requested to submit to the chemical test; (3) The county court

erred in failing to find that Klingelhoefer had a right to be informed that he was entitled to have a separate, independent chemical test taken by a physician of his choice; (4) The county court erred in failing to find that the stopping of Klingelhoefer's automobile and the subsequent arrest violated his rights guaranteed to him under the fourth amendment of the U.S. Constitution.

Klingelhoefer further assigns as error that the evidence of the preliminary breath test was improperly admitted in evidence and that § 39-669.08 (the statute requiring a driver to submit to a chemical test) is unconstitutionally vague. We believe that the assignments of error are without merit, and the conviction and sentence must be affirmed.

The facts of the case are essentially without dispute. At approximately 11:30 p.m. on July 23, 1984, a deputy sheriff in the Buffalo County sheriff's office clocked Klingelhoefer's automobile with the use of a mobile radar unit as traveling at 65 m.p.h. in a 55 m.p.h. zone. The deputy turned around to follow the vehicle and, while doing so, observed the vehicle swerve left of the centerline and pull up close behind another vehicle. The deputy then pulled the speeding vehicle to the side of the road. After investigation the deputy determined that the driver of the car was Klingelhoefer. At that time the deputy detected the odor of alcohol about Klingelhoefer and noticed that Klingelhoefer's eyes were glassy and bloodshot. He asked Klingelhoefer to perform a variety of field sobriety tests. First, when asked to recite the alphabet, Klingelhoefer correctly stated the letters from A to O, and after O said "Z." Second, when asked to count from 20 to 10 backwards, Klingelhoefer correctly counted from 20 to 15, and then said "15, 13, 15, 14, 10, 9," and then stopped. Third, when requested to touch the tip of his index finger on each hand to the tip of his nose, Klingelhoefer touched the second joint of each finger to his nose. Fourth, Klingelhoefer was asked to walk heel to toe seven steps forward, turn, and walk heel to toe four steps back. In performing the test, Klingelhoefer did not place the heel of his shoe to the toe of his shoe, and when he was turning around he nearly fell over backwards. Fifth, when asked to balance on one leg, Klingelhoefer nearly fell over.

At that point the deputy requested Klingelhoefer to take a preliminary breath test. Klingelhoefer failed the test. The deputy then placed Klingelhoefer under arrest and transported him to the Buffalo County sheriff's office. Upon arrival at the sheriff's office, the deputy read to Klingelhoefer the implied consent postarrest advisement form. He was not given a *Miranda*-type warning, nor was he afforded the right to contact an attorney.

When requested at the sheriff's office to take a breath test, Klingelhoefer refused to do so until the operator of the machine, a deputy sheriff in uniform, produced the certificate showing that the deputy sheriff was certified to operate the machine. When the certificate was not produced, Klingelhoefer refused to take the test. He also stated that he would not take the test because he was not sure whether the officers in the room were police officers, though each was wearing a uniform of the Buffalo County sheriff's office. Klingelhoefer was once again asked to blow into the machine, and he would not accept the mouthpiece or tube. At that point he was cited for both driving while intoxicated and refusing to submit to a chemical test, as well as for speeding.

A number of the issues may be quickly disposed of by reason of either our recent holdings in *Fulmer v. Jensen*, 221 Neb. 582, 379 N.W.2d 736 (1986), or by reason of earlier decisions which have firmly established the law in this jurisdiction.

In resolving this case we need, however, to separate the two charges. We turn first, then, to the assignments raised with regard to driving while intoxicated. There is little serious question that the deputy sheriff had probable cause to stop Klingelhoefer. He clocked him doing 65 m.p.h. in a 55 m.p.h. zone, in violation of law. Additionally, Klingelhoefer was observed to be tailgating and swerving left of the centerline. In *State v. Nowicki*, 209 Neb. 640, 645-46, 309 N.W.2d 89, 93 (1981), we said:

> " '[T]he test of probable cause for a warrantless arrest is whether at the moment the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had

committed or was committing an offense.' "

One cannot seriously argue that, based upon the officer's observation of Klingelhoefer's operation of his motor vehicle, the smell of alcohol about him, his glassy, bloodshot eyes, and his inability to successfully complete any of the field sobriety tests, the deputy did not have probable cause to arrest Klingelhoefer. The assignment is simply without merit.

Furthermore, the evidence was sufficient to submit the case to the jury, and, as we observed in *State v. Warnke,* 221 Neb. 625, 627, 380 N.W.2d 241, 242 (1986):

> [I]t is not for this court to accept one version of the case over another . . . . In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Klingelhoefer's claim that the evidence was insufficient to convict him of driving under the influence of alcohol is simply without merit.

That leaves us, then, with only one remaining question regarding Klingelhoefer's conviction for driving while under the influence of alcohol. That question is whether it was reversible error for the trial court to admit over objections results of the preliminary breath test in the presence of the jury. We have previously held that the preliminary breath test may be admitted in evidence for a limited purpose only. See *State v. Green*, 217 Neb. 70, 348 N.W.2d 429 (1984). Where, as here, no issue as to the propriety of an arrest is raised and the evidence of the preliminary breath test is relevant only for the limited purpose of establishing probable cause to require the driver to submit to a test of his or her blood, urine, or breath under § 39-669.08 and thereby make the results of the second test admissible in evidence for the purpose of seeking to convict a driver for operating a motor vehicle while under the influence of alcohol, the admissibility of the preliminary breath test is a question of law and should therefore be admitted into evidence

out of the presence of the jury. See, *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980); *State v. Green, supra*. However, we do not believe that the county court's failure to excuse the jury when receiving that evidence constitutes prejudicial error in this case. As we have already noted, there was more than sufficient evidence to convict Klingelhoefer, absent the results of the preliminary tests. See *State v. Warnke, supra*. Additionally, the record discloses that, immediately upon admission of the evidence, the county court cautioned the jury not to consider the evidence in determining whether Klingelhoefer was driving while intoxicated and gave a similar instruction when submitting the case to the jury. We believe that under the facts in the instant case those efforts by the county court cured any defect so as to render the effect of the testimony nonprejudicial. Error in the admission of evidence is not grounds for reversal of a judgment where no prejudice results from such error. If properly admitted evidence exists to establish that which improperly admitted evidence also establishes, the error in receiving the inadmissible evidence is not grounds for reversal. See *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 343 N.W.2d 903 (1984). See, also, *State v. Bromwich*, 213 Neb. 827, 331 N.W.2d 537 (1983). Furthermore, it has long been the rule in this state that an error in the admission of evidence may, under appropriate circumstances, be cured by an instruction from the court. See *Dovey v. Sheridan*, 189 Neb. 133, 201 N.W.2d 245 (1972). We believe that the record in this case establishes that this is one of those cases where the error was cured by the instruction. For that reason Klingelhoefer's conviction of operating a motor vehicle while under the influence of alcohol in violation of § 39-669.07 must be affirmed.

We turn, then, to the question regarding the assignments of error relating to Klingelhoefer's refusal to submit to a breath test. Questions regarding *Miranda* warnings and right of counsel have recently been resolved by this court and need not be considered again. In the case of *Fulmer v. Jensen*, 221 Neb. 582, 587, 379 N.W.2d 736, 740 (1986), we said: "We adhere to our previous determination that there is no requirement that *Miranda* warnings be given prior to a request to submit to a chemical analysis of blood, breath, or urine under the Nebraska

implied consent law," citing *Wiseman v. Sullivan*, 190 Neb. 724, 211 N.W.2d 906 (1973). We also held in *Fulmer, supra* at 587, 379 N.W.2d at 740, that "we adhere to our previous holdings that under the implied consent law a driver is not entitled to consult with an attorney before submitting to a chemical test, nor is a delay in the test required due to a driver's request to consult with an attorney."

Klingelhoefer next contends that Neb. Rev. Stat. § 39-669.16 (Reissue 1984) is unconstitutionally vague in that there is no definition of the word "reasonable." However, § 39-669.16 has no application in the instant case. Section 39-669.16 refers to administrative revocations. Klingelhoefer was not subjected to disciplinary proceedings pursuant to § 39-669.16 but, rather, to criminal proceedings for violating § 39-669.08. Klingelhoefer has no standing in this case to raise that issue.

That leaves us, then, with the last assignment of error regarding whether Klingelhoefer was entitled to be advised that he could have a physician of his choice evaluate his condition and perform or have performed laboratory tests as provided for in Neb. Rev. Stat. § 39-669.09 (Reissue 1984). In *State v. Miller*, 213 Neb. 274, 328 N.W.2d 769 (1983), we reaffirmed our earlier position that § 39-669.09 does not require the officer to inform the person to be tested of his privilege to request an independent test. See, also, *Zadina v. Weedlun*, 187 Neb. 361, 190 N.W.2d 857 (1971); *State v. Wahrman*, 199 Neb. 337, 258 N.W.2d 818 (1977); *State v. Sommers*, 201 Neb. 809, 272 N.W.2d 367 (1978); *State v. Brittain*, 212 Neb. 686, 325 N.W.2d 141 (1982). We see no reason to depart from our previous position. For that reason all of the assignments of error are overruled, and the judgments and convictions on each count are affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

While I generally concur with nearly all of the majority opinion, I must dissent on the limited issue regarding whether the officer should be required to advise the accused of his rights under Neb. Rev. Stat. § 39-669.09 (Reissue 1984). For all of the reasons more specifically set out in my dissent in *State v. Miller*, 213 Neb. 274, 328 N.W.2d 769 (1983), I would overrule our

holding in *State v. Miller, supra*, insofar as we held that an officer need not inform the person to be tested of his privilege to request an independent test, and would, rather, hold that the officer must advise the defendant of his rights under § 39-669.09.

I am authorized to state that WHITE and GRANT, JJ., join in this concurrence and dissent.

RITA LAFFIN, APPELLANT, V. NELSON ENTERPRIZE, DOING BUSINESS AS KAROUSEL RESTAURANT, APPELLEE.

382 N.W.2d 371

Filed March 7, 1986. No. 85-541.

Workmen's Compensation: Appeal and Error. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Patrick D. Kuehl and Daniel C. Galvin of O'Brien, Galvin & Kuehl, for appellant.

Thomas M. Plaza of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, for appellee.

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

COLWELL, D.J., Retired.

Rita Laffin, plaintiff, appeals a rehearing order of a three-judge panel of the Nebraska Workmen's Compensation Court dismissing her petition for failure to prove a fall in April 1982 was the cause of injuries to her mid and upper back. She assigns two errors: (1) Undue emphasis was placed on plaintiff's credibility; and (2) The setting aside of her award made by the single judge, and the finding that she had failed to sustain her burden of proof. We affirm.

Laffin, age 42 years, fell April 6, 1982, while picking up two packages of frozen french fries at the Karousel Restaurant, South Sioux City, Nebraska, where she had worked as a cook since September of 1981. At the time, she complained of low back pain; one employee, in fact, massaged her lower back area. She continued working until May 6, 1982, when she quit on the advice of Dr. Clifford J. Meylor, a chiropractor in Sioux City, Iowa, to whom she had gone for treatment for low back pain on April 19, 1982. The low back pain responded to treatment. Later, she complained of mid and upper back pain radiating into her arms and legs, weakness in the legs, and urine retention problems. She later saw an orthopedic surgeon and was referred by Dr. Meylor to a neurosurgeon, who, after a myelogram and CAT scan, diagnosed her condition in August 1982 as a possible ruptured disk at the level of T8-9. She was treated by another neurosurgeon, Dr. Alexander Kleider of Sioux City, Iowa, from December 9, 1982, to April 7, 1983, who recommended surgery to explore the possible T8-9 defects. However, he did not see her again until May 9, 1984, when Laffin was admitted to a hospital on an emergency basis, reporting acute pain when she felt her back "pop" while moving some dishes; Dr. Kleider then performed corrective surgery to repair the T8-9 defects.

The evidence shows that Laffin was in an auto accident in 1968, causing injuries to her neck and head; that she had had bladder problems since the 1960s and mid and upper back pains for more than 3 years prior to April 1982; and that she had fallen down more than three times after April 1982.

There was no error in the panel's making a finding concerning several contradictions in plaintiff's testimony that may have affected her credibility, since the weight and credibility of all evidence is for the trier of fact. *Novotny v. Electric Hose & Rubber Co.*, 214 Neb. 216, 333 N.W.2d 406 (1983). Further, the record supports these findings.

The issue of causation is for the trier of fact. 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 Nebraska Workmen's Compensation Court after

rehearing, the evidence must be considered in the light most favorable to the successful party. See, *Novotny v. Electric Hose & Rubber Co., supra*; *Maxey v. Fremont Department of Utilities*, 220 Neb. 627, 371 N.W.2d 294 (1985).

In order to sustain the burden of proving causation, the evidence presented by the claimant must be definite and certain to warrant a compensation award. *Masters v. Iowa Beef Processors*, 220 Neb. 835, 374 N.W.2d 21 (1985).

Testimony of one chiropractor and four medical doctors was presented on the issue of causation. There was no firm, direct medical evidence supporting plaintiff's claim of causation. The panel was thus correct in finding that the plaintiff had failed to sustain her burden of proving that her fall on April 6, 1982, caused the injury to her upper back or precipitated the surgery on her thoracic spine and its aftereffects.

AFFIRMED.

VISIONQUEST, INC., APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF PUBLIC WELFARE, ET AL., APPELLEES.

383 N.W.2d 22

Filed March 14, 1986. No. 84-541.

1. **Courts: Motions to Dismiss: Appeal and Error.** Where there is a question before a district court, acting as an appellate court, concerning its appellate jurisdiction, the district court is procedurally correct in disposing of the case on the basis of a motion to dismiss.
2. **Declaratory Judgments.** A court may refuse to enter a declaratory judgment where it would not terminate the uncertainty or controversy giving rise to the proceedings.
3. _____. The granting of declaratory relief rests in the discretion of the trial court.
4. **Actions: States: Legislature: Waiver.** The state may lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may provide.
5. **Administrative Law: Jurisdiction: Appeal and Error.** A claimant must comply with the requirements of Neb. Rev. Stat. § 77-2407 (Reissue 1981) in order to present a valid appeal to the district court from the denial of a contract claim against the state.

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

Patrick W. Healey of Healey, Brown, Wieland, Kluender, Atwood & Jacobs, and Mark M. Contento, for appellant.

Patrick T. O'Brien, Deputy Attorney General, and Royce N. Harper, for appellees.

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

GRANT, J.

This is an appeal from the district court for Lancaster County, Nebraska. The district court dismissed the petition of plaintiff-appellant, VisionQuest, Inc. (hereinafter VisionQuest), against defendants-appellees, State of Nebraska; Department of Public Welfare, State of Nebraska; and the director of the Department of Public Welfare (hereinafter defendants). The court based its decision on VisionQuest's failure to comply with certain statutory procedures in perfecting its appeal to the district court. VisionQuest timely appealed to this court, contending that the district court erred (1) in dismissing VisionQuest's action, based upon a pleading filed by the defendants and captioned "Motion to Dismiss"; (2) in failing to grant relief by way of mandamus and declaratory judgment; (3) in failing to hold that Neb. Rev. Stat. ch. 24, art. 3 (Reissue 1979 & Cum. Supp. 1984), as applied to this action, set forth a procedure complete in itself with which VisionQuest had fully complied; and (4) in holding that Neb. Rev. Stat. § 77-2407 (Reissue 1981) is applicable to this action. For the reasons hereinafter stated we affirm.

The record in this case consists entirely of a transcript containing the pleadings of the parties and the orders of the trial court filed in the district court, and a supplemental transcript consisting of "Copy of Transcript from Department of Administrative Services, State of Nebraska . . . ." There is no bill of exceptions, since no evidence was taken at any stage of these proceedings.

The transcript from the Department of Administrative Services (hereinafter DAS) was certified by the director of DAS

on March 30, 1982, and filed in the district court on April 9, 1982. The transcript consists of five letters. The first is a letter of December 10, 1981, to the then director of DAS from VisionQuest's counsel, stating VisionQuest had rendered a bill for services to the Department of Public Welfare (hereinafter Department) for $38,940.48 and that the Department had denied payment in full, although it had paid $12,224 (sic), which was applied by VisionQuest to the bill. The letter further stated:

> It appears at this point that payment has been denied and my clients wish to proceed with suit to recover the sums they believe due to them. However, it appears under section 22 of Article V of the Constitution and sections 24-319 and following of the Nebraska Statutes, that it is necessary first to present the claim to you, as Director of Administrative Services, and proceed with suit if the claim is in whole or in part rejected or disallowed.
>
> We are therefore presenting to you at this time our client's demand for payment of the sums due.

The letter further stated: "There is of course considerably more evidentiary matter and legal material, but this letter and the enclosures would appear to be sufficient to acquaint you with the nature of the claim and the issues involve[d]."

Attached to this letter of December 10, 1981, and included by reference, were 10 letters from and to various representatives of, and attorneys for, various parties setting forth their various positions. These 10 letters were written during the time from March 13 to November 5, 1981.

The other primary four letters made a part of the DAS transcript consisted of a letter from DAS to VisionQuest's counsel acknowledging receipt of the December 10, 1981, letter; a letter from DAS to the Attorney General of the State of Nebraska requesting legal advice with regard to the VisionQuest claim; a letter from the Attorney General's office to DAS recommending the claim be denied; and a letter of January 25, 1982, to VisionQuest's counsel from the director of DAS denying the claim.

As stated above, the transcript also sets out the pleadings in the district court. VisionQuest's petition was filed February 24,

1982, and the facts alleged therein show the following.

VisionQuest is a corporation organized under the laws of the State of Arizona, which provides educational and related services to delinquent, disturbed, and handicapped children. VisionQuest does business in Arizona, New Mexico, and elsewhere as authorized by law. At some time prior to 1981, the Department contracted with VisionQuest to provide services for two Nebraska residents, P.J.L., born October 9, 1960, and R.F., born July 26, 1964. Both were placed at a VisionQuest facility, apparently in Arizona. P.J.L. was placed with VisionQuest on July 1, 1980, and that placement apparently continued at least to February 24, 1982, which was the date of the filing of VisionQuest's petition. In the present posture of the case, we do not know when this placement was terminated. In the case of R.F., placement began on June 11, 1980, and terminated on October 15, 1981. The whereabouts of either P.J.L. or R.F. at any time after the filing of this petition is not shown in the record.

In February of 1981 the Department requested VisionQuest to return P.J.L. and R.F. to Nebraska for further placement and treatment. The parents of R.F. objected to the removal of their child from the VisionQuest facility, and their attorney sent a letter dated March 13, 1981, to the administrative director for VisionQuest, directing VisionQuest "not to release, transfer, or other [sic] deliver [R.F.] to the custody of the Department of Public Welfare or other agency of the State of Nebraska until the State has discharged its obligations under the applicable Federal law." The "applicable Federal law" to which this letter refers is the federal Education of the Handicapped Act, 20 U.S.C. §§ 1401 et seq. (1982) (hereinafter EHA). The act is essentially a funding statute through which the federal government provides financial assistance to the states for the education of handicapped children. A state, however, is not entitled to receive these funds unless it fulfills certain prerequisites. Among those prerequisites is the requirement a state or agency must give notice and a "due process" hearing before a child may be removed from his then current placement. See § 1415(a)-(e). In addition, the parents of P.J.L., through counsel, sent a letter dated April 13, 1981, to the then

director of the Department specifically requesting a due process hearing concerning P.J.L.'s proposed change of placement.

The Department's position concerning the issue of placement is stated in a letter from the Department's counsel to VisionQuest's counsel. The letter, dated November 5, 1981, states in part:

> [R.F.] and [P.J.L.] are wards of the State of Nebraska, that is to say, the Department of Public Welfare is the legal guardian of these minors pursuant to Sections 43-209 and 43-905, R.R.S. 1943. These children were placed in VisionQuest by the Department as legal guardian, under the provisions of the Interstate Compact on the Placement of Children (Section 43-1101, R.R.S. 1943). These placements were not made under the provisions of the Federal Education of the Handicapped Act as continually cited by VisionQuest and their counsel. If you have reviewed previous correspondence, you know that it has been and continues to be our position that the Education of the Handicapped Act does not apply to this situation since the Department is not an educational institution as contemplated by the Act.

Effective April 1, 1981, it became the Department's position that it would no longer render payment to VisionQuest for the care of P.J.L. and R.F. because VisionQuest had detained these individuals against the express wishes of the Department and refused to return the minors to Nebraska. Further letters show that the Department later changed its position, and on October 15, 1981, sent a check in the amount of $10,224 to VisionQuest for services rendered to P.J.L. and R.F. for the period April 1, 1981, to September 30, 1981. Accompanying this check was a letter from counsel for the Department stating that the payment was based on an amount that would have been incurred if P.J.L. and R.F. had been returned to Nebraska effective April 1, 1981, and like services had been rendered to the children in Nebraska.

VisionQuest appealed the DAS letter denial of its claim to the Lancaster County District Court. Its petition, filed February 24, 1982, set out two causes of action. The first cause of action prayed for $26,716.48 plus interest for services rendered; for a declaratory judgment and determination of VisionQuest's

rights and the rights and obligations of all the parties as they pertain to §§ 1401 et seq., and "for a declaration and determination of Defendants' continued responsibility to make payment for the services performed by Plaintiff [VisionQuest]"; and for a writ of mandamus directing the Department to pay for VisionQuest's services. The second cause of action was based on quantum meruit for services rendered.

Defendants filed their answer on March 29, 1982. On June 3, 1982, defendants filed a pleading captioned "Motion to Dismiss," alleging that the court lacked jurisdiction of the action because VisionQuest had not perfected its appeal to the district court in compliance with § 77-2407 and Neb. Rev. Stat. §§ 27-1301.01 (Cum. Supp. 1969) and 27-1303 (Reissue 1964). On June 2, 1983, the district court sustained the Department's motion to dismiss and entered an order stating in part: "Plaintiff's petition essentially presents a claim against the State of Nebraska for money. Sections 77-2406 et. seq. are applicable and have not been complied with by the plaintiff in this case."

VisionQuest then filed a "Motion for Judgment Notwithstanding or for New Trial." That motion was overruled on June 5, 1984. In its order the district court stated that it was still of the opinion that VisionQuest's petition essentially presents a claim for money against the State and VisionQuest has failed to comply with the applicable Nebraska law in perfecting its appeal. The following was also part of that order: "The Court has determined that the request for declaratory judgment must also be dismissed for the reason that a declaratory judgment would not terminate this controversy which is essentially a claim against the State of Nebraska for money."

In its first assignment of error, VisionQuest contends that the pleading filed by the defendants, captioned "Motion to Dismiss," is not a permissible pleading in civil practice, citing *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984), and *Smick v. Langvardt*, 216 Neb. 778, 345 N.W.2d 830 (1984). While it is true we held in *Nelson* and *Smick, supra*, that there is no pretrial pleading in Nebraska known as a motion to

dismiss, there is an important distinction between those cases and this one. In *Nelson* and *Smick, supra*, the plaintiffs originally brought suit in the district court, and defendants in those cases, rather than filing a demurrer or motion for summary judgment (pleadings authorized by statute and as to which a body of law has settled the legal ramifications), sought to dispose of the cases, without trial, by means of a motion. VisionQuest, on the other hand, in this case, appealed to the district court following what it contends to be an adverse decision from the director of DAS.

It is a generally accepted rule of law that an appellate court has the power to determine whether or not an appeal properly lies. Neb. Ct. R. 7B(1) (rev. 1983) states: "A motion to dismiss for lack of jurisdiction may be filed at any time after an appeal has been docketed." While our review of the Lancaster County District Court rules of practice and procedure (1984) does not show that the district court has a comparable rule, there is no reason such a disposition is not available to the district court, acting as an appellate court, while considering appeals from administrative tribunals as in this case. In *Gesman v. State*, 216 Neb. 126, 342 N.W.2d 196 (1984), we specifically held that a motion to dismiss a similar appeal should have been sustained.

The motion to dismiss filed by the defendants set out that the district court had "no jurisdiction of this action." Defendants' motion was based on VisionQuest's failure to comply with certain statutory provisions in perfecting its appeal to the district court. Where there is a question before a district court, acting as an appellate court, concerning its appellate jurisdiction, the district court is procedurally correct in disposing of the case on the basis of a motion to dismiss.

In its second assignment of error, VisionQuest argues that the district court erred "in failing to grant appellant [VisionQuest] relief by way of mandamus and declaratory judgment, where controversy existed as to what law governed the rights and liabilities of the parties." VisionQuest maintains that relief by way of declaratory judgment is proper in this case because it is "caught in the middle" between the parents of P.J.L. and R.F., who are asserting their rights under EHA, and the Department, which requested return of these individuals pursuant to the

Interstate Compact on Placement of Children. See Neb. Rev. Stat. § 43-1101 (Reissue 1984). While we agree that there is some confusion as to the applicability of EHA and the interstate compact in this case, we hold that the district court was correct in finding that VisionQuest's petition was "essentially a claim . . . for money." P.J.L., R.F., or their parents were not before the district court, nor were any allegations made concerning their rights or status. We agree with the trial court's determination that another reason for not treating VisionQuest's petition as one seeking declaratory relief exists because a declaratory judgment would not terminate the controversy between VisionQuest and the defendants. As stated in *Millard School Dist. v. State Department of Education*, 202 Neb. 707, 711, 277 N.W.2d 71, 73 (1979): "A court may refuse to enter a declaratory judgment where it would not terminate the uncertainty or controversy giving rise to the proceedings."

Further, in *Millard School Dist. v. State Department of Education, supra*, we reiterated that the granting of declaratory relief rests in the discretion of the trial court. See, also, *Blanco v. General Motors Acceptance Corp.*, 180 Neb. 365, 143 N.W.2d 257 (1966). Ordinarily, when a plaintiff asks for declaratory relief, that plaintiff requests a court to direct it in doing or refraining from doing some action that may be at the plaintiff's legal peril. VisionQuest alleges in its petition that it "might be subjected to liability if they caused the removal of the youths from their existing program." There is nothing in the skimpy record before us which supports this allegation. We hold that the district court properly exercised its discretion in refusing to treat VisionQuest's petition as a request for declaratory relief.

VisionQuest's third and fourth assignments may be treated together. VisionQuest contends that the court erred in failing "to hold that Chapter 24, Article 3 of the Nebraska statutes, as applied to this action, set forth a procedure complete in itself with which appellant had fully complied," and in holding that § 77-2407 applied to VisionQuest's action against defendants.

VisionQuest alleges that Neb. Rev. Stat. § 24-319 (Reissue 1979) specifically controls the procedure in this case. That

statute, insofar as applicable to this case, provides: "The several district courts of the judicial districts of the state shall have jurisdiction to hear and determine (1) all claims against the state filed therein which have previously been presented to the Director of Administrative Services, and have been in whole or in part rejected or disallowed." VisionQuest's position is that that section alone controls, and the mere submission and rejection of a claim frees up the claimant to file a petition in the district court and there first present factual evidence. VisionQuest would treat its contractual claim in a fashion identical with the treatment of a tort claim against the state. See Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981). In the tort claim procedure § 81-8,213 provides that no suit is permitted under that act until the State Claims Board has made a final disposition of the claim, except that if there is no disposition of the claim for 6 months, the claim may be withdrawn and suit begun initially against the state in the district court in the same manner that plaintiffs generally seek tort damages from defendants.

Nebraska law treats contract claims against the state in an entirely different manner. Neb. Const. art. V, § 22, provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." This constitutional provision was discussed in *Gentry v. State*, 174 Neb. 515, 517-18, 118 N.W.2d 643, 645 (1962), where this court stated: "This provision permits the state to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe. This provision of the Constitution is not self-executing. Legislative action is necessary to make it available." The Legislature has provided the manner and where tort claims against the state may be brought and where and in what manner contract claims against the state may be brought.

With regard to contract claims of the type here considered, in § 24-319 the Legislature decreed that the district courts have jurisdiction to hear and determine such claims "which have previously been presented to the Director of Administrative Services, and have been . . . disallowed." The Legislature then provided a specific manner in which claims should be presented

to the Director of Administrative Services. Neb. Rev. Stat. § 77-2406 (Reissue 1981) provides in part that "[a]ll claims . . . upon the treasury of this state, before any warrant shall be drawn for the payment of the same, shall be examined, adjusted and approved by the Department of Administrative Services." Section 77-2407 provides in part as follows:

> In case of the disallowance of any claim, or any part thereof, the party aggrieved by the decision of the director may appeal therefrom to the district court of the county where the capital is located within twenty days after receiving official notice. Such appeal may be taken in the manner provided by law in relation to appeals from county courts to such district courts, and shall be prosecuted to effect as in such cases. The party taking the appeal shall give bond to the State of Nebraska in the sum of two hundred dollars, with sufficient surety to be approved by the clerk of the court to which such appeal may be taken, conditioned to pay all costs which may accrue to the Director of Administrative Services by reason of taking such appeal. No other bond shall be required.

Sections 24-319 (Reissue 1979) and 77-2407 and 77-2408 (Reissue 1981) must be read together and with article VIII, § 9, of the Constitution of the State of Nebraska, which provides:

> Claims upon treasury; adjustment; approval; appeal. The Legislature shall provide by law that all claims upon the treasury shall be examined and adjusted as the Legislature may provide before any warrant for the amount allowed shall be drawn. Any party aggrieved by the action taken on a claim in which he has an interest may appeal to the district court.

The entire constitutional and legislative approach to disposition of contract claims against the state is based on appeals from the actions taken by designated statutory officers, and does not contemplate independent suits in the district court. A claimant must comply with the requirements of § 77-2407 in order to present a valid appeal to the district court from the denial of a contract claim against the state.

In *Scotts Bluff County v. State*, 133 Neb. 508, 276 N.W. 185

(1937), and in *Pickus v. State*, 115 Neb. 869, 215 N.W. 129 (1927), this court held that following the proper procedure was mandatory in order to confer jurisdiction on appeal to the district court. The ultimate dispositive question, then, is whether VisionQuest complied with the requirements of § 77-2407 in filing its petition in the district court.

VisionQuest does not assign as error any action of the trial court in determining that VisionQuest did not follow the procedures set out in § 77-2407. We need not reach defendants' contentions that VisionQuest did not comply with §§ 27-1301.01 and 27-1303, which statutes were repealed by 1972 Neb. Laws, L.B. 1032, § 287, but which statutes were held to be applicable to such appeals in *School Dist. No. 17 and Westside Comm. Schools v. State*, 210 Neb. 762, 316 N.W.2d 767 (1982). That situation has now been clarified by amendment to § 77-2407, effective September 6, 1985.

In the case at bar, VisionQuest, at the minimum, was required to comply with the requirement of § 77-2407 that it appeal "to the district court . . . within twenty days." VisionQuest did not do so. Its February 24, 1982, petition was not timely as an appeal of the DAS denial of January 25, 1982.

Nor did VisionQuest comply with the specific requirement of § 77-2407 that "[t]he party taking the appeal shall give bond to the State of Nebraska in the sum of two hundred dollars . . . ." Such a bond was never posted in this case. In *Gesman v. State*, 216 Neb. 126, 129, 342 N.W.2d 196, 198 (1984), we said: "There is absolutely no evidence of the filing of a *$200* bond. . . . The requirement as to the furnishing of a proper appeal bond is mandatory and essential to confer jurisdiction of the proceedings on the district court." Insofar as VisionQuest's contention in its brief at 17 that "[r]equiring a bond to pursue a claim is an invidious discrimination against those unable to furnish a bond, and is not a valid requirement," we note that the specific requirement of a $200 bond was first enacted by the Legislature in Gen. Laws § 2, p. 202 (1877), and the same requirement in the same amount has been set forth in the various changes in that law up through the time of VisionQuest's appeal to district court.

Insofar as VisionQuest contends that the application of § 77-2407 "would be nonsensical and would deny the rights to a fair hearing," close examination of the record before us does not show that, at any time in the proceedings before DAS, VisionQuest requested a hearing. Nor did VisionQuest at any time before the district court contend that it had been damaged or prejudiced by the lack of a hearing. Had such a contention been made before the district court and the district court's determination that hearing was not necessary been assigned as error in this court, we would be faced with an entirely different situation. Instead, VisionQuest has presented a case where we must assume that the presentation it made to DAS constituted all the presentation it desired to make. The issue of the propriety of DAS's making a final denial of a claim without an evidentiary hearing is not before us.

The action of the district court in sustaining defendants' motion to dismiss VisionQuest's petition was correct and is affirmed.

AFFIRMED.

DOUGLAS BOISEN, APPELLEE, V. PETERSEN FLYING SERVICE, INC., A NEBRASKA CORPORATION, APPELLANT.

383 N.W.2d 39

Filed March 14, 1986. No. 84-707.

1. **Contracts.** When neither the terms of a contract nor facts and circumstances demonstrating the intent of the parties are disputed, construction of a contract is a question of law.
2. **Appeal and Error.** Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a trial court.
3. **Restrictive Covenants: Employer and Employee.** There are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on

the employee.

4. _____: _____. Not every employer-employee relationship infuses validity and enforceability into a postemployment restraint on competition by a former employee.
5. _____: _____. Regarding a postemployment covenant not to compete, an employer has a legitimate business interest in protection against competition by improper and unfair methods, but an employer is not entitled to enforcement of a restrictive covenant which merely protects the employer from ordinary competition.
6. _____: _____. Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition.
7. _____: _____. An employer has a legitimate need to curb or prevent competitive endeavors by a former employee who has acquired confidential information or trade secrets pertaining to the employer's business operations.
8. _____: _____. Ordinarily, an employer has no legitimate business interest in postemployment prevention of an employee's use of some general skill or training acquired while working for the employer, although such on-the-job acquisition of general knowledge, skill, or facility may make the employee an effective competitor for the former employer.
9. _____: _____. A covenant not to compete, as a partial restraint of trade, is available to prevent unfair competition by a former employee but is not available to shield an employer against ordinary competition.

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

Jerry C. Stirtz of Martin, Stirtz & Martin, for appellant.

Michael R. Snyder, for appellee.

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

SHANAHAN, J.

Douglas Boisen commenced an action for declaratory judgment, see Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1979), seeking determination that a postemployment covenant not to compete, contained in Boisen's employment contract with Petersen Flying Service, Inc., was invalid. We affirm the judgment of the district court for Kearney County declaring the postemployment restraint unenforceable.

The basic facts bearing upon disposition of Petersen Flying's

appeal are not disputed. When neither the terms of a contract nor facts and circumstances demonstrating the intent of the parties are disputed, construction of a contract is a question of law. See, *Bishop Cafeteria Co. v. Ford*, 177 Neb. 600, 129 N.W.2d 581 (1964); *Grantham v. General Tel. Co.*, 191 Neb. 21, 213 N.W.2d 439 (1973); *Don J. McMurray Co. v. Wiesman*, 199 Neb. 494, 260 N.W.2d 196 (1977). Regarding a question of law, this court has an obligation to reach its conclusion independent from the conclusion reached by a trial court. See, *Ranger Division v. Bayne*, 214 Neb. 251, 333 N.W.2d 891 (1983) (construction of federal regulations to determine whether, as a matter of law, absence of a disability waiver was an absolute defense to an applicant's claim concerning an employer's alleged discrimination against the physically disabled); *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985) (declaratory judgment action to determine validity of a nonassignment provision in health care contracts).

Douglas Boisen, 35 years old and a lifetime resident of Kearney County, lived near Minden with his wife and children. Douglas, a farmer since 1971, formed a farming partnership in 1974, Boisen Farms, with his father. Douglas obtained a private pilot certificate in 1977. Charles O. Petersen, president and sole shareholder of Petersen Flying, was a flight instructor for Douglas in obtaining the private pilot certificate. The business of Petersen Flying, incorporated in 1976, consisted of aerial spraying for application of agricultural chemicals—herbicides and insecticides. Boisen Farms was one of Petersen Flying's customers.

In 1979 Douglas began training toward a commercial pilot certificate. Petersen again instructed Douglas and indicated an interest in Douglas' future employment by Petersen Flying as a spray pilot, after Douglas obtained his commercial pilot certificate. Douglas received a commercial pilot certificate in 1981 and arranged with Petersen for special instruction in flying a spray plane. Petersen supervised several low-altitude practice runs made in a Grumman "Ag-Cat," one of Petersen Flying's spray planes used in Douglas' efforts to develop skills as an aerial applicator. When Douglas became proficient in flying an Ag-Cat, Petersen, on behalf of Petersen Flying,

submitted to Douglas a written agreement denominated "Contract for Use of Aircraft, Employment as Pilot and Agreement Not to Compete." The submitted contract contained a provision:

> It is expressly understood and agreed, that for the consideration provided herein by employer, employee agrees that in the event he does not enter the employment of employer, or in the event he does enter employment with employer, but later leaves such employment for any reason, whether at his own instance, or at the instance of the employer, then, in any of such events, employee agrees that he shall not enter any occupation or employment, whether working for someone else or as a self-employed person, as owner, operator, employee, salesman, representative, pilot, instructor, advisor or consultant in, with or to any business which is in competition with any business presently performed or performed at any time during the employment of employee, by Petersen Flying Service, Inc., employer herein, within a radius of 50 miles of Minden, Kearney County, Nebraska, for a period for 10 years from the date of this agreement, or from the date such employee shall leave the employment of employer, which ever is later.

Douglas and Petersen signed the agreement on July 6, 1982. After signing the agreement Douglas did some aerial spraying for Petersen Flying in 1982 and during the first few weeks of the "spraying season" in 1983. While employed by Petersen Flying, Douglas did not contact any of Petersen Flying's customers regarding aerial spraying, that is, did not solicit orders for spraying or make collections for chemicals applied by Petersen Flying. As a result of his growing up in Kearney County and acquaintance with other members of the farming community, Douglas knew the identity of some customers by location of their farms. For identification of sites to be sprayed, Douglas and other spray pilots of Petersen Flying were given names of customers immediately before spraying operations. Douglas' only on-the-job training, knowledge, or skill acquired related to operating the Ag-Cat, mixing chemicals to be sprayed, and applying chemicals on fields of customers. Chemicals were

mixed according to the manufacturer's label on the container.

Late in 1983, Petersen Flying discharged Douglas from employment, claiming that Douglas never developed into a good spray pilot.

In his petition Douglas alleged:

> The restraint purportedly imposed by [the employment contract] is unreasonable concerning the nature of employment or occupation purportedly prohibited, the area within which such employment or occupation is prohibited, and the length of time during which such employment or occupation if [sic] prohibited, and as such, the restraint does not correspond with the need, if any, for protecting the legitimate interests of [Petersen Flying].

By his petition Douglas prayed that the covenant not to compete, contained in the agreement of July 6, 1982, be "declared invalid and of no force or effect."

In its answer Petersen Flying claimed that the contract with Douglas constituted "a bargain by an assistant, servant or agent not to compete with his employer, after termination of employment, within such territory and during such time as may be reasonably necessary for the protection of the employer without imposing undue hardship on the employee." Petersen Flying also filed a cross-petition, alleging that the restrictive covenant was "valid and enforcable [sic] and should be enforced against [Douglas]" and praying that the restrictive covenant be determined valid and enforceable or "that in the event said Contract cannot be fully enforced, that the Court determine and reform the same to be equitable between the parties."

At trial Douglas testified he wanted to enter the aerial spraying business. As described by Charles Petersen, the aerial spraying of Petersen Flying was not fly-by-night. Petersen Flying owned six aircraft and obtained customers through "personal contact, word of mouth, advertising [and a] lot of hard work." Petersen testified that the aerial spraying business is a "flexible business and you go wherever the bugs are." Customer contact was initiated by a prospective customer, or, as Petersen explained, "[Y]ou wait for the farmer to call." Petersen Flying did "nothing" to retain customers from season

to season. The "price" charged for aerial spraying determined whether a customer stayed with Petersen Flying or went to one of its competitors in the area. Information about a competitor's price "generally" came from a prospective customer. Petersen Flying had no trade secrets. A customer list of Petersen Flying was nonexistent. Petersen acknowledged that Douglas, during employment with Petersen Flying, learned "no more" than Douglas would have learned from another engaged in the aerial spraying business. When asked about his reason for the postemployment restrictive covenant, Petersen responded: "The whole fact is that I've been in business in this area, why should I train somebody to go out and run me competition in the area that I have been developing."

The district court found the covenant not to compete was "unreasonable and unenforceable." The district court refused to modify the covenant, as requested by Petersen Flying, regarding the restrictions involving time and space.

Petersen Flying claims the district court erred in (1) finding that the restrictive covenant was unenforceable and (2) refusing to modify the covenant to provide enforceability.

> There are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.

Securities Acceptance Corp. v. Brown, 171 Neb. 406, 417, 106 N.W.2d 456, 463 (1960).

Petersen Flying invokes the "equities" involved in the case before us and emphasizes that flying a spray plane is not Douglas' primary occupation, characterizing Douglas as "flying a spray plane more for the thrill of the helmet, the goggles, the roar of the engine and the white scarf trailing out of the open cockpit than for the living wage he would make to feed his family." Brief for Appellant at 11. In this manner Petersen Flying contends that Douglas' aerial spraying is an avocation, not a vocation, and suggests that a court should consider

several factors, indicated in *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982), regarding a "balancing test" applied in determining whether enforcement of a covenant not to compete would be unduly harsh and oppressive to an employee.

However, not every employer-employee relationship infuses validity and enforceability into a postemployment restraint on competition by a former employee. Before weighing the various factors pertinent to hardship on a promisor in a restrictive covenant and enforceability of such restraint, we reexamine some principles formulated concerning validity of a covenant not to compete. More fundamental than, or at least preliminary to, the "balancing test" found in *Philip G. Johnson & Co. v. Salmen, supra*, is the test embodied in the question, Is the restraint " ' "reasonably necessary to protect the employer in some legitimate interest" ' "? *Brewer v. Tracy*, 198 Neb. 503, 505, 253 N.W.2d 319, 321 (1977); *Diamond Match Div. of Diamond International Corp. v. Bernstein*, 196 Neb. 452, 243 N.W.2d 764 (1976); *Securities Acceptance Corp. v. Brown, supra*. See, also, Restatement (Second) of Contracts § 188(1)(a) (1981). Regarding a postemployment covenant not to compete, an employer has a legitimate business interest in protection against " 'competition by improper and unfair methods,' " but an employer is not entitled to enforcement of a restrictive covenant which merely protects the employer from " 'ordinary competition.' " *Diamond Match Div. of Diamond International Corp. v. Bernstein, supra* at 455, 243 N.W.2d at 766. "A restraint on the employee is illegal when its purpose is the prevention of competition, except when the methods of competition to be prevented are methods commonly regarded as improper and unfair." 6A A. Corbin, Corbin on Contracts § 1394 at 100 (1962).

To distinguish between "ordinary competition" and "unfair competition," courts and commentators have frequently focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill

under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition. See *Dana F. Cole & Co. v. Byerly*, 211 Neb. 903, 320 N.W.2d 916 (1982). See, also, *Sidko Paper Company v. Aaron,* 465 Pa. 586, 351 A.2d 250, 254 (1976) (an employer "clearly has a protectible interest in customer goodwill"); 6A A. Corbin, *supra* (special justification for postemployment restriction exists "if a part of the employee's compensated service consists in the creation of the good will of customers and clients, a good will that is likely to follow the person of the employee himself"); Corbin on Contracts § 1391B at 573 (C. Kaufman ed. Supp. 1984) ("Some courts seem to overlook the fact that covenants against competition are imposed, not to protect the employer against ordinary competition, but only to protect against unfair siphoning away of the employer's good will"); Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625 (1960). Also, an employer has a legitimate need to curb or prevent competitive endeavors by a former employee who has acquired confidential information or trade secrets pertaining to the employer's business operations. See *Brewer v. Tracy, supra*. See, also, *Whitmyer Bros., Inc. v. Doyle, et al.*, 58 N.J. 25, 33, 274 A.2d 577, 581 (1971) (an employer has a "patently legitimate interest in protecting his trade secrets"); 6A A. Corbin, Corbin on Contracts § 1394 (1962). From the foregoing we glean that an objective of a covenant not to compete is prevention of an employee's competitive use of information or a relationship with a customer or client, which pertains peculiarly to the employer and has been acquired in the course of the employee's employment with the employer. See Blake, *supra* at 647.

On the other hand, "[p]ost-employment restraints are scrutinized with particular care," and "[a] line must be drawn between the general skills and knowledge of the trade and information that is peculiar to the employer's business." Restatement (Second) of Contracts § 188, Comment *g*. at 45 (1981). Ordinarily, an employer has no legitimate business interest in postemployment prevention of an employee's use of some general skill or training acquired while working for the

employer, although such on-the-job acquisition of general knowledge, skill, or facility may make the employee an effective competitor for the former employer. See Blake, *supra* at 652. See, also, 6A A. Corbin, *supra* § 1394. "An opportunity to develop good will which is no different from the opportunity any other like employee in the industry would have with some other firm is not traceable to the particular position and situation of the employer." Corbin on Contracts § 1391B at 574 (C. Kaufman ed. Supp. 1984).

Petersen Flying has not shown any special circumstance affecting a legitimate business interest to be protected by a covenant not to compete. Beyond general contact with members of the community, Douglas had no personal and business-based contact with a customer or prospective customer of Petersen Flying. Although Douglas' low-altitude flying over a customer's fields at times probably brought him within relative proximity to Petersen Flying's customers, such contact is not close customer contact likely to lead away customers from Petersen Flying or divert customers to any prospective aerial spraying business operated by Douglas. Douglas was not exposed to, and did not acquire, confidential information accumulated by Petersen Flying regarding its customers or potential customers. As acknowledged by Petersen, the on-the-job training and knowledge acquired by Douglas were no different from that which would have been received from another employer engaged in the business of aerial spraying. The nature of Douglas' services rendered during employment with Petersen Flying contained no inherent threat to Petersen Flying's relationship with its customers, who were generally known and accessible to anyone involved in the business of aerial spraying. Petersen Flying had no trade secrets for aerial spraying, such as a significantly different technique unknown to competitors or a unique and advantageous method to conduct an aerial spraying business. Reduced to its rudiments, Petersen Flying's objective in the covenant not to compete is prevention of prospective competition consequent to another aerial spraying business' serving agricultural customers and, perhaps, ultimately causing a reduction of revenue due to competitive prices or fewer customers, available

or served. A covenant not to compete, as a partial restraint of trade, is available to prevent unfair competition by a former employee but is not available to shield an employer against ordinary competition. Under the circumstances we conclude that the questioned covenant not to compete does not protect "some legitimate business interest" of Petersen Flying and is, therefore, invalid and unenforceable. Petersen Flying's argument that a "balancing test" should be applied in this case simply does not get off the ground.

Petersen Flying maintains, however, that a court should exercise equitable powers and modify the restrictions of the covenant in this case. If such power had been exercised in this case, Petersen Flying argues, the restrictive covenant should have been enforced as judicially modified. Without commenting on the question whether a court, if ever, has the power to modify a restrictive covenant which is too broad, see *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982), we dispose of Petersen Flying's last argument by reiterating that Petersen Flying is not entitled to avail itself of the restrictive covenant as protection against the threat of ordinary competition. The purpose or effect of eliminating or preventing ordinary competition invalidates the restrictive covenant in question. Consideration of propriety or availability of judicial modification concerning the covenant's restraints based on time and place becomes unnecessary on account of the questioned covenant's invalidity. See *Johanson v. Liberty Mutual Insurance Company*, 232 N.Y.S.2d 856, 860 (1962) (a restrictive covenant which protects only against ordinary competition is "unenforceable even though it is limited as to time and place"). See, also, Corbin on Contracts § 1391B at 573 (C. Kaufman ed. Supp. 1984) (if the purpose or effect of a restrictive covenant is only to restrain ordinary competition, such condition "absolutely invalidates" a restrictive covenant). Whatever a more narrow draft of the questioned covenant might have been or may be, thereby decreasing the limitation of time or space involved in the restriction under examination, is irrelevant. Any modification in diminution of the restrictions on time and space still pertains to a restriction on a form of competition against which Petersen Flying is not entitled to

protection.

The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., and BOSLAUGH, J., concur in the result.

FARMERS UNION CO-OPERATIVE INSURANCE COMPANY OF NEBRASKA, APPELLANT, V. JIMMY L. NEALS, APPELLEE, CONTINENTAL WESTERN INSURANCE COMPANY, GARNISHEE-APPELLEE.

383 N.W.2d 35

Filed March 14, 1986. No. 84-825.

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

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

Alan L. Plessman, for garnishee-appellee.

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

PER CURIAM.

Plaintiff-appellant Farmers Union Co-Operative Insurance Company of Nebraska filed a notice of appeal in the district court for Lancaster County, Nebraska, on October 17, 1984. The notice of appeal states in part that appellant "appeals to the Supreme Court of the State of Nebraska from the order and judgment of the District Court entered on September 18, 1984, denying the plaintiff's motion for a new trial." Appellant sets out in its brief at 1: "C. HOW THE ISSUE WAS DECIDED At the trial held on June 7, 1984, the parties stipulated as to the facts relevant to the case. The Honorable Dale E. Farhnbruch [sic] on August 30, 1984, found that appellant could not recover in a garnishment action against the appellee and dismissed appellant's action."

The record before this court does not contain, in the transcript, the supplemental transcript, or the bill of exceptions, any court order or findings of August 30, 1984, or September 18, 1984, nor any motion for new trial. The only judgment appearing in the transcript is one dated March 31, 1980, in favor of appellant against Jimmy L. Neals.

Appellant's brief does not make any references to the transcript, although such references are required by Neb. Ct. R. 9C(1) (rev. 1983). A simple adherence to this rule might have brought the missing orders to light.

The bill of exceptions of two pages makes reference to a "stipulation," which in turn makes no reference to any garnishment proceedings.

It is not the province of this court to attempt to make the records before us comply with our rules of appeal. To do so would inevitably require us to become lawyers for one contending side or the other.

There is no final order or judgment before us to be reviewed. The appeal is therefore dismissed.

APPEAL DISMISSED.

TODD VOYLES AND MELINDA VOYLES, MINORS, BY AND THROUGH KAREN RACHAU, NEXT FRIEND, APPELLANTS, V. DEBROWN LEASING, INC., A CORPORATION, AND PAUL JOHNSON, APPELLEES.

383 N.W.2d 36

Filed March 14, 1986. No. 85-082.

1. **Constitutional Law: Rules of the Supreme Court: Statutes: Appeal and Error.** Failure to comply with the rules of the Supreme Court regarding presentation of a question concerning constitutionality of a statute—written notice of a constitutional question filed with the Clerk of the Supreme Court when the brief of the one contesting constitutionality is filed with the court, and service of the contestant's brief on the Attorney General within the prescribed time—precludes the Supreme Court's considering a question about constitutionality of a statute.
2. **Summary Judgment: Motor Vehicles: Negligence: Final Orders: Appeal and Error.** A partial summary judgment that a claimant is a guest passenger within

the purview of Nebraska's former guest statute, Neb. Rev. Stat. § 39-6,191 (Reissue 1978), while the issue of the host driver's negligence is unresolved, is not a final judgment or order reviewable by the Supreme Court.

3. **Pleadings: Motions to Dismiss.** A pretrial motion to dismiss is not permissible as a pretrial pleading but may sometimes be recognized as a demurrer on stipulation of the parties or by rule of court.
4. _____: _____. An evidentiary hearing on a motion to dismiss does not convert an irregular pleading, such as a pretrial motion to dismiss, into any form of pleading allowable under present Nebraska law governing civil procedure.

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

Robert B. Creager of Berry, Anderson, Creager & Wittstruck, for appellants.

William D. Sutter of Barlow, Johnson, DeMars & Flodman, for appellees.

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

SHANAHAN, J.

This appeal involves consolidated actions for bodily injury as the result of a one-vehicle accident which occurred in Nebraska on July 19, 1980. Two minors injured in the accident filed separate lawsuits, which were consolidated for disposition in the district court for Lancaster County and appeal to this court.

The amended petition of each minor alleged that the minor was a passenger in a vehicle operated by the defendant Paul Johnson. In his answer Johnson denied negligence but alleged that if there were any negligence, such negligence was not gross negligence required for recovery in view of the then existing guest statute of Nebraska, Neb. Rev. Stat. § 39-6,191 (Reissue 1978), which provided:

> The owner or operator of a motor vehicle shall not be liable for any damages to any passenger or person riding in such motor vehicle as a guest or by invitation and not for hire, unless such damage is caused by the driver of such motor vehicle being under the influence of intoxicating liquor or because of the gross negligence of the owner or

> operator in the operation of such motor vehicle. For the purpose of this section, the term guest is hereby defined as being a person who accepts a ride in any motor vehicle without giving compensation therefor, but shall not be construed to apply to or include any such passenger in a motor vehicle being demonstrated to such passenger as a prospective purchaser.

By reply each minor alleged that the guest statute was unconstitutional. On April 11, 1984, Johnson filed motions for partial summary judgment, seeking adjudication that each minor was a guest passenger whose claim was governed by the guest statute, § 39-6,191. The district court, on October 2, entered in favor of Johnson a partial summary judgment that each minor "was a guest passenger as a matter of law under the Nebraska Guest Statute" and further provided that each "plaintiff shall have 14 days to amend" the plaintiff's amended petition "in compliance with this Order."

The plaintiffs filed motions for a new trial regarding the partial summary judgment, and those motions were overruled on October 8. Neither plaintiff amended his or her respective amended petition on which the partial summary judgment had been granted. Johnson, on October 23, filed a "Motion to Dismiss" in which he alleged the court's October 2 partial summary judgment and plaintiffs' noncompliance with the order for amendment of their amended petitions, and then prayed for dismissal of each "plaintiff's Amended Petition with prejudice." Nothing further was filed by the parties, and Johnson's motion to dismiss was heard by the court on January 11, 1985. In conjunction with that hearing, the court received evidence which had been previously submitted regarding the partial summary judgment and also received additional evidence offered for the first time on January 11, including the following stipulation of the parties:

> 1. That a jury trial in this proceeding may be waived and the cause called on for trial to the court.
>
> 2. That plaintiff may offer such evidence as was offered by either party in the proceedings on the defendant's motion for partial summary judgment, and any other additional evidence that the plaintiff may have or wishes

the court to consider at the trial in this proceeding.

3. That the defendant acknowledges and agrees that although the trial in the above cause will be limited by the partial summary judgment granted by the trial court, nothing in this stipulation shall be deemed a waiver of the plaintiff's opposition to said motion for partial summary judgment, either at the proceedings before the District Court on the trial of this cause, or in any subsequent appeal to the Supreme Court.

4. That in the event a proceeding before the Nebraska Supreme Court results in a reversal or a remand of the above case for a trial, the parties reserve the right to request and demand a trial by jury unless both of the parties agree to waive jury trial.

After receiving and reviewing the evidence, the court made the following decision:

> The Court, having reviewed the entire record, finds and concludes that there is not sufficient evidence in the record to support a finding of gross negligence, and therefore the Court finds generally . . . for the defendants and against the plaintiffs and judgment is therefore entered for the defendants and against the plaintiffs . . . .

Neither of the plaintiffs-appellants filed a written notice with the Clerk of the Supreme Court regarding the constitutional question of the guest statute raised in the trial court. The appellants did not serve on the Attorney General of Nebraska a copy of their brief assigning unconstitutionality of § 39-6,191 (guest statute).

The appellants contend that the district court erred (1) in failing to find that the guest statute, § 39-6,191, is unconstitutional, (2) in finding that the plaintiffs were guest passengers and entering partial summary judgment in favor of Johnson on that question, and (3) in dismissing plaintiffs' actions.

First, concerning the question about the constitutionality of the guest statute, § 39-6,191, we are unable to locate in the record any ruling or decision by the district court on the question whether the guest statute is unconstitutional. Moreover, on account of the appellants' failure to comply with

the rules of this court regarding presentation of a question concerning constitutionality of a statute—written notice of a constitutional question filed with the Clerk of the Supreme Court when the brief of the one contesting constitutionality is filed with the court, and service of the contestant's brief on the Attorney General within the prescribed time—we will not consider a question about constitutionality of the guest statute, § 39-6,191. See Neb. Ct. R. 16A (rev. 1983). See, also, *Zoimen v. Landsman*, 192 Neb. 561, 223 N.W.2d 49 (1974).

Second, concerning the partial summary judgment that the guest statute, § 39-6,191, applies to the claims of the appellants, such partial summary judgment is not a final judgment reviewable by this court. See Neb. Rev. Stat. § 25-1911 (Reissue 1979) (appellate jurisdiction of the Supreme Court of the State of Nebraska).

A final order is statutorily defined:

> An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.

Neb. Rev. Stat. § 25-1902 (Reissue 1979).

The procedure for a summary judgment is governed by Neb. Rev. Stat. §§ 25-1330 to 25-1336 (Reissue 1979). Disposition by partial summary judgment is found in § 25-1333:

> If on motion under sections 25-1330 to 25-1336 judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are

just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

The partial summary judgment entered by the district court in these proceedings was interlocutory, determining only the status of the appellants as guest passengers and, thus, specifying the nature of negligence, namely, gross negligence, which must be proved before the appellants may recover. (There has been no allegation indicating that driving "under the influence of intoxicating liquor" is involved in this case as a cause of the accident.) Pretrial determination of the guest passenger status of the appellants does not defeat their recovery. Pretrial adjudication of the appellants' status in this case is analogous to a pretrial order specifying the issues to be resolved at trial. Cf. *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986) (effect of pretrial conference, report, and order controlling issues determinable at trial). After entry of the partial summary judgment in this case, the nature of Johnson's negligence, if any, was still a question left for disposition in the trial court. A partial summary judgment that a claimant is a guest passenger within the purview of Nebraska's former guest statute, § 39-6,191, while the issue of the host driver's negligence is unresolved, is not a final judgment or order reviewable by the Supreme Court. Cf. *Hart v. Ronspies*, 181 Neb. 38, 146 N.W.2d 795 (1966) (summary judgment for a plaintiff on the issue of the defendant's negligence, reserving for trial issues of plaintiff's contributory negligence, proximate cause, and damages, is an interlocutory summary adjudication and not appealable as a final judgment). Cf., also, *Grantham v. General Telephone Co.*, 187 Neb. 647, 193 N.W.2d 449 (1972) (summary judgment in favor of defendants on the issue of physical damage in construction of plaintiffs' building, but reserving the issue of lost profits, is not an appealable final order or judgment).

Third, the district court's dismissal of the appellants' actions is incorrect. The motion filed by Johnson sought dismissal of the actions with prejudice because the plaintiffs had not complied with the court's order of October 2, 1984, requiring the plaintiffs to amend their petitions. However, the district

court did not dismiss the actions as a sanction for noncompliance with the court's order. Whether dismissal as a sanction would be appropriate under the circumstances is a question not raised in the present case. Rather, the district court disposed of the case on the basis of evidence presented before trial in conjunction with the pending motion to dismiss and some improvised and arcane procedure suggested by the parties. As far as we can fathom from the record presented, the district court treated the pretrial motion to dismiss as a pseudomotion for summary judgment, proceeded to receive evidence bearing on the issue of Johnson's negligence, determined there was insufficient evidence to establish Johnson's gross negligence necessary for recovery by appellants, and entered judgment in favor of Johnson.

A pretrial motion to dismiss is not permissible as a pretrial pleading but may sometimes be recognized as a demurrer on stipulation of the parties or by rule of court. See *Blitzkie v. State*, 216 Neb. 105, 342 N.W.2d 5 (1983). In *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984), we held that an evidentiary hearing on a motion to dismiss did not convert an "irregular pleading," namely, a pretrial motion to dismiss, into any form of pleading allowable under our present law governing civil procedure. See, also, *Smick v. Langvardt*, 216 Neb. 778, 345 N.W.2d 830 (1984).

Johnson's motion to dismiss and evidence accompanying such motion were designed to produce a pretrial disposition on the merits, although the parties envisioned an appeal to this court for review of a disposition adverse to the appellants pursuant to such motion and contemplated a potential "remand [of appellants' cases] for a trial . . . by jury," if demanded by either party. We are compelled to conclude that the disposition made by the trial court was pursuant to a peculiar pleading, procedure, and practice, none of which is authorized by present Nebraska law. Therefore, we reverse the judgment of the district court which dismissed the appellants' actions and remand those actions to the district court for further proceedings provided by and in conformity with law.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., concurs in the result.

ROBERT R. CARUSO ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

383 N.W.2d 41

Filed March 14, 1986. No. 85-151.

1. **Statutes.** One of the basic rules of statutory construction is that statutory language will be given its plain and ordinary meaning.
2. **Constitutional Law: Words and Phrases.** The word "impair," as used in the U.S. Constitution, requires no construction and may be given its ordinary meaning, which, according to the most basic dictionary definition, is "to make worse."
3. _____: _____. Not every change constitutes an impairment under the federal Constitution. The change must take something away and not work to the parties' benefit.

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

Raymond J. Hasiak, for appellants.

Herbert M. Fitle, Omaha City Attorney, Kent N. Whinnery, Timothy K. Kelso, and Earl G. Greene III, for appellee.

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

KRIVOSHA, C.J.

The appellants, Robert R. Caruso, Raymond J. Hasiak, Harold Hug, and John Meehan, who are personnel employed by the City of Omaha, filed this action in the district court for Douglas County, Nebraska, seeking an order directing the City of Omaha either to relieve police officers and firefighters from having to continue to make contribution to the City of Omaha's police and firemen's retirement system once they have been employed for more than 25 years or, in the alternative, to increase their pension benefits at the rate of 2 percent for each year beyond 25 years of service.

The specific question raised by this appeal is whether a section of the Omaha home rule charter and provisions of the Omaha Municipal Code, creating a retirement system which requires that before Omaha police officers or firefighters may receive full retirement benefits they must have been employed for at least 20 years and must also have attained the age of 55, constitute a violation of the employees' federal constitutional

rights. The district court found that the requirements were valid and binding and dismissed the appellants' petition. We affirm.

The record discloses that prior to 1961 the pension system for police officers and firefighters employed by the City of Omaha provided benefits of a flat $150 per month for each month a police officer or firefighter lived following retirement. Neither police nor fire personnel had any vested rights prior to retirement, and all contributions made by members were deposited in a general fund. If a member quit, retired, or died before reaching the age of retirement, he or she lost all rights in the pension. In addition, the contributions to the fund were a condition of employment.

Effective May 27, 1957, the electorate of the City of Omaha approved and adopted a new home rule charter. Section 6.09 of that charter set a minimum retirement age of 55 for police officers and firefighters. This provision, evidently for the first time, made provision for vesting of an employee's pension. Section 6.09 of the 1956 charter, effective May 27, 1957, has not since that date been amended in any way relevant to this matter. On July 1, 1961, the remainder of the retirement system was put in place by the adoption of various municipal ordinances. Section 22-61 of the Omaha Municipal Code provided for pension rights substantially better than police officers and firefighters had ever received before. Section 22-86 of the code gave these employees the right, if they quit or were terminated for cause, to receive all of the moneys they had contributed into the pension fund, plus interest. This was substantially better than had been the case before 1961, when the employees were not entitled to receive any of their contributions if they quit or were terminated. Additionally, provisions were made for work-related disability pensions and non-work-related disability pensions. Again, this was an increased benefit over that which had existed prior to 1961.

The sections of the Omaha Municipal Code specifically challenged by this suit are §§ 22-73, 22-75, and 22-76. Section 22-73 presently provides that each employee of the police or fire department must contribute to the city retirement pension an amount equal to 7.25 percent of the employee's salary. The city makes an additional contribution equal to 8.55 percent of the

employee's salary. Section 22-75 provides that if an employee has served 20 or 25 years *and* is over 55 years of age, he or she shall be entitled to a service retirement pension. And, finally, § 22-76 provides that an employee over the age of 55 years who has been employed for 20 years is entitled, upon retirement, to a pension equal to 40 percent of his or her highest average monthly compensation during any consecutive 12 months during the member's last 5 years of service and 50 percent if employed for 25 years.

The appellants in this case are affected employees who have accumulated more than 20 years of service but at that time had not yet attained the age of 55 years. According to § 22-73, although they are already entitled to a 40-percent pension when they reach the age of 55, if they choose to continue working, they are still required to contribute 7.25 percent of their salary into the pension fund. Furthermore, if they accumulate 25 years of service before reaching 55 years of age, they are required to continue making contributions to the pension fund even though the amount of their pension cannot exceed 50 percent of their highest average monthly compensation received during any consecutive 12-month period during the last 5 years of service. Due to these facts, appellants maintain that they have been denied certain rights under the federal Constitution. Specifically, they maintain that the requirement that they must continue to make contributions to the pension plan even though they may not retire until they reach age 55, and cannot, in any event, receive more than 50 percent of their highest average monthly compensation paid during any consecutive 12-month period during the last 5 years of service, impairs the obligation of contract, in violation of U.S. Const. art. I, § 10, as well as deprives appellants of property without due process of law, in violation of U.S. Const. amend. XIV, § 1. Further, appellants maintain that the provisions of the Omaha charter and ordinances establishing and creating their pension system deny appellants equal protection of the laws, in violation of U.S. Const. amend. XIV, § 1. As we have indicated, we are simply unable to find any basis for the claim.

Accepting, for the purpose of argument, that the right of a public employee to receive benefits under a public retirement

plan is not a gratuity but, rather, is deferred compensation and is contractual in nature, and, therefore, protected against unconstitutional impairment, see *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982), we still are unable to see how anything done by the City of Omaha impairs the obligation of the contract.

While appellants argue that the actions of the city in some manner "impair the obligation of a contract," they do not cite us to any specific act of the city which causes that "impairment." One of the basic rules of statutory construction is that statutory language will be given its plain and ordinary meaning. See, *CONtact, Inc. v. State*, 212 Neb. 584, 324 N.W.2d 804 (1982); *O'Neill Production Credit Assn. v. Schnoor*, 208 Neb. 105, 302 N.W.2d 376 (1981). The word "impair," as used in the U.S. Constitution, requires no construction and may be given its ordinary meaning, which, according to the most basic dictionary definition, is "to make worse." Webster's Third New International Dictionary, Unabridged 1131 (1981). Obviously, then, not every change constitutes an impairment under the federal Constitution. The change must *take something away* and not work to the parties' benefit. Therefore, in order for appellants to succeed under their contention that the ordinances of the City of Omaha "impair" the obligation of a contract, appellants have the burden of showing how the situation which now exists has been made worse than that which existed when their rights were created. Absent such a showing, there is no proof of any "impairment."

Prior to 1961, Omaha police officers and firefighters were not entitled to any pension unless and until they reached retirement eligibility. All of their contributions were lost if they left their employment prior to retirement. After 1961 they were, for the first time, given the right to withdraw their own contributions, together with interest, if they left prior to retirement. We cannot, therefore, see how the new system could have made their retirement benefits worse and thereby constituted an impairment. Moreover, prior to 1961, they received no benefits unless and until they retired, although they were, as a condition of employment, required to make

contributions to the pension fund. Also, upon retirement, they received only $150 per month, regardless of what their earnings had been. Again, we are unable to see how the language of the Omaha charter or ordinance has made their retirement benefits worse than they would have been prior to 1961. Unlike the *Halpin* case, *supra*, where employees came to work upon the representation that they would receive an increased benefit, and, in fact, were offered a reduced benefit, here no employees came to work under the promise of receiving anything more than they are now receiving, and, in fact, some came with the promise of receiving much less. While *Halpin* stands for the proposition that pensions are not gratuities and are matters of contract, it does not stand for the proposition that a public employee is entitled to the best pension the public employee might desire. Where, as here, there is simply no evidence to indicate that the benefits have in any way been made worse than they were prior to 1961, and, in fact, in some cases have been made better, we are simply unable to grasp appellants' argument that the enactments in question impair the obligation of a contract, in contravention of the U.S. Constitution.

Likewise, we are unable to determine how appellants contend that the ordinances deny them either due process or equal protection. As to due process, appellants have in no manner shown, either to the district court or to this court, how any property which they originally had was taken from them—the first step in a due process analysis. The evidence is clear beyond dispute that the system in place after 1961 is substantially better than what existed prior to 1961. Whatever property rights in their pensions the employees may have acquired by being employed prior to 1961 are in no way taken away. While it may be true that if one employee begins working at an earlier age than a second employee, the first employee may contribute more to the pension fund, it is also true that, since the salary upon which the pension is based continues to increase as long as the employee continues to work, upon leaving employment and retiring the first employee may receive more than the second. The fact that if both employees continue employment until retirement they may receive the same monthly payment does not constitute the taking of property in

violation of the federal Constitution. To hold so would require us to further recognize that if a pension system was set up in such a way that if one retiree died before another and thereby did not receive as large a pension as someone who lived longer, somehow a property right had been taken. There is no evidence in the record to indicate that the contribution made by any employee exceeds the benefits obtained by an employee or that, from an actuarial point of view, requiring an employee to continue making contributions until retirement is unreasonable. In addition, even before reaching 55 years of age, any employee is free to leave his or her employment after 25 years of service and receive full benefits upon attaining the age of 55 even though such employee has made no further contributions. Furthermore, should an employee leave the job *before* he or she accumulates 20 years of service, he or she is entitled to be refunded the sum total of such contributions, together with the interest accrued thereon. There simply is no evidence to support a claim that any property right is being taken.

Finally, as to the equal protection argument, the evidence discloses that all employees are treated alike, to the extent that employees can be treated alike. As we have already indicated, obviously, if one employee comes to work at an earlier age than another, there is some difference in total compensation. Likewise, if one employee, once retired, dies earlier than another employee, there are some differences in benefits received. Those differences, however, do not constitute any denial of equal protection. Using a rational basis test on this classification, age not being a suspect class, see *Vance v. Bradley*, 440 U.S. 93, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979), it appears obvious that this is not a case where no reasonably conceivable set of facts could establish a rational relationship between the classification and an arguably legitimate end of the government. See *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984). As we have already indicated, the actuarial soundness of the system is one such justification. There is no evidence to indicate that the city has acted unreasonably in making a requirement that employees who remain in the employment of the city continue to make

contribution until retirement.

For these reasons the district court's decision was in all respects correct, and the judgment should be affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

IN RE INTEREST OF BOBBI JO MCMANAMAN, A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. BOBBI JO MCMANAMAN, APPELLANT.
383 N.W.2d 45

Filed March 14, 1986. No. 85-521.

Criminal Law: Police Officers and Sheriffs: False Reporting. One purpose of the false reporting statute, Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984), is to prevent a waste of time and effort by law enforcement personnel.

Appeal from the Separate Juvenile Court of Lancaster County. Affirmed.

Robert Wm. Chapin, Jr., of Mowbray, Chapin & Walker, P.C., for appellant.

Michael G. Heavican, Lancaster County Attorney, and Leigh Ann R. DeVore, for appellee.

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

BOSLAUGH, J.

Bobbi Jo McManaman appeals from a determination by the separate juvenile court of Lancaster County, Nebraska, that she is a child under 18 years of age and a person as defined by Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 1982). This determination was based upon a finding that the appellant provided false information to a police officer with intent to instigate an investigation of an alleged criminal matter, in violation of Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984).

On appeal the appellant claims that the separate juvenile court erred (1) in finding that the statements in question were made with criminal intent, (2) in finding that the appellant's comments were made for the purpose of instigating a criminal investigation, (3) in not granting appellant's motion to dismiss at the close of all the evidence, and (4) in improperly interpreting the legislative intent of § 28-907.

The first three assignments of error, in essence, constitute a challenge to the sufficiency of the evidence.

The facts giving rise to this case, as shown in the record, are that on March 25, 1985, in Lincoln, Nebraska, the appellant accepted a ride with four white males in a pickup truck. The four men and the appellant had all been at a party at the home of a mutual acquaintance. The appellant accepted the ride offered by one of the men, Michael Bell, thinking that she would be taken home. Her requests to be taken there were not heeded, and two of the men, Bell and Dennis Dyer, made sexual advances, which she rebuffed. Finally, after driving for some time and after repeated sexual advances by Bell and Dyer, the appellant was able to escape in the Wilderness Park area near Lincoln. She was able to flee when Bell and Dyer, who had her pinned to the ground in a hayfield and were threatening sexual assault, apparently were scared off by her loud screams.

The appellant then made her way to a farmhouse, where her mother was called. It was agreed that the appellant would be taken to the Lincoln Police Department. There, the appellant was questioned by Officer Geoffrey Marti. The appellant related a story which was generally accurate except for the statement that she had been forced into the truck against her will by two of the men. The appellant identified Michael Nickolite as one of these two men. She subsequently identified each of the four men from separate photographic arrays.

Two officers were involved in the followup investigation that night. Tracy Milbourn was arrested for kidnaping in the early morning hours following the incident. A broadcast was made for the other three men.

As a result of Milbourn's arrest, his pickup truck, the truck involved in the incident in question, was towed away that morning. Milbourn was subsequently charged with attempted

first degree sexual assault and kidnaping. A $50,000 bond was set for Milbourn's release, and his name was reported in local papers in connection with the incident. Because he was on parole, Milbourn was held for a period of time even after charges relating to the appellant's false allegations were dismissed.

On the day following the alleged kidnaping and attempted assaults, Det. Gregory Sorenson of the Lincoln Police Department interviewed Nickolite and Bell, who had both been arrested. After noting discrepancies between the appellant's and their stories, Detective Sorenson reinterviewed the appellant. At that time she admitted she had entered the truck voluntarily and that neither Nickolite nor Milbourn had done anything to her. The appellant said that she had made the statement about being abducted because she feared police inaction if she admitted she had entered the truck voluntarily and because she did not want to cause trouble for the acquaintance hosting the party which had involved alcohol and marijuana.

At trial it was stipulated that Michael Bell had pleaded guilty to a forgery charge as part of a plea bargain in which the charge of debauching a minor was dismissed. A charge of attempted debauching of a minor against Dennis Dyer was dismissed in exchange for his plea of guilty to disturbing the peace. At the end of all the evidence, the appellant renewed her motion to dismiss on the ground that the State had failed to establish a prima facie case under § 28-907(1)(a). The court found that, beyond a reasonable doubt, the appellant had violated the law as alleged in the petition.

Where the sufficiency of the evidence to sustain a conviction is challenged, "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." *State v. Fix*, 219 Neb. 674, 678, 365 N.W.2d 471, 474 (1985). Rather, in a case such as the present, we

> "will not interfere with a verdict of guilty based on conflicting evidence unless, as a matter of law, the evidence is so lacking in probative force that it is insufficient to support the finding of guilt beyond a

> reasonable doubt. * * * A guilty verdict of the fact finder in a criminal case must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it."

State v. Fallis, 205 Neb. 465, 476, 288 N.W.2d 281, 287 (1980) (quoting *State v. Allen,* 198 Neb. 755, 255 N.W.2d 278 (1977), *overruled on other grounds, State v. Benson,* 199 Neb. 549, 260 N.W.2d 208 (1977)).

Section 28-907(1)(a) provides:

> (1) A person commits the offense of false reporting if he or she: (a) Furnishes information he or she knows to be false to any peace officer or other official with the intent to instigate an investigation of an alleged criminal matter or to impede the investigation of an actual criminal matter.

In the present case there was evidence from which the separate juvenile court could find beyond a reasonable doubt that the appellant had made a statement she knew to be false to a peace officer. Officer Marti testified that when he interviewed the appellant on the night of the incident, she said that she had been forcibly abducted by two men, one of whom was Michael Nickolite. Detective Sorenson testified that after the appellant was confronted with the conflicting stories given by two of her alleged assailants, she admitted that she had not been abducted and that Tracy Milbourn and Michael Nickolite had committed no offenses against her. In fact, at trial the appellant admitted making the false statement to Officer Marti.

Further, there was evidence which, if believed, was sufficient to support the court's determination that the statement was made with the intent to instigate an investigation of an alleged criminal matter. The appellant claims that, because she "embellished" her story merely to ensure that the police would take action in regard to the sexual molestations, she did not act with the requisite criminal intent. At trial the appellant explained that she had given the abduction statement in order to protect a friend who was hosting a party where marijuana, drug paraphernalia, and alcohol were available. This evidence suggests that the appellant fully intended to shift attention away from the party to the alleged kidnaping. The court committed no error in finding beyond a reasonable doubt that the

appellant had violated the provisions of § 28-907(1)(a).

The appellant's final assignment of error alleges that the separate juvenile court misinterpreted and misapplied § 28-907(1)(a), in that the purpose of the statute is to punish persons who, for personal or malicious gain, file reports with the police which have no basis in fact, have no substance, and are totally void of any truth. The appellant asserts that § 28-907(1)(a) should not be used to punish the giving of false information where any part of the report has led to the conviction of a third party.

In *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 299, 363 N.W.2d 362, 365 (1985), we stated that, in interpreting 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).

Previously, in *State v. Fix*, 219 Neb. 674, 365 N.W.2d 471 (1985), we determined that the evil intended to be prevented by § 28-907(1)(a) had occurred where a false statement made by the defendant resulted in the waste of time and effort on the part of law enforcement personnel. In *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985), we held that the underlying purpose of § 28-907(1)(a) is to prevent the public from willfully furnishing erroneous information to law enforcement officers and thus interfering with the performance of their duties.

Construing a similar statute, the court in *State v. Daniels*, 165 N.J. Super. 47, 50, 397 A.2d 700, 701 (1979), concluded:

> While the underlying purpose of the statute is concededly to prevent "waste of investigative resources" and to

> prevent distraction and misleading of the police from their activity in detection and investigation of crime [citation omitted], we believe the full scope of the legislative contemplation as to the prohibited conduct extends to the prophylactic purpose of the statute in preventing conduct which *could* mislead, deter and distract the police . . . .

In *Daniels* the court found the defendant in violation of the statute despite the fact that his false information had no adverse impact upon the police investigation. The court stated: "All that is essential is that the information given must have been false and that it might have had a relationship to the crime and to normal police activity directed toward the detection of any offenders implicated and any investigation related thereto." *Id.*

In the present case the appellant's false information obviously effected the criminal investigation in question. Although two convictions were obtained from the truthful information relayed by the appellant, her false information led to the expending of law enforcement resources to investigate a crime which never occurred. We conclude that the separate juvenile court properly interpreted and applied § 28-907(1)(a) in this case.

The judgment is affirmed.

AFFIRMED.

GALYEN PETROLEUM COMPANY, A CORPORATION, APPELLEE, V. FRANK SVOBODA AND KAY SVOBODA, HUSBAND AND WIFE, APPELLEES, FIRST NATIONAL BANK, O'NEILL, NEBRASKA, APPELLANT.

383 N.W.2d 49

Filed March 14, 1986. No. 85-641.

1. **Statutes.** Where the words of the statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning, and the words used must be given their ordinary meaning.
2. **Liens: Crops: Debtors and Creditors: Words and Phrases.** Purchase price, under Neb. Rev. Stat. § 52-903 (Reissue 1984), means more than money and may include credits applied to a debt.

Appeal from the District Court for Rock County: EDWARD E. HANNON, Judge. Reversed and remanded with directions.

William W. Griffin, for appellant.

John M. Gerrard of Domina & Gerrard, P.C., for appellee Galyen Petroleum Company.

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

KRIVOSHA, C.J.

This appeal involves the interpretation of the Nebraska petroleum products lien statutes, Neb. Rev. Stat. §§ 52-901 to 52-904 (Reissue 1984). Appellee Galyen Petroleum Company sold petroleum products to Frank Svoboda in 1984 for use in producing popcorn being raised by Svoboda. When Svoboda failed to pay Galyen for the petroleum, Galyen perfected a petroleum products lien on all the popcorn produced by Svoboda, in accordance with § 52-901, which provides:

> Any person who furnishes gasoline, diesel fuel, tractor fuel, oil, grease, or other petroleum products to another to be used in farm machinery for power or lubricating purposes in the production of any agricultural crop shall be entitled to a lien upon all such crops produced and owned by the person to whom such fuel or lubricant had been furnished to secure the payment of the purchase price thereof, upon compliance with the provisions of sections 52-901 to 52-904.

There appears to be no question that Galyen complied with the provisions of § 52-902, which provides:

> Within six months after the fuel or lubricant, referred to in section 52-901, has been furnished, the person selling such fuel or lubricant shall file with the clerk of the county in which the crop, referred to in section 52-901, is produced a verified notice of such lien, which notice shall show (1) the name and address of the person claiming the lien, (2) the name of the person to whom such fuel or lubricant has been furnished for use in farm machinery in the production of crops, (3) a description of the land upon which such crop or crops were grown, (4) the amount of

> fuel or lubricant furnished, and (5) the amount due for furnishing such products. The fee for filing, amending, or releasing such lien shall be the same as set forth in section 9-403, Uniform Commercial Code.

At some point after perfecting its lien, Galyen initiated foreclosure proceedings. After the foreclosure action was commenced but before the case came to trial, appellant, First National Bank of O'Neill, Nebraska, entered into an agreement with Svoboda whereby First National purchased from Svoboda all of his inventory of popcorn, including that upon which Galyen had filed its petroleum lien. In consideration for the sale of the popcorn by Svoboda to the bank, First National agreed to credit Svoboda's debt to First National, then amounting to some $1.6 million. After purchasing this popcorn First National made effort to take possession and control of the popcorn by placing a lock on the bin mechanisms wherein the popcorn was stored. Galyen claims to have done likewise.

The primary issue presented to the district court was an interpretation of § 52-903, which reads in part as follows:

> From and after the date of filing of the notice provided for in section 52-902, the claimant shall have a lien upon the crops produced and owned by the person to whom the fuel or lubricant, referred to in section 52-901, had been furnished to the amount of the purchase price of such fuel or lubricant so sold to such person. In the event the person to whom such fuel or lubricant was furnished desires to sell or deliver any portion of the crop so produced, such person so desiring to sell or deliver the same shall notify the consignee or purchaser that such petroleum bill has not been paid. Such lien shall shift to the purchase price thereof in the hands of the purchaser or consignee above mentioned in this section.

There appears to be no dispute that First National was advised by Svoboda of Galyen's lien. The specific question, then, is whether Galyen's lien remained on the popcorn once purchased by First National or transferred to the purchase price. The district court found that the lien remained on the popcorn and that Galyen was entitled to foreclose on its lien on the popcorn in the possession of First National. First National,

on the other hand, argues that the lien, by the language of the statute, did shift to the purchase price in the hands of First National. However, since that "purchase price" was the forgiveness of a debt, there was no money in the hands of First National for the lien to attach to, and, therefore, Galyen's only remedy is to sue Svoboda and thereby attempt to recover the money from Svoboda. In fact, we believe that neither party is correct, and, for that reason, we must reverse the judgment and remand this action.

The language of § 52-903 is clear and unambiguous. Where the words of the statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning, and the words used must be given their ordinary meaning. See, *Cohee v. Cohee*, 210 Neb. 855, 317 N.W.2d 381 (1982); *O'Neill Production Credit Assn. v. Schnoor*, 208 Neb. 105, 302 N.W.2d 376 (1981).

Section 52-903 clearly provides that the lien shall shift to *the purchase price thereof in the hands of the purchaser*. In the instant case that means the purchase price in the hands of First National became subject to the lien of Galyen before First National did anything with the purchase price. First National's obligation, therefore, was to first pay to Galyen the moneys due to Galyen and then either pay the balance to Svoboda or credit his account. Galyen has no obligation to pursue Svoboda but, rather, under the clear meaning of § 52-903, First National had a duty to withhold and pay to Galyen the amount of its lien before paying the balance to either Svoboda or to his credit.

First National argues, apparently, that because the consideration for the popcorn was the crediting of the debt owed by Svoboda to First National, there is no money upon which the lien could attach. This, of course, is not true. The question which we must ask is not whether there was any money paid to Svoboda but, rather, what was the *purchase price*. We believe the evidence discloses that the *purchase price* was $1.6 million. That it was paid by First National through the process of crediting Svoboda's debt to the bank does not change the fact that there was a purchase price of $1.6 million or that Galyen's lien attached to it while "in the hands of the purchaser." Purchase price, under § 52-903, means more than money and

may include credits applied to a debt.

In the early case of *Schrandt v. Young*, 62 Neb. 254, 265-66, 86 N.W. 1085, 1089-90 (1901), we said:

> Counsel contend, however, that an agister's lien existed only as to certain of the sheep subsequently delivered to be kept at an agreed price in money. The statute providing for an agister's lien does make use of the words "contract price," and the word "price" in ordinary parlance undoubtedly refers to money. But this is not controlling. Contracts like the one in question have always been considered agistment contracts equally with those where a money compensation was agreed on. *Bass v. Pierce*, 16 Barb. [N.Y.], 595. The reason of the law extends to all contracts of agistment, whether for money or some other valuable consideration, and the words in the context, "procure, contract with or hire," indicate no intention to restrict the benefit of the statute to agisters for a money consideration. Moreover, the word "price" does not invariably refer to money, but may mean reward or compensation generally. In *Hudson Iron Co. v. Alger*, 54 N.Y., 173, the court said: "It is said further, that the words 'price' and 'vendee' used in the statute imply a sale for money. It is true that 'price' generally means the sum of money which an article is sold for; but this is simply because property is generally sold for money, not because the word has necessarily such a restricted meaning. * * * The Latin word from which price is derived, sometimes means 'reward,' 'value,' 'estimation,' 'equivalent,' and Webster shows that it is sometimes used in the same sense; and I can not doubt that it was used in this statute in the sense of 'value' or 'compensation.' There is just as much reason for applying the rule of the statute to this case as to one where the sale was for a money price; and it is right to assume that congress meant to apply the rule to every case wholly within the reason of the rule, unless the language used clearly forbids it." In an English statute the word "price" received a like construction in a connection very like that here in question. *London & Yorkshire Bank v. Belton*, 15 Q. B. Div. [Eng.], 457. It is no reason for

> denying the protection of the statute to this contract, that the compensation was to be made out of the wool and the increase of the flock, and not in money.

In *Schrandt*, had we held otherwise, the very purpose of the act would have been defeated. Likewise, were we to hold otherwise here, the purpose of the petroleum products lien would be defeated.

Whether First National chooses to pay Svoboda by check, which is then endorsed back to First National, or chooses to pay Svoboda by merely entering a debit and credit on its books is of no consequence to Galyen, nor does it change the act. The fact is that First National purchased the popcorn from Svoboda for $1.6 million, for which it paid by a credit on its books. Before it could apply that credit, however, the lien held by Galyen attached instantly to the purchase price in its hands, and Galyen was entitled to receive from First National payment sufficient to satisfy its lien; the balance, if any, then to be applied to Svoboda's debt to First National. For that reason the decision of the district court must be reversed and the cause remanded with directions to enter judgment in favor of Galyen and against First National for the amount of its lien, which First National is obligated to pay.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLANT, V. JEFFERY L. CROM, APPELLEE.
383 N.W.2d 461

Filed March 21, 1986. No. 84-471.

Motor Vehicles: Constitutional Law: Search and Seizure. A motorist has a reasonable expectation of privacy which is not subject to arbitrary invasions solely at the unfettered discretion of police officers in the field.

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

Paul L. Douglas, Attorney General, Donald L. Knowles,

Douglas County Attorney, and J. Michael Tesar, Special Deputy County Attorney, for appellant.

Michael T. Levy of Levy & Lazer, P.C., for appellee.

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

PER CURIAM.

The municipal court of the city of Omaha convicted defendant, Jeffery L. Crom, of driving while under the influence of alcohol. On appeal the district court reversed the conviction on the ground that the evidence of Crom's intoxication had been obtained as the result of an unconstitutional seizure of his person. The State has appealed to this court; we affirm.

On August 15, 1983, four or five patrolmen and a sergeant assigned to the 11 p.m. to 7 a.m. shift of the Omaha Police Department's selective enforcement unit determined to set up a transitory checkpoint, at which every fourth vehicle reaching it would be stopped on the pretext of checking the operator's license and the vehicle registration. The actual purpose of the stops, however, was to determine whether the operator of the vehicle emitted an odor of alcohol, in which event further investigation would follow.

All decisions relating to the establishment and operation of the checkpoint were made entirely by these field officers, who were not acting under any standards, guidelines, or procedures promulgated by the policymakers for the police department or other law enforcement agency. The officers were free to move the checkpoint from place to place and in fact established a number of such checkpoints at different locations throughout the city of Omaha at various times, as they alone saw fit.

The checkpoint in question was established at a little before 1 a.m. on August 16, 1983, by placing a marked police vehicle, with its rotating red lights flashing, in the center of the two southbound lanes of traffic near a southwest Omaha intersection, selected because of its proximity to a bar which had been the recent source of "numerous problems." The time was selected because of its near relationship to the bar's closing time.

Crom was driving one of the fourth cars to reach the checkpoint, and he was therefore stopped. There was no indication prior to the stop that Crom was driving under the influence of alcohol, that his motor vehicle was improperly registered, that he was operating the motor vehicle without a valid driver's license, or that he was violating any other law.

The officer making the stop detected the odor of alcohol on Crom's breath and gave Crom a field sobriety test. Crom failed that test and was transported to police headquarters, where a Breathalyzer test was administered. This test showed a blood alcohol level in excess of ten-hundredths of 1 percent, and Crom was charged with violating Neb. Rev. Stat. § 39-669.07 (Reissue 1984).

In *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), a police officer, notwithstanding that he had observed no traffic or equipment violation or other suspicious activity, stopped a motorist to check his driver's license and vehicle registration. As he was walking toward the stopped vehicle, the officer smelled marijuana and, the marijuana being in plain view, seized it.

Delaware argued the evidence of the marijuana's presence should not have been suppressed because officers should not be subject to any constraints in deciding which automobiles shall be stopped for license and registration checks. Delaware's contention was that its interest in discretionary spot checks as a means of ensuring the safety of its roadways outweighs the resulting intrusion on the privacy and security of the persons detained. The U.S. Supreme Court rejected Delaware's argument and affirmed the suppression of the evidence. In doing so the Court acknowledged that a state has a vital interest in the safety of its highways and therefore in determining what vehicles are being operated and by whom. The Court observed, however, that the fourth amendment to the U.S. Constitution imposes a standard of reasonableness upon the exercise of discretion by law enforcement agents in order to safeguard the privacy and security of individuals against arbitrary invasions.

The Court stated that the permissibility of a particular law enforcement practice is therefore judged by balancing its intrusion on the individual's fourth amendment interests

against its promotion of legitimate governmental interests. The reasonableness standard usually requires, at a minimum, that the facts upon which the intrusion is based be capable of measurement against an objective standard, whether this be probable cause or a less stringent test. Where the balance of interests precludes insistence upon some quantum of individualized suspicion, other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the officer in the field.

The Court then reasoned that, given the alternative mechanisms available to accomplish Delaware's ends, the record did not warrant a conclusion that the incremental contribution to highway safety warranted the physical and psychological intrusion upon the occupants of the vehicles randomly stopped at the unbridled discretion of law enforcement officials. The Court therefore held that except in those situations in which there is at least an articulable and reasonable suspicion that a motorist is unlicensed, that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his or her documents is unreasonable under the fourth amendment to the U.S. Constitution. The Court said:

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.

(Footnote and citations omitted.) 440 U.S. at 661.

Three months after its decision in *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), the U.S.

Supreme Court decided *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). Therein, two police officers stopped Brown, who was unknown to them, because he was walking in an area with a high incidence of drug traffic. The officers did not suspect Brown of any specific misconduct but wanted to ascertain his identity pursuant to a state statute requiring one lawfully stopped by an officer to identify himself or herself. In finding that Brown had been seized in violation of the fourth amendment to the U.S. Constitution, the Court again noted that determination of the reasonableness of a seizure involves a weighing of the gravity of the public concern served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. Citing *Delaware*, among other cases, the Court said at 51: "A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field."

The uncontradicted evidence in the case before us is that there was no plan formulated at the policymaking level of the Omaha Police Department, or elsewhere, which considered, weighed, and balanced the factors enumerated in *Delaware* and *Brown*. Rather, a six- or seven-person unit within the department, commanded by a field sergeant, was left free to decide when, where, and how to establish and operate the transitory checkpoint in question. The checkpoint was thus subject to the constitutional infirmity found to exist in both *Delaware* and *Brown*; that is, a driver's reasonable expectation of privacy was rendered subject to arbitrary invasion solely at the unfettered discretion of officers in the field.

As such, Crom was unreasonably seized in violation of the fourth amendment to the U.S. Constitution. The judgment of the district court reversing Crom's conviction was therefore correct and must be affirmed. That determination makes it unnecessary that we consider any other aspect of this case.

AFFIRMED.

KRIVOSHA, C.J., concurring.

I concur in the result reached in the per curiam opinion

adopted by the court. I write separately, however, because I believe that the per curiam, standing alone, may lead one to believe that the mere adoption of a plan formulated at the policymaking level of a law enforcement agency may be sufficient to permit the type of random stops conducted in the instant case. I believe there is more to this matter than merely the formulation of a plan.

An examination of the decisions throughout the United States, including those by the U.S. Supreme Court, indicates that there is much confusion and some facial inconsistency in the decisions regarding the constitutional validity of roadblocks. Some courts have concluded that it is not a violation of either the fourth or fourteenth amendments to the Constitution of the United States for police officers, state or federal, to stop a motor vehicle without reasonable cause or an articulable reason. See, *Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983); *United States v. Croft*, 429 F.2d 884 (10th Cir. 1970); *United States v. Millar*, 543 F.2d 1280 (10th Cir. 1976); *United States v. Prichard*, 645 F.2d 854 (10th Cir. 1981); *State v. Smolen*, 232 A.2d 339 (Conn. Cir. 1967); *City of Miami v. Aronovitz*, 114 So. 2d 784 (Fla. 1950); *Sowers v. The State*, 146 Ga. App. 701, 247 S.E.2d 225 (1978); *People v. Estrada*, 68 Ill. App. 3d 272, 386 N.E.2d 128 (1979); *Morgan v. Town of Heidelberg*, 246 Miss. 481, 150 So. 2d 512 (1963); *State v. Coccomo*, 177 N.J. Super. 575, 427 A.2d 131 (1980); *State v. Shankle*, 58 Or. App. 134, 647 P.2d 959 (1982); *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983). Other courts, including the U.S. Supreme Court, have held to the contrary, declaring that, absent an articulable reason or the existence of reasonable cause, such stops violate the fourth amendment to the U.S. Constitution. See, *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973); *State v. Severance*, 108 N.H. 404, 237 A.2d 683 (1968); *Koonce v. State*, 651 S.W.2d 46 (Tex. App. 1983); *State ex rel. Ekstrom v. Justice Ct. of State*, 663 P.2d 992 (Ariz. 1983); *State v. Olgaard*, 248 N.W.2d 392 (S.D. 1976); *People v. Glover*, 93 Cal. App. 3d 376, 155 Cal. Rptr. 592 (1979); *State v. Hilleshiem*, 291 N.W.2d 314 (Iowa 1980); *State v. Marchand*,

104 Wash. 2d 434, 706 P.2d 225 (1985). One may find a collection of most of these cases reported in Annot., 37 A.L.R.4th 10 (1985). See, also, Gardner, *Searches and Seizures Of Automobiles And Their Contents: Fourth Amendment Considerations In A Post-Ross World,* 62 Neb. L. Rev. 1 (1983).

The answer as to whether any roadblock can ever be constitutionally established lies within the fourth amendment to the U.S. Constitution. The amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In each case the question to be addressed is whether the search or the seizure is "unreasonable."

It has long been held, and is considered to be well settled, that "under the Fourth and Fourteenth Amendments . . . a search conducted without a warrant issued upon probable cause is '*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' " *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). One of those exceptions is what is frequently referred to as "the automobile exception." See, *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973); *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). The reason for this exception appears to be twofold. The courts have indicated that because of the mobility of the automobile, less stringent requirement should be imposed upon police officers seeking to search or seize an automobile. Courts have further indicated that persons are inclined to expect less privacy in an automobile than they would in their homes and therefore are not required to be given the same kinds of protection that the fourth amendment affords to persons in their homes. See *Chambers v. Maroney*, 399 U.S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970), *reh'g denied* 400 U.S. 856, 91 S. Ct. 23, 27 L. Ed. 2d 94.

It is clear, however, that the mere fact that an automobile is

involved does not eliminate the guarantees provided by the fourth amendment nor make every search or seizure of an automobile reasonable. *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). As noted by the U.S. Supreme Court in *Delaware v. Prouse*, 440 U.S. 648, 662-63, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979):

> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio, supra* [392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)], recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles.

Moreover, the rules applicable to searches apply equally to seizures, both growing out of the prohibition contained within the fourth amendment. That stopping an automobile is a seizure and therefore must be reasonable under the facts of the case is without question. As noted by the U.S. Supreme Court in *Delaware v. Prouse, supra* at 653-55:

> The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976); *United States v. Brignoni-Ponce*, 422

> U.S. 873, 878 (1975); cf. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of "reasonableness" upon the exercise of discretion by government officials, including law enforcement agents, in order " 'to safeguard the privacy and security of individuals against arbitrary invasions. . . .' " *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978), quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," whether this be probable cause or a less stringent test. In those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field," [citations omitted].

Therefore, the fact that one is in an automobile and does not have as great an expectation of privacy as one might have in the confines of his or her home does not totally eliminate the restrictions imposed upon the government under the fourth amendment.

While it is argued in this case, as in all other similar cases, that such stops are in the interest of traffic safety and therefore the government has an important interest, that factor alone is not sufficient. The interest of the members of the driving public, who are not violating the law, to be free of unreasonable seizures must also be a part of the balancing formula.

As the U.S. Supreme Court noted:

> The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting every occupant of every vehicle on the roads to a seizure—limited in magnitude compared to other

> intrusions but nonetheless constitutionally cognizable—at the unbridled discretion of law enforcement officials. To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ."

(Citation omitted.) *Delaware v. Prouse*, 440 U.S. 648, 661, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

The mere fact that a citizen is out of his home and on the public street does not deprive that citizen of all of his fourth amendment rights. As observed by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), the fourth amendment right of privacy belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.

Whether a search and seizure is unreasonable within the meaning of the fourth amendment may depend upon the facts and circumstances of each case. See *Cooper v. California*, 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967), *reh'g denied* 386 U.S. 988, 87 S. Ct. 1283, 18 L. Ed. 2d 243. There is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Camara v. Municipal Court*, 387 U.S. 523, 536-37, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

In *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979), the U.S. Supreme Court discussed in some detail how the balancing of the state's needs, on the one hand, and the public right to privacy, on the other hand, should be balanced. In *Brown* the police attempted to stop an individual and obtain identification solely on the basis that he had walked away from another individual in an alley. In declaring such action inappropriate the U.S. Supreme Court said at 50-51:

> " '[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person,' *id.*, at 16, and the Fourth Amendment requires that the seizure be 'reasonable.' " *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

The reasonableness of seizures that are less intrusive than a traditional arrest, see *Dunaway v. New York*, 442 U.S. 200, 209-210 (1979); *Terry v. Ohio*, 392 U.S. 1, 20 (1968), depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977); *United States v. Brignoni-Ponce, supra*, at 878. Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. See, *e.g.*, 422 U.S., at 878-883.

A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See *Delaware v. Prouse*, 440 U.S. 648, 654-655 (1979); *United States v. Brignoni-Ponce, supra*, at 882. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware v. Prouse, supra*, at 663. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-562 (1976).

The only exceptions to the general rule, absent exigent circumstances, appear to be those few cases involving individuals coming into this country at or near our borders and passing through *permanent* checkpoints. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976). The U.S. Supreme Court, in approving the action taken by the government in *Martinez-Fuerte, supra*, carefully pointed out that each defendant was arrested at a *permanent* checkpoint operated by the Border Patrol. In upholding the validity of such stops at permanent checkpoints because of the government's overriding interest in maintaining national

security, the U.S. Supreme Court said at 558:

> "[T]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." [Citation omitted.]

The Court went on to further note at 559:

> Routine checkpoint stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review.

While the U.S. Supreme Court has held that stops for brief questioning routinely conducted at *permanent* checkpoints near our borders are consistent with the fourth amendment and need not be authorized by warrant, it has consistently

emphasized that the stop must be at a *permanent* location having all of the characteristics of a permanent location located near our borders. In *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S. Ct. 2535, 37 L. Ed. 2d 596 (1973), the U.S. Supreme Court struck down the practice of the Border Patrol's randomly searching automobiles more than 25 air miles north of the Mexican border, notwithstanding the fact that 8 U.S.C. § 1357(a)(3) (1970) of the Immigration and Nationality Act provided for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States," as authorized by regulations to be promulgated by the Attorney General. The Attorney General's regulations had defined "reasonable distance" as "within 100 air miles from any external boundary of the United States." In declaring such action in violation of the fourth amendment, the U.S. Supreme Court in *Almeida-Sanchez, supra* at 269, said: "Automobile or no automobile, there must be probable cause for the search."

The basis for this view as to what is reasonable and what is unreasonable under the fourth amendment to the U.S. Constitution is not new. It had its inception more than 50 years ago in the case of *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925). In that case Carroll had been convicted of transporting 68 bottles of bonded whiskey and gin in violation of the National Prohibition Act, a matter which was of as much concern to the government in 1925 as drunk drivers are to the government in 1985. In holding that the government could not stop and search an automobile absent some articulable reason or reasonable cause, Chief Justice Taft said for the Court at 153-54:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.

> But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.

This notion was repeated some 50 years later in *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), when the U.S. Supreme Court said:

> Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

The majority in *Delaware v. Prouse, supra,* did, by way of dictum, attempt to modify its holding by saying at 663:

> This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of *all* oncoming traffic at roadblock-type stops is one possible alternative.

(Emphasis supplied.) Whatever may have been the purpose of that dictum, it did not change the results in *Delaware v. Prouse, supra*, nor does it change the requirements of the fourth amendment.

When one examines the U.S. Constitution in light of the manner in which it has been interpreted over the years in cases of this nature, including *Delaware v. Prouse, supra*, one must conclude that the offhand suggestion by Justice White that roadblock-type stops at less than permanent facilities (if that is what Justice White meant, and it is not clear) of all cars would satisfy the requirements of the fourth amendment, absent evidence of probable cause or exigent circumstances, does not seem to stand the balancing test required by the fourth amendment and appears to be inconsistent with the holding of

the case itself. See *State v. Marchand,* 104 Wash. 2d 434, 706 P.2d 225 (1985).

Even those state courts which have approved such stops have imposed strict requirements on the police in an effort to effect what they perceive to be a reasonable balance between the rights of the citizen and the needs of the government.

The Iowa Supreme Court in 1980 set out what is believed to be a minimum requirement to pass constitutional muster when, in the case of *State v. Hilleshiem*, 291 N.W.2d 314, 318 (Iowa 1980), it said:

> Where there is no consent, probable cause, or *Terry*-type reasonable and articulable suspicion, a vehicle stop may be made only where there minimally exists (1) a checkpoint or roadblock location selected for its safety and visibility to oncoming motorists; (2) adequate advance warning signs, illuminated at night, timely informing approaching motorists of the nature of the impending intrusion; (3) uniformed officers and official vehicles in sufficient quantity and visibility to "show . . . the police power of the community;" and (4) a predetermination by policy-making administrative officers of the roadblock location, time, and procedures to be employed, pursuant to carefully formulated standards and neutral criteria.

On that basis the Iowa Supreme Court, in the *Hilleshiem* case, declared a roadblock stop similar to that conducted in the instant case to be in violation of the fourth amendment to the U.S. Constitution and sustained the defendant's motions to suppress the evidence obtained as a result of the roadblock.

One is inclined to believe, however, that when requirements such as those suggested in *Hilleshiem* are imposed, the end result is not very likely to produce many, if any, drunk drivers. Therefore, balancing the right of privacy of the citizen against the interests of the government in apprehending drunk drivers, one might conclude that no *temporary* roadblock created to apprehend drunk drivers is ever permissible.

In reaching that conclusion we are fully cognizant of the serious problems that drunk drivers pose to the public. We must, however, address that problem squarely and honestly,

and not by ignoring the requirements of the Constitution. According to what little evidence is available, the roadblock in the instant case did little to aid the police in apprehending drunk drivers. Although the police conducted biweekly roadblocks for 50 weeks preceding the roadblock in question, no evidence was produced which established that a single driver was arrested for drunk driving prior to the evening in question. On the basis of that record it is difficult to find that the interests of the state outweigh the fourth amendment right of the citizen.

While we recognize that a drunk driver behind the wheel of an automobile poses a serious threat to society, we should not ignore the provisions of either the fourth amendment or the declarations of the U.S. Supreme Court in such matters. If the police may stop citizens at random on the pretext of checking identification, what is to stop the police from halting persons in a parking lot as they approach their automobiles? And if such a seizure is permitted, what is left of the fourth amendment?

The issue presented in cases of this nature is not whether persons who violate the law by operating a motor vehicle under the influence of intoxicants should be permitted to go free. To be sure, they should not. The question is whether citizens may be stopped at 1 a.m. to display their operators' licenses and automobile registrations, absent any articulable reason or reasonable suspicion that they have violated the law. While we are aware of the problems which drunk drivers pose to all citizens, we are further aware of the hazards which may be imposed upon the public if the fourth amendment to the Constitution of the United States is not adequately enforced. Justice Jackson, soon after his return from the Nuremberg trials, wrote:

> "These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." [Citation omitted.]

Almeida-Sanchez v. United States, 413 U.S. 266, 274, 93 S. Ct.

2535, 37 L. Ed. 2d 596 (1973).

And in *Boyd v. United States*, 116 U.S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746 (1886), the U.S. Supreme Court, 100 years ago, said:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

It may very well be that no set of rules which permits transitory roadblocks of the type here can ever satisfy the requirements of the fourth amendment.

BOSLAUGH and HASTINGS, JJ., concurring.

We concur in the judgment of the court. The particular roadblock in this case appears to have violated a generally accepted rule that roadblocks should be established by carefully circumscribed, objective regulations established by high-level administrative officials. *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984); *State v. Hilleshiem*, 291 N.W.2d 314 (Iowa 1980).

Although such a rule has merit, it is not, as suggested, supported by the language in *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), preventing the stopping of automobiles "at the unbridled discretion of police officers." It is important to recognize that *Prouse* went no further than to declare that traffic stops made in a random manner at the "unbridled discretion of police officers" violate the fourth amendment to the Constitution of the United States.

Prior to the decision in *Delaware v. Prouse, supra*, it had been the law in this state, both by statute and by the decisions of this court, that a peace officer could stop any motor vehicle at

any time and require the operator to exhibit his or her operator's license and the registration for the vehicle. Neb. Rev. Stat. § 60-435 (Reissue 1978); *State v. Kretchmar,* 201 Neb. 308, 267 N.W.2d 740 (1978); *State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975); *State v. Shepardson*, 194 Neb. 673, 235 N.W.2d 218 (1975). Although there were conflicts in the cases from other jurisdictions, there was a large body of law which held that random stops for the purpose of enforcing licensing, registration, and safety laws were constitutional.

Although *Delaware v. Prouse, supra*, declared random stops unconstitutional, it made clear that under proper circumstances a roadblock-type stop may be used as a traffic law enforcement device. The opinion stated at 663:

> This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative. We hold only that persons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.

The opinion recognized the importance of spot checks as an enforcement tool and emphasized that it is the "unconstrained exercise of discretion" that makes a random stop unconstitutional. The opinion suggested that the "[q]uestioning of all oncoming traffic at roadblock-type stops" is an acceptable alternative. The concurring opinion suggested that stopping "every 10th car to pass a given point" would not be unconstitutional. 440 U.S. at 664.

This view is reinforced by the construction that the U.S. Supreme Court has placed on the *Prouse* case in its later decisions. In *United States v. Villamonte-Marquez,* 462 U.S. 579, 589, 103 S. Ct. 2573, 77 L. Ed. 2d 22 (1983), the Court referred to "the preference for roadblocks as opposed to random spot checks expressed in *Delaware v. Prouse* . . . ." Later in the same opinion the Court stated at 592-93: "Random stops without any articulable suspicion of vehicles away from the border are not permissible under the Fourth Amendment,

United States v. Brignoni-Ponce, supra; Delaware v. Prouse, 440 U.S. 648 (1979), but stops at fixed checkpoints or at roadblocks are."

In *United States v. Brignoni-Ponce,* 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975), decided prior to *Delaware v. Prouse, supra,* the Court noted that Border Patrol agents have no part in enforcing laws that regulate highway use. The Court then stated at 883 n.8: "Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters."

In *Texas v. Brown,* 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983), the defendant had been stopped at a "routine driver's license checkpoint." *Id.* at 733. When the police officer who had stopped the defendant asked the defendant for his license, the officer saw a balloon which contained narcotics fall from the defendant's hand. The U.S. Supreme Court held that the seizure of the balloon was constitutional, since it was in "plain view" and there was no issue concerning the validity of the officer's initial stop of the vehicle.

In *Texas v. Brown, supra,* the Court noted that a generalized expectation that some of the automobiles halted at the roadblock, which was located in a " 'medium' area of narcotics traffic," would contain narcotics or paraphernalia did not make the seizure of the narcotics discovered in "plain view" in the defendant's vehicle unconstitutional. *Id.* at 743-44.

The annotation at 37 A.L.R.4th 10 (1985) discusses a number of the cases which have considered the validity of roadblocks to discover vehicular or driving violations. The author notes that such cases have generally held roadblock stops to be reasonable and lawful.

In *Little v. State,* 300 Md. 485, 501, 479 A.2d 903, 911 (1984), the Maryland Court of Appeals observed:

> A majority of courts, however, have sustained the use of roadblocks as a proper law enforcement tool. As a general rule, the constitutionality of traffic checkpoints has been upheld where: (1) the discretion of the officers in the field is carefully circumscribed by clear objective regulations established by high level administrative

> officials; (2) approaching drivers are given adequate warning that there is a roadblock ahead; (3) the likelihood of apprehension, fear or surprise is reduced by a display of legitimate police authority at the roadblock; and (4) *vehicles are stopped on a systematic, nonrandom basis that shows drivers they are not being singled out for arbitrary reasons.*

(Emphasis supplied.)

In *People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984), the New York Court of Appeals noted that individualized suspicion is not a prerequisite to a constitutional seizure of an automobile which is " 'carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers' . . . ." *Id.* at 525, 473 N.E.2d at 3, 483 N.Y.S.2d at 651. The roadblock involved in that case had been established pursuant to a memorandum of the county sheriff. The procedures established in the memorandum avoided discrimination by providing for the stopping of all vehicles "or every second, third or fourth vehicle . . . ." *Id.* at 523, 473 N.E.2d at 2, 483 N.Y.S.2d at 650. The court stated:

> The fact that the plan contemplated situations in which not every car would be stopped did not affect its validity in view of the specific nondiscriminatory pattern of selection it called for [citations omitted] and of the reasonableness of allowing some cars to pass when traffic became congested [citations omitted].

Id. at 526, 473 N.E.2d at 4, 483 N.Y.S.2d at 652.

The correct rule appears to be that roadblocks are a permitted method of enforcement for laws pertaining to the licensing, registration, and operation of motor vehicles so long as vehicles are not stopped pursuant to the "unbridled discretion" of officers in the field. It is random stops, not "roadblock-type stops," that are unconstitutional.

The suspension or revocation of an operator's license cannot be an effective deterrent unless there is some practical method by which those driving without a license can be identified and apprehended. A roadblock or checkpoint may well be the only effective method to enforce this sanction.

This case involves much more than the stopping of an

intoxicated driver. At issue here is the method by which the State may enforce not only its vehicle licensing, registration, and traffic laws but also vehicle weight laws, fish and game laws, and other similarly licensed and regulated activities.

We subscribe to the following statements of Judge Nolan in his dissenting opinion to *Commonwealth v. McGeoghegan,* 389 Mass. 137, 145, 449 N.E.2d 349, 354 (1983):

> If illegal alien traffic and smuggling are sufficiently serious public problems to justify the Border Patrol in stopping vehicles for brief questioning of their occupants at a specific checkpoint despite the absence of articulable facts to justify the stopping of a motor vehicle (see *United States v. Martinez-Fuerte,* 428 U.S. 543, [96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976)], the "carnage caused by drunk drivers" (*South Dakota v. Neville,* 459 U.S. 553, 558, [103 S. Ct. 916, 74 L. Ed. 2d 748 (1983)] is even more serious and widespread.
>
> . . . .
>
> On balance, the inoffensive intrusion of a systematic stopping of all vehicles at a fixed point is a small price to pay for efforts to reduce the frightening slaughter on our highways caused by driving under the influence of liquor.

FRANCIS S. MAPLE, APPELLANT AND CROSS-APPELLEE, V. CITY OF OMAHA, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

384 N.W.2d 254

Filed March 28, 1986. No. 84-747.

1. **Evidence: Negligence.** Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are factual determinations.
2. **Judgments: Appeal and Error.** In our review of a bench trial of an action at law, this court must consider the evidence in the light most favorable to the successful party, resolving all conflicts in his favor. That party is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
3. _____: _____. The findings of a trial court in a law action tried without a jury have the effect of a jury verdict and will not be set aside on appeal unless they are

clearly wrong.

4. **Police Officers and Sheriffs: Emergency Vehicles.** A police officer must be allowed to rely on the emergency status of the dispatch for his or her own protection and that of the public. As long as such officer acts in good faith in operating emergency equipment, he or she enjoys the privileges provided in Neb. Rev. Stat. §§ 39-608 and 39-640 (Reissue 1984).
5. **Emergency Vehicles.** Whether an authorized emergency vehicle is operating "proper audible or visual signals" under Neb. Rev. Stat. § 39-640 (Reissue 1984) is a factual question.
6. **Proximate Cause: Negligence.** Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of, as a proximate cause.
7. **Negligence.** The question of comparative negligence is for the determination of the fact finder.
8. **Political Subdivisions Tort Claims Act: Negligence: Liability.** Under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), it was the intent of the Legislature, with certain exceptions noted, to hold a municipality liable to an injured party for negligence of its employees, in the same manner that a private person would be liable to such claimant. There is no requirement that the negligent act complained of be performed by such municipal employee in furtherance of a private duty owed to the claimant as opposed to a duty owed the claimant and public generally.
9. **Political Subdivisions Tort Claims Act: Immunity: Negligence: Proof.** Although we do not engage in a special duty-general duty analysis of sovereign immunity, it is still necessary for the claimant, in order to recover from the municipality, to prove that a duty was owed to him or her, that this duty was breached, and that an injury was proximately caused by that breach.
10. **Statutes.** Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning.
11. **Emergency Vehicles: Negligence.** The statute granting emergency privileges to police vehicles clearly imposes a duty of due regard or due care upon the drivers of emergency vehicles, and in a negligence action their conduct will be measured against that of a reasonable person exercising due care under the same emergency circumstances.
12. **Emergency Vehicles: Right-of-Way.** The statutory law granting the right-of-way to emergency vehicles generally does not condition that right-of-way on other drivers' perception of emergency equipment.
13. **Motor Vehicles: Negligence.** A driver's failure to see one favored over him under the rules of the road is negligence as a matter of law.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Thomas J. Culhane of Erickson & Sederstrom, P.C., for appellant.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Thomas O. Mumgaard, for appellee.

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

HASTINGS, J.

This is an action for personal injuries and property damages sustained in a collision between motorcyclist Francis S. Maple and a City of Omaha police cruiser driven by Officer Jesse Cortez. The bench trial took place on May 15 and 16, 1984, after which the district court for Douglas County dismissed plaintiff-appellant Maple's petition.

The accident occurred at 114th and Pacific Streets in Omaha on September 12, 1980, at approximately 7:30 a.m. Officer Cortez had been dispatched to the scene of a personal-injury automobile accident at 114th and Davenport and was proceeding eastward on Pacific, operating his red lights and siren, when he entered the intersection of 114th and Pacific. The officer slowed the cruiser to approximately 2 to 3 miles per hour to negotiate a left turn northward onto 114th Street. A fire engine, which was also operating its lights and siren, had just turned north onto 114th and Pacific, from the east side of the intersection, 8 to 10 seconds earlier.

Maple was traveling west on Pacific, about one block behind the firetruck. The east side of Pacific at its intersection with 114th Street is six lanes wide. Two lanes are south of a median for eastbound traffic. North of the median are a left turn lane, two lanes for through traffic, and one lane for right turn only. Maple was in the northernmost westbound through-traffic lane. Since the southernmost through-traffic lane was obstructed by two schoolbuses and another vehicle stopped at the green light, Maple did not see the police cruiser attempting to turn north.

Although he heard a siren, Maple proceeded into the intersection at 30 to 40 miles per hour, under the impression that the siren emanated solely from the firetruck. Officer Cortez

saw the motorcycle when it was 5 to 6 feet from the cruiser, a split second before the collision. Since he had his foot on the brake already, he was able to stop the cruiser before impact. Maple was 6 to 10 feet from the cruiser when he saw it, but was unable to swerve and avoid it.

Maple's motorcycle struck the police cruiser in front of the right front tire. Maple suffered a compound fracture of his left leg and a closed fracture of his left wrist.

In his second amended petition, Maple claimed that the City of Omaha was liable under the theory of respondeat superior, not only for alleged negligent acts of Officer Cortez but also for alleged negligent acts of the 911 emergency operators who, Maple contends, wrongfully dispatched Officer Cortez to the scene of the 114th and Davenport accident on a high priority basis. The City of Omaha denied Maple's allegations of negligence and claimed damages to its police cruiser, pleading that Maple was contributorily negligent for failing (1) to keep a proper lookout, (2) to have his motorcycle under control, and (3) to yield the right-of-way; and for entering the intersection at an excessive rate of speed.

The trial court made extensive findings of fact in rendering its decision for the defendant, City of Omaha. Most of Maple's assignments of error dispute these factual findings: (1) That one of the busdrivers heard the police siren and that Maple entered the intersection despite the presence of other vehicles stopped at a green light; (2) That Maple was negligent in traveling at the speed he did and that his speed was a proximate cause of the accident; (3) That Maple failed to keep a proper lookout and maintain control over his vehicle; (4) That the police cruiser was properly operating as an emergency vehicle at the time of the accident and that it had a right-of-way under Neb. Rev. Stat. § 39-608 (Reissue 1984); (5) That Maple was contributorily negligent for failing to hear the police siren or to distinguish it from the firetruck's siren; and (6) That Maple's contributory negligence was more than slight, and sufficient to bar recovery. Also assigned as error was the court's determination that the city's 911 emergency operators owed no duty of care to Maple as a member of the public at large.

On cross-appeal the city assigned as error the factual finding

that Officer Cortez was negligent in proceeding into the intersection without complete certainty that other drivers would yield the right-of-way, and the application of a common negligence standard to the officer's acts rather than the reckless disregard standard imposed by § 39-608(5).

Where evidence is in conflict and such that reasonable minds may draw different conclusions therefrom, the questions of negligence and comparative and contributory negligence are factual determinations. *Stephen v. City of Lincoln*, 209 Neb. 792, 311 N.W.2d 889 (1981).

In our review of a bench trial of an action at law, this court must consider the evidence in the light most favorable to the successful party, resolving all conflicts in his favor. That party is entitled to the benefit of every inference that can reasonably be deduced from the evidence. The findings of a trial court in a law action tried without a jury have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Crawford v. Ham*, 209 Neb. 802, 311 N.W.2d 896 (1981).

A review of the record reveals that Maple is correct in disputing the trial court's finding that one of the busdrivers heard the *police cruiser's* siren. Timothy Richardson testified that he did not hear the police siren but stopped when he saw the cruiser's red lights. Richardson did hear the firetruck's siren, and Samuel Cato, the other busdriver, testified that he heard a siren but was unable to identify its source.

In any event, both busdrivers reacted properly to the emergency vehicles by stopping their vehicles. Despite the trial court's misstatement of this fact, there was other evidence to support the court's finding that the police siren was audible. Other witnesses testified that they were able to hear the cruiser siren.

The record also reveals evidence to support the court's finding that Maple entered the intersection despite the presence of other vehicles stopped at a green light. Harriet Beckenhauer stated that she could see an impending collision, observing Maple passing vehicles stopped at the green light.

There was also sufficient evidence for the court to find that 30 to 40 miles per hour was an excessive speed for Maple under the circumstances. The findings that Maple failed to maintain

control of his motorcycle and to keep a proper lookout are related and equally supported by the record. If Maple had noticed that other cars were not moving through the green light, he might have reduced his speed and been able to swerve and avoid the collision. Working in tandem, these three acts of negligence were a proximate cause of Maple's injuries.

The trial court properly found that the police cruiser was operating as an emergency vehicle and that it had a right-of-way under § 39-608. In the definitional section of the Nebraska Rules of the Road, authorized emergency vehicle is defined as including "police vehicles." Neb. Rev. Stat. § 39-602(5) (Reissue 1984).

Neb. Rev. Stat. § 39-640 (Reissue 1984) provides:

> (1) Upon the immediate approach of an authorized emergency vehicle which makes use of proper audible or visual signals:
>
> (a) The driver of any other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to and as close as possible to the right-hand edge or curb of the roadway, or to either edge or curb of a one-way roadway, clear of any intersection, and shall stop and remain in such position until such emergency vehicle passes, unless otherwise directed by any police or traffic officer; . . . .
>
> . . . .
>
> (2) This section shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway.

Maple argues that the police cruiser was not an emergency vehicle because the automobile accident to which Officer Cortez was dispatched was not truly an emergency. He suggests that because of the 911 operator's alleged negligence in dispatching the officer on a high priority, the police cruiser was not entitled to the traffic privileges allowed an emergency vehicle.

The defendant in a criminal action for motor vehicle homicide made a similar argument in *State v. Otto*, 184 Neb. 597, 169 N.W.2d 612 (1969). The defendant requested a strict application of a statute which allowed a speed limit exemption

for police officers " 'in the chase or apprehension of violators of the law.' " This court found the exemption applied, as "[t]he police officer here was responding to a legitimate command and order from his superiors. . . . It is enough, as in this case, that the police officer knew of an emergency, for which he could render effective assistance, and was operating in response to a call for assistance." *Id.* at 600-01, 169 N.W.2d at 614-15.

A post hoc inquiry into the seriousness of the matter to which an emergency vehicle is dispatched to determine whether that vehicle was entitled to emergency privileges would not serve the purpose of § 39-640. A police officer must be allowed to rely on the emergency status of the dispatch for his or her own protection and that of the public. As long as such officer acts in good faith in operating emergency equipment, he or she enjoys the privileges provided in §§ 39-608 and 39-640.

The appellant argues, further, that Officer Cortez was not making use of "proper audible or visual signals" as required by § 39-640. Since the standard operating procedure of the Omaha Police Department instructs that police cruisers should operate rotating top red lights, siren, headlights, and spotlights when dispatched on an expedite call, Maple argues that the police cruiser was not entitled to emergency vehicle privileges unless the City of Omaha proved that Officer Cortez was operating all of this equipment at the time of the accident.

The record indicates that Officer Cortez was operating only red lights and a siren. Whether an authorized emergency vehicle is operating "proper audible or visual signals" under the statute is a factual question. Although the standard operating procedure is evidence of proper signals for given circumstances, it does not establish requirements as a matter of law. The trial court's determination that Officer Cortez was operating proper audible or visual signals was not clearly wrong; thus the court was not in error to find that the police cruiser had a right-of-way under § 39-640.

The trial court's determination that Maple was contributorily negligent for failing to hear the police siren or to distinguish it from the firetruck's siren was also supported by the evidence. Contributory negligence is conduct for which plaintiff is responsible, amounting to a breach of the duty

which the law imposes upon persons to protect themselves from injury, and which, concurring and cooperating with actionable negligence for which defendant is responsible, contributes to the injury complained of, as a proximate cause. *Stephen v. City of Lincoln*, 209 Neb. 792, 311 N.W.2d 889 (1981).

Since there was testimony at trial that Maple was wearing a hood under his motorcycle helmet and that other drivers at the intersection could hear the police siren, the trial court was not clearly wrong in finding that Maple was contributorily negligent in failing to hear or distinguish the police siren.

We also reject Maple's assignment of error disputing the trial court's finding that Maple's contributory negligence was more than slight, and sufficient to bar recovery. The question of comparative negligence is for the determination of the fact finder. *Stephen v. City of Lincoln, supra*. The trial court was not clearly wrong in its finding. This factual finding and those discussed above are affirmed.

In response to Maple's allegation that the City of Omaha's 911 operators caused his injuries in part by dispatching Officer Cortez on a higher priority than was required by the information reported, the trial court found that the operators owed no duty of care to Maple as a member of the public at large; thus there was no breach to form the basis of a negligence claim against them or the City of Omaha as their employer.

The court cited *Massengill v. Yuma County*, 104 Ariz. 518, 456 P.2d 376 (1969), among other authority, to the effect that a government official or employee owes no duty of care to the general public in the absence of an undertaking of a special or private duty. The Arizona Supreme Court has since rejected this doctrine in *Ryan v. State*, 134 Ariz. 308, 656 P.2d 597 (1982).

In abandoning the doctrine in *Massengill*, the *Ryan* court stated in part as follows:

> We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recovery. [Citations omitted.] Thus, the parameters of duty owed by the state will ordinarily be coextensive with those owed by others.

134 Ariz. at 310, 656 P.2d at 599.

Appropriate to this discussion is an examination of our own Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983). Section 23-2402, in defining a tort claim, makes reference to loss or damage "caused by the negligent or wrongful act or omission of any employee of the political subdivision, while acting within the scope of his office or employment, under circumstances where the political subdivision, *if a private person*, would be liable to the claimant. . . ." (Emphasis supplied.)

Limitations are found in § 23-2409 which exclude acts based on the execution of a statute, discretionary functions, assessment or collection of taxes, establishment of a quarantine, or assault and battery. Nowhere is there found an exemption for the exercise of a duty owed to the public generally.

Ryan cited two recent Florida cases which paraphrased language from *Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010 (Fla. 1979), referring to criticism from courts and commentators concerning the "governmental-proprietary" and "special duty-general duty" analysis of sovereign immunity and holding that the failure to properly maintain an existing traffic control device was an operational duty which permitted filing of a suit against a governmental entity.

Appellee cites us to *Trautman v. Stamford*, 32 Conn. Supp. 258, 350 A.2d 782 (1975), as supporting the special duty-general duty dichotomy. However, that case relied, in part at least, on *Massengill*.

New York still follows the general-duty exemption as expressed in *DeLong v County of Erie*, 89 A.D.2d 376, 455 N.Y.S.2d 887 (1982). *Trezzi v City of Detroit*, 120 Mich. App. 506, 328 N.W.2d 70 (1982), is listed by appellee as supporting this same view. However, in *Trezzi*, the Michigan statute exempted governmental agencies from tort liability while engaged in governmental functions, and the court held that operating a "911 emergency system" was a governmental function.

In any event, we are persuaded by the reasoning of the Arizona court in *Ryan*. However, as noted in *Ryan*, the plaintiff

still must show that a duty was owed to him, that this duty was breached, and that an injury was proximately caused by that breach.

In the instant case Officer Cortez was dispatched on an "expedite" level, which authorized him to operate his cruiser as an emergency vehicle. Officer Caniglia, the 911 operator, received a call from a Dr. O'Neil, who reported "[t]here's been an accident down here just south of 114th and Davenport East, by the new fabric center and there's a two car accident, a couple of people not hurt badly, but need an ambulance and a police unit."

Following standard operating procedure, the call was then transferred to a fire and rescue operator. After the call was transferred the fire and rescue operator questioned Dr. O'Neil further, and he explained that a car was on fire and asked again for police and an ambulance, as a woman was injured. The district police dispatcher received a dispatch card within a minute of the original call, and it was his duty to dispatch a cruiser and determine the level of dispatch. Upon receiving the card, and himself hearing the fire and rescue operator sending a fire engine and rescue squad, he dispatched the officer on an expedite basis.

Plaintiff argues that the 911 operator was negligent in not questioning Dr. O'Neil in more detail so as to determine with more certainty the level of dispatch required. However, as stated by Officer Caniglia during his testimony,

> When he said the three words, "not hurt badly," I didn't think they were going to send one. But then he comes right back and said to send an ambulance, and there's the doctor saying "send an ambulance," you don't question that any further because if you're going to stop to question a doctor, you might as well forget it.

Interestingly enough, several of the cases cited by the parties from other jurisdictions claimed liability on the municipality because of a delay in dispatching an emergency vehicle.

There is no credible evidence in this record that the 911 dispatchers, or others, acted improperly or imprudently in dispatching Officer Cortez on an emergency basis. Therefore, as a matter of law, although for a different reason, we agree

with the trial court that no liability attached to the city because of the actions of the dispatchers.

For its cross-appeal the City of Omaha contends that the trial court was in error in finding that it was contributorily negligent in a degree sufficient to bar its recovery. This involves the court's finding that Officer Cortez was held to a standard of due care rather than the reckless disregard standard and, accordingly, was negligent in proceeding into the intersection without complete certainty that plaintiff would yield the right-of-way granted his emergency vehicle.

We are thus required to interpret the legal significance of the involved statutes and, further, to determine whether there is any evidence to support the trial court's determination.

The City of Omaha argues that under § 39-608(5) the trial court incorrectly applied a negligence standard entitled "Authorized emergency vehicles; privileges; conditions," holding a driver of an emergency vehicle liable for a breach of due regard rather than the less stringent standard for reckless disregard. That statute provides:

> (5) The provisions of this section shall not relieve the driver of such emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect such driver from the consequences of his reckless disregard for the safety of others.

Essentially, the city contends that emergency vehicle drivers should be held liable for reckless disregard but not for breach of due regard. Such a reading of the statute, however, renders meaningless the duty of due regard which the Legislature sought to impose. The imposition of a duty of due regard would be nugatory if one who neglected that duty were not held liable for that breach. Where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words will be given their ordinary meaning. *Kellogg Company v. Herrington*, 216 Neb. 138, 343 N.W.2d 326 (1984).

Granted, the reckless disregard clause adds little if one is held liable for a breach of due regard. It goes without saying that if one is liable for breach of due regard, he or she is surely liable for reckless disregard. Nevertheless, the statute clearly imposes

a duty of due regard upon the drivers of emergency vehicles, and in a negligence action their conduct will be measured against that of a reasonable person exercising due care under the same emergency circumstances.

If § 39-608(5) were not interpreted to impose a duty of due regard or due care, it would be difficult to reconcile with § 39-640, which makes no mention of reckless disregard in a clause similar to § 39-608(5). Section 39-640(2) sets out the circumstances under which other drivers must yield the right-of-way to an emergency vehicle and is applicable in many of the same situations as § 39-608: "(2) This section shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway."

Reading these two statutes together, we believe that the Legislature intended to impose a duty of due regard or due care upon emergency vehicle drivers and that they should be held liable for breaches of such duty.

The trial court states that since the officer's view of the northernmost through-traffic lane was obstructed, the officer should have waited either until a vehicle stopped in that lane or until the green light for east-west traffic turned red before executing his left turn. The question which we must determine is whether there was any credible evidence supporting the trial court's conclusion that Officer Cortez failed to exercise due regard or due care under the circumstances.

Maple argues that this finding is consistent with *Hammon v. Pedigo*, 173 Neb. 787, 799, 115 N.W.2d 222, 228 (1962), in which we quoted a Kentucky decision:

> "The provision exempting an emergency vehicle from ordinary traffic regulations confers no absolute immunity upon the driver, for it is based on the prescribed conditions. Nor does the preferential status relieve the driver from the duty of having due regard for the safety of other people lawfully using a street or highway. The duty is measured by the danger to be apprehended. Notice and warning to persons required to yield the right of way is essential, and a reasonable opportunity to yield or get out of the way is necessary before they become chargeable

with the obligation to give preference to the emergency vehicle. . . ."

(Quoting *Gasparac v. Castle*, 330 S.W.2d 111 (Ky. 1959).)

Appellant apparently interprets this passage to relieve drivers from the duty to yield the right-of-way to emergency vehicles unless they actually see emergency lights or hear a siren. Such an interpretation is inconsistent with § 39-640 and ignores that part of the quoted passage requiring " 'due regard for the safety of other people *lawfully* using a street or highway.' " (Emphasis supplied.)

That statute does not condition the right-of-way on other drivers' perception of emergency equipment. And since we have affirmed the district court's findings of negligence on Maple's part, it can hardly be said that Maple was using the streets "lawfully."

We have held repeatedly that a driver's failure to see one favored over him under the rules of the road is negligence as a matter of law. *Mitchell v. Kesting*, 221 Neb. 506, 378 N.W.2d 188 (1985); *Stephen v. City of Lincoln*, 209 Neb. 792, 311 N.W.2d 889 (1981); *Bonnes v. Olson*, 197 Neb. 309, 248 N.W.2d 756 (1976); *Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848 (1960).

The great weight of the evidence demonstrates that Officer Cortez was extremely cautious in attempting a left turn onto 114th Street. The trial court's finding that Officer Cortez, and consequently the City of Omaha, was negligent in proceeding through the intersection, under the circumstances of this case, was clearly wrong.

The City of Omaha was entitled to recover its damages proximately resulting from Maple's negligence. The judgment of the district court to the contrary is reversed and that part of the cause is remanded for further proceedings consistent with this opinion.

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

DEBORAH A. COTTON, APPELLANT, V. NORMAN D. COTTON, APPELLEE.

383 N.W.2d 739

Filed March 28, 1986. No. 84-770.

Courts: Judgments. The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.

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

James T. Hansen, for appellant.

Gregory J. Beal of Gregory J. Beal & Associates, P.C., for appellee.

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

HASTINGS, J.

These proceedings arise out of a marriage dissolution case. The appeal involves credits applied by the trial court against its judgment for alimony and child support, resulting from payments made by the respondent directly to the petitioner rather than through the clerk of the court.

Petitioner has appealed, contending that because the decree of dissolution directed payments to be made through the clerk of the court, as provided for in Neb. Rev. Stat. § 42-369 (Reissue 1984), respondent should get no credit for payments made directly to the petitioner, as evidenced by respondent's canceled checks admittedly endorsed by the petitioner.

After a rather extensive and contentious hearing, the petitioner finally admitted the receipt of the checks, agreed as to the balance of alimony due, but continued to argue the accuracy of the unpaid child support. The trial court gave credit on the judgment for child support for approximately $12,000, and determined the February 1, 1984, balance for alimony to be $4,625.65 and for child support the sum of $4,654.91.

Petitioner argues the rule against modifying accrued support judgments and the principles of setoff. Neither is applicable in this case. What is germane is the inherent power of a court to

determine the status of its judgments. "The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record." (Syllabus of the court.) *Manker v. Sine*, 47 Neb. 736, 66 N.W. 840 (1896), cited with approval in *Hopwood v. Hopwood*, 169 Neb. 760, 100 N.W.2d 833 (1960).

The statute in question was designed to avoid this type of litigation. Had respondent followed its dictates, he would have avoided a great deal of time, trouble, and expense. However, the language of the statute, we believe, is only directory, not mandatory. The Legislature could not have intended that a plaintiff receive double recovery.

We have reviewed the record de novo and conclude that the trial court was correct in its findings. Its judgment is affirmed.

AFFIRMED.

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLANT, V. JOHN CARROLL, APPELLEE.

383 N.W.2d 740

Filed March 28, 1986. No. 84-792.

1. **Courts: Jurisdiction: Appeal and Error.** To acquire jurisdiction over the subject matter of the action, the requirements of the statute granting right of appeal are mandatory and must be fully complied with in order for the district court to have jurisdiction, and the district court may not enter any order other than an order of dismissal.
2. **Attorney Fees.** A district court may award attorney fees for securing dismissal of an untimely appeal from an order of the Nebraska Equal Opportunity Commission.

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

Robert M. Spire, Attorney General, and Sharon M. Lindgren, for appellant.

Clyde A. Christian, for appellee.

KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and CAMP, D.J., and COLWELL, D.J., Retired.

CAMP, D.J.

The appellee, John Carroll, after being terminated from his employment with the Nebraska Department of Correctional Services, filed two claims for wrongful dismissal. The first claim was in the form of a grievance with the State Personnel Board, alleging that his discharge was wrongful because he was fired for a violation that other individuals similarly situated also committed without being punished. The personnel board ruled in favor of Carroll and ordered his reinstatement without awarding backpay. No appeal was taken from this ruling.

A hearing was subsequently held before the Nebraska Equal Opportunity Commission on the ground that his discharge was racially motivated. The parties stipulated that the record and findings from the personnel board hearing would be introduced into evidence for the purpose of the hearing before the Equal Opportunity Commission. The commission ordered that Carroll be reinstated and awarded backpay.

The appellant, Department of Correctional Services, filed an untimely appeal to the Douglas County District Court, which appeal was dismissed as being out of time.

Following the dismissal of the appeal, the attorney for Carroll filed an application with the district court for attorney fees for services rendered before the personnel board and before the commission. Following a hearing at which the Department of Correctional Services objected to the award of the portion of the attorney fees attributable to the personnel board action, the district court awarded $6,656.25 in attorney fees for services rendered before both the personnel board and the commission. From that order the department now appeals to this court.

The issue presented to this court by the briefs and arguments of the parties is whether the district court erred in awarding an attorney fee that included hours of representation before the State Personnel Board. We do not reach that matter, as we find that the issue of awarding an attorney fee was not before the

district court.

Neb. Rev. Stat. § 48-1120(6) (Reissue 1984) provides: "In any action or proceeding under sections 48-1101 to 48-1125, wherein an appeal is lodged in the district court, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs." To acquire jurisdiction over the subject matter of the action, the requirements of the statute granting right of appeal are mandatory and must be fully complied with in order for the district court to have jurisdiction, and the district court may not enter any order other than an order of dismissal. *McCorison v. City of Lincoln*, 218 Neb. 827, 359 N.W.2d 775 (1984); *Bd. of Ed. of Keya Paha County v. State Board of Education*, 212 Neb. 448, 323 N.W.2d 89 (1982).

In *Airport Inn v. Nebraska Equal Opp. Comm.*, 217 Neb. 852, 353 N.W.2d 727 (1984), this court awarded attorney fees pursuant to § 48-1120(6) where the employee was awarded backpay after proving he had been the victim of gender-based discrimination. The fees awarded included those incurred at all stages of the proceedings, including those undertaken in the commission. That case is distinguishable from the present case in that the district court in *Airport Inn, supra*, had jurisdiction to modify the commission's award of backpay, and actually did so, whereas in this case the district court lacked jurisdiction over the subject matter and was powerless to modify or reverse the commission's action.

The plain meaning of § 48-1120(6) is to permit an award of attorney fees only where they were necessarily incurred in determining an issue over which the district court had jurisdiction. Since the district court was unable to reach the substantive issues raised before the personnel board and the commission, it had no authority to grant attorney fees for expenses incurred at those proceedings.

As there was an appearance by appellee's attorney in the district court as the result of appellant's processing the appeal, an award of attorney fees would be proper under § 48-1120(6) for securing the dismissal of the appeal. We determine that an award of $1,500 for services in the district court is reasonable and proper.

The decision of the district court is affirmed as modified.
AFFIRMED AS MODIFIED.

FERN E. RIEDY, APPELLANT, V. HAROLD E. RIEDY, APPELLEE.
383 N.W.2d 742

Filed March 28, 1986. No. 84-838.

1. **Foreign Judgments: Alimony: Jurisdiction.** Money obligations accrued under a foreign alimony decree registered in this state pursuant to the provisions of the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 through 25-15,104 (Reissue 1979), may be enforced by the courts of this state.
2. _____: _____: _____. The Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 through 25-15,104 (Reissue 1979), does not permit the courts of this state to enforce or modify foreign alimony decrees with respect to unaccrued money obligations.
3. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and dismissed.

Patrick J. Nelson of Jacobsen, Orr & Nelson, P.C., for appellant.

David W. Jorgensen of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

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

CAPORALE, J.

Upon the application of the appellee husband, Harold E. Riedy, the trial court reduced the amount of alimony he was obligated to pay under the terms of an Iowa decree of dissolution previously registered by the appellant wife, Fern E. Riedy, pursuant to the Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. §§ 25-1587 through 25-15,104 (Reissue 1979). We reverse and dismiss for lack of jurisdiction.

It is clear that money obligations accrued under a foreign alimony decree registered in this state pursuant to the

provisions of the act may be enforced by the courts of this state. *Sullivan v. Sullivan*, 168 Neb. 850, 97 N.W.2d 348 (1959).

The present case, however, does not seek to have the Nebraska courts enforce money obligations which have accrued under a foreign alimony decree but, rather, seeks to have the courts of this state modify money obligations which had not yet accrued under the decree as registered.

The question which must be answered, then, is whether the act contemplates the registration of such a decree with a view toward enforcing unaccrued money obligations.

Some courts have permitted enforcement of foreign judgments with respect to unaccrued money obligations. *Schroeder v. Schroeder*, 271 Or. 582, 533 P.2d 350 (1975); *Salmeri v. Salmeri*, 554 P.2d 1244 (Wyo. 1976). Indeed, the court in the latter case, as did the trial court in this case, modified unaccrued money obligations arising under a foreign decree registered under the act. At least one court, however, has held that a foreign child support decree is not entitled to registration under the act to enforce money obligations which had not accrued. *Siegel v. Mosier*, 632 S.W.2d 76 (Mo. App. 1982).

An analysis of the act itself convinces us that it does not contemplate the enforcement of a foreign alimony decree with respect to unaccrued money obligations. But cf. *Johnson v. Johnson*, 215 Neb. 689, 340 N.W.2d 393 (1983) (which entertained but refused to modify a foreign child support decree registered under the act).

Section 25-1589 requires that the petition for registration "set forth a copy of the judgment to be registered, the date of its entry *and the record of any subsequent entries affecting it . . . .*" (Emphasis supplied.) While it is true that a judgment debtor may, by appearing, adducing evidence, and failing to file a bill of exceptions, waive that requirement, *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983), the language of that section nonetheless manifests that only accrued money obligations come within the purview of the act, for there could be no entries affecting unaccrued money obligations.

Section 25-1592 of the act provides that at any time after registration a levy may be made under the registered judgment.

Obviously, a levy cannot be made upon an unaccrued money obligation, for no judgment could yet have been entered upon it.

Section 25-1593 provides that if the judgment debtor over whom personal jurisdiction has been obtained fails to plead, or if, after hearing, the registering court fails to set the registration aside, the registered judgment shall become a final personal judgment of the registering court. Section 25-1598 provides a means for the registered judgment to become a final judgment quasi in rem of the registering court where personal service has not been obtained upon the judgment debtor and a levy has been made. Again, unaccrued money obligations cannot become final judgments.

It is clear to us, therefore, that the act provides a means of enforcing accrued judgments and does not permit the enforcement of unaccrued money obligations. Having no jurisdiction to enforce the unaccrued money obligations, the trial court had no jurisdiction to modify those obligations.

We recognize that in this instance the parties agreed that the district court could consider and adjudicate the matter. It is axiomatic, however, that the parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent. *Whitehouse Energy Savers v. Hanlon*, 214 Neb. 572, 334 N.W.2d 802 (1983).

Since the trial court lacked jurisdiction, this court also lacks jurisdiction. *Moell v. Mennonite Deaconess Home & Hosp.*, 221 Neb. 168, 375 N.W.2d 618 (1985).

The judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

STANLEY E. KRUL, JR., APPELLANT AND CROSS-APPELLEE, V. TODD E. HARLESS AND STERKEL FARMS, INC., APPELLEES AND CROSS-APPELLANTS.

383 N.W.2d 744

Filed March 28, 1986. No. 84-845.

1. **Negligence.** Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of the defendant; and (3) his actions contribute to the injuries as a proximate cause.
2. **Motor Vehicles: Right-of-Way: Words and Phrases.** Right-of-way shall mean the right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian approaching under such circumstances of direction, speed, and proximity as to give rise to danger of collision unless one grants precedence to the other. Neb. Rev. Stat. § 39-602(81) (Reissue 1984).
3. **Motor Vehicles: Right-of-Way.** Generally, an unexcused vehicular encroachment on another's lane of traffic, such as driving to the left of the midline of a roadway contrary to the rules of the road, prevents acquisition of a right-of-way and precludes the unlawful encroachment from becoming a favored position in movement of traffic.
4. _____: _____. A motorist colliding with an unlawfully encroaching vehicle is not, as a matter of law, guilty of contributory negligence more than slight by failing to see and avoid such approaching, encroaching vehicle.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Michael J. Javoronok of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellant.

Robert P. Chaloupka of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees.

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

SHANAHAN, J.

The district court for Morrill County sustained cross-motions for summary judgment and dismissed the petition of Stanley E. Krul, Jr., for damages (bodily injury and property) and the counterclaim of Sterkel Farms, Inc., for property damage, arising from an automobile-truck accident. The accident occurred shortly before 10 a.m. on January 8,

1983, near an intersection of a private driveway and an east-west gravel road in Morrill County. Weather was not a factor in the accident.

Krul, alone and driving his Ford Pinto, was northbound on a private driveway from his neighbor's farm residence. The driveway intersected with a gravel county road running east and west for which the speed limit was 50 m.p.h. An east-west shelterbelt of fir trees was located south of the county road and east of the private driveway. As the road ran eastward, a grade developed to a crest of a hill at some distance from the driveway. The record does not disclose the degree of the grade or the distance from the driveway to the crest of the hill.

According to his deposition testimony, Krul was operating his car at approximately 25 m.p.h. down the driveway, as he approached the road. The shelterbelt obstructed Krul's vision to the east as he approached the road-driveway intersection, preventing Krul from seeing traffic westbound and approaching from the east on the road. Without stopping his car before entering the road, Krul completed his turn to the right and drove east on the road at a speed less than 10 m.p.h. for 70 feet, when he first saw the westbound truck approaching "on my side of the road." On seeing the oncoming truck Krul "tried to go for the ditch" at the south side of the road. At impact with Krul's car the truck was south of the road's "imaginary centerline."

There is no question that Harless was employed by Sterkel Farms at the time of the accident and was acting within the scope of such employment. Sterkel Farms' tractor was pulling an empty trailer used to transport cattle. Harless, by deposition, testified that he was alone and operating Sterkel Farms' truck tractor and semitrailer westbound, approaching the crest of the hill east of the road-driveway intersection. As it approached the crest of the hill, Sterkel Farms' truck was traveling "43 to 45 miles an hour," and "maybe a couple mile an hour over that" when the truck started down the hill. Harless acknowledged making the statement, "Well, I was going — I was in eleventh gear, which is anywhere from 45 to 53 miles per hour," and was aware of road conditions, sandy shoulders at roadside, the shelterbelt, and, generally, the vicinity of the

accident site. Harless explained one problem in driving a semi on a sandy road, such as the road where the accident happened, namely, "If you get too far over, [too close to] the edge of the road, it will suck you off the road and stuff like that." Although he testified he did not know the width of the road at the accident scene, Harless also acknowledged in his deposition that he made a statement in which he estimated the road to be, probably, 15 or 16 feet wide. On account of the sandy condition at its edges, according to Harless, the road was a dangerous surface for a semi. Harless testified he did not know the distance from the crest of the hill to the road's intersection with the private driveway. According to Harless' testimony, Krul's car had entered the road without stopping and never completed the right turn onto the road. As soon as he saw Krul, Harless "stepped on the brakes," but "the sand sucked me a little bit" to the left (south). Harless did not know the distance which his rig skidded before impact at a point "less than 50 feet" from the intersection. Harless also did not know whether the semi was north or south of the road's centerline at impact with the Krul car, but, at impact, Krul was "in his [Krul's] lane."

The sheriff of Morrill County responded to a call concerning the accident. The sheriff was Roger D. Sterkel, younger brother of Robert D. Sterkel, owner of Sterkel Farms. Sheriff Sterkel testified that, on arrival at the accident scene, he made measurements. The width of the road was 19 feet and "probably measured 23, 24 feet from sloping shoulder to sloping shoulder." The sheriff identified one set of tire tracks as belonging to the semi and another set as belonging to Krul's Pinto. As testified by the sheriff: "Well, I measured from the vehicle tracks from one side to the edge of the road, what I assumed to be about the edge, and that was about 7 feet, and the other side was about 12." Regarding the measurement of 7 feet, the sheriff explained: "That was measuring from the left track of the semi to the sloping shoulder of the south side of the road." In further explanation, referring to the measurement of 12 feet, Sheriff Sterkel testified: "That was the right track from the semi to the north side of the road, to the right side of the road to the sloping shoulder."

Although he acknowledged lack of experience, courses, or

training as an accident investigator in determining a point of impact, Sheriff Sterkel located the point of impact "[b]ecause that's where the vehicle, the car tracks, met right with the semi tracks and that's where the glass and the first debris started." The sheriff made no measurement to determine the distance between what he believed to be the point of impact and the road's intersection with the private driveway. Sterkel Farms' rig was 8 feet wide, "the trailer and everything." Skid marks east of the "point of impact" measured 120 feet. The rear skid mark from the semi, according to the sheriff, was "a couple of feet, I'd say about four feet at the most," south of the road's centerline. During redirect examination by Sterkel Farms' counsel in reference to measurements at the scene, the following transpired:

Q. So everything we're talking about here would just be a guess really, wouldn't it?
A. The measurements from the —
Q. Except for the measurements of 7 and 12 feet.
A. Right. Everything else would be —
Q. — would be a guess, wouldn't it?
A. Right.

Sterkel recalled the distance from the road to the shelterbelt—15 or 16 feet—although he never made any measurement, but, rather, "I just sort of stepped it off."

Photographs taken at the accident scene depicted Krul's Pinto damaged on its left side. The car's right front headlight was undamaged, and there was no visible damage to the right side of the car. Major damage to the Krul car was concentrated in the area of the left front headlight, which was demolished, and in the area of the bumper and front tire on the left side. The left front fender was torn from the car's body. Damage extended toward the rear of the vehicle, culminating in a large gash at the rear part of the door on the driver's side. Debris attributable to the Krul car, apparently the remainder of the left front fender, was depicted at the south edge of the road, either east of the sheriff-established point of impact or directly south of such point. The only damage to the Sterkel Farms' rig was located on the left dual tires of the tractor and was evidenced by fresh scuffs on those tires, as well as fresh dents in the tire rims

for the tractor's duals. Depicted were the tire marks from the semi and the usable road surface which, according to the sheriff, consisted of 10 feet north of the truck's tracks.

When he arrived at the scene and as a part of his investigation, Sheriff Sterkel questioned Krul and Harless. Krul appeared to be in shock, but, answering the sheriff's questions, Krul stated: "I didn't stop. I turned right out there. I didn't see the semi in time to avoid the collision." According to Sterkel, Krul "said it was his fault." Harless told the sheriff that

> [Harless] felt like he was at fault because he came over the hill and he was in the middle of the road, and he didn't see the car until it was too late. And when he did see the car, he applied his brakes and he tried to move over out of the way, but he was too late.

In response to a question, "Did [Harless] say anything about speed?" the sheriff responded, "He talked like he was running about 50 with his semi."

In his petition Krul alleged that Harless, operating Sterkel Farms' semi, failed to keep a proper lookout, to reasonably control the semi, and to drive on the right half of the road. Krul also alleged Harless drove at a rate exceeding the speed limit. Harless and Sterkel Farms answered, denied any negligence, and alleged that the proximate cause of the accident was Krul's negligence in operating his car, namely, lack of lookout, no reasonable control, failure to stay on the right half of the road, and failure to yield the right-of-way to the semi driven by Harless. Assumption of the risk on the part of Krul was also alleged.

On cross-motions for summary judgment, the district court granted both motions, finding there was no genuine issue as to any material fact and that

> [e]ach driver was guilty of contributory negligence sufficient to bar recovery as a matter of law. Harless was operating his vehicle over the center line of the road and at a speed which could have been excessive under the circumstances. Krul entered the county road from a private lane without stopping and looking. If he had looked, there would not have been a collision.

Krul and Sterkel Farms appeal dismissal of their respective

actions.

A motion for summary judgment is properly granted only where no genuine issue of fact exists concerning any material fact, the ultimate inferences to be drawn from the facts are clear, and the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979); *Stromsburg Bank v. Nuttelman*, 218 Neb. 687, 358 N.W.2d 746 (1984). In considering a motion for summary judgment, a court must view the evidence most favorably to the party against whom the motion is directed, granting that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. See *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985). Although the primary purpose of a summary judgment is to pierce allegations made in pleadings and show conclusively that the controlling facts are other than as pled, see *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985), summary judgment is an extreme remedy and should be awarded only when an issue is clear beyond all doubt. See *Scheideler v. Elias*, 209 Neb. 601, 309 N.W.2d 67 (1981).

Some Nebraska statutes applicable in the present case include:

> In all actions brought to recover damages for injuries to a person or to his property caused by the negligence or act or omission giving rise to strict liability in tort of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence or act or omission giving rise to strict liability in tort and contributory negligence shall be for the jury.

Neb. Rev. Stat. § 25-1151 (Reissue 1979).

> The driver of a vehicle emerging from an alley, driveway, private road, or building shall stop such vehicle

> immediately before driving onto a sidewalk or onto the sidewalk area extending across such alley, driveway, road, or building entrance, and shall yield the right-of-way to any pedestrian approaching on any sidewalk extending across such alley, driveway, road, or building entrance. Before entering the highway, he shall yield the right-of-way to all vehicles approaching on such highway.

Neb. Rev. Stat. § 39-638 (Reissue 1984).

> Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway [subject to exceptions not applicable in the present case].

Neb. Rev. Stat. § 39-620(1) (Reissue 1984).

> Passing vehicles proceeding in opposite directions shall keep to the right side of the roadway, passing left to left, and upon roadways having width for not more than one lane of traffic in each direction, each driver shall give to the other, as nearly as possible, at least one half of the main-traveled portion of the roadway.

Neb. Rev. Stat. § 39-621 (Reissue 1984).

"Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of the defendant; and (3) his actions contribute to the injuries as a proximate cause." *Steinauer v. Sarpy County*, 217 Neb. 830, 836, 353 N.W.2d 715, 721 (1984).

We reviewed a factual situation strikingly similar, even virtually identical, to the facts of the present case when we decided *Hilferty v. Mickels*, 171 Neb. 246, 106 N.W.2d 40 (1960). In *Hilferty*, Hilferty was driving his car west on a private driveway intersecting a two-lane gravel county road with a width of 18 feet. A wooded shelterbelt extended northward approximately 300 feet along the east side of the road. An icy condition existed on the road parallel with the shelterbelt which obstructed a road traveler's vision of the private driveway. Mickels was traveling south at a speed between 48 and 49 m.p.h., was driving in the center of the road, and was, therefore, encroaching on the road's east, or northbound, lane of traffic. Hilferty, seeing the southbound Mickels several hundred feet north of the driveway-road

intersection, did not stop at the intersection but at a speed of 10 m.p.h. drove his car onto the road. Hilferty's car had not completed its right turn when it collided with the Mickels vehicle. In reaching its decision the district court relied on Neb. Rev. Stat. § 39-752 (Reissue 1952)—the statutory predecessor of the current § 39-638 (Reissue 1984)—namely: "The driver of a vehicle entering a public highway from a private road or drive shall yield the right of way to all vehicles approaching on such public highway." The district court found that the cause of the collision was Hilferty's failure to yield the right-of-way to Mickels, dismissed Hilferty's petition due to the plaintiff's contributory negligence as a matter of law, and awarded judgment for the full amount of Mickels' counterclaim.

In reversing the district court's judgment that Hilferty was guilty of contributory negligence as a matter of law, barring recovery, and in setting aside the counterclaim judgment in favor of Mickels, whom this court determined to be guilty of negligence as a matter of law and not entitled to any recovery, this court in *Hilferty v. Mickels, supra*, stated at 260, 106 N.W.2d at 49: "It is not every traveler upon a public highway, then, who is entitled to the right-of-way over one entering from a private lane or drive . . . ," and then expressed the following at 262, 106 N.W.2d at 50:

> "The 'right of way' does not include a right to encroach upon that half of the highway upon which cars coming from the opposite direction are entitled to travel. * * * Moreover, 'before the driver of any vehicle is entitled to the right of way such driver himself must be operating his vehicle within the law and not in violation thereof.' . . ."

Citing and quoting from *Carley v. Zeigler*, 156 Cal. App. 2d 643, 320 P.2d 165 (1958). In *Hilferty* we also stated at 262, 106 N.W.2d at 50:

> The statute concerning right-of-way of a vehicle traveling upon a public highway over a vehicle entering it from a private [road] quoted above does not mean that any vehicle traveling on any part of the highway in any manner, however negligently approaching the private [road], has the right-of-way in the entire highway. . . . The right-of-way which the statute makes available does not

include a right to encroach on the half or part of a highway on which traffic coming from the opposite direction is entitled to travel. A provision of law granting a right-of-way to a user of a highway is generally not absolute but relative and subject to the qualification that the person entitled to claim the right will exercise it with proper regard for the safety of himself and others.

This court has consistently adhered to the rule that the failure to see an approaching vehicle is negligence as a matter of law where such vehicle is indisputably located in a "favored position." See, *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981); *Treffer v. Seevers,* 195 Neb. 114, 237 N.W.2d 114 (1975). A vehicle is located in a " 'favored position' " when it is " 'within that radius which denotes the limit of danger,' " *Hermansen v. Anderson Equipment Co.*, 174 Neb. 325, 330, 117 N.W.2d 791, 794 (1962), a definition which focuses upon the vehicle's geographical proximity to the collision point and the vehicle's favored status under the applicable rules of the road. See, *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984) (whether vehicle was indisputably in a favored position turned upon whether the vehicle's driver had executed a left turn prior to a traffic signal's turning red); *Bonnes v. Olson*, 197 Neb. 309, 248 N.W.2d 756 (1976) (concept of favored position viewed in terms of whether a vehicle, within the limit of danger, was favored under rules of the road); *Maska v. Stoll*, 163 Neb. 857, 81 N.W.2d 571 (1957) (favored position defined in terms of whether a vehicle is "within that range which denotes limit of danger" and favored "under rules of the road").

Statutory characterization of a "right-of-way" is found in Neb. Rev. Stat. § 39-602(81) (Reissue 1984): "Right-of-way shall mean the right of one vehicle or pedestrian to proceed in a lawful manner in preference to another vehicle or pedestrian approaching under such circumstances of direction, speed, and proximity as to give rise to danger of collision unless one grants precedence to the other." Generally, an unexcused vehicular encroachment on another's lane of traffic, such as driving to the left of the midline of a roadway contrary to §§ 39-620 and 39-621, prevents acquisition of a right-of-way and precludes the

unlawful encroachment from becoming a favored position in movement of traffic. Accordingly, a motorist colliding with an unlawfully encroaching vehicle is not, as a matter of law, guilty of contributory negligence more than slight by failing to see and avoid such approaching, encroaching vehicle.

We are aware that this court has adopted a general rule that a motorist's failure to look, when looking would have been effective in avoiding a collision, is negligence as a matter of law. See *Circo v. Transit Auth. of City of Omaha*, 217 Neb. 497, 348 N.W.2d 908 (1984). Application of the foregoing general rule is limited to situations where another vehicle is indisputably located in a favored position, see *Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848 (1960), or a driver charged with negligence as a matter of law has executed a dangerous driving maneuver which, in part, led to a collision. See, *Circo v. Transit Auth. of City of Omaha, supra* (plaintiff, in executing a left turn, moved "beyond what would be the normal lane of traffic for such a left turn"); *Zeiger v. Farmers Co-op Assn.*, 212 Neb. 933, 327 N.W.2d 43 (1982) (plaintiff executed a left turn across a public highway between intersections). Absent such factual variances, the controlling principle remains that although a "driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is . . . driving on the side of the highway where he has a lawful right to be," *Murray v. Pearson Appliance Store*, 155 Neb. 860, 867, 54 N.W.2d 250, 255 (1952), where such driver "fails to see a car not shown to be in a favored position, the presumption is that [the other driver] will respect his right-of-way and the question of [the lawful driver's] contributory negligence in proceeding . . . is a jury question." *Maska v. Stoll, supra* at 865, 81 N.W.2d at 576.

Under the record presented in this case, there are genuine issues of material fact and variable inferences which may reasonably be drawn from facts yet to be determined regarding Krul's claim. Although he did not stop at the road-private driveway intersection, under the circumstances in the present case Krul was not required by § 39-638 to stop before entering the county road. Krul testified he had completed his turn and traveled 70 feet east in the south, or eastbound, lane of traffic on the county road, all without having seen Sterkel Farms'

truck approaching from the east. Whatever the sheriff's testimony lacks in providing results of accurate measurements at the scene, the sheriff's testimony concerning the tire marks from the semi establishes that the truck was encroaching on the eastbound lane of traffic for some distance immediately before impact. There is no excuse established justifying the semi's encroachment on Krul's lane of traffic. Harless admitted that, when the semi collided with the Pinto, Krul was in the eastbound lane. Clearly, Sterkel Farms' semi acquired no right-of-way or favored position in reference to the Krul car. If Krul had proceeded east in his lane of traffic as he testified, and had the semi been driven in its westbound lane of traffic available for passage, would the accident have occurred? Cf. *Hilferty v. Mickels*, 171 Neb. 246, 106 N.W.2d 40 (1960). Given the impact at some distance east of the private driveway and Krul's right-of-way to be accorded in the south, or eastbound, lane of traffic, could not Krul presume that any westbound motorist, not in a favored position, would respect Krul's right-of-way? See *Maska v. Stoll*, 163 Neb. 857, 81 N.W.2d 571 (1957). As far as the arboreous shelterbelt is concerned and its obstruction to a view of the county road, were the trees actually a factor in the accident? Was Krul's lack of observing Sterkel Farms' rig negligence under the circumstances? If the rate of speed for Krul's car is accepted, and there is nothing in the record negating such speed, Krul was driving east at 10 m.p.h., or moving at a rate of 14.66 feet per second. Krul's traveling 70 feet on the road required 4.77 seconds. On the other hand, Sterkel Farms' semi, traveling at 50 m.p.h., was moving at a rate of 73.33 feet per second and would travel 350 feet in the time Krul's car traveled 70 feet. Was the truck visible on the road before or when Krul entered the road from the private driveway? Or was the truck out of view somewhere beyond the crest of the hill, an undisclosed distance to the east? Under present principles, if Krul is contributorily negligent, the effect of such contributory negligence may yet be a question to be resolved under Nebraska's comparative negligence statute. See, § 25-1151; *Hilferty v. Mickels, supra*; *Maska v. Stoll, supra*. Resolution of such questions on the basis of the record before us would be speculation and much like many of the

investigating officer's measurements, a "guess." With questions of facts existing in this case, the district court's judgment in sustaining the motion for summary judgment against Krul is incorrect and is reversed.

Regarding operation of Sterkel Farms' semi, we believe the district court correctly concluded that there was contributory negligence as a matter of law sufficient to bar recovery by Sterkel Farms. Section 39-620(1) required Harless to operate the semi on the right half of the road. The evidence conclusively establishes that Harless was driving the westbound semi in the eastbound, or south, lane of traffic, in violation of the rules of the road. Harless was aware of road conditions but was unable to return the semi to its proper lane of traffic. See §§ 39-620 and 39-621. Such operation was a proximate cause of the accident and sufficient contributory negligence as a matter of law to bar recovery. See *Hilferty v. Mickels, supra*. *Hilferty* presents a cow case for Sterkel Farms' cattle truck. The district court's judgment sustaining Krul's motion for summary judgment against Harless and Sterkel Farms is correct and is affirmed.

This matter is remanded to the district court for further proceedings on Krul's petition.

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

CHARMINE E. RAY, APPELLEE, V. HUBERT L. RAY, APPELLANT.

383 N.W.2d 752

Filed March 28, 1986. No. 84-875.

1. **Alimony: Appeal and Error.** The determination of alimony is initially entrusted to the discretion of the trial court and will not be disturbed unless there has been an abuse of discretion.
2. **Alimony: Pensions: Property Division.** Pension benefits are properly to be considered by the court in exercising its discretion in property division or award of alimony.
3. **Alimony: Pensions.** The award of alimony to a nonmilitary spouse for her lifetime, as a method of dealing with her interest in her husband's military pension, falls within the method of dealing with that pension approved in *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981).

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed as modified.

Robert C. Wester of Schirber Law Offices, P.C., for appellant.

Chris M. Arps, P.C., for appellee.

BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

PER CURIAM.

Hubert L. Ray (hereinafter referred to as Hubert) appeals to this court from a decree entered in a dissolution of marriage proceeding by the district court for Sarpy County, Nebraska. In that action Hubert was the respondent and his wife, Charmine, was the petitioner. A dissolution hearing was held October 3, 1984. At that hearing there was introduced in evidence a stipulation with reference to a property settlement entered into between the parties and also with regard to the custody of their only child, which they agreed was to be given to the petitioner. The court found that the marriage was irretrievably broken and entered a decree dissolving the marriage on October 29, 1984, the decree also incorporating the provisions of the stipulation entered into between the parties.

Hubert and Charmine were married on September 2, 1967, and their only child, Breck Lindsey Ray, was born on August 18, 1973. Both parties were 39 years of age at the time of the hearing on October 3, 1984, and were in good health. The record indicates that the parties were married shortly before Hubert began active duty in the Air Force in 1967. Hubert testified at the hearing for dissolution of the marriage that by virtue of the fact that he was in the Air Force, the parties moved around frequently after they were married. At the time the decree was entered, Hubert had put in 17 years of service and held the rank of lieutenant colonel, and he stated also that he had a "reasonably good shot" at making full colonel.

Both Hubert and Charmine are college graduates. Charmine taught school for 3½ years after the parties were married. She quit teaching before their child was born and has not returned to that vocation. She admitted at the dissolution hearing that

she left teaching of her own volition and not at the request of her husband. Charmine is not at the present qualified or licensed to teach school in Nebraska, but needs only one 3-hour educational course to become so qualified.

At the time of the dissolution hearing, Charmine was temporarily employed by AT&T, and has been employed by that company for approximately 1 year prior to the hearing, earning approximately $5.25 per hour. She testified at the hearing that she expected to be laid off the following month.

Charmine, in her testimony at the hearing, admitted that she had had a chemical dependency problem throughout her marriage which limited her ability to contribute financially and emotionally to her family. However, she had sought medical help for this dependency and did not see it as a problem in the future.

The court, in its decree, awarded custody of the minor child to Charmine, and awarded her $300 per month as child support, and also awarded her $1,000 per month alimony "until further order of this Court or the death of the petitioner." The district court also noted in its decree that the alimony was "subject to dropping to $500.00 per month in the event of a remarriage of the petitioner or living under circumstances that would constitute a common law marriage . . . ."

The court, in its decree, divided the property of the parties equally. Charmine was awarded all personal belongings, household goods, and furnishings in her possession and also a 1984 Oldsmobile automobile. Hubert was ordered to pay all indebtedness of the parties incurred prior to the filing of the petition. He was also awarded all personal belongings and household goods and furnishings in his possession; also a 1981 Ford pickup truck with a camper, a home in Virginia valued at $130,000, and all interests and rights in his U.S. Air Force pension.

It appears from the evidence that Hubert is eligible to retire from the Air Force after completing 20 years of service. In this case his 20 years of service will be completed in approximately 2 more years. If he would retire at that time, he will receive $1,500 per month pension. At the time the dissolution decree was entered, the pension had not yet vested. Thus, if Hubert had

retired on the date of the decree, he would not have received any pension benefits. It should be remembered, however, that the district court, in its decree, awarded Hubert sole interest in all of his rights in the military pension.

Hubert alleges in his assignment of error that the district court abused its discretion in the award of $1,000 per month alimony to Charmine. However, he admits in his brief that the first $500 of the total $1,000 alimony, compensating Charmine for her interest in the Air Force pension, "may be excessive, but it probably is not an abuse of discretion." It is the remaining $500 alimony for "an indefinite period of time" which Hubert alleges is an abuse of discretion. Brief for Appellant at 11.

Under the established law of this state, we review this case de novo on the record and reach conclusions without reference to the conclusions reached by the trial judge. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984). However, when the evidence is in conflict, this court gives weight to the fact that the trial judge saw and heard the witnesses and accepted one version of the facts rather than another. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984); *Witcig v. Witcig*, 206 Neb. 307, 292 N.W.2d 788 (1980).

The determination of alimony is initially entrusted to the discretion of the trial court and will not be disturbed unless there has been an abuse of discretion. *Ford v. Ford*, 219 Neb. 13, 360 N.W.2d 495 (1985). Ultimately, the test for the award of alimony is one of reasonableness as determined by the facts of each case. *Sonntag v. Sonntag*, 219 Neb. 583, 365 N.W.2d 411 (1985); Neb. Rev. Stat. § 42-365 (Reissue 1984). In considering whether the trial judge abused his discretion in this case, we begin with the premise that pension benefits are properly to be considered by the court in exercising its discretion in property division or award of alimony. *Raley v. Raley*, 218 Neb. 644, 357 N.W.2d 470 (1984); *Taylor v. Taylor*, 217 Neb. 409, 348 N.W.2d 887 (1984); *McBride v. McBride*, 211 Neb. 459, 319 N.W.2d 72 (1982); *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981). Under Neb. Rev. Stat. § 42-366 (Reissue 1984), which statute was amended in 1980, any pension benefits may be considered as marital property, and thus divisible in a

dissolution of marriage action, whether or not the pension is vested.

Section 42-366 was relied upon by this court in *Kullbom v. Kullbom, supra*, in which we upheld the inclusion of a pension as a part of the marital estate in the division of property in a dissolution of marriage action. In 1981 the U.S. Supreme Court held that federal law precluded a state court from awarding a nonmilitary spouse a portion of the military spouse's government pension. *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981). Subsequently, this court decided *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982), in which we held that, as a result of *McCarty v. McCarty, supra*, military pensions were exempt from the provisions of § 42-366. However, we noted that the court could still consider such pension as a source of alimony for the nonmilitary spouse. Congress subsequently passed the Uniformed Services Former Spouses Protection Act, Pub. L. No. 97-252, § 1002(a), 96 Stat. 730 (1982) (codified at 10 U.S.C. §§ 1401 et seq. (1982)) (USFSPA). This act provided that the retirement income of a military officer could be treated as solely the property of the military officer or the property of both the military officer and his spouse in accordance with the law of that particular state. Subsequently, this court decided *Taylor v. Taylor, supra*, in which we held that, as a result of this statute, "nondisability military pensions need no longer be treated differently than nonmilitary pensions" as per division of property in a marriage dissolution case. 217 Neb. at 413, 348 N.W.2d at 889.

In this case the trial court specifically awarded respondent "[a]ll interest and rights in his United States Air Force Pension." The trial court also awarded alimony to petitioner of $1,000 per month from November 1, 1984, until further order of the court or the death of petitioner "subject to dropping to $500.00 per month in the event of a remarriage of the petitioner or living under circumstances that would constitute a common law marriage should one be recognized in this jurisdiction." In his oral remarks at the conclusion of the case, the trial judge explained this decision by stating: "And for the record, the rationale behind that is the $500 a month is to compensate her for an interest in the Air Force pension . . . ." It is apparent that

the trial judge was awarding petitioner alimony and considering the Air Force pension as the source of funds in the award of that alimony. We find that the trial court did not err in so considering respondent's potential Air Force pension as a source of revenue for the purpose of awarding alimony.

We do determine, however, that the trial court did abuse its discretion in the amount of alimony. We determine that while petitioner was entitled to $1,000 per month alimony at the time of the entry of the decree herein, the decree should be modified to provide that the alimony shall be $500 per month 18 months after entry of the decree. Beginning May 1, 1986, the alimony shall be $500 per month until petitioner dies or remarries or until the respondent begins receiving his retirement benefits in accordance with his military pension plan. At the time he begins to receive his military pension benefits, respondent is to continue to pay petitioner the sum of $500 per month until the death of either party or the further order of the court. This will allow the petitioner to complete additional schooling in a relatively short period of time and then receive alimony which will continue to be paid after respondent retires and begins to reap the retirement benefits primarily earned while petitioner and respondent were married to one another. See *Anderson v. Anderson, ante* p. 212, 382 N.W.2d 620 (1986).

The trial court's judgment must be modified in another respect, although not raised by either party. We determine the phrase in the court's decree to the effect that petitioner's receipt of alimony should be continued subject to "dropping to $500.00 per month in the event of . . . [petitioner's] living under circumstances that would constitute a common law marriage should one be recognized in this jurisdiction" should be deleted from the decree. We determined in *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985), that in a system of "no fault" divorce, spousal misconduct alone does not determine a divorced spouse's entitlement to alimony.

The trial court's decree, as modified, is affirmed.

AFFIRMED AS MODIFIED.

BRODKEY, J., Retired, concurring.

I concur in the court's well-reasoned opinion but am compelled to write separately to emphasize the fact that we are

dealing here with a military pension that had *not yet vested* at the time the original dissolution decree was entered.

Neb. Rev. Stat. § 42-366(8) (Reissue 1984) states that "[t]he court shall include as part of the marital estate, for the purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, *whether vested or not vested*." (Emphasis supplied.)

The court's decision upholding the use of a military pension which had not yet vested as a source of alimony is a logical one in view of the above statute and the pattern of recent case law in this state regarding military pensions, but I believe it deserves further emphasis to avoid possible future confusion.

FIRST NATIONAL BANK IN ORD, NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. J.H. SCHROEDER, INDIVIDUALLY, AND J.H. SCHROEDER FAMILY TRUST, APPELLANTS AND CROSS-APPELLEES.

383 N.W.2d 755

Filed March 28, 1986. No. 84-904.

1. **Trusts: Perpetuities.** A trust is not created unless there is a beneficiary who is definitely ascertained at the time of the creation of the trust or definitely ascertainable within the period of the rule against perpetuities.
2. **Trusts.** It is essential to the creation and existence of a trust that a beneficiary be designated with sufficient clarity and certainty to be capable of identification, although not necessarily by name.
3. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.
4. **Motions for Continuance: Witnesses: Evidence.** To warrant a continuance because of the absence of a witness or evidence, the expected evidence must be credible and such as probably to affect the result. The absence of evidence that plainly cannot alter the result of the action is clearly no ground for a motion to continue a cause.

Appeal from the District Court for Valley County: RONALD D. OLBERDING, Judge. Affirmed.

Curtis A. Sikyta, for appellant.

Robert E. Wheeler, for appellee.

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

HASTINGS, J.

J.H. Schroeder and the J.H. Schroeder Family Trust appeal the judgment of the district court which, in response to plaintiff's petition in the nature of a creditor's bill, decreed that the defendant trust was null and void.

In March of 1978 J.H. Schroeder transferred substantially all of his assets to the J.H. Schroeder Family Trust (hereinafter trust), which he created. In exchange for the property, Schroeder received a certificate of beneficial interest for 100 units, representing the "entire . . . value of the trust."

Both before and after the creation of the trust, the First National Bank in Ord carried on a business relationship with Schroeder. This relationship existed with Schroeder in his personal capacity, and essentially the trust was disregarded.

In September of 1982 the bank obtained a judgment against Schroeder on a note. Thereafter, the bank executed on the judgment and it was returned unsatisfied. The bank then filed this action to set aside the trust.

Although finding in favor of the defendants on four causes of action, including the bank's allegations that the trust was invalid due to fraudulent conveyances, the court did rule for the bank on its claim that the trust was void in failing sufficiently to specify beneficiaries. The trustees were ordered to hold the assets in a constructive trust for J.H. Schroeder.

The defendants appeal, and the plaintiff cross-appeals based on the court's dismissal of its other four causes of action. However, because we affirm the judgment of the trial court on its finding against the defendants, it is unnecessary to consider the cross-appeal.

"A trust is not created unless there is a beneficiary who is definitely ascertained at the time of the creation of the trust or definitely ascertainable within the period of the rule against perpetuities." Restatement (Second) of Trusts § 112 at 243

(1959).

The trust created by Schroeder does not identify the beneficiaries nor provide a method for determining who the beneficiaries were intended to be. The trust provides:

> CERTIFICATES OF BENEFICIAL INTEREST
>
> The Beneficial Interests, as a convenience, for distribution are divided into One Hundred (100) Units, substantially in the certificate form hereto attached. They are non-assessable, non-taxable . . . non-negotiable but transferable; and the lawful possessor thereof shall be construed the true and lawful owner thereof. . . .

The trust document contains no provision indicating who is to receive the certificates of beneficial interest, nor does it empower the trustees to make that determination.

Schroeder argues that because the trust provides that the possessor of a beneficial interest certificate is the "true and lawful owner thereof" and that the trust in fact transferred the certificate of 100 units of beneficial interest to him, the beneficiaries were at all times ascertainable.

Schroeder misses the point that "[i]t is essential to the creation and existence of a trust that a . . . beneficiary . . . *be designated* with sufficient clarity and certainty to be capable of identification, although not necessarily by name . . . ." (Emphasis supplied.) 76 Am. Jur. 2d *Trusts* § 135 at 377 (1975). The trust simply designates the owner as the beneficiary without providing how possession and ownership shall occur. Resultingly, the trust, on its face, does not adequately identify its beneficiaries and therefore must fail. The trial court's ruling in this regard is correct and makes it unnecessary to address whether the trust violated the rule against perpetuities.

The defendants also assigned as error the trial court's failure to grant a continuance due to the absence of a material witness. "A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal." *In re Interest of M.*, 215 Neb. 383, 390, 338 N.W.2d 764, 769 (1983).

To warrant a continuance because of the absence of a

> witness or evidence, the expected evidence must be credible and such as probably to affect the result. The absence of evidence that plainly cannot alter the result of the action is clearly no ground for a motion to continue a cause.

17 C.J.S. *Continuances* § 51 at 428 (1963). Accord *Life Insurance Clearing Co. v. Altschuler*, 55 Neb. 341, 75 N.W. 862 (1898).

In the case at bar the trial court determined as a matter of law that the trust document was insufficient to establish a trust. The defendants' witness, who was to testify primarily about the administration of the trust, could in no way have altered that result. There was no abuse of discretion in denying the continuance.

We affirm the decree of the trial court declaring that the J.H. Schroeder Family Trust is void and that "its assets are held by the Trustees in Constructive Trust for J. H. Schroeder."

AFFIRMED.

MIKE PRATT & SONS, INC., A CORPORATION, ET AL., APPELLANTS, V. METALCRAFT, INC., A CORPORATION, ET AL., APPELLEES.

383 N.W.2d 758

Filed March 28, 1986. No. 84-914.

1. **Conspiracy.** Where two or more persons combine to unlawfully injure another's business, the action is properly one for conspiracy.
2. _____. The principal element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter, persons cannot conspire.
3. _____. To constitute a conspiracy there must be a combination of two or more persons; a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy.
4. **Causes of Action: Torts: Contracts.** In order for there to exist a cause of action for tortious interference with a business relationship, it is necessary to prove: (1) The existence of a valid business relationship or expectancy; (2) Knowledge by the interferer of the relationship or expectancy; (3) An intentional act of interference on the part of the interferer; (4) Proof that the interference caused

the harm sustained; and (5) Damage to the party whose relationship or expectancy was disrupted.

5. **Contracts: Liability.** A justifiable termination does not operate to create a liability, either under a contract theory or under the state antitrust statutes, against one who terminates a contract.

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

Thomas J. Guilfoyle of Thomas J. Guilfoyle, P.C., for appellants.

Philip J. Lee of Schumacher & Gilroy, for appellees Metalcraft, Inc., and Ruiz.

Dennis J. Mullin of Breeling, Welling, Place & Steier, for appellees Barr, Henneman, and AMRIC International Corporation.

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

KRIVOSHA, C.J.

The appellants, Mike Pratt & Sons, Inc., and Pratt Protection Systems, Export, Inc. (jointly hereinafter referred to as Pratt), appeal from a judgment entered in the district court for Douglas County, Nebraska, in favor of the appellees, Metalcraft, Inc., AMRIC International Corporation, Joseph R. Ruiz, Robert Barr, Duane Henneman, and Richard Holm. Pratt's suit sought to recover money damages from the various appellees for allegedly conspiring to tortiously interfere with a business or contract right and for further violating the provisions of the Nebraska antitrust statutes, Neb. Rev. Stat. §§ 59-801 et seq. (Reissue 1984). Pratt has assigned four specific errors allegedly committed by the district court. All of them, however, may be grouped together into one, the essence being that the district court's decision is wrong as a matter of law. We have reviewed the record and conclude that the decision of the district court was not in error as a matter of law and that the judgment dismissing the action should be affirmed.

In proceeding to review this matter, we are required to keep in mind that the findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be

disturbed on appeal unless clearly wrong. In such a circumstance it is not within this court's province to resolve conflicts in the evidence or to weigh the evidence; if there is a conflict in the evidence, this court will review the evidence rendered and will presume that controverted facts were decided in favor of the successful party. See *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983). See, also, *Schmode's, Inc. v. Wilkinson*, 219 Neb. 209, 361 N.W.2d 557 (1985); *H & L Equip. v. Schardt*, 217 Neb. 653, 349 N.W.2d 924 (1984). Unless we are able to say as a matter of law that there is no evidence to support the district court's decision, we are compelled to affirm.

The record discloses that in 1980 and 1981, Pratt was engaged in the sale of a number of products and services, including a hand-held portable fire extinguisher. The products were sold both directly by Pratt and through "independent dealers." It eventually became known to Pratt that the extinguisher sold by Pratt used what was thought to be a toxic substance as an extinguishing agent and that, therefore, Pratt needed to find another product to sell. At this time Pratt employed 8 or 10 persons.

Through personnel at Du Pont chemical company, Pratt learned that the appellee Metalcraft, Inc., manufactured a hand-held portable fire extinguisher which used the chemical Halon 1301. Halon 1301 was apparently a safe and effective fire extinguishing agent. At this time the extinguisher manufactured by Metalcraft was sold to the military pursuant to military specifications but had not as yet been approved for other uses by Factory Mutual, an independent testing laboratory, whose approval would be a prerequisite to the sale of this extinguisher in most states.

Michael Pratt contacted the president of Metalcraft, Joseph Ruiz, and persuaded Ruiz to let Pratt market Metalcraft's products. After Ruiz flew to Omaha and met with Michael Pratt and his employees, Pratt and Ruiz verbally agreed to an arrangement whereby Pratt would be a distributor of all Metalcraft products in certain areas. In connection with the marketing of Metalcraft's existing products, Metalcraft also agreed it would allow Pratt to sell a hand-held portable fire

extinguisher using Halon 1301 once the product had been approved by Factory Mutual. Everyone recognized, however, that at the time the agreement was entered into, the product had not yet been approved by Factory Mutual.

On February 3, 1981, Ruiz sent to Pratt a letter appointing Pratt as the exclusive distributor of Metalcraft products, including the military-approved version of the Halon 1301 hand-held portable extinguisher. In addition, a new version that was hoped to be Factory Mutual approved was made a part of the agreement. The letter granted Pratt an exclusive right for a term of 6 months following the obtaining by Metalcraft of the Factory Mutual approval. Additionally, Pratt was given the option to renew the agreement for another 6 months. The February 3, 1981, agreement was supplemented by an additional letter dated March 17, 1981, which granted Pratt the right to market a fire extinguisher identified as the SEA-FIRE unit, and other larger systems as they were developed.

After receipt of the two letters Pratt attempted to develop an organization and market the products. The record discloses that after March 1981 Pratt virtually discontinued the sale of all of its other items and focused its entire energy and attention on the sale and development of the Halon 1301.

During 1981, however, Pratt experienced severe difficulties in selling the military version of the Halon 1301. In some areas the military version extinguisher could not be sold because it was not Factory Mutual approved. In other areas, such as Omaha, Nebraska, the military version could be sold but only as an ancillary fire system and not for the purpose of meeting code requirements. Because of the expenditure of time and money on the promotion of a product which was then unavailable and the difficulties in selling an unapproved product, Pratt was beginning to experience cash-flow problems by the end of 1981. This was partially true because Pratt had phased out most of its other products in order to put all of its efforts toward selling the expected Factory Mutual-approved Halon 1301 hand unit.

Toward the end of 1981, in order to alleviate some of the financial problems, Pratt started a photocard business. Pratt continued the promotion and development of the Halon 1301

hand-held portable fire extinguisher, but with diminished effort, and began making arrangements to resume direct sales of fire alarms, which was the business Pratt had been in prior to getting into the sale of fire extinguishers. By April 1, 1982, because all or most of the employees of Pratt were paid on a commission basis and the company had all but stopped making money, there was a mass exodus by the employees, and the only remaining employees of Pratt on April 1, 1982, were its president, Michael Pratt, and his wife, Rita.

The evidence of subsequent events is in conflict. Nevertheless, the record would permit the trial court to reach the conclusions it reached. Those conclusions would establish that sometime in the early or middle part of April 1982, Metalcraft verbally terminated its agreement with Pratt, although the relationship was not terminated in writing until May 24, 1982. Ruiz gave three reasons for the termination.

The first incident apparently occurred sometime prior to October of 1981. Pratt had called Ruiz, claiming to have a large order overseas. As a result of this assurance by Pratt, Metalcraft increased its stocking levels. However, the order never materialized and Metalcraft was forced to keep the extra stock. The second incident happened sometime in February of 1982. Apparently, Pratt sold some non-Factory Mutual-approved fire extinguishers to a person representing a company in California. Upon investigation by the California fire marshal, the California corporation was not permitted to sell the extinguishers. Pratt was asked to take back the extinguishers but refused to do so. The California salesman and the state fire marshal both then contacted Ruiz, who informed Pratt of his displeasure at this turn of events. Pratt eventually took the product back. This situation led to a telephone call between Michael Pratt and Ruiz, from which Pratt concluded and related to the appellee Robert Barr, who was then employed by Pratt, that it looked like Pratt would not be a Metalcraft distributor any longer. This conversation occurred in March of 1982. Thirdly, Pratt, being unable to pay for products that it had purchased from Metalcraft, arranged with Ruiz to return products and demonstration units to satisfy Pratt's indebtedness. In a phone conversation sometime before April

26, 1982, regarding the return of the products, Ruiz felt he was led to believe that Pratt's purpose in returning the products, including sales tools, was to arrange the termination of the distributorship and the winding up of the relationship and to liquidate Pratt's indebtedness to Metalcraft. Ruiz testified that he told Michael Pratt that if Pratt returned the goods, he, Ruiz, would consider their relationship at an end. Ruiz concluded that Pratt was no longer interested in being a distributor of Metalcraft products and was, he felt, terminating the arrangement. While Pratt maintains such was not the case, there was sufficient evidence to support Ruiz' position, and the district court's finding to that effect is not clearly wrong.

On or about April 26 or 27, 1982, Ruiz called Barr at home, and Barr informed Ruiz that Barr no longer worked for Pratt, having terminated his relationship prior to April 1, 1982. Ruiz had placed the call to Barr after attempting to contact Pratt, without success. He testified that he contacted Barr to discover what was wrong. In that same conversation Ruiz informed Barr that the relationship between Pratt and Metalcraft was over.

On April 30, 1982, Pratt wrote a letter to Ruiz and returned the products for credit. This letter was included with the products and came to Ruiz' attention eventually. Although Pratt concluded the letter with a request to be informed when the long-awaited Factory Mutual approval had been obtained, Ruiz still felt that based upon the return of the products and the sales aids, the business relationship was at an end. To leave no doubt, however, Ruiz sent a letter to Pratt dated May 24, 1982, stating that the Pratt-Metalcraft relationship was terminated.

During this time, Barr and another former Pratt employee, Duane Henneman, having left Pratt's employment prior to April 1, 1982, considered setting up a distributorship company for a variety of products, and, in May of 1982, they organized a corporation known as AMRIC.

The record further discloses that on May 1, 1982, Barr telephoned Ruiz to ascertain the status of the Metalcraft distributorship. He asked Ruiz pointblank whether Pratt was still Metalcraft's distributor. Ruiz assured him that Pratt was no longer representing Metalcraft and verbally committed to Barr that AMRIC could have distributorship rights in Metalcraft.

The record further discloses that sometime in the early part of April 1982, a James Klosner, who had been a manufacturer's representative in the health care industry for about 20 years, was approached in an Omaha bar by a Mike Niemann. There is no indication from the record that, at any time prior to contacting Klosner, Niemann had had any conversations with Barr, Henneman, or any other representative of AMRIC. Niemann suggested to Klosner that he, Klosner, could become involved in the distribution of a new product being manufactured by Du Pont and Metalcraft. Subsequently, Klosner told Niemann he was interested in this new product, and on or around May 1, 1982, Niemann, apparently for the first time, contacted Barr and arranged a meeting at his home between Klosner, Barr, and Henneman. On May 7, 1982, Barr went to Niemann's home, where Klosner was present, and a subdistributorship agreement was executed between AMRIC and Klosner regarding the subdistribution of the Metalcraft Halon 1301 extinguisher. At that meeting there were brochures and advertising pamphlets which had been supplied by Niemann. Niemann did not testify, and the evidence does not reveal how Niemann came into possession of these promotional materials. Pratt argues that undoubtedly Barr or Henneman must have been in contact with Metalcraft prior to May 1, 1982, and that therefore there is conclusive evidence of their conspiracy to interfere with the contract between Metalcraft and Pratt. We may dispose of that argument, however, by simply saying that there is no evidence to support that claim, and there is no basis upon which, on review, we can say that the district court was in error in not reaching the conclusions urged by Pratt in that regard.

We believe, further, that the district court's finding that an agreement between AMRIC and Metalcraft was reached on or about April 1, 1982, must simply have been a clerical error, as it is not supported at all by the record. We find that the only credible evidence in the record relating to the date of any initial agreement between AMRIC and Metalcraft shows that it was entered into on or about May 1, 1982.

A written agreement was finally executed between Metalcraft and AMRIC on October 1, 1982. Near the end of

1982 or the beginning of 1983, a hand-held portable Halon 1301 extinguisher manufactured by Metalcraft received Factory Mutual approval and was at last available for distribution and sale; however, for reasons not relevant to this action, AMRIC's contract with Metalcraft for the distribution of the Factory Mutual-approved, hand-held portable extinguisher was terminated without performance by AMRIC.

We first direct our attention to the claim of Pratt that Metalcraft and the other appellees engaged in a civil conspiracy to tortiously interfere with Pratt's contract. The elements of a civil conspiracy are set out in the case of *Diesel Service, Inc. v. Accessory Sales, Inc.*, 210 Neb. 797, 803-04, 317 N.W.2d 719, 723 (1982), wherein we said:

> Where two or more persons combine to unlawfully injure another's business, the action is properly one for conspiracy.
>
> " '. . . The principle [sic] element of conspiracy is an agreement or understanding between two or more persons to inflict a wrong against or injury upon another. It involves some mutual mental action coupled with an intent to commit the act which results in injury. Without the scienter persons cannot conspire.' " *Dixon v. Reconciliation, Inc., supra* at 47, 291 N.W.2d at 232. . . .
>
> " 'To constitute a conspiracy there must be a combination of two or more persons; * * * a preconceived plan and unity of design and purpose, for the common design is of the essence of the conspiracy.' "

And in order for there to exist a cause of action for tortious interference with a business relationship, it is necessary to prove:

> (1) The existence of a valid business relationship or expectancy; (2) Knowledge by the interferer of the relationship or expectancy; (3) An intentional act of interference on the part of the interferer; (4) Proof that the interference caused the harm sustained; and (5) Damage to the party whose relationship or expectancy was disrupted.

Miller Chemical Co., Inc. v. Tams, 211 Neb. 837, 841, 320 N.W.2d 759, 762 (1982).

In the instant case the district court found that Pratt had "failed to prove by a preponderance of evidence that a conspiracy existed between the defendants to injure the plaintiff by taking his distributorship rights from him through any preconceived plan or unity of design and purpose arrived at among the defendants" and that Pratt had "failed to prove by a preponderance of the evidence that the defendants intentionally interfered with plaintiff's distributorship rights with the defendant Metalcraft, Inc." It is not possible for us to say that such findings were clearly wrong. There was no direct evidence offered by Pratt to show a preconceived plan. The most that Pratt offered was its own speculation and conjecture. Pratt argues that if one looks at the evidence, it is obvious that a conspiracy must have been brewing even before Barr and Henneman left Pratt. While one may make the argument, it cannot be said that the district court's refusal to accept the argument was wrong. In addition, there was certainly more than enough evidence to establish that AMRIC and Metalcraft did not begin negotiations on a distributorship contract until after both sides truly believed that the Pratt-Metalcraft relationship was at an end. Barr testified that he had received assurances from Ruiz before the meeting with Klosner that the Metalcraft distributorship was "up for grabs." Further, Ruiz testified that he believed that when Pratt returned the Metalcraft products at the end of April, Pratt was through dealing with Metalcraft. One cannot say that such a belief on Ruiz' part was unreasonable or could not be believed. In brief, there was credible evidence for the district court to conclude that none of the defendants intentionally conspired to interfere with, or intentionally interfered with, the Metalcraft contract with Pratt.

The district court also found that there was sufficient evidence to justify Metalcraft's terminating its relationship with Pratt. We cannot say that that finding was in error. Once we determine, as we do, that the district court was not in error in determining that there was no conspiracy and that Metalcraft properly terminated the arrangement with Pratt, Pratt's claim that there was a violation of the Nebraska restraint of trade act also falls.

As to Metalcraft, we have concluded that it was justified in terminating its relationship with Pratt. We have held that such a justifiable termination does not operate to create a liability, either under a contract theory or under the state antitrust statutes, against one who terminates a contract. See *Hompes v. Goodrich Co.*, 137 Neb. 84, 288 N.W. 367 (1939). Regarding AMRIC, if we accept, as we must, the district court's finding that AMRIC first became involved in negotiations with Metalcraft after Pratt had but only two employees, was in severe financial difficulty, and had abandoned further efforts to sell the Metalcraft product, we see no evidence that AMRIC attempted in any way to drive Pratt out of business. See *Pierce Co. v. Century Indemnity Co.*, 136 Neb. 78, 285 N.W. 91 (1939). We, therefore, are unable to say that the district court was in error in failing to find that any of the appellees violated the Nebraska restraint of trade act.

Reviewing the record, as we must in a law action, we find that the decision of the district court was not in error, and the judgment is affirmed.

AFFIRMED.

IN RE ESTATE OF MARY M. OLTMER, A PROTECTED PERSON. VELMA BRANDL, GERALDINE VOLSICKA, ET AL., APPELLEES, V. MARY M. OLTMER, APPELLANT.

383 N.W.2d 764

Filed March 28, 1986. No. 84-930.

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

The Law Offices of Robert M. Cook, for appellant.

Jewell, Gatz & Collins, for appellee Volsicka.

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

HASTINGS, J.

For the second time Mary M. Oltmer has appealed from an order appointing a conservator of her estate. The earlier case, affirming such appointment, is found at 214 Neb. 830, 336 N.W.2d 560 (1983).

In the present case the brief filed by the appellant does not contain any assignments of error regarding the decision or judgment of the district court. The record does not disclose any plain error prejudicial to the appellant.

As previously held by this court, in the absence of any assigned error, the judgment of the district court will be and is affirmed. *Baggett v. City of Omaha*, 220 Neb. 805, 373 N.W.2d 391 (1985).

AFFIRMED.

FRANK STAVA, APPELLANT, V. LOUIS F. STAVA AND ROBERT W. STAVA, APPELLEES.

383 N.W.2d 765

Filed March 28, 1986. No. 85-001.

1. **Deeds: Mortgages: Proof.** One asserting that an absolute conveyance of real estate is in fact an equitable mortgage has the burden of proving such fact by clear and convincing evidence.
2. **Deeds: Mortgages.** When it is contended that a conveyance of real estate is in actuality a mortgage, the test is whether the relation of the parties to each other as debtor and creditor continued. If it does, the transaction will be treated as a mortgage, otherwise not.
3. **Deeds: Mortgages: Intent.** Whether a deed absolute in form is a mortgage depends upon the intention of both grantor and grantee of the deed. Their intention may be evidenced not only by the documents in question but also by their declarations and conduct.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

Roy A. Sheaff and John F. Sheaff of Sheaff Law Offices, for appellant.

Robert E. Sullivan of Haessler, Sullivan & Inbody, for appellees.

KRIVOSHA, C.J., WHITE, and SHANAHAN, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

RIST, D.J.

This is an action in equity brought by plaintiff-appellant, Frank Stava, to have a deed executed and delivered by him to his brothers, the defendants-appellees, Louis F. Stava and Robert W. Stava, determined to be an equitable mortgage, to obtain possession of the premises, and for an accounting of proceeds received by appellees during their possession of the property involved. The trial court found generally against plaintiff and for the defendants and dismissed plaintiff's action. Plaintiff appeals to this court, assigning as error the determination by the trial court that the conveyance was an absolute conveyance and not an equitable mortgage, and in denying plaintiff's motion for new trial. No specification of error being briefed with respect to the denial of the motion for new trial, we will limit our consideration to the first assignment.

The case was tried upon a stipulation of facts and the receipt into evidence of the court file. Being an action in equity, we review this action de novo on the record. Neb. Rev. Stat. § 25-1925 (Reissue 1979).

The record reflects that the parties are the beneficiaries of the estate of Cecilia S. Stava, also known as Sadie Stava. Pursuant to a family settlement agreement respecting the estate, plaintiff received a trailer court property described as being located in or adjacent to the city of Wahoo, Saunders County, Nebraska, and because the estate could not be closed as a result of certain estate securities having been previously pledged on a construction bond in plaintiff's behalf, plaintiff gave a real estate mortgage on the trailer court property to defendants to secure what was owed them under the settlement contract.

Some time passed after the execution and delivery of the mortgage. When plaintiff was unable to pay defendants the amount due under the contract, defendants brought an action to foreclose the mortgage, which went to decree on March 16, 1982. Following decree, plaintiff took a 9-month stay of sale,

and at the conclusion thereof an order of foreclosure sale was issued and the sale was advertised. On February 28, 1983, which was either the day of foreclosure sale or the day before, plaintiff executed his warranty deed conveying the trailer court property to defendants. The deed reserved no rights in plaintiff. As a result of the execution and delivery of the deed, no foreclosure sale was had, and defendants began receiving rents from the property and paying expenses. Plaintiff continued to occupy a portion of the property. Shortly thereafter, a notice to vacate was served upon him by defendants, who then brought an action in forcible entry and detainer resulting in an order to plaintiff to vacate the premises. Plaintiff then commenced this action.

The sole issue is whether the warranty deed given by plaintiff to defendants on February 28, 1983, was an absolute conveyance or an equitable mortgage. Plaintiff, having alleged the deed is such a mortgage, has the burden of proving the same, 59 C.J.S. *Mortgages* § 48 b. (1949), and must do so by clear and convincing evidence. *Winkelmann v. Luebbe*, 151 Neb. 543, 38 N.W.2d 334 (1949). One of the principal tests is whether the relation of the parties to each other as debtor and creditor continues after the conveyance is made. If it does, then the transaction will be considered a mortgage, otherwise not. *Cizek v. Cizek*, 201 Neb. 4, 266 N.W.2d 68 (1978). The intention of the parties may be evidenced not only by the documents in question but by the declarations and conduct of the parties. *Davison v. Inselman*, 185 Neb. 236, 175 N.W.2d 85 (1970).

Applying the above rules to this case, we find the only evidence sustaining plaintiff's position is the allegations contained in his petition and his statement he gave the deed as security. We find no evidence that defendants agreed to treat the deed as a mortgage. While defendants have stated they would like to settle the matter in the interest of family harmony and that if all amounts due them were paid, they would consider reconveying the premises to plaintiff, none of such statements constitutes an admission that the deed was a mortgage. It is clear the delivery of the deed by plaintiff to defendants was considered by the latter to pay the debt and satisfy the

foreclosure action they brought. The fact that plaintiff might obtain a reconveyance of the property by paying the debt is, at the most, only an option available to plaintiff, and if he does not pay the debt, the deed has satisfied it. Such arrangement does not make the deed a mortgage. It is and remains an absolute conveyance. In *Dingwerth v. Assendrop*, 155 Neb. 343, 51 N.W.2d 756 (1952), this court held that if personal liability to pay the debt is extinguished and it is optional that the grantor rescue the property by payment or relinquish it by nonpayment, it is a conveyance of the property and not a mortgage. See, also, *Winkelmann v. Luebbe, supra*; *Cizek v. Cizek, supra*.

The conduct of the parties is also instructive on how they regarded the situation. Defendants brought action to foreclose plaintiff's mortgage given at the time of the estate settlement agreement. That action went to decree; plaintiff took his stay and at the time of foreclosure sale gave the deed in question without any limitation contained therein. Shortly after receiving the deed, defendants brought an action in forcible entry and detainer which resulted in plaintiff's ouster from the property. All of defendants' actions are consistent with the deed's being given to satisfy the debt and their conduct in asserting their rights as the owners of the property. We find nothing in the record to show that defendants ever regarded plaintiff as their debtor after the deed was delivered.

It is clear from the authorities previously cited that in order to prove an agreement to treat a deed as a mortgage, it must be shown that such was the intention of all parties to the deed. Plaintiff has failed to meet his burden of proof in this regard.

We affirm the judgment of the trial court.

AFFIRMED.

AGNES SCHRODT, APPELLANT, V. SULLIVAN TRANSFER AND STORAGE COMPANY, A NEBRASKA CORPORATION, APPELLEE.

383 N.W.2d 767

Filed March 28, 1986. No. 85-005.

1. **Summary Judgment.** A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law.
2. _____. The burden is on the moving party to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled.
3. _____. Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear.
4. _____. The party against whom the motion is directed is entitled to the benefit of all favorable inferences to be drawn from the facts.

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

Daniel E. Wherry of Johnston, Barber, Wherry & Knight, for appellant.

William G. Blake of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for appellee.

KRIVOSHA, C.J., WHITE, and SHANAHAN, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

WHITE, J.

Agnes Schrodt appeals from an order of the Lancaster County District Court sustaining the appellee's, Sullivan Transfer and Storage Company's, motion for summary judgment. We reverse and remand for trial.

This case arises out of a contract dispute between Agnes Schrodt and Sullivan Transfer. Evidence was received in support of and opposing the motion. Taking a version most favorable to the appellant, the facts appear to be as follows. From 1956 until January 1982 Sullivan was in the business of moving household goods interstate and intrastate. Sullivan and Mrs. Schrodt entered into a written "Packing Contract" on

June 8, 1972, which provided that Mrs. Schrodt was to pack the household goods prior to their being moved, supply the necessary packing materials, employ and pay packing laborers, provide workmen's compensation, maintain accurate tax records, and provide liability insurance for packed goods. The original agreement also set out in some detail the rate of compensation for Mrs. Schrodt and her workers. What these individuals were to be paid depended upon the item packed, the type of container used, and the destination of the shipment—that is, whether it was an interstate or intrastate move.

The disputed provision of the packing contract, paragraph 1(c), provides:

> (c) If at any time during the term of this contract any of the rates and charges herein specified for any packers service shall not be the lawful rates and charges therefor, the lawful rates and charges shall be deemed substituted herein in place and stead of those herein specified and not then being lawful.

The record indicates that after discussions with Sullivan's manager, Earl Bottlinger, Mrs. Schrodt understood this provision to provide for a system of pay increases for her, depending upon the packing rates set by the Interstate Commerce Commission, which Sullivan can legally charge its customers. If the ICC tariff rates increased, Mrs. Schrodt was to receive the same percentage increase in her compensation.

After the packing contract was executed but before either party rendered any services, Mrs. Schrodt and Sullivan, through Mr. Bottlinger, modified the contract by a parol agreement. Under the new agreement Mrs. Schrodt was to be an employee rather than a subcontractor of Sullivan. This part of the written agreement was modified because of the quantity of paperwork it would generate for Mrs. Schrodt. However, according to Mrs. Schrodt, the method by which her salary increases were to be calculated was unaffected by the parol agreement—when ICC rates went up, Mrs. Schrodt's rate of pay was to go up accordingly.

Approximately 2 years later, Mrs. Schrodt discovered in conversations with drivers and other Sullivan employees that

the ICC rates had increased. Mrs. Schrodt asked Mr. Bottlinger about the rate increase and inquired when she would receive her raise pursuant to the orally modified packing contract. Mr. Bottlinger replied that he would speak with his superiors about the matter, but evidently he never did, or if he did he never responded to Mrs. Schrodt's request, except to assure her that something would be done. Consequently, Mrs. Schrodt continued to request "many times" of Mr. Bottlinger and of other Sullivan managers that they verify the increased ICC rates and arrange for her salary increase. Each time she was assured that the problem would be resolved. At the same time, she continued to work for Sullivan at a salary not reflecting any ICC rate increases.

After Mrs. Schrodt discovered the ICC increases and began demanding her pay increase under the agreement, she eventually received a raise. However, this raise was not based on the ICC tariff increases as contemplated in paragraph 1(c) but, rather, on a single, higher interstate rate for all packing jobs, regardless of the interstate or intrastate nature of the move.

The district court found that there were no genuine issues of material fact and that, as a matter of law, Mrs. Schrodt had waived the provision of paragraph 1(c) when she accepted a raise calculated in a manner inconsistent with it.

A party is entitled to summary judgment if the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact, that the ultimate inferences to be drawn from those facts are clear, and that the moving party is entitled to judgment as a matter of law. *Allan v. Massey-Ferguson, Inc.*, 221 Neb. 528, 378 N.W.2d 664 (1985). The burden is on the moving party to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled. *Id.* Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear. *Gilbert v. City of Tekamah*, 221 Neb. 614, 379 N.W.2d 758 (1986). The party against whom the motion is directed is entitled to the benefit of all favorable inferences to be drawn from the facts. *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35

(1985).

Summary judgment in this case was inappropriate because the record reflects a number of genuine issues of material fact. Mrs. Schrodt has maintained throughout that she did not relinquish any rights she may have had with respect to the method of calculating her wage increases when she and Mr. Bottlinger orally modified the written agreement. She further insists that when she accepted the eventual pay increase which was based only on ICC interstate rates, she in no way waived the provision in paragraph 1(c) which escalated her pay on a percentage basis of ICC rates. Mrs. Schrodt further maintains that when she accepted the eventual wage increase, it was understood to be a partial payment of the percentage-based wage increases due her under paragraph 1(c). She also contends that various managers of Sullivan led her to believe that the raise would be forthcoming retroactively. Finally, there is no evidence in the record indicating that the wage increase Mrs. Schrodt ultimately accepted was not related to the ICC tariffs or was calculated differently than agreed by the parties.

In support of its motion for summary judgment, Sullivan offered the depositions of Agnes Schrodt and Clifford Schrodt, her husband. Rather than illustrating the lack of genuine issues of material fact, these depositions support the existence of a number of factual disputes, not to mention any reasonable inferences that could be drawn. See, e.g., *Regnev, Inc. v. Shasta Beverages*, 215 Neb. 230, 337 N.W.2d 783 (1983). Sullivan has failed to meet its burden of establishing conclusively the lack of any material issue of fact in its quest for summary judgment. Accordingly, the judgment is reversed and the cause remanded for trial.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

PROFESSIONAL RECRUITERS INC., APPELLEE, V. WILKINSON MANUFACTURING COMPANY, INC., APPELLANT.

383 N.W.2d 770

Filed March 28, 1986. No. 85-011.

1. **Judgments: Appeal and Error.** Where an action at law is tried without a jury, the decision of the trial court has the effect of a jury verdict and will not be disturbed on appeal unless it is clearly wrong.
2. _____: _____. It is not within the province of this court 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 the 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.
3. **Employer and Employee.** The criteria for determining whether one is an independent contractor or an employee include the right of control, the independence the workman enjoys, the degree of supervision of the work, whether tools are provided by the workman or the other party, the method of payment, and the contractual understanding between the parties.
4. _____. There is no single test by which the determination of whether or not a workman is an employee, as distinguished from an independent contractor, may be made. This must be determined from all the facts in the case.

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

P. Scott Dye and R. Scott Anderson of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Kenneth W. Pickens, for appellee.

KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and CAMP, D.J., and COLWELL, D.J., Retired.

KRIVOSHA, C.J.

The district court for Douglas County, Nebraska, entered judgment in favor of the appellee, Professional Recruiters Inc., and against the appellant, Wilkinson Manufacturing Company, Inc., in the amount of $9,984 plus costs. The basis of the court decree was that Wilkinson had breached its contract with Professional Recruiters in that Wilkinson had refused to pay Professional Recruiters a previously agreed upon fee due Professional Recruiters for having obtained an employee for Wilkinson. From that order Wilkinson now appeals to this court. We affirm.

This is a law action in which the jury was waived and the case tried to the court. See *Grubbs v. Kula*, 212 Neb. 735, 325 N.W.2d 835 (1982). We have consistently held that where an action at law is tried without a jury, the decision of the trial court has the effect of a jury verdict and will not be disturbed on appeal unless it is clearly wrong. See, *Havelock Bank v. Woods*, 219 Neb. 57, 361 N.W.2d 197 (1985); *South Sioux City Star v. Edwards*, 218 Neb. 487, 357 N.W.2d 178 (1984); *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 341 N.W.2d 588 (1983).

The most that can be said about the record in this case is that the evidence is in conflict. In that regard we have also frequently held that it is not within the province of this court 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 the 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. See *Grubbs v. Kula, supra.*

Viewing the evidence, therefore, in a light most favorable to Professional Recruiters, the district court could find that Professional Recruiters is a firm specializing in the placement of people in the data processing industry. On October 15, 1981, Louis Tomsu, Wilkinson's personnel director, contacted Sandra Olson, an employee of Professional Recruiters, and requested her assistance in locating a data processing manager. Tomsu also on that date contacted "four or five" or "six" other agencies in his attempt to locate a manager. Olson testified that because Wilkinson was a new client, she discussed with Tomsu the fee schedule, which was based upon a specific percentage of the newly hired employee's starting salary but not to exceed a maximum fee of 30 percent of the salary. Olson testified that Tomsu orally agreed to pay the fee. No written contract or signed memorandum was entered into by the parties. Olson further testified that she sent a fee schedule to Tomsu, although no transmittal letter is in evidence. Tomsu denies making any agreement concerning the fees or receiving any fee schedule. This, however, was a conflict which the district court resolved in favor of Professional Recruiters. Under the rules as earlier

outlined, we are bound to accept that finding.

Olson further testified that Tomsu agreed to a 30-day "placement guarantee." Tomsu denied that such a placement guarantee was ever discussed. The evidence then establishes that Professional Recruiters referred three candidates to Wilkinson. The third candidate was Robert Haifley, Jr. Professional Recruiters had a conference of approximately 15 to 30 minutes in length with Haifley before referring him to Wilkinson. Upon referral Tomsu requested Haifley's telephone number, which Professional Recruiters provided. Haifley prepared his own resume, interviewed with Wilkinson, and negotiated his own agreement.

On December 31, 1981, Haifley entered into a contract with Wilkinson to provide Wilkinson data processing services. The agreement was to become effective on January 4, 1982. The contract attempted to describe Haifley as a consultant but contained provisions consistent with an employment agreement. The contract required Haifley to work a minimum of 40 hours per week and further required that he obtain from Wilkinson permission to work any hours in excess of 40 for which he would seek compensation. While the contract, on its face, purports to be a contract of 1 year's duration, other provisions of the contract basically permit Wilkinson to terminate the contract at will. The contract also prohibited Haifley from subcontracting out any duties under the contract. The district court obviously found that the "contract" entered into between Wilkinson and Haifley was one covered by the agreement between Professional Recruiters and Wilkinson, and, again, we cannot say the district court was wrong.

While Tomsu informed Professional Recruiters that Wilkinson had interviewed Haifley and was definitely interested in Haifley, Tomsu did not at any time inform Professional Recruiters that Wilkinson had hired Haifley. Professional Recruiters continued to refer candidates to Wilkinson until Haifley informed Professional Recruiters that he had been hired by Wilkinson. In fact, even after Haifley began working for Wilkinson, Tomsu continued to deny that Haifley was employed. A former employee of Wilkinson testified that Tomsu had told him that Wilkinson would not be

required to pay a fee to Professional Recruiters because Haifley had been hired as a consultant and not as an employee. After Professional Recruiters learned that Haifley was working for Wilkinson, Professional Recruiters sent Wilkinson a bill. Haifley continued to provide services in data processing to Wilkinson until May 17, 1982, when his arrangement with Wilkinson was terminated. Haifley was paid a total of $12,400.16 by Wilkinson.

The mere assertion by Wilkinson that the contract between Wilkinson and Haifley was for the retention of an independent consultant and not the retention of an employee is not sufficient to carry the day. Whether one is an independent contractor or an employee is most often a question of fact to be determined by the trier of facts from the evidence. What various parties to the agreement describe the arrangement as is not binding. The criteria for determining whether one is an independent contractor or an employee include the right of control, the independence the workman enjoys, the degree of supervision of the work, whether tools are provided by the workman or the other party, the method of payment, and the contractual understanding between the parties. See *Rudolf v. Tombstone Pizza Corp.*, 214 Neb. 276, 333 N.W.2d 673 (1983). As we observed in *Voycheske v. Osborn*, 196 Neb. 510, 244 N.W.2d 74 (1976): "There is no single test by which the determination of whether or not a workman is an employee, as distinguished from an independent contractor, may be made. This must be determined from all the facts in the case." (Syllabus of the court.)

As we have observed, the district court resolved these facts in favor of Professional Recruiters and against Wilkinson. Based upon the evidence in the case, we cannot say that the district court erred in concluding that Haifley was in fact an employee and not an independent contractor.

In view of the fact that we cannot say as a matter of law that the district court's findings were in error, we are required to affirm the decision of the district court. The decision is affirmed.

AFFIRMED.

WHITE, J., concurring.

I concur in the result reached by the majority, except that portion of the opinion discussing Haifley's status of employee or consultant. The resolution of this case has nothing to do with Haifley's employment status; it has to do with the terms of the agreement between the appellant and the appellee. The majority's discussion of Haifley's status is irrelevant unless there was some condition in the contract between appellant and appellee which makes employment status a variable in the parties' obligations. Here, there is no indication that this was the case.

DALE GLUP, APPELLANT, V. CITY OF OMAHA, THROUGH RICHARD E. COTTAGE, HOUSING MANAGER, HOUSING AND COMMUNITY DEVELOPMENT DIVISION, PLANNING DEPARTMENT OF THE CITY OF OMAHA, APPELLEE.

383 N.W.2d 773

Filed March 28, 1986. No. 85-034.

1. **Pleadings: Judgments: Time: Appeal and Error.** As required by Neb. Rev. Stat. §§ 25-1905 and 25-1931 (Reissue 1979), within 1 calendar month after rendition of the final judgment or order sought to be reversed, vacated, or modified, a petitioner in error must file a petition and an appropriate transcript containing the final judgment or order to be judicially reviewed.
2. **Pleadings: Judgments: Jurisdiction: Time.** Timely filing of both the petition in error and the certified transcript is mandatory to confer jurisdiction on a court asked to review a final judgment or order, as provided by Neb. Rev. Stat. § 25-1905 (Reissue 1979).
3. **Pleadings: Judgments: Jurisdiction.** Where a proceeding in error pursuant to Neb. Rev. Stat. § 25-1905 (Reissue 1979) is utilized to seek reversal, vacation, or modification of a final judgment or order, jurisdiction of a court does not attach until a petition and transcript, containing the final judgment or order, are filed in the court requested to review such judgment or order.
4. **Pleadings: Judgments: Jurisdiction: Public Officers and Employees: Appeal and Error.** Unless a petitioner in an error proceeding demonstrates that lack of a timely filed transcript is the result of failure in performance of a public duty owed by the official charged with preparation or furnishing the transcript, absence of a mandatory transcript prevents or defeats jurisdiction of a court asked to review a final judgment or order.
5. **Jurisdiction: Appeal and Error.** Whether a question is raised by the parties

concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter.

6. _____: _____. Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte.
7. **Judgments: Jurisdiction: Appeal and Error.** If a district court is without jurisdiction over the subject matter of litigation, the Supreme Court does not acquire jurisdiction as a result of an appeal from a final order of the district court.

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

David F. Eaton and James E. Schaefer of Gallup & Schaefer Law Offices, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Allen L. Morrow, for appellee.

KRIVOSHA, C.J., WHITE, and SHANAHAN, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

SHANAHAN, J.

Dale Glup appeals the judgment of the district court for Douglas County, affirming action of the city council of the City of Omaha and dismissing Glup's appeal from the city council's action in declaring a structure on Glup's real estate to be a nuisance on account of fire damage. See Neb. Rev. Stat. § 14-102(32) (Reissue 1983). Omaha is a city of the metropolitan class. Neb. Rev. Stat. § 14-101 (Reissue 1983).

Salient facts appear in the allegations of Glup's petition, as admitted by the city. Situated on the real estate owned by Glup was a one-story "masonry and wood frame" structure which had been damaged by fire. On April 26, 1984, the housing manager of the city's planning department, housing and community development division, held a "condemnation hearing" and declared Glup's structure a nuisance to be torn down and removed. § 14-102(32). Pursuant to the appropriate ordinance, Glup appealed the condemnation to the Omaha City Council, which, on June 12, upheld the action taken by the housing manager on April 26. Glup filed his petition in the

district court on July 12 and a praecipe with the city clerk that same day. By his petition Glup sought reversal of the order entered by the city council, that is, a judgment from the district court "quashing the declaration of nuisance and condemnation" issued by the city council. On August 1 Glup filed in the district court a transcript of the proceedings of the city council. In its answer filed on August 16, the city admitted Glup's ownership and the action taken by the city council. There were no further filings by the parties. After an evidentiary hearing on December 12, the action of the city council was "affirmed and [Glup's] appeal dismissed" by the district court. Glup appeals the district court's dismissal. Neb. Rev. Stat. § 25-1905 (Reissue 1979) provides that "[t]he plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified." Neb. Rev. Stat. § 25-1931 (Reissue 1979) requires that proceedings in error be commenced "within one calendar month after the rendition of the judgment or making of the final order complained of."

Adams v. City of Omaha, 179 Neb. 684, 139 N.W.2d 885 (1966), disposes of Glup's appeal. In *Adams v. City of Omaha, supra*, on June 9, 1964, the Omaha City Council declared an owner's structure to be a public nuisance and ordered the building to be torn down. The property owner filed her petition in the district court on July 9 but did not file a certified transcript until July 16. The district court sustained the city's motion to dismiss based on the property owner's failure to file a transcript of the proceedings of the city council within 1 month as prescribed by § 25-1931. The property owner argued to this court that Neb. Rev. Stat. § 14-813 (Reissue 1962) (procedure applicable when a right of appeal is conferred by specified statutes pertaining to cities of the metropolitan class) governed the form of proceedings in the district court. (Section 14-813 (Reissue 1962) is the predecessor of the present § 14-813 (Reissue 1983) and, for the purpose of the present case, contained language identical to the current statute.) In holding that § 14-813 was inapplicable on account of absence of a specific statute authorizing an appeal, this court stated in *Adams v. City of Omaha, supra* at 686, 139 N.W.2d at 886:

> Section 25-1905, R.R.S. 1943, does apply to the appeal here. Under its provisions, a transcript of the proceedings must be filed with the petition. . . . The case of Anania v. City of Omaha, 170 Neb. 160, 102 N.W.2d 49, is controlling. The requirement that a plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified within the time specified is mandatory and jurisdictional.

As was the statutory framework at the time of *Adams v. City of Omaha, supra,* in the present case existing statutes pertaining to a metropolitan city's exercise of its power to tear down and remove a fire-damaged structure, as authorized by § 14-102(32), do not confer a right of appeal from exercise of that particular municipal power. Consequently, an error proceeding is the proper method to obtain review of municipal action taken pursuant to § 14-102(32).

In construing §§ 25-1905 and 25-1931 we have repeatedly and consistently held that within 1 calendar month after rendition of the final judgment or order sought to be reversed, vacated, or modified, a petitioner in error must file a petition and an appropriate transcript containing the final judgment or order to be judicially reviewed. See, *Fisher v. Housing Auth. of City of Omaha*, 214 Neb. 499, 334 N.W.2d 636 (1983); *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976). Timely filing of both items, the petition in error and the certified transcript, is mandatory to confer jurisdiction on a court asked to review a final judgment or order, as provided by § 25-1905. See, *Frankforter v. Turner*, 175 Neb. 252, 121 N.W.2d 377 (1963); *Anania v. City of Omaha*, 170 Neb. 160, 102 N.W.2d 49 (1960). Where a proceeding in error pursuant to § 25-1905 is utilized to seek reversal, vacation, or modification of a final judgment or order, jurisdiction of a court does not attach until a petition and certified transcript, containing the final judgment or order, are filed in the court requested to review such judgment or order. See, *Moell v. Mennonite Deaconess Home & Hosp.*, 221 Neb. 168, 375 N.W.2d 618 (1985); *Marcotte v. City of Omaha, supra*; *Anania v. City of Omaha, supra.*

In Glup's case the transcript of proceedings of the city council was filed more than 1 month after rendition of the final order and action of the city council, some 20 days after the statutory deadline prescribed by § 25-1931.

Unless a petitioner in an error proceeding demonstrates that lack of a timely filed transcript is the result of failure in performance of a public duty owed by the official charged with preparation or furnishing the transcript, absence of a mandatory transcript prevents or defeats jurisdiction of a court asked to review a final judgment or order. See *Marcotte v. City of Omaha, supra*. Here, Glup did not request a transcript until July 12, when he filed a praecipe with the city clerk. No justification is offered for failure to supply the transcript in compliance with the jurisdictional requirements applicable in this case.

Whether a question is raised by the parties concerning jurisdiction of the lower court or tribunal, it is not only within the power but the duty of an appellate court to determine whether such appellate court has jurisdiction over the subject matter. See *Ark. S & L v. Corning S & L*, 252 Ark. 264, 478 S.W.2d 431 (1972). Where lack of subject matter jurisdiction in the original tribunal is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of the reviewing court to raise and determine the issue of jurisdiction sua sponte. See, *Stewart v. Herten*, 125 Neb. 210, 249 N.W. 552 (1933); *Wencpal v. Kizas*, 374 Ill. 333, 29 N.E.2d 532 (1940); *Board of Trustees v. City of Fort Wayne*, 362 N.E.2d 855 (Ind. App. 1977).

If the district court in this case did not have jurisdiction over the subject matter of the action, that fact could be raised at any stage of the proceedings, and such jurisdictional deficiency must be recognized by this court, whether formally raised or not, if such jurisdictional defect is apparent on the face of the record. If the district court lacked power to entertain the proceedings and decide the questions raised by such action, this court is equally without power to review the final judgment or order which is the subject matter of the action brought to the district court. See *Board, etc. v. Jewett*, 184 Ind. 63, 110 N.E. 553 (1915).

> " 'A petition in error in a district court to test the validity of a final order of an inferior tribunal is an independent proceeding the object of which is to obtain a reversal of the order presented for review. * * * Appellate jurisdiction of a case cannot be conferred upon a court by action of the parties thereto and the absence of such jurisdiction may be asserted at any time during the pendency of the litigation. * * * An appellate court may not consider or decide a case within its appellate jurisdiction unless its authority to act is invoked in the manner prescribed by law. * * * If a district court was without jurisdiction of the subject matter of litigation, this court does not acquire jurisdiction thereof by an appeal to it from a final order of the district court therein.' . . ."

Brown v. City of Omaha, 179 Neb. 224, 227, 137 N.W.2d 814, 817 (1965). See, also, *Anania v. City of Omaha, supra*; *Frankforter v. Turner, supra*; *Harms v. County Board of Supervisors*, 173 Neb. 687, 114 N.W.2d 713 (1962). In this case the district court never acquired jurisdiction. Consequently, this court, as well, has no jurisdiction to review the proceedings and action of the city council of the City of Omaha. Although the district court without jurisdiction could not render judgment on the merits as the result of a trial in this case, under the circumstances the judgment of the district court in dismissing Glup's appeal is correct and is, therefore, affirmed.

AFFIRMED.

CHARLES E. SIERKS, APPELLANT, V. DARREL D. DELK, MEAD CONTAINER, A DIVISION OF THE MEAD CORPORATION, A FOREIGN CORPORATION, ET AL., APPELLEES.

383 N.W.2d 778

Filed March 28, 1986. No. 85-046.

1. **Negligence.** Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of the defendant; and (3) his

actions contribute to the injuries as a proximate cause.

2. **Directed Verdict.** The standard governing a trial judge in assessing a motion for a directed verdict is well established. The judge must resolve every controverted fact in favor of the party against whom the verdict is sought, and must also give that party the benefit of every reasonable inference that can be drawn from the facts in evidence.
3. _____. The court should direct a verdict only when facts are conceded, undisputed, or such that reasonable minds could draw but one conclusion from them.

Appeal from the District Court for Nemaha County: ROBERT T. FINN, Judge. Reversed and remanded for further proceedings.

Robert V. Roach of Welsh, Sibbernsen & Roach, for appellant.

Donald R. Witt of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and CAMP, D.J., and COLWELL, D.J., Retired.

WHITE, J.

This is a civil action involving a claim of damages for personal injuries and property damage resulting from a motor vehicle accident. Plaintiff-appellant, Charles Sierks (Sierks), sued defendants-appellees, Darrel Delk, Delk's employer Mead Container, and Ruan Leasing Company (Delk), in a jury trial on December 10, 1984. After Sierks rested, Delk moved for a directed verdict, contending that there was insufficient evidence of negligence on the part of Delk to submit to the jury; that the evidence showed that Sierks was guilty of contributory negligence, more than slight, in comparison with the negligence, if any, of Delk; and that the negligence, if any, of Delk was less than gross in comparison with that of Sierks. The motion was sustained. Sierks' motion for new trial was overruled and this appeal followed.

On April 5, 1983, Sierks was driving his automobile east on Highway 136, a two-lane concrete highway, near Auburn, Nebraska. He planned to make a left turn onto a gravel road. The terrain was flat in the vicinity of the turnoff. A misting rain was falling which required the use of windshield wipers. At

approximately 2,000 feet before reaching the intersection, Sierks noticed Delk's semitrailer truck traveling behind him. As Sierks turned on his left turn signal approximately 500 feet from the intersection, he observed the truck in his left side mirror, traveling at approximately the same speed he was traveling. At 400 feet before the turnoff, Sierks looked in his side view mirror for the last time and observed that the truck was still behind him. He did not use his inside rear view mirror because the rain and mud on the rear window obstructed his vision through that window. Sierks looked ahead for oncoming traffic and, seeing none, moved his automobile into the left-hand lane while traveling at 35 to 40 miles per hour about 200 feet before reaching the intersection. His intent was to allow the truck to pass him on the right. A few seconds after Sierks entered the passing lane, his car was struck from behind by the truck driven by Delk. The collision resulted in injuries to Sierks and damage to his car.

Plaintiff assigns as error the directed verdict in favor of the defendants. We find merit in plaintiff's assignment. The issue of whether plaintiff was contributorily negligent is a question of fact which should have been submitted to the jury.

" 'Generally, one is contributorily negligent if (1) he breaches the duty imposed upon him by the law to protect himself from injury; (2) his actions concur and cooperate with actionable negligence of the defendant; and (3) his actions contribute to the injuries as a proximate cause.' " *Krul v. Harless, ante* p. 313, 319, 383 N.W.2d 744, 748-49 (1986).

The following statute is relevant in this case.

> In all actions brought to recover damages for injuries to a person or to his property caused by the negligence or act or omission giving rise to strict liability in tort of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence

> attributable to the plaintiff; and all questions of negligence or act or omission giving rise to strict liability in tort and contributory negligence shall be for the jury.

Neb. Rev. Stat. § 25-1151 (Reissue 1979).

The standard governing a trial judge in assessing a motion for a directed verdict is well established. The judge must resolve every controverted fact in favor of the party against whom the verdict is sought, and must also give that party the benefit of every reasonable inference that can be drawn from the facts in evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Kahrhoff v. Kohl*, 219 Neb. 742, 366 N.W.2d 128 (1985). In addition, the court should direct a verdict only when facts are conceded, undisputed, or such that reasonable minds could draw but one conclusion from them. *Krug v. Laughlin*, 208 Neb. 367, 303 N.W.2d 311 (1981).

Under the facts of this case, reasonable minds could conclude that Sierks was not negligent in looking to his rear, activating his turn signal, checking once again for oncoming traffic, and then moving to the left-hand lane. The matter should have been submitted to the jury.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ANN VREDEVELD, APPELLANT, V. GELCO EXPRESS, APPELLEE.

383 N.W.2d 780

Filed March 28, 1986. No. 85-345.

1. **Workmen's Compensation: Appeal and Error.** Factual determinations by the Workmen's Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. Regarding facts determined and findings made upon rehearing in the Workmen's Compensation Court, Neb. Rev. Stat. § 48-185 (Reissue 1984) precludes the Supreme Court's substitution of its view of facts for that of the Workmen's Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workmen's Compensation Court.
2. **Workmen's Compensation: Expert Witnesses: Appeal and Error.** Where the

record presents nothing more than conflicting medical testimony, the Supreme Court will not substitute its judgment for that of the Workmen's Compensation Court.

3. **Expert Witnesses.** 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.
4. _____. The nature and number of examinations by a physician are factors affecting credibility of a medical witness and weight to be attached to testimony from such witness.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Gwyer Grimminger of Grimminger Law Office, for appellant.

Kenneth H. Elson, for appellee.

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

SHANAHAN, J.

Ann Vredeveld appeals the dismissal of her petition on rehearing in the Nebraska Workmen's Compensation Court. We affirm.

In October 1983 Vredeveld was employed as a route driver for Gelco Express in Grand Island and was responsible for loading and unloading various items of freight ranging in weight from 1/2 to 200 pounds. On October 14, 1983, Vredeveld was attempting to load a 175-pound gas tank onto her truck when she suffered "sharp pains" in her "right side." Vredeveld completed the route but, later that day, notified her supervisors of her injury and requested to be temporarily replaced. Gelco refused to grant temporary leave, and Vredeveld continued to drive her route. On October 25 Vredeveld saw her family physician, Dr. Sheridan Anderson, who diagnosed Vredeveld as suffering from an "acute muscle sprain" of the right abdominal muscle, known in medical parlance as the "abdominis rectus." Anderson recommended that she "stay off work and do no lifting."

Vredeveld left her employment with Gelco and continued to

see Dr. Anderson for treatment. As a result of the injury, Gelco paid Vredeveld benefits for temporary total disability and also paid Vredeveld's medical expenses. When her temporary disability payments were discontinued on May 13, 1984, Vredeveld filed a petition in the Nebraska Workmen's Compensation Court claiming "permanent partial disability" resulting from the injury sustained October 14, 1983. In its answer Gelco admitted that Vredeveld had sustained "strained stomach muscles arising out of and in the course of her employment by [Gelco]" but denied Vredeveld's alleged "permanent partial disability as a result of the strained stomach muscles."

At the rehearing, Vredeveld described the circumstances surrounding the accident and residual effects of the injury. In particular, Vredeveld described the pain she felt when she carried an item "of any weight at all": "I have pain in my right side. It starts burning, [I] get muscle spasms. If I do anything that is very strenuous then the left side will pick up on the same thing." Vredeveld also testified, however, that the symptoms were "not as bad now as they were at the time of the accident."

Prior to the rehearing, Vredeveld was examined, at Gelco's request, by Dr. John G. Yost and Dr. A.E. Van Wie. On her own initiative Vredeveld had continued to see Dr. Anderson periodically and had also consulted Dr. Barton Hultine, a self-employed "rehabilitation specialist and vocational expert." Apart from Vredeveld's testimony, the evidence presented to the three-judge panel consisted solely of the observations and conclusions of the four doctors.

Dr. Anderson is a general practitioner in Grand Island and was Vredeveld's family doctor for a few years prior to his initial diagnosis of Vredeveld's abdominal injury. Anderson testified that Vredeveld had been "disabled from her work" at the time of the initial examination and had continued to suffer "much of the restrictions in her activity that she had at the beginning." In Anderson's opinion Vredeveld was burdened with a "degree of disability that would preclude her ability to work at a variety of jobs," including "the kind of work she was doing before," for a period of possibly 10 or more years. Although he was not familiar with any manner of fixing a percentage of disability,

Anderson testified that if the percentage was based on the kind of work Vredeveld performed for Gelco, her disability was 100 percent.

During cross-examination, Anderson conceded that his conclusions were based solely on Vredeveld's "subjective complaints" and noted that in this kind of case, "where you can't look at a lab report, . . . it's all judgment." Anderson also admitted that his office notes and records indicated that Vredeveld's condition had gradually improved from November 1983 to March 1984, culminating in his notation on March 14, 1984, that the tenderness was "less" in the abdominal region.

Dr. Hultine also testified on Vredeveld's behalf and recited the findings of his "examination" conducted on March 7, 1985. Hultine has a doctorate in vocational rehabilitation from the University of Western Colorado but has no "medical background" and no "skill in making any medical determination." Hultine's examination consisted of reviewing the medical findings of Anderson and conducting a brief test of Vredeveld's ability to move, stretch, and bend. Hultine observed that Vredeveld was "unable to carry more than ten pounds without discomfort," was "very restricted in her ability to bend, to squat, to crawl or to climb," and concluded that her future employment was restricted to something "sedentary" in nature.

To rebut testimony from Anderson and Hultine, Gelco offered the testimony of Dr. Yost and Dr. Van Wie. Yost, a specialist in orthopedic surgery, examined Vredeveld on April 26, 1984. After listening to Vredeveld's history concerning the injury, Yost took x rays of Vredeveld's dorsal spine, chest, and left shoulder and had her exercise her various joints "through the entire range of motion." During the exercise portion of the examination, Vredeveld, when prompted by Yost, complained of tenderness in her abdominal region but, nevertheless, was able without complaint "to bend over and touch her toes with rhythmic motion." Based upon the one examination, Yost felt that Vredeveld's "subjective complaints were far, far greater than any objective findings" and concluded that she had initially sustained a "sprain of her abdominal muscles" that should have taken a "maximum of about six weeks" to heal.

Accordingly, Yost also felt that Vredeveld could "probably perform any and all types of work she so desired."

On cross-examination Yost was asked to reconcile an apparent discrepancy in his testimony, namely, how he could, more than 7 months after the incident, diagnose Vredeveld as suffering from a sprained abdominal muscle, while stating that any such sprain should have been healed within 6 weeks of the accident. Yost explained that he had found no objective indication that Vredeveld was suffering from a sprain as of April 1984 but had simply "assumed she had a sprain and gave her the benefit of the doubt, by believing what she told [him]." Although conceding that it would be virtually impossible to detect objective signs of a sprained muscle more than 7 months after the initial sprain, Yost stated: "I didn't think she had anything when I examined her. I thought she'd have been back to work. I could see no reason that this woman had any injury at the time I saw her that would keep her from working."

Dr. Van Wie, a surgeon, examined Vredeveld on January 14, 1985, and could not find "any basis" for Vredeveld's "complaint of pain in her abdominal area." Although he did not actually make a diagnosis, explaining, "I saw her late, after the fact," Van Wie commented: "I don't know when this so-called injury occurred, but she had nothing I could base any injury on at this time, other than some subjective complaints." Van Wie also noted that Vredeveld's "abdominal musculature was better than the average female for that age."

On April 16, 1985, the three-judge panel dismissed Vredeveld's petition, resolving the "irreconcilable medical testimony" in Gelco's favor and finding that Vredeveld was not entitled to compensation for permanent partial disability but "ha[d] received all to which she [was] entitled to as a result of [the] accident." Vredeveld claims that the court's judgment is "contrary to [the] evidence."

> Factual determinations by the Workmen's Compensation Court will not be set aside on appeal unless such determinations are clearly wrong. [Citations omitted.] Regarding facts determined and findings made upon rehearing in the Workmen's Compensation Court, § 48-185 precludes the Supreme Court's substitution of its

> view of facts for that of the Workmen's Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workmen's Compensation Court.

Gibson v. City of Lincoln, 221 Neb. 304, 314, 376 N.W.2d 785, 791-92 (1985) (citing and quoting from *Thompson v. Monfort of Colorado*, 221 Neb. 83, 375 N.W.2d 601 (1985)). See, also, Neb. Rev. Stat. § 48-185 (Reissue 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.' " *Paris v. J. A. Baldwin Mfg. Co.*, 216 Neb. 151, 154, 342 N.W.2d 198, 200 (1984). "Where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court." *Doty v. Aetna Life & Casualty*, 217 Neb. 428, 435, 350 N.W.2d 7, 10 (1984).

To avoid the application of those oft-stated rules, Vredeveld contends that the medical testimony adduced at the rehearing was not irreconcilable but, in fact, compelled a finding in her favor. Specifically, Vredeveld maintains that Dr. Yost's testimony merely constituted an assumption "that a sprain should have healed within the time he states," which, in any event, was undermined by his "finding tenderness in the area of injury six months after the date of the injury." Brief for Appellant at 8. Thus, his testimony did not explicitly contradict the opinion of Dr. Anderson. Similarly, Vredeveld claims that Dr. Van Wie's testimony did not directly contradict the testimony of Dr. Anderson, noting that Dr. Van Wie did not reach a diagnosis of Vredeveld's condition and did not explicitly find that she was not disabled.

We cannot agree with Vredeveld's characterization of the record. Although Dr. Yost admitted that Vredeveld's subjective response indicated some "tenderness" in the abdominal region, he unequivocally stated that he found no objective indication of any injury to Vredeveld and that she was perfectly fit to return to the type of work she had performed for Gelco. Such testimony is obviously irreconcilable with Dr. Anderson's opinion that Vredeveld was, as to her previous line of work, 100

percent disabled. Likewise, Dr. Van Wie, although he refused to make a diagnosis, did state that he could find nothing to "base any injury on." Vredeveld suggests that the testimony of both doctors is internally inconsistent and, thus, devoid of any probative value. Even assuming that the testimony of either witness was contradictory, in *Zaleski v. Farmland Foods*, 219 Neb. 157, 161, 361 N.W.2d 523, 526 (1985), this court held:

> 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.

The Workmen's Compensation Court, as the trier of fact, was entitled to resolve any conflicts in the evidence in Gelco's favor and to accept the opinions of Dr. Yost and Dr. Van Wie negativing Vredeveld's claim for "permanent partial disability."

Vredeveld also maintains that the Workmen's Compensation Court should have accepted the conclusions of the attending physician, Dr. Anderson, who was "best able to arrive at a prognosis . . . due to his continuing examination and treatment of [Vredeveld]." Brief for Appellant at 7. Vredeveld argues that placing emphasis on the opinion of the attending physician is especially vital in the context of any case, such as hers, where the diagnosis of the patient could only be based on the subjective complaints of such patient. In *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985), we rejected a rule of evidence that an attending physician is conclusively more credible and supplies testimony accorded greater weight than testimony from a physician who has neither attended nor examined a party. The case before us provides a corollary to *Gibson v. City of Lincoln, supra.* The nature and number of examinations by a physician are factors affecting credibility of a medical witness and weight to be attached to testimony from such witness. We decline adoption of an evidentiary rule which, as a matter of law, requires that less credence and weight are attached to testimony of a physician whose medical information about a party is obtained only by office

examination rather than from treatment of a party. "In the absence of discredit as a matter of law, the 'trier of fact' remains the sole judge of a witness' credibility and the testimony's weight." *Gibson v. City of Lincoln, supra* at 313, 376 N.W.2d at 791.

The judgment of the Workmen's Compensation Court on rehearing is supported by competent evidence, is not clearly wrong, and is therefore affirmed.

AFFIRMED.

BERNADET MEYERS, APPELLANT, V. VICTOR J. MEYERS, APPELLEE.

383 N.W.2d 784

Filed March 28, 1986. No. 85-387.

1. **Child Support: Modification of Decree.** Child support payments are not subject to modification unless there has occurred since the entry of the prior order a material change of circumstances not in the contemplation of the parties and of such a nature as to require modification in the best interests of the child.
2. _____: _____. A material change in circumstances results from an alteration and passage from one condition to another.
3. _____: _____. Determination of whether there has been a material change in circumstances involves a consideration of whether there has been a change in the financial resources of the parents, the needs of the child for whom support is paid, and whether the change in circumstances is temporary or permanent.
4. **Child Support: Modification of Decree: Appeal and Error.** Questions relating to the modification of child support are initially entrusted to the sound discretion of the trial court, and, while on appeal such matters will be reviewed de novo on the record, the decision of the trial court will be affirmed in the absence of an abuse of its discretion.
5. **Divorce: Courts: Statutes: Jurisdiction.** In matters relating to the dissolution of marriages, courts have only such power as is conferred upon them by statute.
6. **Divorce: Courts: Minors: Jurisdiction.** The only statutory authority conferred on district courts to deal with children in dissolution actions is that contained in Neb. Rev. Stat. § 42-364 (Reissue 1984).
7. **Statutes.** Statutory language will be given its ordinary and popular meaning; a statute is open to construction only if it is ambiguous.
8. _____. Where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning.

9. **Statutes: Legislature: Intent.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
10. **Divorce: Statutes: Child Support.** The dissolution statutes do not empower courts to order a parent to contribute to the support of an adult handicapped child.
11. **Attorney Fees: Modification of Decree: Appeal and Error.** 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 that discretion.
12. **Attorney Fees.** Among the factors to be evaluated in the awarding of an attorney fee is the result obtained.
13. _____. An attorney fee will ordinarily be denied where no reasonable justification appears for the position taken by the party claiming entitlement to such a fee.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and in part reversed and remanded with direction.

Warren S. Zweiback and Patricia A. Lamberty of Zweiback, Flaherty, Betterman & Lamberty, P.C., for appellant.

Robert J. Hovey of Robinson & Hovey, for appellee.

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

PER CURIAM.

The mother, Bernadet Meyers, appeals from the order dismissing her October 9, 1984, application to modify a prior decree of dissolution. Specifically, the application seeks a $200-per-month increase in the amount of child support the father, Victor J. Meyers, had been ordered to pay her as the custodial parent of the parties' handicapped son, David Joseph; an order requiring the father to continue said payments beyond the son's minority; and other equitable relief. The mother assigns as errors the district court's (1) finding that there had been no material change in circumstances such as to warrant a change in child support payments during the son's minority, (2) holding that it had no authority to continue child support payments beyond the son's minority and thus refusing to accept evidence with respect to the son's needs after majority,

and (3) ruling that the mother was not entitled to the award of an attorney fee. We affirm in part and in part reverse and remand with direction.

The son became 19 years of age, and thus attained majority, on February 9, 1985. The parties' April 1982 decree of dissolution ordered the father to pay child support in the amount of $150 per month for the eldest child of the parties, now an adult, $300 per month for the subject son, who has suffered from the effects of cerebral palsy since birth, and $300 per month for the youngest child, now age 14, "until such time as each child respectively is emancipated, dies, or reaches his majority."

At the beginning of the May 7, 1985, hearing on the modification application, the trial judge stated that he deemed the court to be without authority to award any support after the son attained majority. The trial court therefore ruled that only evidence relevant to the amount of support needed between the date of the application and the son's majority would be admissible.

Dr. William David MacInnes, a licensed clinical psychologist certified in clinical neuropsychology, conducted a neuropsychological evaluation of the son and concluded that the son's primary abnormalities were manifestations of his cerebral palsy. Through an offer of proof, Dr. MacInnes gave his opinion that the son, who had been in a special program at his high school until his senior year because of his handicaps, could not function in a normal college setting and, likewise, could not successfully work at a job. It is Dr. MacInnes' opinion that the son needs to attend a special college program for handicapped students. Dr. MacInnes also stated that the son's cerebral palsy would become more of a handicap as he became older, since he had not developed the skills necessary to meet society's expectations of an adult.

The mother offered to prove that the son's future educational expenses would be approximately $4,225 per year. She also offered to prove that "during the last year or two," the son needed services and eyeglasses which she could not obtain because she lacked funds with which to pay for them. These were as follows, each having the fair and reasonable value

indicated:

Eye examination and glasses	$ 150
Capping of teeth	3,000
Speech therapy	3,536
Dermatology services	300
Total	$6,986

Objections that the offers were not relevant were initially sustained, but, later, evidence concerning the $6,986 of needs was received.

The mother's total income for 1982 was $16,472, of which $15,572 came from wages; her 1984 total income of $18,674 included $17,975 from wages. At the time of the hearing she was earning $17,544 per year. She testified to monthly expenses of $1,682.25. An objection to the mother's effort to prove that she owed various creditors $10,409 because of expenses incurred on behalf of the son was properly sustained, as the discussion concerning the second assignment of error demonstrates, because the exhibit did not designate which expenses were incurred prior to the son's 19th birthday.

In 1982 the father had a total income of $45,048, of which $44,903 was from wages; his 1983 total income of $51,841 included wages of $51,268; his 1984 wages totaled $41,465.74; and his 1985 wages amounted to $47,706.60. Other than the child support payments mentioned earlier, the father's monthly expenses total, for himself, his current wife, and her two children, approximately $2,565.

We begin our analysis of the mother's first assignment of error by again noting that child support payments are not subject to modification unless there has occurred since the entry of the prior order a material change of circumstances not in the contemplation of the parties and of such a nature as to require modification in the best interests of the child. *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985); *Tworek v. Tworek*, 218 Neb. 808, 359 N.W.2d 764 (1984); *Helgenberger v. Helgenberger*, 209 Neb. 184, 306 N.W.2d 867 (1981). While we have recognized that the phrase "material change in circumstances" eludes precise definition, we have held that it results from an alteration and passage from one condition to

another. The determination of whether such a change has occurred involves a consideration of whether there has been a change in the financial resources of the parents, the needs of the child for whom support is paid, and whether the change in circumstances is temporary or permanent. *Graber v. Graber, supra*; *Soukup v. Soukup*, 208 Neb. 672, 305 N.W.2d 372 (1981). Questions relating to the modification of child support are initially entrusted to the sound discretion of the trial court, and, while on appeal such matters will be reviewed de novo on the record, the decision of the trial court will be affirmed in the absence of an abuse of its discretion. *Graber v. Graber, supra.*

Although whether there has been a material change of circumstances is a matter necessarily considered on a case-by-case basis, a review of past similar cases is helpful in determining the outcome of the issue in this case.

In *Graber v. Graber, supra*, the mother sought to increase the amount of child support the father was required to pay. This the court refused to do, noting that while the father's gross income had increased, his adjusted gross income had decreased. Further, the mother's adjusted gross income had substantially increased, and the illness which prevented her from working at the time of the modification hearing was temporary in nature. The other alleged changes, an increased mortgage payment and private schooling for the children, were held to be within the parties' contemplation at the time of the decree sought to be modified.

Soukup v. Soukup, supra, refused to increase the father's child support obligation where the evidence indicated that neither the father nor the mother had experienced a substantial change in financial circumstances.

An increase in child support was affirmed in *Pfeiffer v. Pfeiffer*, 201 Neb. 56, 266 N.W.2d 82 (1978), in part because of a significant increase in the father's income.

The evidence of the son's special needs during his minority was relevant. Thus, the record establishes that during the period of his minority, the son required services and eyeglasses which were not obtained for him solely because of the mother's inability to pay for them. We conclude that, under the circumstances, it was an abuse of discretion to deny the

equitable relief sought by the mother in that regard. Since the father earns 72 percent of the combined incomes of the parties, we hold that he shall pay 72 percent of the cost of each of the services and the eyeglasses previously itemized, if, as, and when the services and eyeglasses are actually provided to the son and the costs therefor actually incurred. In no event, however, shall the father's liability exceed 72 percent of the costs set forth above. See *Lenz v. Lenz, ante* p. 85, 382 N.W.2d 323 (1986).

The issue presented by the mother's second assignment of error, that is, whether the courts of this state have the power to compel divorced parents to directly support a handicapped child beyond minority, presents an exercise in statutory construction.

The established law of this state is that in matters relating to the dissolution of marriages, courts have only such power as is conferred upon them by statute. *Sosso v. Sosso*, 196 Neb. 242, 242 N.W.2d 621 (1976). *Sosso* also notes that the only statutory authority conferred on district courts to deal with children in dissolution actions, the context in which this case arises, is that contained in Neb. Rev. Stat. § 42-364 (Reissue 1984).

The relevant portion of § 42-364 provides: "When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any *minor children* and their maintenance as shall be justified . . . . Subsequent changes may be made by the court after hearing on such notice as prescribed by the court." (Emphasis supplied.)

Neb. Rev. Stat. § 38-101 (Reissue 1984) states that "[a]ll persons under nineteen years of age are declared to be minors," unless they marry before age 19.

The applicable rules of statutory construction are that statutory language will be given its ordinary and popular meaning; a statute is open to construction only if it is ambiguous. *Anderson v. Peterson*, 221 Neb. 149, 375 N.W.2d 901 (1985). Where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *State*

v. Schulz, 221 Neb. 473, 378 N.W.2d 165 (1985); *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985).

Section 42-364 is simply not open to construction; it clearly and unambiguously confers authority to compel divorced parents to support their minor offspring, but it just as clearly and unambiguously confers no authority to compel such parents to directly support their adult offspring. In effect, the mother asks us to read the word "minor" out of the statute and to add words such as to include adult children who are handicapped to the extent they cannot support themselves. More than that, she wishes us to write into the statute a requirement that divorced parents maintain their handicapped offspring in an institution of higher learning to an indefinite age. This we cannot do; as the foregoing rules of statutory construction demonstrate, it is the function of courts to apply statutes, not to enact them.

In an effort to overcome the language of § 42-364, the mother places heavy reliance on the fact that in *Campbell v. Campbell*, 202 Neb. 575, 276 N.W.2d 220 (1979), this court affirmed a decree which required that the father make child support payments for a blind daughter "until she becomes self-supporting." *Id.* at 578, 276 N.W.2d at 222. The mother, however, overlooks the important part of the *Campbell* opinion in that regard. The opinion specifically notes that the father made no complaint concerning that requirement. We know of nothing which prevents any parent from voluntarily supporting his or her adult offspring, handicapped or otherwise. The relevant point is that § 42-364 does not compel the direct support of an adult handicapped child.

Kennedy v. Kennedy, 205 Neb. 363, 287 N.W.2d 694 (1980), involved, in part, the custody of the parties' son who attained majority a month before the case was heard in this court. It was held that, in view of that fact, all disputes concerning his custody had become moot and therefore needed no discussion.

Waldbaum v. Waldbaum, 171 Neb. 625, 107 N.W.2d 407 (1961), rejected a requirement that funds be held in trust beyond the age of the children's majority. Although noting by way of dicta that nothing was shown which would require support of the children beyond their minority, this court

nonetheless reached its decision on the basis that "the father's legal duty to support his child ceases when the child comes of age." *Id.* at 637, 107 N.W.2d at 415.

In a further effort to support her position, the mother refers us to a number of cases from other jurisdictions which, in a variety of circumstances, impose upon a parent, based upon a statutory or judicially decreed duty, an obligation to support an adult handicapped child unable to support himself or herself. E.g., *Castle v. Castle*, 15 Ohio St. 3d 279, 473 N.E.2d 803 (1984); *Sininger v. Sininger*, 300 Md. 604, 479 A.2d 1354 (1984); *Ex Parte Brewington*, 445 So. 2d 294 (Ala. 1983); *Young v. Young*, 609 S.W.2d 758 (Tex. 1980); *Dehm v. Dehm*, 545 P.2d 525 (Utah 1976); *Wells v. Wells*, 227 N.C. 614, 44 S.E.2d 31 (1947).

As the earlier discussion reveals, however, a literal reading of § 42-364 establishes that the district court was correct in determining that it was without authority in this proceeding to order the father to pay child support to the mother on behalf of the son once the son attained majority. Thus, the trial court correctly excluded the mother's offer to prove the cost of the son's future educational expenses.

What authority, if any, may exist in other proceedings to compel a parent to support a handicapped adult child is a matter not before us. We do note that the statutory duties with respect to such children appear to be limited. Neb. Rev. Stat. § 68-214 (Cum. Supp. 1984) provides that if the parents are able, they shall reimburse the Department of Social Services for public assistance to a disabled child. Neb. Rev. Stat. § 83-363 (Reissue 1981) and § 83-366 (Supp. 1985) provide for assessment to the parents of certain costs, or so much thereof as they are able to pay, incurred by a child admitted to a state institution while a minor.

The mother's third complaint, that she was awarded no attorney fee, must also be held to be without merit.

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 that discretion. *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985). Among the

factors to be evaluated in the awarding of such fees is the result obtained. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). It has been held that an attorney fee will ordinarily be denied where no reasonable justification appears for the position taken by the party claiming entitlement to such a fee. *Hohensee v. Hohensee*, 182 Neb. 388, 154 N.W.2d 878 (1967). While we conclude the trial court erred in not granting the mother partial relief, yet there is no reasonable justification for the position taken by her with respect to the father's duty to provide support beyond the son's minority, a major portion of her suit. We therefore cannot conclude that the trial court abused its discretion in refusing to award the mother an attorney fee. Neither do we consider that she is entitled to the award of an attorney fee in this court.

The decree of the trial court is affirmed in part and in part reversed and the cause remanded for further proceedings consistent with this opinion.

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

CAPORALE, J., concurring in part, and in part dissenting.

I agree fully with the majority's resolution of, and all it has to say with respect to the issue presented by, the mother's second and third assignments of error.

However, I disagree with the majority's resolution of the mother's first assignment of error. Its holding that the trial court abused its discretion in refusing to modify the earlier decree so as to compel the father to pay in the future for needs which could have been but were not met during the son's minority is, in my view, contrary to the principles of law previously announced by this court and restated in the majority opinion.

While the mother's dedication to her son's well-being as well as her disinclination to incur expenses which she could not pay is to be appreciated and applauded, her delay in seeking relief ought not be ignored, thus permitting her to extend the time during which the father remains responsible under the decree of dissolution.

Two years and 10 months elapsed from the time of the original decree to the son's majority, all but 4 months of which

elapsed before the mother filed the application now before us. She should have sought relief as soon as she became aware of the fact that the son had needs she could not meet with the child support awarded her by the decree. I fear the majority opinion will lead to filings by custodial parents shortly before a child reaches majority to require noncustodial parents to pay for services after a child reaches majority which could and should have been provided during the child's minority. It seems to me that such a practice would in part defeat the court's holding with respect to the second issue in this case. Of even greater importance, however, is the fact that delay does not serve a child's best interests. Needs which can be met ought to be met as they arise.

There are further substantive problems with the majority's resolution of the mother's first assignment of error. Her testimony that the needs arose "during the last year or two" can be interpreted to mean either that the needs arose during the last year or two prior to the son's reaching majority or that the needs arose during the last year or two prior to the May 7, 1985, hearing on her application. If the first interpretation is the fact, it seems to me legally incorrect, given the proximity of the period to the entry of the decree and the absence of evidence to the contrary, to hold that the needs were not within the contemplation of the parties when their marriage was dissolved. If the second interpretation is the fact, then it was the mother's burden to show that no part of those needs arose after the son's majority. In the absence of such evidence the trial court correctly concluded that the mother's testimony was not relevant.

Moreover, there is a procedural problem with the majority's opinion. Paragraph 5 of the application alleges: "That the changes as aforesaid amount to such a change in circumstance as to merit an increase in child support for the benefit of David Joseph Meyers to the sum of $500.00 per month." The allegations of the application relate to an increase in future child support payments, not to the reimbursement of specific expenses not yet incurred. Thus, requiring the father to pay future expenses grants the mother relief which is extraneous to the issues presented by this case. The mother's prayer for "such

other and further relief as the Court deems just and equitable" is just that, a prayer for relief within the issues framed by the allegations of the application. See *Waite v. Samson Dev. Co.*, 217 Neb. 403, 348 N.W.2d 883 (1984), which states that while a prayer for relief is part of a petition, it is not a portion of the statement of fact required to constitute a cause of action. The issues to be tried must be formed by the pleadings, and a judgment rendered thereon must respond to the issues raised by the pleadings. *Muller Enterprises, Inc. v. Gerber*, 178 Neb. 463, 133 N.W.2d 913 (1965). Only in that way may a party know what he or she is expected to answer and what his or her potential liability might be. The result reached by the majority deprives the father of that fundamental protection.

I would affirm the trial court's decree in its entirety.

KRIVOSHA, C.J., and COLWELL, D.J., Retired, join in this concurrence and dissent.

STATE OF NEBRASKA EX REL. SHARON ROSS, ALSO KNOWN AS SHARON DELAGARZA, APPELLANT, V. JAMES ARTHUR JACOBS, APPELLEE.

383 N.W.2d 791

Filed March 28, 1986. No. 85-394.

1. **Child Custody: Visitation.** The primary consideration in determining custody and visitation is the best interests of the child.
2. **Child Custody: Appeal and Error.** Generally, custody matters are initially entrusted to the sound discretion of the trial court. On appeal they are reviewed de novo on the record and in the absence of an abuse of discretion will be affirmed.

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

Laureen Van Norman, for appellant.

Susan Jacobs of Healey, Brown, Wieland, Kluender, Atwood & Jacobs, for appellee.

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

BOSLAUGH, J.

This action was brought by the State on behalf of the petitioner, a mother of a child born out of wedlock, to establish paternity and obtain support for the child. The respondent father admitted paternity and sought custody of the minor child. The trial court found that both parties were fit and proper persons to have custody of the child, but in consideration of all the facts and circumstances it was in the child's best interests to award custody to the respondent subject to liberal visitation by the petitioner. The trial court found that the father was an able-bodied person, capable of supporting the child without contribution from the petitioner, and made no award of child support. The petitioner has appealed.

The child was born on August 25, 1980, and had been in the care and custody of the petitioner until the court ordered the change in custody on April 26, 1985. The child is the fifth illegitimate child born to the petitioner. Her other four children, ranging in age from 11 to 6, all have the same father. The petitioner testified that the four older children have not been in contact with their father because he is an alcoholic and does not set a very good example for the children.

The petitioner and her children have changed residences nine times since August of 1980. Some of the moves were necessitated by her poor financial condition. The petitioner and her children had been living in the same place in Lincoln, Nebraska, for approximately 1 year prior to trial. She has been employed by the city of Lincoln for almost a year and a half prior to trial. Her monthly gross income is $1,116.

In June 1984 the petitioner and her children resided with the respondent in his home. The parties contemplated marriage, but the petitioner wanted to first find out if it would work. After 2 weeks the respondent phoned the petitioner at his house and gave her 30 to 45 minutes to pack her and the children's belongings and move out. When he returned and found she was still there, he physically removed her from the house without allowing her time to gather her belongings.

The respondent lives in Pleasant Dale, Nebraska, and at the time of trial was working part time at a beverage store and full time as a solar-energy system salesman. Prior to April 1984, the respondent was a commercial helicopter pilot, working in the Far East and Alaska.

The respondent was made aware of the child's birth shortly after it occurred in August 1980. He sent no support for the child until the child was almost 2 years old. Thereafter, he sent support on a sporadic basis. In 1982 he sent the petitioner $820; in 1983, $800; and in 1984, only $305. His income in 1982 and 1983 was over $30,000 a year.

A guardian ad litem was appointed to make an investigation concerning the matter of custody. The guardian found the petitioner's home to be clean and adequately furnished. He did not visit the respondent's home because he was informed that it was fairly new, large, and well furnished. He assumed the respondent's living conditions were not at issue.

At the petitioner's home the guardian visited with the child whose custody is in dispute. The child appeared to be happy and told him that he really liked staying with his dad and that he really loved both his mother and father. The guardian did not have an opportunity to see the child and his father together.

The guardian testified that he was impressed with both of the parties in their own way. Upon cross-examination he testified that if custody were given to the petitioner the case should be reviewed within 6 months in view of the petitioner's unstable living arrangements in the past. He testified:

> I am really basing a good deal of my opinion on the fact that Sharon Ross [petitioner] seems to have stabilized her life pretty much in the last year, but prior to that it really hadn't been too stable, and if for some reason her stability dissolves again I think it's going to make a great deal of difference on [the child's] environment.

Neither party contends that the other is an unfit person for the custody of the child. Both parties appear to love their son and want to have physical custody of him.

Although this action was commenced as a paternity proceeding, the issue now before the court is the custody of the child. The primary consideration in determining custody and

visitation is the best interests of the child. In *Cox v. Hendricks*, 208 Neb. 23, 28, 302 N.W.2d 35, 38 (1981), we said:

> 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 *Cox v. Hendricks, supra*, we applied the standards set out in Neb. Rev. Stat. § 42-364 (Reissue 1978) for dissolution actions and noted at 27, 302 N.W.2d at 38, "The clear trend in recent cases is to disregard the fact that a child was born out of wedlock in deciding custody disputes between natural parents." See, also, *State ex rel. Laughlin v. Hugelman*, 219 Neb. 254, 361 N.W.2d 581 (1985).

Generally, custody matters are initially entrusted to the sound discretion of the trial court. On appeal they are reviewed de novo on the record and in the absence of an abuse of discretion will be affirmed. See *Parsons v. Parsons*, 219 Neb. 736, 365 N.W.2d 841 (1985).

There is substantial evidence in this case that the petitioner, in the past, has had an unstable lifestyle. On occasion she has found it necessary or convenient to leave the child with other persons for varying periods of time.

In 1982, when the child was 2 years old, the petitioner placed the child with her aunt in Missouri for something less than 2 months. Although she denies that she considered placing the child for adoption, she gave the aunt "guardianship as far as to get medical attention."

In June of 1983 the petitioner went to Texas. She took the two older children with her, but left the child involved in this case with her parents. Later, she came back to Nebraska and took the child to Texas, where she lived with Raul Delagarza. She married Delagarza after she had known him, personally, for "about a week" or "a little longer than that." She then left Delagarza, on the same day that she had married him, and returned to Nebraska.

After she had returned to Nebraska she commenced living with Virendra Singh. During June 1984, she left the child with her parents and placed the older children in the Cedars Home for Children, but the child went to the Cedars Home for day care. Her relationship with Singh has continued for about 4 years, and during this time she has had some kind of a relationship with Mike Burgess.

Although the respondent has been slow in establishing a familial relationship with the child, and his past contributions to support were less than generous, from our examination of the record we conclude that it fails to show an abuse of discretion. The judgment is, therefore, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. NATHANIEL A. JACKSON, SR., APPELLANT.

383 N.W.2d 794

Filed March 28, 1986. No. 85-432.

1. **Criminal Law: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, 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.
2. **Sexual Assault: Corroboration.** In a prosecution for sexual assault the victim need not be independently corroborated on the particular acts constituting sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue.
3. **Sentences: Appeal and Error.** Generally, in the absence of an abuse of discretion, this court will not disturb a sentence which is within statutory limits.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

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

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

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

BOSLAUGH, J.

After a trial to the court the defendant, Nathaniel A. Jackson, Sr., was convicted of first degree sexual assault on a child under 16 years of age in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979) and was sentenced to imprisonment for 9 to 14 years. He has appealed and contends that the evidence was insufficient as a matter of law to support his conviction and that his sentence is excessive.

The record shows that on September 21, 1984, the victim, age 7, was taken to her father's apartment by her aunt and legal guardian to spend the night. The victim lived with her aunt and regularly spent at least one night each weekend with her father. At that time her father lived in a one-bedroom apartment with the victim's two brothers, ages 2 and 5, and the defendant, who is the victim's great-uncle.

The victim testified that on Friday night while at her father's apartment, the defendant, age 33, pulled off her clothes, then took off his own clothes and began to kiss her. She further testified that he went up and down on her, put his thing in her, and then something began to run down her leg. On direct examination the victim stated that her father and brothers were asleep in the bedroom when the assault occurred. On cross-examination she first testified that her brothers were sleeping on one couch and her father was sleeping on the other couch. The victim then stated that her father and brothers were sleeping in the bedroom. The victim at all times in her testimony stated that the defendant committed the assault. When asked if it was not her dad that had assaulted her, the defendant replied, "No."

The aunt testified that when she picked up the victim on Saturday morning the victim was not acting right. When asked what was wrong, the victim stated that she had a burning sensation upon urinating. Upon further inquiry the victim started to cry and then told her aunt what the defendant had done to her. The aunt then arranged to have the victim examined by a physician.

A physician from the University of Nebraska Medical Center testified that he had examined the victim on September 24, the Monday following the assault. The doctor found various

bruises and abrasions in the vaginal area which were consistent with a sexual assault on a 7-year-old. He further testified that the bruises had been incurred 2 to 3 days prior to the examination and that the victim had a ruptured hymen, which would indicate some type of sexual penetration.

The testimony of the victim was corroborated by the testimony of the victim's aunt and a pediatric social worker called in to determine what had occurred. Both testified that the victim gave them a similar account of the assault.

The defendant argues that, although there is evidence that the victim was assaulted, there is insufficient evidence to prove that he committed the assault. He points to the inconsistencies in the victim's testimony concerning the location of the assault and the fact that no one but the victim identified him as the person who assaulted her.

In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, 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. *State v. Muniz*, 203 Neb. 206, 277 N.W.2d 712 (1979); *State v. Sommers*, 201 Neb. 809, 272 N.W.2d 367 (1978); *State v. Cano*, 191 Neb. 709, 217 N.W.2d 480 (1974). In effect, this is what the defendant is asking this court to do.

The victim at all times identified the defendant as the person who had assaulted her. Although the defendant testified that he was elsewhere when the assault occurred, there was no evidence to corroborate his alibi. The evidence was sufficient, if believed, to establish that the defendant was present at the victim's father's apartment when the assault occurred.

"In a sexual assault case, the victim need not be independently corroborated on the particular acts constituting sexual assault, but must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principal fact in issue." (Syllabus of the court.) *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980); *State v. Watkins*, 207 Neb. 859, 301 N.W.2d 338 (1981). The evidence in this case was sufficient, if believed, to support the defendant's conviction beyond a reasonable doubt.

The defendant also contends his sentence is excessive. First degree sexual assault on a child is a Class II felony punishable by imprisonment for a term of not less than 1 nor more than 50 years. Neb. Rev. Stat. § 28-105 (Reissue 1979). The defendant was sentenced to a term of not less than 9 nor more than 14 years, with credit for time served. The sentence imposed was well within the statutory limits. Generally, in the absence of an abuse of discretion, this court will not disturb a sentence which is within statutory limits. *State v. Dillon, ante* p. 131, 382 N.W.2d 353 (1986).

Although this was the defendant's first felony conviction, he does have a prior misdemeanor conviction. The record further shows that the defendant had previously sexually assaulted his 9-year-old stepchild. Both the psychiatrist's and the psychologist's reports concerning whether the defendant was a mentally disordered sex offender indicated that the defendant has a propensity to commit repeated sexual offenses.

The record shows there was no abuse of discretion by the trial court on sentencing. The judgment is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

TATANKA SAPANAJIN, APPELLANT, V. CHARLES WOLFORD, SIDNEY POLICE DEPARTMENT, ET AL., APPELLEES.

383 N.W.2d 796

Filed March 28, 1986. No. 85-462.

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

Tatanka SapaNajin, pro se.

John F. Simmons of Wright, Simmons & Selzer, for appellees Wolford et al.

Robert M. Spire, Attorney General, and Sharon M. Lindgren, for appellees Bobo and Dorwart.

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

PER CURIAM.

Tatanka SapaNajin, acting pro se, appeals from an order of dismissal entered by the district court for Cheyenne County. We affirm the order of the district court.

SapaNajin brought this action in the county court for Cheyenne County on June 18, 1984. The claim arises from an arrest described in *SapaNajin v. Johnson*, 219 Neb. 40, 360 N.W.2d 500 (1985). In that case we affirmed the denial of the appellant's habeas corpus application.

In the current action SapaNajin names two officers of the Sidney Police Department, the county sheriff, a deputy county sheriff, two jailers, the county attorney, a deputy county attorney, the county judge, and an associate county judge as defendants in his claim for a $20 penalty allowed by Neb. Rev. Stat. § 29-512 (Reissue 1979).

The county court sustained demurrers by the appellees and dismissed the case. In a journal entry dated December 27, 1984, the judge stated that the petition did not state a cause of action and could not be amended to state a cause of action because § 29-512 is unconstitutional.

Following dismissal by the county court, SapaNajin filed a petition in error in the district court for Cheyenne County. Along with the petition in error, the appellant filed a motion to proceed in forma pauperis in lieu of paying the docket fee. The defendants in the county court proceeding were named as defendants in error and were served with summonses in the proceedings in error.

The defendants in error filed demurrers alleging that the action should be dismissed because the petition in error did not state a cause of action upon which relief could be granted. In a separate motion to dismiss, the defendants in error alleged that the action is frivolous or malicious and that the petitioner in error proceeded without payment of fees and without the court's authority to proceed without payment. On May 14, 1985, the district court sustained the demurrers and found that it was without jurisdiction to entertain the petition in error.

The appellees point out that proceedings in error are distinct from the appeal process, and, since Nebraska district courts have no jurisdiction to review county judgments in proceedings in error, the district court correctly sustained the demurrers and dismissed SapaNajin's petition in error. Appellees argue that if a party seeks review of a county court decision, it must follow the appeal procedure set out in Neb. Rev. Stat. § 24-541.02 (Cum. Supp. 1982):

> (1) In order to perfect an appeal from the county . . . court the appealing party shall within thirty days after the rendition of the judgment or making of the final order complained of:
>
> (a) File with the clerk of the county . . . court a notice of appeal; and
>
> (b) Deposit with the clerk of the county . . . court a docket fee in the amount of the filing fee in district court for cases originally commenced in district court.
>
> (2) Satisfaction of the requirements of subsection (1) of this section shall perfect the appeal and give the district court jurisdiction of the matter appealed . . . .

Appellees argue further that 1974 Neb. Laws, L.B. 733, was promulgated for the express purpose of eliminating the petition in error as a method of obtaining district court review of county court judgments. The introductory statement of L.B. 733 recites that it is an act to "eliminate petition in error proceedings." That bill amended two relevant statutes:

> 24-541. In all cases not otherwise specifically provided for, either party may appeal from the final judgment of the county or municipal court to the district court of the county where the judgment was rendered. All such appeals shall be ~~by petition in error or~~ de novo on the record . . . .

And under the heading "Review on Petition in Error":

> 25-1901. A judgment rendered, or final order made, by ~~a county court or~~ any ~~other~~ tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court.

In *Languis v. De Boer*, 181 Neb. 32, 146 N.W.2d 750 (1966),

we were confronted with an almost identical procedural problem. Some of the appellants had filed a petition in error with the district court for review of changes made by the county superintendent. A 1963 amendment established a new appeal process for the appellants' situation. Previous to that amendment, review could be had only by proceedings in error. The trial court held that the appeal procedure was the exclusive method of review and dismissed the petition in error. We found on the contrary, that the 1963 amendment was not intended to eliminate proceedings in error.

Such was not the case, however, with 1974 Neb. Laws, L.B. 733. That bill was clearly intended to eliminate proceedings in error as a method of obtaining district court review of a decision rendered by a county court. The appeal procedure is, indeed, exclusive in this instance. The district court was correct.

Finally, the appellant raises several constitutional arguments that 1974 Neb. Laws, L.B. 733, is infirm, since the appellant, acting pro se, could not determine the proper method of obtaining review in the district court. We disagree. Section 24-541.02 is neither vague nor overbroad.

As we stated in *McCorison v. City of Lincoln*, 218 Neb. 827, 830, 359 N.W.2d 775, 777 (1984), a litigant has every right to represent himself or herself. "By doing so, however, he must be bound by the same rules that bind all others, and the fact that he may not have as much knowledge about the mechanics of the law does not grant the courts the right to disregard them."

Even if error proceedings had been a viable procedure for review in this instance, neither the district court nor this court acquired jurisdiction. The filing of a petition in an error proceeding, accompanied by a certified transcript of the proceedings complained of, is jurisdictional. *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976). Such was not done in this instance.

The judgment of the district court was correct and is affirmed.

AFFIRMED.

DORA R. BARADA, APPELLANT, V. RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, AND BEHLEN MFG. CO., APPELLEES.

383 N.W.2d 799

Filed March 28, 1986. No. 85-506.

1. **Employment Security Law: Appeal and Error.** In any judicial proceeding under Neb. Rev. Stat. §§ 48-638 to 48-640 (Reissue 1984), the court shall consider the matter de novo upon the record.
2. **Employment Security Law: Words and Phrases.** "Misconduct" within the meaning of Neb. Rev. Stat. § 48-628(b) (Reissue 1984) is a deliberate, willful, or wanton disregard of an employer's interest or of the standards of behavior which the employer has a right to expect of his employees, or carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

Joseph S. Ramirez, for appellant.

Laureen Van Norman, for appellee Sorensen.

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

WHITE, J.

This is an appeal from an order of the district court for Platte County which affirmed the decision of the Nebraska unemployment compensation appeal tribunal. The tribunal determined that the employee, Dora R. Barada, was terminated for misconduct within the meaning of the Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-669 (Reissue 1984), and that the employee was disqualified from receiving benefits for a period of 7 weeks.

"In any judicial proceeding under sections 48-638 to 48-640 the court shall consider the matter de novo upon the record." § 48-639. "[I]t is our duty to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof." *Heimsoth v. Kellwood Co.*, 211 Neb. 167, 168, 318 N.W.2d 1, 2 (1982). In our review, however, we keep in mind that where there is a dispute of fact the district court observed the demeanor of the witness and accepted one version

of the facts rather than the other.

We accept the following version of the facts of this case. Appellant, Dora Barada, is a female, age 59, and had been employed by the Behlen Mfg. Co. at its Columbus, Nebraska, plant since May of 1974 until her discharge on September 14, 1984, slightly more than 10 years.

In May of 1984 the Behlen Mfg. Co. had a change of ownership from being an apparently wholly owned subsidiary of the Wickes Companies, Inc., to private ownership. During the prior ownership by Wickes, a companywide retirement program was in effect. The new ownership determined to put in place a new retirement program. Originally, Behlen management fixed the period from August 1 through 15, 1984, as the enrollment period. The period was extended to allow persons to examine the written plan.

It was clear to all employees that among the several options available, retention of the old retirement plan was not one of the options. The options available to be examined were the subject of three informational meetings by the Behlen management. An opportunity was given to individual employees to examine the written plan, and to Barada to have the plan examined by a private attorney if she desired. The options available were that (1) Behlen would contribute 2 percent of the employee's annual earnings regardless of contribution or noncontribution by the employee, (2) the employee could contribute from 0 to 6 percent to the plan, (3) the employer would match 50 percent of the elective contribution percentage of employee's pay, and (4) the employee could choose not to participate at all. No benefits were available to an employee unless one of the options was exercised.

As of the date of the discharge, Barada refused to exercise any of the three options to participate or to execute a document signifying the fourth option, i.e., not to participate at all.

We are satisfied that the employer afforded Barada information about the plan and an opportunity to examine the written plan personally or by counsel. Though advised of that right at least some weeks prior to the discharge date, no effort by Barada to examine the plan was made, except over a half

hour break. Although she advised Behlen management that she wished to have her attorney examine the plan, she had not, as of September 14, 1984, contacted an attorney. When asked by Behlen management as to when she expected to contact an attorney, she answered, "Now, don't pin me down."

Management testified that it was essential that all employees indicate which of the four options (three participation, one nonparticipation) they desired. Counsel apparently advised management of a potential liability to the estate of former employees or of retired employees if no written record of election existed, and therefore recommended that each employee be required to execute a document so signifying.

At the fateful September 14 meeting, employee Barada refused to sign anything, after notice that such refusal would result in her discharge.

At issue in this appeal is whether the refusal to designate a plan or nonplan is "misconduct" within the meaning of § 48-628(b) sufficient to disqualify Barada from benefits for not more than 10 weeks. In *Bristol v. Hanlon*, 210 Neb. 37, 41, 312 N.W.2d 694, 696 (1981), *overruled on other grounds, Heimsoth v. Kellwood Co., supra*, we recited the definitions of misconduct used by other courts and adopted as a definition "a deliberate, willful, or wanton disregard of an employer's interest or of the standards of behavior which the employer has a right to expect of his employees, or carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design."

We do not accept, as the district court did not, the possibility of a limited understanding by Barada of the options offered or their effect, if any, on previous pension plans, in view of the extended efforts of management to explain the plans and the availability of the plan to independent counsel. Nor do we accept that management, once prepared to accept a refusal to sign as an exercise of the nonparticipation option, is estopped from requiring a signed designation, especially where the reason (advice of management counsel) was explained to Barada.

We conclude that the failure to designate a plan was

misconduct. Therefore, the decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT MICHAEL RICH, APPELLANT.

383 N.W.2d 801

Filed March 28, 1986. No. 85-547.

1. **Criminal Law: Convictions: Proof.** To sustain a conviction for a crime, the corpus delecti must be proved beyond a reasonable doubt.
2. **Criminal Law: Verdicts: Appeal and Error.** A verdict by a trier of fact in a criminal proceeding will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with directions to dismiss.

Dennis R. Keefe, Lancaster County Public Defender, and Harry A. Moore, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

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

PER CURIAM.

Appellant, Robert Michael Rich, was charged on March 29, 1985, in the municipal court of Lincoln with larceny, a violation of Lincoln Mun. Code § 9.32.060 (1975). On April 25, 1985, trial was held, Rich was found guilty by the court, and was sentenced to 6 months' probation and a $25 fine. Rich appealed to the district court, which affirmed the judgment, and then appealed to this court. For the reasons stated below we reverse.

On March 7, 1985, Rich shopped in a convenience store where he was observed by the store's owner through a one-way mirror. At trial the owner testified that she observed Rich wipe his brow with a handkerchief and that she believed he then used

the handkerchief to conceal a box of chocolate pudding, which he placed in his pants pocket. Rich paid for two soft drinks, left the store, and boarded a city bus. He was not asked to pay for any pudding, nor did he do so. The owner testified that she saw a bulge in Rich's pants pocket that appeared to have the shape of a box of pudding. She called the police but did not confront Rich herself because she did not know if he was dangerous. A police officer contacted Rich on the bus and searched him but did not find a box of pudding. Rich denied taking a box of pudding from the store.

The issue before the municipal court was whether sufficient competent evidence was adduced at trial to find the appellant guilty beyond a reasonable doubt. Appellant assigns as error that the proof was not sufficient to establish the corpus delecti beyond a reasonable doubt and that the proof was not sufficient to support the finding of guilt. To sustain a conviction for a crime, the corpus delecti must be proved beyond a reasonable doubt. *State v. Workman*, 213 Neb. 479, 329 N.W.2d 571 (1983). A verdict by a trier of fact in a criminal proceeding will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Hilker*, 210 Neb. 810, 317 N.W.2d 82 (1982). We believe the evidence in this case is not sufficient to have permitted the court to find guilt beyond a reasonable doubt.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. LARRY D. BLATTNER, APPELLANT.

383 N.W.2d 803

Filed March 28, 1986. No. 85-660.

Criminal Law: Verdicts: Appeal and Error. In determining the sufficiency of the evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.

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

John B. McDermott of McDermott, Depue & Zitterkopf, for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Larry D. Blattner, was charged with driving while under the influence of alcohol, first offense, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984). Following a trial to the court, Blattner was found guilty and sentenced to 7 days' imprisonment, a fine of $200 plus costs, and a 6-month suspension of his motor vehicle operator's license. Blattner appealed to the district court for Hall County, Nebraska, which affirmed his conviction, and it is from that judgment which he now appeals to this court. We affirm.

The evidence is virtually without dispute, although the inferences to be drawn therefrom are disputed by Blattner. The evidence discloses that on November 20, 1984, at approximately 11:30 p.m., Officer Charles Hines of the Grand Island Police Department was on patrol on Locust Street in Grand Island, Nebraska. Locust Street consists of five lanes; two northbound, two southbound, and a turning lane. Officer Hines observed a vehicle traveling ahead of him in the far right

lane to drift to the right, then suddenly swerve left across the centerline, going into the turning lane, and then swerve back to the right lane. The driver of the vehicle did not give any indication of a turn, nor did he use a turn signal. Officer Hines activated the overhead lights on his patrol car and pulled the vehicle into a nearby parking lot. Upon investigation the officer determined that Blattner was the driver of the vehicle. After approaching the vehicle, Officer Hines detected an odor of alcohol about Blattner. In response to a question by the police officer, Blattner stated that he had had two or three beers. Blattner then told the officer that he was having trouble with his power steering. There was, however, no evidence offered at trial to support that claim.

Officer Hines then requested that Blattner perform various field sobriety tests. First, after stating that he knew the alphabet, Blattner three times unsuccessfully attempted to recite the alphabet. Second, Blattner tried to perform the one-leg balancing test but kept touching his other foot to the ground to catch himself. And, finally, Officer Hines asked Blattner to walk heel to toe. Though he did the correct number of steps forward and back, Blattner swayed as he walked and was uncertain as he turned. In fact, Blattner came very close to losing his balance when he turned. At trial Officer Hines testified that, in his opinion, Blattner was under the influence of alcohol at the time he was operating his motor vehicle. He based his opinion on Blattner's balance, his speech, his inability to recite the alphabet, and the odor coming from him.

Blattner's single assignment of error is that the verdict is unsupported by the evidence. In order to reach the result urged upon us by Blattner, we would be required to make new findings in this case. This we cannot do. As we noted in *State v. Green*, 217 Neb. 70, 75-76, 348 N.W.2d 429, 432 (1984):

> In determining the sufficiency of the evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to

support it.

It is not possible for this court to say that the county court was in error in believing the police officer and disbelieving Blattner. As a matter of fact, if we view the evidence most favorably to the State, as we are required to do, there is more than sufficient evidence to support the conviction. The judgment of the district court affirming the judgment of the county court is therefore, in all respects, affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. DAVID LARKIN, APPELLANT.
383 N.W.2d 804

Filed March 28, 1986. No. 85-661.

1. **Testimony: Evidence: Damages: Insurance: Hearsay.** Testimony concerning an insurer's estimated cost of repairing damage is, when offered to prove the amount of damage, hearsay evidence and inadmissible.
2. **Testimony: Witnesses.** Where an objection has been overruled, it is unnecessary to object to further testimony of the same nature by the same witness.

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

James H. Truell of Ahlschwede, DeBacker & Truell, for appellant.

Robert M. Spire, Attorney General, and Dale D. Brodkey, for appellee.

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

CAPORALE, J.

Defendant, David Larkin, appeals his conviction, following a jury trial, of felony criminal mischief. He assigns as error, among others, the trial court's receipt of certain evidence concerning the amount of pecuniary loss involved. Because that assignment is meritorious, we reverse the conviction and remand the cause for a new trial.

Neb. Rev. Stat. § 28-519 (Cum. Supp. 1984) states that one commits felony criminal mischief if he or she, among other things, intentionally or recklessly damages the property of another such as to cause a pecuniary loss in excess of $300.

The evidence is such that the jury could find that defendant slashed or otherwise damaged four tires of a vehicle owned by one against whom he held a grudge, and, further, set the vehicle on fire.

Defendant does not question that the evidence properly establishes the tire damage resulted in a pecuniary loss of $220.12. He does, however, challenge the trial court's evidentiary rulings concerning the amount of pecuniary loss caused by the fire.

The prosecutor asked the owner of the vehicle to identify a document evidencing her insurer's estimate of the cost of repairing that damage and then asked the owner what amount had been estimated. Defendant objected on the ground there was "insufficient foundation." The trial court overruled the objection and permitted the witness to answer that the amount of the estimate was $130.05. Thereafter, the owner was asked if the insurer was going to pay her the $130.05. She answered, without objection, that the insurer did not pay her directly but paid the person making the repairs. The insurer's repair estimate was then offered in evidence and received over defendant's second objection that sufficient foundation was lacking.

While defendant's first objection was not as precisely stated as might be desired, the question concerning the amount of the estimate was clearly objectionable. The owner was being asked to state what someone else said it should cost to repair the fire damage. She was therefore asked to testify about a declarant's out-of-court statement which was offered to prove the truth of the matter asserted, the cost of repair. As such, the question called for inadmissible hearsay testimony. Neb. Rev. Stat. §§ 27-801, 27-802 (Reissue 1979). See *Jorgensen v. Jorgensen*, 194 Neb. 271, 231 N.W.2d 360 (1975). Notwithstanding its imprecision, it was clear from the context of the objection that defendant was challenging the propriety of allowing the owner

to testify not about what she personally knew as to the cost of repairing the fire damage but what her insurer told her in that regard. The trial court therefore erred in overruling that objection and receiving her testimony. Neb. Rev. Stat. § 25-1141 (Reissue 1979) provides that where an objection has been overruled, it is unnecessary to object to further testimony of the same nature by the same witness. Thus, it was unnecessary that defendant object again when the owner was asked to state whether the insurer was going to pay her the $130.05. Just as the trial court erred in overruling defendant's first objection, it erred in overruling defendant's second objection and admitting the hearsay estimate document itself into evidence.

As noted earlier, in order to prove felony criminal mischief there must be proof of a pecuniary loss in excess of $300. The only competent evidence is that the pecuniary loss resulting from defendant's misconduct is $220.12, as a matter of law not enough to support the conviction. As a consequence, the conviction must be, and hereby is, reversed.

This resolution makes unnecessary a consideration of defendant's other assignments of error. The cause is therefore remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE, J., participating on briefs.

ROLLIN C. BAMMER, APPELLEE, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLANT.

384 N.W.2d 263

Filed April 4, 1986. No. 84-651.

1. **Administrative Law: Implied Consent: Jurisdiction: Appeal Bonds.** The execution, approval, and filing of the bond required by Neb. Rev. Stat. § 60-420 (Reissue 1984) are necessary steps to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court.
2. **Administrative Law: Implied Consent: Jurisdiction: Appeal Bonds: Time.**

Filing in the district court does not satisfy the requirement of Neb. Rev. Stat. § 60-420 (Reissue 1984) that the bond be filed in the office of the director of the Department of Motor Vehicles within 20 days of the order concerning which complaint is made.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and dismissed.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellant.

Mark S. Trustin of Stehlik, Smith, Trustin, Schweer & Ruder, for appellee.

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

CAPORALE, J.

Holly Jensen, director of the Department of Motor Vehicles, appeals the district court's reversal of her order revoking Rollin C. Bammer's operator's license pursuant to the implied consent statutes, Neb. Rev. Stat. §§ 39-669.08, 39-669.18, and 60-420 (Reissue 1984). Among the director's assignments of error is the claim that the district court, and consequently this court, lacks jurisdiction over the subject matter of the proceeding. We agree and, consequently, without considering her other assignment of error, reverse the decision of the district court and dismiss this appeal.

On January 27, 1984, the director received a letter dated the previous day from Bammer's attorney advising that a petition appealing her order had been filed with the district court for Sarpy County and that a bond had been obtained which had been "sent . . . for approval to the state auditor." The letter went on to say that a copy of that bond was enclosed. The director's transcript, prepared on January 31, 1984, contains a copy of an unapproved bond bearing facsimilies of signatures purporting to be those of Bammer and of an attorney-in-fact for the corporate surety.

The original bond, showing it to be in connection with a proceeding before the director, and which was approved by the state auditor on January 27, 1984, was filed with the clerk of the district court on Monday, February 6, 1984. The copy of the

bond sent to the director is a true copy of the original as filed with the district court, except that the former lacks a facsimile of the auditor's signature. Subsequently, on May 2, 1984, the original of the bond was sent to the director and a true copy thereof substituted in the district court's file.

The relevant hearing before the director and the trial before the district court took place prior to July 10, 1984, when the present version of § 60-420 (Reissue 1984) became effective. However, the amendments made by 1984 Neb. Laws, L.B. 697, do not concern us, for there was no change in the relevant portion of § 60-420, which reads:

> The ruling, decision, or order of the director in refusing to issue or reinstate such license or in suspending, canceling, or revoking the same shall be as final and binding as the final order or judgment of a court of general jurisdiction. The applicant, licensee, or appellant shall, within twenty days from the date of the final order complained of, execute a bond for costs to the State of Nebraska in the sum of two hundred dollars with sufficient surety to be approved by the Auditor of Public Accounts. The bond shall be filed in the office of the director.

In essence, the director claims that the copy of the bond filed with her on January 27, 1984, is a nullity because it was not approved by the auditor and that the bond filed with the district court for Sarpy County on February 6, 1984, was a nullity because it was not filed with her until after the 20 days allotted by § 60-420.

Bammer argues that § 60-420 requires only that the bond be executed and approved within 20 days of the director's order, not that it be filed within those 20 days or any other fixed period. In support of that position he points out the requirement that the bond be filed in the office of the director is contained in a separate sentence from that which concerns itself with the execution and approval of the bond within 20 days of the order about which complaint is made. The argument is an effort to create an ambiguity where none exists. Whether the execution, approval, and filing requirements be contained in one, two, or three sentences in no manner changes the sense of the statute that a bond in fact be executed, approved, and filed

in the director's office within the time specified. Were Bammer's argument accepted, a bond, once executed and approved, would never have to be filed. Such a holding would, in effect, defeat the bond requirement.

Moreover, we have previously stated that the filing of the bond required by the foregoing statute is a necessary step to the acquisition of subject matter jurisdiction of an implied consent proceeding by the district court. *Lydick v. Johns*, 185 Neb. 717, 178 N.W.2d 581 (1970); *Buettner v. Sullivan*, 191 Neb. 592, 216 N.W.2d 872 (1974).

The most recent case bearing on the issue, decided after the district court made its decision in this case, is *Black v. State*, 218 Neb. 572, 358 N.W.2d 181 (1984). Therein, a $200 check drawn on the trust account of appellant's attorney was sent to the office of the director. The director sent a letter stating this deposit was not sufficient as a bond under the version of § 60-420 then in effect. A proper bond was then sent to the director; however, it was not received by the director's office until 21 days after the order of revocation had been issued. This court stated the right of appeal was clearly statutory, that the statute's requirements were mandatory, and that it was the appellant's duty to see that the bond was delivered to the proper official within the time provided by law. The district court was held to have properly dismissed the appeal, as it lacked jurisdiction due to the aggrieved party's failure to meet those requirements.

A filing in the district court is obviously not a filing in the office of the director. Consequently, the February 1984 district court filing failed to comply with the requirement of § 60-420 that an approved bond be filed in the office of the director within 20 days from the date of the final order about which complaint was made. *Black v. State, supra.*

However, this court has permitted appeal bonds filed on time, but which were defective in form or substance, to be amended. *The Exchange Bank v. Mid-Nebraska Computer Services, Inc.*, 188 Neb. 673, 199 N.W.2d 5 (1972) (incomplete conditions); *Ballantyne Co. v. City of Omaha*, 173 Neb. 229, 113 N.W.2d 486 (1962) (incomplete conditions); *State v. Kidder*, 169 Neb. 181, 98 N.W.2d 800 (1959) (provided only one

of two required sureties). The director's complaint is that the copy of the bond filed with her on January 27 was not approved by the auditor. She makes no complaint that the copy of the bond given her contained neither the original signature of Bammer as the principal nor that of the surety. We therefore do not concern ourselves with the adequacy of the facsimile signatures. Thus, the precise question before us is whether the January 27 filing with the director, although defective because it was not approved by the auditor, was nonetheless a sufficient bond so as to permit its subsequent amendment by the filing made with the director in May.

In *Stigge v. Graves*, 213 Neb. 847, 332 N.W.2d 49 (1983), an appeal from an order dissolving a school district was undertaken pursuant to a statute which provided that the appeal procedure would be as in appeals from the county to the district court. The appellants filed their notice of appeal, a $50 cash bond undertaking to diligently prosecute the appeal and pay any judgment and costs, and a praecipe for transcript in the district court. A duplicate copy of each of the documents was delivered to the superintendent. In moving for a dismissal the superintendent argued that the appeal documents and bond had not been "filed" with her as required, but only delivered, or served, on her, and that she had not approved the bond. We noted that the procedural statutes were not designed to fit the situation but that they did provide for a cash or surety bond for not less than $50, to be approved by the superintendent. In reversing the district court's judgment of dismissal, this court said that the bond could be amended.

Just as in *Stigge*, the original of the bond in this case was filed in the district court rather than in the proper office. And just as in *Stigge*, the copy of the bond originally filed in the proper office in this case was not approved. However, unlike the situation in *Stigge*, the procedure specified by § 60-420 is specifically designed for appeals from the director. The unambiguous language of § 60-420 requires that a bond approved by the auditor be filed with the director within 20 days of the final order of which complaint is made. Therein lies another significant difference between the situation in *Stigge* and that presented by the case at hand. In *Stigge* the bond was

to be approved by the superintendent, the very person who made the decision from which the appeal was taken. In the present case, however, the approval is to be by an independent third party, the auditor, thereby avoiding the concern expressed in *Stigge* that the superintendent could thwart an appeal by refusing to approve the bond. Thus, *Stigge* does not apply to the situation presently before us.

Rather, this case is controlled by *Black v. State*, 218 Neb. 572, 358 N.W.2d 181 (1984). Bammer had the duty to timely file a properly approved bond with the director. The unapproved copy of the bond he did file with the director within the statutory time was not sufficient to permit an amendment by a later untimely filing of an approved bond. Consequently, the district court failed to acquire jurisdiction and should have dismissed Bammer's appeal.

That being so, the district court's judgment is reversed and this appeal dismissed.

REVERSED AND DISMISSED.

IMMANUEL, INC., A NEBRASKA NONPROFIT CORPORATION, APPELLANT, V. BOARD OF EQUALIZATION OF DOUGLAS COUNTY, NEBRASKA, APPELLEE.

384 N.W.2d 266

Filed April 4, 1986. No. 84-712.

Taxation: Appeal and Error. In its appellate review of a question whether property is exempt from taxation pursuant to Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1981), the Supreme Court determines tax exemption in an equitable trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues 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.

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

Wesley E. Hauptman of Erickson & Sederstrom, P.C., for appellant.

Donald L. Knowles, Douglas County Attorney, Rockford G. Meyer, and H.L. Wendt, for appellee.

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

GRANT, J.

Immanuel, Inc. (Immanuel), doing business as Immanuel Medical Center, appeals the decision of the district court for Douglas County, Nebraska, which held that a facility owned and operated by Immanuel Medical Center known as the Immanuel Employee Child Care Center (Child Care Center), was not exempt from property taxation in 1982. Immanuel assigns as error the trial court's (1) failure to find that the subject property was exclusively used for charitable purposes, (2) failure to find that the issue regarding educational use of the subject property was properly raised before the Douglas County Board of Equalization, (3) failure to find that the subject property was exclusively used for educational purposes, and (4) failure in not using a liberal standard in construing the terms "educational" and "charitable." For the reasons set out hereinafter, we reverse.

The record shows that Immanuel is a nonprofit corporation organized and doing business under the Nebraska Nonprofit Corporation Act. Neb. Rev. Stat. §§ 21-1901 et seq. (Reissue 1983). Immanuel does not distribute any part of its income to its members, directors, officers, or private individuals and is exempt for federal income tax purposes. Immanuel's primary purpose is to provide health care to the public. Immanuel Medical Center is a 615-bed health care complex located on a 130-acre campus near 72d Street and Redick Avenue in Omaha, Nebraska. Immanuel Medical Center consists of Immanuel Hospital, Immanuel Professional Plaza, a center for continuing education, a community mental health center, an alcoholism treatment center, a nursing home, a motel for outpatients and families of inpatients, an apartment complex serving persons of retirement age, and, for children of Immanuel employees, the child day-care center which is the subject of the instant case. All of these buildings are located on Immanuel's 130-acre campus in close proximity to one another.

In 1980 Immanuel began construction on the Child Care Center. That facility became operational in May 1981. As previously stated, the Child Care Center provides child day care for the exclusive use of Immanuel employees. The Child Care Center is open 5 days a week from 6 a.m. to 6 p.m. and is licensed by the Department of Social Services. Sixty children, ranging in age from 6 weeks to 12 years, are cared for at the Child Care Center. The initial motive in establishing such a facility was for the recruitment and retention of nurses and other professional employees. The cost to Immanuel employees utilizing the Child Care Center is slightly above the average charged by similar day-care centers in the Omaha area.

On August 26, 1982, Immanuel applied for a real estate tax exemption with the Douglas County assessor's office for the property upon which the Child Care Center is located. On October 8, 1982, the county assessor's office denied Immanuel's claim for exemption, stating, "This property is used as a Child Care center by Immanuel employees and is an employee benefit."

A hearing was held before the Douglas County Board of Equalization (Board) on October 26, 1982, concerning the tax-exempt status of the Child Care Center. See Neb. Rev. Stat. § 77-202.02 (Reissue 1981). Upon the recommendation of the Douglas County assessor's office, the Board denied Immanuel's application for exemption from real estate taxes.

Immanuel then timely appealed the Board's decision to the district court, which held that the Child Care Center "is not reasonably necessary for the operation of the Immanuel Medical Center, and is not being used exclusively for charitable purposes."

The power and right of the state to tax property are presumed, and therefore tax exemption provisions are strictly construed, and their operation will not be extended by construction. The subject property which is claimed to be exempt must clearly come within the provisions granting tax exemption. However, this does not mean that the statutory language should not receive a liberal construction to carry out the express legislative intent. See *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 381 N.W.2d 166 (1986).

The relevant statute in this case is Neb. Rev. Stat. § 77-202(1)(c) (Reissue 1981). We have previously held that in our appellate review of a question whether property is exempt from taxation pursuant to § 77-202(1)(c), this court determines tax exemption in an equitable trial of factual questions de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, the Supreme Court of Nebraska will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. See *Bethphage Com. Servs. v. County Board, supra.*

Section 77-202(1)(c) requires the applicant for tax exemption to prove three things: (1) That the subject property is owned by a charitable, educational, religious, or cemetery organization; (2) That the subject property is not being used for financial gain or profit to the owner or user; and (3) That the subject property is being used exclusively for charitable, educational, religious, or cemetery purposes. The Board concedes that the Child Care Center is owned by a charitable organization and is not being owned or used for financial gain or profit to Immanuel. The Board, however, contends that the Child Care Center is not being used exclusively for charitable or educational use.

In reference to § 77-202(1)(c) this court has held that *exclusively* means the primary or dominant use of property, not an incidental use of the property. *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965). Immanuel's first assignment of error is that the district court erred in not finding that the Child Care Center is used exclusively (as that term has been defined by this court in the context of cases such as this) for charitable purposes.

In *Lincoln Woman's Club, supra* at 363-64, 133 N.W.2d at 460, we held:

> The word "charitable" has been held to mean something more than mere alms-giving or the relief of poverty and distress and *it has been given a significance broad enough to include practical enterprises for the good of humanity* operated at a moderate cost to those who receive the benefits.

(Emphasis supplied.)

In *United Way v. Douglas Co. Bd. of Equal.*, 215 Neb. 1, 337

N.W.2d 103 (1983), we stated that the underlying policy in providing a tax exemption for charitable use is that such use benefits the general public. In *United Way, supra* at 3, 337 N.W.2d at 105, we said: "The policy in providing for tax exemptions for charitable uses is based on the principles that tax exemptions benefit the public generally and the organization performs services which the state is relieved pro tanto from performing."

The Board argues that based upon the facts in this case the Child Care Center is simply not being used for charitable purposes. The Board contends that the Child Care Center is merely a convenient day-care service provided to Immanuel's employees at prevailing fair market rates and that the predominate use of the Child Care Center is for day care, which is not a charitable use. It further argues that the Child Care Center does not benefit the public generally but, rather, provides a direct benefit to Immanuel's employees.

We disagree with the Board's conclusion. It is clear that Immanuel is entitled to tax exemption for its hospital and hospital grounds as a charitable use of property. See, *St. Elizabeth Hospital v. Lancaster County*, 109 Neb. 104, 189 N.W. 981 (1922); *Lanning Memorial Hospital Ass'n v. Adams County*, 117 Neb. 618, 221 N.W. 959 (1928). As we stated in *Bethesda Foundation v. County of Saunders*, 200 Neb. 574, 578, 264 N.W.2d 664, 667 (1978), hospitals "are universally classed as charitable institutions."

In extending tax exemption to a hospital, only those facilities which are reasonably necessary for the competent operation of the hospital should receive tax-exempt status. The Board admits that such facilities would include cafeterias, employee restrooms, and locker rooms. Employee parking lots generally receive tax-exempt status also. See Annot., 33 A.L.R.3d 938 (1970). The Board argues that the Child Care Center is not reasonably necessary for the operation of the hospital, as a hospital, and therefore the Child Care Center is not entitled to tax exemption. We disagree.

Jacquelyn Wilcoxson, the director for nursing service at Immanuel, testified that nursing care provided at Immanuel is primary nursing, which means that there is continuity of care.

A nurse is responsible for the same patient throughout the patient's stay in the hospital. If that continuity of care would be broken, due to the nurse's absence for any reason, then the patient's care suffers. One of the frequent reasons for the absence or tardiness of nurses is the difficulty in obtaining reliable care for their children while they are working. Wilcoxson further testified that many articles have been written indicating that when nursing care is carried out continuously, there is certainly a beneficial effect on the patient's recovery. Wilcoxson also testified that, since the opening of the Child Care Center, the absenteeism and tardiness of the nursing staff had declined. Gail Flanery, a consultant on child care, also testified on Immanuel's behalf. Flanery testified that a recent study of 415 companies, one-half being hospitals, including Immanuel, showed that where on-site or nearby-site day care is offered, there are generally wide-ranging positive effects, including an increase in employee productivity. In addition, recruitment of new employees is definitely improved when child care is offered. Flanery further testified that employee turnover, absenteeism, and tardiness are all significantly reduced where child care similar to that of Immanuel is offered.

The Board places particular emphasis on *Doane College v. County of Saline*, 173 Neb. 8, 112 N.W.2d 248 (1961). In *Doane College, supra*, we denied tax exemption to several buildings owned and located on the Doane College campus. These buildings were apartments which were rented to members of the faculty at rental rates comparable to privately owned property in the community. The college presented evidence that the housing units were constructed in an effort to relieve a critical housing situation in the area and to give the college a competitive advantage with other schools in attracting and employing new members of the faculty. In denying tax exemption we held that "the use of the faculty housing units for educational purposes was incidental, or remote and not direct, and that the primary or dominant use of this property was not for educational purposes." *Id.* at 14, 112 N.W.2d at 252.

The record before us supports the fact that the Child Care Center has a direct benefit in alleviating staffing problems at the hospital and in aiding the primary nursing care to patients.

We find that the Child Care Center is reasonably necessary for the operation of the hospital for the furnishing of those benefits and should be granted tax-exempt status. Because of this disposition of the case, we need not consider any further errors assigned by Immanuel.

The judgment of the district court is reversed.

REVERSED.

HASTINGS, J., concurs in the result.

WILLIAM G. TAYLOR, APPELLEE, V. KIRK A. WALLESEN, APPELLANT, AND DON ROLAND, APPELLEE.

384 N.W.2d 270

Filed April 4, 1986. No. 84-771.

1. **Records: Appeal and Error.** The responsibility for filing a bill of exceptions in the Supreme Court rests upon the appellant.
2. **Records: Evidence: Appeal and Error.** When, on appeal, this court is asked to review errors which require a consideration of the evidence, we cannot give them consideration in the absence of a bill of exceptions.

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

Harry R. Meister of Brenner & Meister Law Office, for appellant.

John W. Ballew, Jr., of Raymond, Olsen, Ediger & Ballew, P.C., for appellee Taylor.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and GRANT, JJ., and BUCKLEY, D.J.

HASTINGS, J.

Defendant Kirk A. Wallesen has appealed a jury verdict of $9,000 in favor of the plaintiff, which was returned following the court's instruction in favor of the plaintiff on the issue of liability.

Eight separate errors are detailed in defendant's brief. However, the resolution of each necessitates a bill of

exceptions. None has been filed with this court. The responsibility for filing such bill of exceptions in the Supreme Court rests upon the appellant. Neb. Ct. R. 5C(5) (rev. 1983).

When, on appeal, this court is asked to review errors which require a consideration of the evidence, we cannot give them consideration in the absence of a bill of exceptions. *Lanc v. Douglas County Welfare Administration*, 189 Neb. 651, 204 N.W.2d 387 (1973). Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

OMAHA CITY EMPLOYEES LOCAL 251, AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, APPELLANT AND CROSS-APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS.

384 N.W.2d 271

Filed April 4, 1986. No. 84-900.

1. **Contracts.** Where a contract is clear and unambiguous, it is not subject to a construction different from that which flows from the language used.
2. **Ordinances: Municipal Corporations: Courts.** The adoption of ordinances under the police power is a legislative act, and the courts cannot interfere with such matters by attempting to mandate their adoption or amendment.

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

Bruce G. Mason of Ross & Mason, P.C., and, on brief, Thomas F. Dowd of Dowd, Fahey, Dinsmore & Hoffman, for appellant.

Herbert M. Fitle, Omaha City Attorney, Kent N. Whinnery, and Denise A. Hill, for appellees.

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

HASTINGS, J.

This is a dispute over certain labor practices of the City of

Omaha. Two of the issues decided by the trial court were not appealed and are not discussed here.

Joseph Zenchuk, a regular semiskilled laborer in the classified service of the city, was discharged on June 15, 1982, while seasonal employees continued to be employed and perform some of the same tasks previously undertaken by Zenchuk. Omaha City Employees Local 251 (the union) sought a declaration that the layoff was impermissible, as well as a determination of damages for Zenchuk because of lost wages. Additionally, the union requested an order enjoining the city from hiring seasonal workers to perform work which the city carried on for the full 12 calendar months of each year.

The district court, inter alia, determined that Zenchuk was not wrongfully discharged, but ordered the city to discontinue hiring seasonal employees to perform work in areas which were carried on by the city for a period of time in excess of 9 months each calendar year. The union has appealed from the first finding, and the city has cross-appealed, objecting to the second finding.

Article 10, § 2, of the labor agreement between the union and the city provides that "[n]o regular employee shall be laid off from any classification while there are . . . seasonal . . . employees working in the same classification."

Omaha Mun. Code, ch. 23, art. I, § 23-1 (1980), provides in part as follows:

> *Class*: A position or group of positions that involve similar duties and responsibilities, require similar qualifications, and designated by a single title indicative of the kind of work.
>
> *Class specification*: The written description of a class including the title, statement of the duties and responsibilities, and the minimum requirements of education and experience appropriate upon entrance for satisfactory performance in a position of the class.

The majority of Omaha employees are regular employees in the classified service. The city also employs seasonal and part-time employees, who may or may not be classified. The qualifications, employment, and remuneration of regular classified bargaining unit employees are heavily regulated both

by city ordinances and the collective bargaining agreement. Regular classified employees receive many fringe benefits, including paid sick leave, paid vacations, paid holidays, insurance, and longevity pay.

The wage rate paid a regular classified employee is substantially higher than that paid an unclassified seasonal or part-time employee. As of January 1, 1984, a semiskilled laborer in the regular classified service, such as Joseph Zenchuk, had a pay range of $8.53 to $9.03 per hour. Unclassified seasonal employees, on the other hand, were paid $4.90 per hour regardless of their duties.

Employed in 1980 as a regular semiskilled laborer in the classified service in the traffic maintenance division, Joseph Zenchuk's duties included traffic sign installation, pavement marking, street striping, barricade placement, barricade repair, and sign painting. When outdoor work was prohibitive in January through April, Zenchuk and other regular employees repaired and maintained the striping machine.

While employed as a regular semiskilled laborer, Zenchuk worked with seasonal employees in the traffic maintenance division. In contrasting their job duties Zenchuk testified that seasonal and regular employees worked on the same crews, performing many of the same tasks. However, daily work assignments were given to the regular employees, who were responsible for seeing that the work was completed and instructions were followed. Furthermore, if equipment problems developed, it was the function of the regular employees to repair the machinery.

On May 28, 1982, Zenchuk was notified by the city of his layoff from his position with the traffic maintenance division, effective June 15, 1982. He refused to exercise his right to "bump down" to a lower-paying classification as an Automotive Equipment Operator I in the public safety department. With the exception of January, February, and March, seasonal employees were employed in the traffic maintenance division throughout Zenchuk's layoff period.

Zenchuk returned to the traffic maintenance division as a seasonal employee on April 15, 1983, and was reinstated as a regular semiskilled laborer on June 15. All of Zenchuk's duties

as a seasonal employee were duties he had performed as a regular employee.

The union argues that article 10, § 2, of the labor agreement prohibits the city from laying off a regular employee in the classified service while a seasonal employee is performing *any* of the job duties or functions included within the classification of a regular employee. The city insists, and the trial court agreed, that the agreement simply provides that a regular employee, a classified employee, cannot be laid off if there is a seasonal employee so designated in that same classification. We agree with the trial court's interpretation.

Where a contract is clear and unambiguous, it is not subject to a construction different from that which flows from the language used. *Moreland v. Transit Auth. of Omaha*, 217 Neb. 775, 352 N.W.2d 556 (1984).

The evidence discloses that when the City of Omaha hires seasonal employees, it may hire them under a regular classification, such as "seasonal semiskilled laborer," or as a "seasonal worker." Seasonal employees are hired under a regular classification if they are performing essentially the same duties and responsibilities of that classification.

The record discloses no seasonal workers employed under the same classification as Zenchuk at the time of his layoff. The findings of the trial court were correct in that regard. If the union desires to renegotiate this provision of the agreement to conform with its argument, it is free to do so at the next opportunity.

As to the second issue, Omaha Mun. Code, ch. 23, art. I, § 23-1 (1982), defines seasonal employment as "Employment of a *seasonal nature*, the duration of which does not exceed nine (9) calendar months." (Emphasis supplied.) The trial court interpreted this language to read, in effect, "employment *in a job* of a seasonal nature, the duration of which *job* does not exceed nine (9) calendar months."

Omaha Mun. Code, ch. 23, art. III, § 23-235 (1982), provides in part as follows: "Appointments to seasonal positions may be made by an appointing authority with the approval of the personnel director . . . . Seasonal appointments shall not exceed nine (9) months and successive seasonal

appointments to the same position shall not be made."

The union would have us read these sections to restrict seasonal appointments to occupations or positions which normally do not last beyond 9 months, such as golf course greenskeepers, lifeguards, snow shovelers, etc. By the same token, it would have us prohibit appointments of seasonal employees which "shall not exceed nine (9) months" to positions in accounting, finance, and paving repairs during peak seasons involving budgeting, tax assessment, and summer paving repairs, simply because these occupations generally are carried on 12 months a year, although less intensive in nature during certain times of the year.

We are not prepared to judicially amend the plain meaning of the ordinance to arrive at that conclusion. "The adoption of ordinances under the police power is a legislative act and the courts cannot interfere with such matters by attempting to mandate their adoption or amendment." *Schaffer v. City of Omaha*, 197 Neb. 328, 331, 248 N.W.2d 764, 766 (1977).

The judgment of the district court, insofar as it interpreted the municipal code as to the meaning of seasonal employees, was incorrect, and it is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

KRIVOSHA, C.J., participating on briefs.

DAYTON HENNINGS, APPELLANT, V. SCOTT C. SCHUFELDT AND FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLEES.

384 N.W.2d 274

Filed April 4, 1986. No. 84-968.

1. **Pedestrians: Negligence: Right-of-Way.** A pedestrian crossing a street between intersections is held to a higher standard of care than one crossing at a crosswalk where the pedestrian is afforded the right-of-way.
2. **Pedestrians: Right-of-Way.** When crossing a street at a point between intersections and outside of marked crosswalks, a pedestrian is required to yield the right-of-way to all vehicles on that roadway.

3. **Pedestrians: Negligence.** A pedestrian crossing between intersections is required to keep a constant lookout for his own safety in all directions of anticipated danger. One who fails to keep such a lookout is ordinarily guilty of negligence to such a degree that recovery is barred as a matter of law.
4. _____: _____. A pedestrian crossing between intersections is not required to look one way and continue to do so, but must look in the direction or directions of anticipated danger and continue to be alert to safeguard against injury.
5. _____: _____. One who attempts to cross a street at a point between intersections without looking is guilty of such negligence as would bar recovery as a matter of law.
6. **Pedestrians: Negligence: Trial.** When a pedestrian crosses a street between intersections without looking at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, and proceeds regardless of that fact, the situation ordinarily presents a question for the court. Where the pedestrian looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he could avoid injury to himself, a jury question is usually presented.
7. _____: _____: _____. A mere statement by the injured person that he looked in the direction from which he was struck is not sufficient of itself to ensure a consideration of his case by a jury. The statement must be consistent with the facts and circumstances in evidence to present a jury question.

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

Warren C. Schrempp and Peter J. Hoagland of Schrempp, Hoagland, Gray & Gerdes, for appellant.

Kile W. Johnson of Barlow, Johnson, DeMars & Flodman, for appellee Schufeldt.

Thomas A. Otepka of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee Farmers Mutual Insurance Company.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

PER CURIAM.

This case arose out of a motorcycle-pedestrian accident that occurred in Louisville, Nebraska, on April 9, 1983. The plaintiff, Dayton Hennings, was walking across Main Street between intersections when he was struck by a motorcycle operated by the defendant Scott C. Schufeldt. Farmers Mutual Insurance Company of Nebraska was joined as a party defendant because it had issued a policy of insurance to the

plaintiff which provided coverage against uninsured motorists.

At the close of all the evidence the trial court sustained the defendants' motion for a directed verdict. The plaintiff has appealed and claims that the trial court erred in sustaining the defendants' motion for directed verdict.

The accident occurred between 7 and 7:30 p.m. It was dark and misting at the time of the accident. The plaintiff was dressed in dark clothing, but a street light illuminated the accident site fairly well.

On the night of the accident the plaintiff had driven to Louisville to speak with his wife's employer at Schram's Restaurant and Lounge. Schram's is located on the east side of Main Street, about two-thirds of a block south of 2d Street. Main is a two-lane street which runs north and south and is intersected by 2d Street to the north and 3d Street to the south. It is 58 feet wide and has diagonal parking on both sides.

After parking his car on the west side of Main, directly across from Schram's, the plaintiff crossed the street. Following a brief conversation with Thomas Michael Schram, Jr. (Mike Schram), the plaintiff left the sidewalk in front of Schram's, intending to cross the street to his car. The path the plaintiff took was located between intersections and was not a crosswalk. He walked between cars which were diagonally parked on the east side of Main Street in front of Schram's. After he had passed between the cars, he looked both to his left (south) and right (north). He saw no traffic to his left. To his right he saw a small light by the Flower Patch, a florist's shop located over two-thirds of a block to the north, on the northwest corner of 2d Street and Main. He believed the light to be coming toward him. Thinking he had adequate time to cross, the plaintiff proceeded to walk straight west across the street. The plaintiff was nearly 60 years old and had an artificial right leg. He walked with a cane and was said to walk slower than the average person, due to the artificial leg.

The defendant testified that he had not passed the Flower Patch on Main Street but, instead, had turned left onto Main from East 2d Street. He also testified that he did not see the plaintiff until just before the collision and that, at that time, the plaintiff was looking west and down toward the ground a bit,

not at the defendant. In deposition statements the defendant said that at the time of the accident his motorcycle lights were on, he was driving 15 m.p.h. in a 20 m.p.h. zone, and he was looking straight through the windshield, which he later testified had not collected enough rain to obstruct his view.

Neither party was aware of other traffic on the street when the accident occurred. The defendant stated that he was not sure which direction the plaintiff had come from, but he thought he came from the east because the plaintiff was facing west when the collision occurred. He also indicated that because he did not see the plaintiff until just before the collision, he had not had time to brake to avoid the plaintiff. The testimony was uncontradicted that it was commonplace to cross streets between intersections in Louisville.

Somewhere in the southbound lane of Main Street, the plaintiff collided with the fairing near the handlebars on the left front side of the southbound motorcycle driven by the defendant. The plaintiff was spun around by the impact and fell to a sitting position in the street.

At the close of the plaintiff's case, the defendants made a motion for a directed verdict, which was overruled. No further evidence was adduced, and the defendants renewed their motion for a directed verdict. This time the motion was sustained, the court ruling

> that when one moves from the place of safety and could have seen the approaching vehicle in close proximity to him and suddenly moves into the path of the vehicle and he's struck, his own conduct is contributory negligence more than slight, which is a matter of law and precludes his recovery.

The court also noted that it had not originally sustained the motion at the end of the plaintiff's case because, at that point, the evidence had to be treated in the light most favorable to the plaintiff and, as such, was too close to direct the verdict. In considering the renewed motion the court stated that it would consider the evidence as it was, not in the light most favorable to the plaintiff.

This court, when reviewing an order sustaining a motion for directed verdict, will construe all controverted facts and

inferences arising from the evidence in favor of the party against whom the verdict was granted. *Mitchell v. Kesting*, 221 Neb. 506, 378 N.W.2d 188 (1985). Where the facts adduced on an issue are such that reasonable minds can draw but one conclusion, the court must decide the question as a matter of law rather than submit it to the jury for determination. *Poppe v. Petersen,* 221 Neb. 877, 381 N.W.2d 534 (1986).

Although it appears the trial court did not view the evidence in a light most favorable to the plaintiff in directing a verdict, we believe the trial court reached the correct result in directing the verdict for the defendants. "A proper judgment will not be reversed even if the trial court gave the wrong reasons for its rendition." *Kresha v. Kresha*, 220 Neb. 598, 602, 371 N.W.2d 280, 283 (1985).

In the amended petition the plaintiff alleged that the defendant Schufeldt was negligent in the following particulars:

> a. In failing to have his vehicle under reasonable control;
>
> b. In failing to keep a proper lookout for the plaintiff;
>
> c. In failing to yield the right of way to the plaintiff;
>
> d. In operating his vehicle at an excessive rate of speed; that is, a rate of speed that was greater than was reasonable and prudent under the circumstances then and there existing.

In his answer the defendant Schufeldt denied the plaintiff's allegations of negligence and alleged that the plaintiff's own negligence was more than slight and sufficient to bar his recovery from the defendants. In particular, he alleged that the plaintiff was negligent in (1) failing to keep a proper lookout for the vehicle operated by Schufeldt, (2) failing to yield the right-of-way to the vehicle operated by Schufeldt, and (3) failing to cross the street within a designated pedestrian crosswalk.

On direct examination the plaintiff testified that as he got into the street he looked back and forth but was not aware of the motorcycle again until he collided with it. On cross-examination the plaintiff testified that his eyesight and hearing were good on the night of the accident. He admitted that he had neither stopped in the middle of the street to look

nor had he seen the motorcycle headlight again after entering the traveled portion of Main Street. He also conceded to making the statement, in deposition testimony, that once he had checked both left and right from between the parked cars, he had not looked again as he crossed the street.

Several principles have been repeatedly applied in cases involving motor vehicle-pedestrian collisions, where the pedestrian crossed between intersections outside of marked crosswalks. One such principle is that "one who attempts to cross a street at a point between intersections without looking is guilty of such negligence as would bar recovery as a matter of law." *Gerhardt v. McChesney*, 210 Neb. 351, 355, 314 N.W.2d 258, 262 (1982). Another is that a pedestrian crossing between intersections "is required to keep a constant lookout for his or her own safety in all directions of anticipated danger." *Id.* One who fails to keep such a lookout is ordinarily guilty of negligence to such a degree that recovery is barred as a matter of law. *Schutz v. Hunt*, 212 Neb. 228, 322 N.W.2d 414 (1982). The duty imposed by this rule is not that a pedestrian must look one way and continue to do so but that he must "look in the direction or directions of anticipated danger, and . . . continue to be alert to safeguard against injury." *Doan v. Hoppe*, 133 Neb. 767, 772, 277 N.W. 64, 66 (1938).

Further, it has been held that when a pedestrian in a place of safety

> sees or could have seen the approach of a moving vehicle in close proximity to him or her and suddenly moves from the place of safety into the path of such vehicle and is struck, such conduct constitutes contributory negligence more than slight as a matter of law and precludes recovery.

Gerhardt v. McChesney, supra at 355-56, 314 N.W.2d at 262; *Hrabik v. Gottsch*, 198 Neb. 86, 251 N.W.2d 672 (1977).

A pedestrian crossing a street between intersections is held to a higher standard of care than one crossing at a crosswalk where the pedestrian is afforded the right-of-way. *Gerhardt v. McChesney, supra*. When crossing a street at a point not within a crosswalk, a pedestrian is required to yield the right-of-way to all vehicles on that roadway. Neb. Rev. Stat. § 39-643(1) (Reissue 1984). It is apparent in the present case that the

plaintiff did not yield the right-of-way to Schufeldt's motorcycle. Violation of the statute, however, is not determinative of the degree of Hennings' negligence, if any. *Jarosh v. Van Meter*, 171 Neb. 61, 105 N.W.2d 531 (1960).

The rule typically applied to determine whether such cases present the issue of contributory negligence as a matter of law or fact is that

> when a pedestrian crosses a street between intersections without looking at all, or looks straight ahead without glancing to either side, or is in a position where he cannot see, and proceeds regardless of that fact, the situation ordinarily presents a question for the court. Where the pedestrian looks but does not see an approaching automobile, or sees it and misjudges its speed or its distance from him, or for some other reason concludes that he could avoid injury to himself, a jury question is usually presented.

Hrabik v. Gottsch, supra at 89-90, 251 N.W.2d at 675. But as stated in *Merritt v. Reed*, 186 Neb. 561, 565, 185 N.W.2d 261, 264 (1971), " 'the foregoing rule does not mean that a mere statement by the injured person, that he looked in the direction from which he was struck is sufficient of itself to insure a consideration of his case by a jury. . . .' " (Emphasis omitted.) The statement must be consistent with the facts and circumstances in evidence to present a jury question. *Merritt v. Reed, supra*. For if a pedestrian testified that he looked, " 'it is implied that he looked in such a manner that he would see that which was in plain sight, unless some reasonable excuse for not seeing is shown. . . .' " (Emphasis omitted.) *Id.* at 565-66, 185 N.W.2d at 264.

In the present case it is clear that the plaintiff, even if he did look, failed to see the Schufeldt motorcycle after entering the traveled portion of the street. He also failed to stop at the middle of the street to check for southbound traffic, which, at that point, presented the greatest danger to his safety. It is obvious from the plaintiff's failure to detect the approaching motorcycle, after he had previously seen a light coming toward him from over two-thirds of a block away, that he was not keeping a proper lookout. In addition, there is no reasonable

explanation for the plaintiff's failure to see Schufeldt's motorcycle prior to impact. The evidence is uncontradicted that the motorcycle had its lights on and was traveling in a straight line, below the speed limit, and the street was relatively well lighted, with no other traffic. It can only be concluded that the plaintiff, although perhaps not suddenly, moved from a place of safety into the path of the Schufeldt motorcycle, which the plaintiff would have seen if he had exercised the slightest degree of care.

The plaintiff's conduct was negligence of such a degree that it defeated, as a matter of law, any right of recovery arising from this accident which the plaintiff might otherwise have had against the defendants.

The trial court was correct in directing a verdict in favor of the defendants. The judgment is affirmed.

AFFIRMED.

GRANT, J., dissenting.

I respectfully dissent. In my judgment the recital of facts in the majority opinion shows negligence on the part of both plaintiff and defendant Schufeldt. I do not believe plaintiff's negligence in not properly judging the location, direction, and speed of a "small light way down by the Flower Patch" on a dark, rainy night can be considered, as a matter of law, gross in comparison with the negligence of defendant in never seeing plaintiff at all as plaintiff, using his cane to aid his progress with his artificial right leg, walked across one-half of a 58-foot-wide, unoccupied street. I believe the case should have been submitted to the jury under appropriate instruction as to comparative negligence of plaintiff and defendant.

SHANAHAN, J., joins in this dissent.

SANDY CREEK PUBLIC SCHOOLS, SCHOOL DISTRICT NO. 1-C, APPELLANT, V. ST. PAUL SURPLUS LINES INSURANCE COMPANY, APPELLEE.

384 N.W.2d 279

Filed April 4, 1986. No. 85-003.

1. **Insurance.** An insurer is required to undertake the defense of claims asserted against its insured which fall within the coverage of its policy.
2. **Equity: Jurisdiction.** Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case.
3. **Insurance: Words and Phrases.** As used in an exclusionary definition in an insurance policy, "money damages" means money sued for by a plaintiff which plaintiff prays should be paid by the insured directly to, or for the direct or indirect benefit of, the plaintiff allegedly damaged by actions of the insured.

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

Robert F. Bartle of Nelson & Harding, for appellant.

Steven D. O'Brien of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

GRANT, J.

Plaintiff-appellant, Sandy Creek Public Schools, school district No. 1-C (Sandy Creek), a Nebraska Class III school district, sought a declaratory judgment against defendant-appellee, St. Paul Surplus Lines Insurance Company (St. Paul), under a contract of insurance between the parties. In its petition Sandy Creek sought a declaration that St. Paul "had an obligation to defend and to pay for all losses incurred by Plaintiff [Sandy Creek]," together with all costs and expenses of defending an earlier legal action brought against Sandy Creek. The district court found there was no coverage afforded Sandy Creek under the policy and dismissed the petition. Sandy Creek appeals to this court, requesting that the lower court's decision be reversed and that St. Paul be required to reimburse Sandy Creek for the reasonable legal expenses incurred in defending the earlier case, denominated

Wilson v. School District No. 1-C, docket 32, page 222, case No. 9122 (hereinafter the *Wilson* case).

Sandy Creek assigns two errors: "1. The trial court erred in failing to recognize St. Paul's obligation to defend its insured school board members. 2. The trial court erred in determining that the policy of insurance did not provide coverage for the causes of action alleged in the Wilson action." For the reasons set out hereinafter we affirm the action of the trial court.

The underlying law is clear. An insurer is required to undertake the defense of claims asserted against its insured which fall within the coverage of the policy. *Gottula v. Standard Reliance Ins. Co.*, 165 Neb. 1, 84 N.W.2d 179 (1957).

The facts of the instant case were presented to the trial court in the form of a "STIPULATION OF FACTS" which shows the following.

St. Paul issued a liability policy to Sandy Creek, agreeing to "pay on behalf of the Insureds all Loss which the Insureds shall be legally obligated to pay for any civil claim or claims first made against them because of a Wrongful Act" and to "reimburse the Educational Entity for all Loss for which the Educational Entity shall be required by law to indemnify the Insureds for any civil claim or claims first made against them because of a Wrongful Act." Under the policy issued, "Insureds" are defined, in part, as "the Educational Entity named in the Declarations and all elected and appointed board members . . . ." The educational entity named in the policy was Sandy Creek.

The relevant exclusions from coverage were set out in the policy as follows:

> EXCLUSIONS. The Company [St. Paul] shall not be liable to make payment for Loss in connection with any claim made against the Insureds allegedly based upon or arising out of any one or more of the following:
>
> . . . .
>
> D. claims, demands or actions seeking relief, in any form other than money damages;
>
> E. for fees or expenses relating to claims, demands or actions seeking relief or redress, in any form other than money damages.

The history of the *Wilson* case shows that on April 4, 1984, four individual plaintiffs (each a resident of Clay County, Nebraska, a registered voter, a "patron" of Sandy Creek, and a parent of children attending school in the Sandy Creek school district) filed a petition in the district court for Clay County, Nebraska, against Sandy Creek and six named persons "*INDIVIDUALLY AND AS MEMBERS OF THE BOARD OF EDUCATION OF [SANDY CREEK]* . . . ." This petition set out four causes of action. The first three causes sought various restraining or mandatory court orders either restraining or requiring Sandy Creek, the individual board members, or both, to do or refrain from doing certain acts with regard to a proposed consolidation of certain schools in the district. Those three causes of action obviously sought relief other than money damages and, under the exclusionary clauses of the policy, did not require St. Paul to afford a defense to either Sandy Creek or the board members.

The fourth cause of action alleged that "the actions of the defendant Board of Education of [Sandy Creek] . . . were null, void and illegal" as violating the provisions of Neb. Rev. Stat. §§ 84-1408 to 84-1414 (Reissue 1981) (commonly known as the "open meetings law"). The fourth cause sought a court order determining that certain actions of the school board members were null and void; requiring the board of education to render an accounting of all moneys spent pursuant to the allegedly void acts; restraining the board members from acting pursuant to their allegedly void acts; and an order that "the individual defendants be required to indemnify and reimburse the School District [Sandy Creek] . . . for all sums paid out or distributed on account of the void acts of March 6, 15 and 27, 1984."

On April 5 the *Wilson* plaintiffs filed a motion seeking a temporary injunction enjoining "defendants individually and as members of the Board of Education of [Sandy Creek]" from holding a certain bond election or issuing any bonds or closing any existing, separate schools in the district. A copy of the petition was delivered to St. Paul's agent in Fairfield, Nebraska, on April 9, 1984. On April 12 a hearing was held on the *Wilson* plaintiffs' motion for temporary injunction, and the motion was denied. On April 17 attorneys for Sandy Creek wrote to St.

Paul's Fairfield agent, seeking "written confirmation of your company's acceptance of this firm in defending the [*Wilson*] lawsuit," informing the agent that the *Wilson* plaintiffs' motion for a temporary injunction had been successfully resisted; and informing him that "trial on other causes of action in the petition has been set for May 3." Trial of the *Wilson* case was held on May 3, and at the conclusion of the plaintiffs' evidence, the case was dismissed on defendants' motion. The *Wilson* plaintiffs filed a notice of appeal to this court, which they later dismissed on or about October 1, 1984. On May 23, 1984, St. Paul wrote to the attorneys representing Sandy Creek, informing them that St. Paul had determined there was no coverage under the policy. Sandy Creek filed its amended petition in this case against St. Paul in October of 1984.

The stipulation of facts above referred to summarized the parties' view of the instant case in setting out that

> [a] controversy exists between plaintiff [Sandy Creek] and defendant [St. Paul], by reason of this dispute as to whether defendant had any duty, pursuant to provisions of the attached insurance policy, to defend or provide coverage to plaintiff by reason of the litigation and issues raised in Wilson v. School District No. 1-C.

It is basic to our review to note that there are two separate "Insureds" under the policy in question—the Sandy Creek district itself and the group consisting of individual members of the school board of Sandy Creek. We have already stated that the first three causes of action against Sandy Creek and the individual school board members did not seek money damages against the district or the school board members. An examination of the fourth cause shows that it does not seek money damages or relief of any kind against Sandy Creek. The seven separate paragraphs in the prayer of the fourth cause of action seek relief only against the board of education and request that "the individual defendants be required to indemnify and reimburse the School District . . . ." If this part of the relief, sought pursuant to the fourth cause of action, constitutes a claim for money damages against Sandy Creek, then St. Paul would have the duty to defend Sandy Creek, even though the thrust of the *Wilson* petition sought a remedy in

equity. In *Ogle v. Lincoln Real Estate, Inc.*, 209 Neb. 704, 310 N.W.2d 513 (1981), a suit was brought in equity to cancel a conveyance of real estate from the defendants to the plaintiffs and for damages sustained by plaintiffs on account of the defendants' conduct in the transaction. The trial court granted equitable relief to the Ogles and awarded them damages, stating at 707-08, 310 N.W.2d at 515, " '[W]here a court of equity has properly acquired jurisdiction in a suit for equitable relief, it will make a complete adjudication of all matters properly presented and involved in the case . . . .' " Therefore, if the fourth cause of action seeks "money damages," St. Paul might have the duty to defend the *Wilson* lawsuit on behalf of its insureds who were alleged to owe such money damages.

Sandy Creek asserts that the fourth cause of action claimed money damages, since it requested that the individual board members "indemnify and reimburse" the district. St. Paul disagrees with this construction of the meaning of "money damages," stating at 9 of its brief that "[i]t is elementary that 'damages' must flow from the wrongdoer to the aggrieved or injured party. Under no circumstances would damages have flowed to the Wilson plaintiffs. They simply did not seek compensation for themselves."

Both parties present the definition of "damages" provided in Black's Law Dictionary 351-52 (5th ed. 1979):

> A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another.

We disagree with St. Paul's position. Initially, we note that in the *Wilson* case the plaintiffs sought damages for themselves. They did not request that money damages be paid directly to plaintiffs, but prayed that money allegedly illegally spent by the board members be restored to the school district in which they were residents and patrons and in which their children went to school.

Secondly, in the situation presented in the instant case, we construe "money damages" to mean money flowing *from* the

individually insured defendants and not necessarily directly *to* the plaintiffs in that case. As used in an exclusionary definition in an insurance policy, "money damages" means money sued for by a plaintiff which plaintiff prays should be paid by the insured directly to, or for the direct or indirect benefit of, the plaintiff allegedly damaged by actions of the insured. It is sufficient to constitute "money damages," in construing the exclusions in the St. Paul policy, if plaintiffs seek to have an insured pay money either to the plaintiffs or for the benefit of the plaintiffs. In the *Wilson* case, the *Wilson* plaintiffs contended that the individual school board members had committed an actionable wrong, that the wrong resulted in an illegal expenditure of public money, and that the plaintiffs were entitled to have money illegally expended repaid to the district by the school board members. Such a repayment would result in a benefit to plaintiffs, in that the school district would regain moneys and thus improve the district's financial position to the indirect benefit of the *Wilson* plaintiffs. The dispositive question in the case before the court in *Wilson* was whether the individual board members were at risk and could be assessed "money damages."

In the instant case, however, Sandy Creek's petition seeks damages for St. Paul's failure to provide coverage and a defense *to Sandy Creek* alone. No money damages, however that term may be defined, were ever sought from Sandy Creek, and St. Paul was not required, under its policy, to extend coverage or a defense to Sandy Creek.

An entirely different situation may be present, however, as to the individual school board members of Sandy Creek. The *Wilson* plaintiffs sought the return of money which had been spent for purposes which the individual school board members thought appropriate and legal but which the *Wilson* plaintiffs thought inappropriate and illegal. The school board members had not received the moneys themselves, so it was not a question of restoring something that they had wrongly taken. Instead, the individuals were faced with the legal request that they pay, from their own funds, sums which they had authorized and directed be spent for purposes they deemed public. Such a request is one for "money damages" against the

individual members of the school board.

Although the question of the two classes of insureds was not presented directly to the trial court, Sandy Creek directly states the question to this court in its first assignment of error—that the trial court erred in failing to recognize St. Paul's obligation to defend the school board members. This question could be considered as being within the allegations of Sandy Creek's petition against St. Paul, if the positions of Sandy Creek and the individual board members in the *Wilson* case were identical. Those positions were not identical and, indeed, might well have been in direct conflict.

In its brief at 9, Sandy Creek states,

> Each of the board members was exposed to personal liability and had the Wilson plaintiffs received the requested relief, "money damages" may have flowed from the individual school board members to the School District. But the law then requires the District to indemnify its board. Neb. Rev. Stat. §79-4,155 (Reissue 1981).

Sandy Creek then asserts that its statutorily required indemnification of the individual members for the payments made to itself would constitute incurring "money damages" by Sandy Creek.

Whatever the merits of Sandy Creek's reasoning, it is based on an erroneous premise. The law does not *require* Sandy Creek to indemnify its board members. Neb. Rev. Stat. § 79-4,155 (Reissue 1981) provides in part:

> (1) A school district shall have *power to indemnify* any person who was or is a party . . . to any . . . pending . . . action . . . *other than an action by or in the right of the school district*, by reason of the fact that he is or was a school board member . . . *if he acted in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the school district* . . . .

(Emphasis supplied.)

Subsection (4) of § 79-4,155 states in part:

> Any indemnification under subdivisions (1) . . . unless ordered by a court, shall be made by the school district *only as authorized in the specific case upon a*

> *determination that indemnification of the school board member . . . is proper in the circumstances because he has met the applicable standard of conduct set forth in subdivisions* (1) . . . . Such determination shall be made by the school board members by a majority vote of a quorum consisting of school board members who were not parties to such action, suit, or proceeding, or if such a quorum is not obtainable, or, even if obtainable a quorum of disinterested board members so directs, by independent legal counsel in a written opinion.

(Emphasis supplied.)

It is apparent that the district is not *required* to indemnify its school board members. The statute also provides that the school district does not have any power to reimburse its school board members if the action against the members is one "by or in the right of the school district." An examination of the *Wilson* petition shows that the *Wilson* plaintiffs might be presenting a claim in the right of the school district and against the school board members.

Sandy Creek did not plead, nor in any way indicate in its petition, that it was presenting a claim for its school board members or that it was an assignee of any of the individuals' rights. Sandy Creek, therefore, may not successfully pursue a claim for coverage against St. Paul which might have been pursued only by its school board members. Sandy Creek's interest might well have been directly adverse to the interests of its board members. The insurance policy issued by St. Paul to Sandy Creek and its board members was issued pursuant to § 79-4,155(7), which provides:

> A school district shall have power to purchase and maintain insurance on behalf of any person who is or was a school board member, officer, employee, or agent of the school district against any liability asserted against him and incurred by him in any such capacity or arising out of his status as such, whether or not the school district would have the power to indemnify him against such liability under the provisions of this section.

St. Paul did not owe Sandy Creek a defense in the *Wilson* case, because only injunctive relief was sought against Sandy

Creek. The position of the school board members in the *Wilson* case is not before us, but it is clear that the attorneys representing Sandy Creek could not also represent the school board members and be reimbursed by St. Paul for their actions. The action of the trial court in this case dismissing Sandy Creek's petition was correct and is affirmed.

AFFIRMED.

KENNETH RUPPERT, WILBUR RUPPERT, BERNARD RUPPERT, I.B. HILL, AND HELEN MAGEE, APPELLEES, V. ETHEL P. BREAULT AND FERN LOUISE FENNY, APPELLANTS.

384 N.W.2d 284

Filed April 4, 1986. Nos. 85-040, 85-041, 85-042, 85-043, 85-044.

1. **Trusts: Property: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property.
2. **Trusts: Fraud: Property.** Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus, if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced.
3. **Trusts: Proof.** The burden of establishing a constructive trust is always upon the person who bases his rights thereon, and he must do so by evidence that is clear, satisfactory, and convincing.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Reversed and remanded with directions to dismiss.

John F. Hanson & Fred T. Hanson of Hanson & Hanson, for appellants.

Arlan G. Wine, for appellees.

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

KRIVOSHA, C.J.

The five appellees in this case, Kenneth Ruppert, Wilbur Ruppert, Bernard Ruppert, I.B. Hill, and Helen Magee, each individually filed suit in the district court for Red Willow County, Nebraska, seeking to impose a constructive trust upon the proceeds of five certificates of deposit purchased by Lloyd H. Ruppert, the proceeds of which are now in the possession of Ruppert's two daughters, the appellants, Ethel P. Breault and Fern Louise Fenny. The cases were ultimately consolidated for trial and are jointly appealed to this court. Following trial in the district court for Red Willow County, Nebraska, the district court imposed a constructive trust upon the proceeds of the five certificates of deposit. It is from this order which the appellants Breault and Fenny appeal. A number of assignments of error are alleged. We turn first, however, to the principal underlying issue, that being whether the district court should have imposed a constructive trust on the proceeds of the five certificates of deposit. We believe that the district court should not have entered such an order, and for that reason we reverse and remand.

The evidence, such as it is presented in the record, is virtually without dispute. The appellants, Ethel P. Breault and Fern Louise Fenny, are the daughters of Lloyd H. Ruppert, who died testate on July 25, 1982. By the terms of a will executed by Ruppert on May 20, 1980, he left all of his residuary estate to his two daughters, if his wife predeceased him. At the time Ruppert executed his will, he also executed an unlimited general durable power of attorney appointing his daughter Ethel P. Breault as his attorney-in-fact.

Following his wife's death in September of 1980, Ruppert instructed Breault that in the event he was rendered helpless by a stroke she was to "cash in all my assets into one account in my bank, because I might lay there a long, long time and it will take a lot of money." One of the appellees, I.B. Hill, corroborated this fact by testifying that Ruppert had given Breault a power of attorney "to be used to pay for his debts or his sickness or anything else; that he did not want to leave this world owing any

money."

The record further discloses that in 1981 Ruppert decided to sell his home and personal belongings. He eventually moved into a trailer on the property of one of the appellees, Kenneth Ruppert. At the time of the sale of his home and personal belongings, Ruppert again repeated his instructions to Breault and gave her a key to his safe-deposit box. The evidence discloses that from time to time he reminded her of his instructions, and as late as June 13, 1982, four days before his final illness began, he again instructed her as to what she was to do with his assets in the event he suffered a stroke. It is reflected by the evidence that during all of this time Ruppert was a strong-minded, independent, and clever businessman who was very capable of handling his own affairs.

On June 17, 1982, Ruppert suffered a stroke. On July 19, 1982, Breault returned from the State of Washington, where she lived, to McCook, Nebraska. Ruppert's doctors advised Breault that Ruppert, in a coma since the stroke, could remain alive in that state for some time. Breault testified that she concluded at that time that in light of his previous instructions to her, and the opinion expressed by the doctor, that it was her "time to take over." She went to Ruppert's bank, The First National Bank of McCook, for the purpose of getting his assets together. She testified that it was her intention to fly him back to the State of Washington when his health improved and take care of him there, using his savings.

Using the key given to her by her father and the original copy of the power of attorney, Breault went to The First National Bank of McCook and opened Ruppert's safe-deposit box. She discovered seven certificates of deposit and several U.S. Savings Bonds. The certificates were issued on four separate banks. Two of the certificates of deposit, each for $10,000, were in the name of Ruppert alone. The other five certificates of deposit, two in the amount of $10,000 and three in the amount of $5,000, were each in the name of Ruppert and one of the appellees. The evidence discloses that Breault was advised by the bank that cashing the U.S. Savings Bonds would be a long, drawn-out process; therefore, she decided to cash all of the certificates of deposit, including those in Ruppert's name

alone, and place them in one account. Upon cashing the First National certificates of deposit, and paying a penalty for early withdrawal, she deposited the remaining funds in Ruppert's bank account at The First National Bank of McCook. She then cashed each of the other three certificates of deposit.

On July 24, 1982, she departed for Washington State, taking with her the savings bonds in Ruppert's name, as well as four cashier's checks made payable to Lloyd H. Ruppert and representing the proceeds of certificates of deposit in The First National Bank of McCook, First Federal Lincoln, American Charter Savings and Loan Association, and the McCook National Bank. Additionally, she withdrew all of the money from Ruppert's checking account except for approximately $2,000 which she left for current expenses. She testified that she intended to open an account in Ruppert's name in Washington State so that she would be able to pay all of his expenses from her home. She also testified that she did this so that, when the time came, she could arrange for Ruppert to be transported to Washington.

All of the assets, including the cashier's checks for the certificates of deposit, were kept in the name of Lloyd H. Ruppert alone. On July 25, 1982, the day after Breault returned to Washington, her father died. Breault was notified, and on July 27, 1982, she returned to McCook, Nebraska, bringing back all of the assets with her and putting all of the cash items in The First National Bank of McCook checking account. Ruppert's will was informally probated on August 2, 1982, and Breault was appointed personal representative. Notice to creditors was published, and the time for filing claims expired October 4, 1982. No objections were filed, and a final accounting and petition for complete settlement was filed on February 17, 1983, and a formal hearing was held on March 15, 1983. At that time the county court entered an order finding that Breault and her sister, Fenny, were the only surviving heirs of Ruppert and entitled to all of the property in his name.

In the meantime, on March 1, 1983, the appellees filed suit in the district court for Red Willow County, Nebraska, seeking to have a constructive trust imposed on the proceeds of the five certificates of deposit. As we have indicated, the district court

granted their relief and imposed a constructive trust.

In beginning our analysis of this issue, we must keep in mind that, this being an action in equity, it is reviewed by us de novo. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985). Before proceeding to review those facts de novo, we believe it appropriate to set out the rules applicable to a constructive trust. In *Kuhlman v. Cargile*, 200 Neb. 150, 157, 262 N.W.2d 454, 458-59 (1978), we noted:

> When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. Campbell v. Kirby, 195 Neb. 610, 239 N.W.2d 792 (1976). A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment. . . . Each case involving the existence of a constructive trust is to be determined on the peculiar facts, circumstances, and conditions presented therein. Jenkins v. Jenkins, *supra*.

Earlier, in *Nelson v. Seevers*, 143 Neb. 522, 527, 10 N.W.2d 349, 351-52 (1943), we described in some detail how a constructive trust comes into existence, noting:

> The subject of constructive trusts, on the other hand, is intimately connected with that of frauds. "Rightly understood, a 'constructive trust' is only a mode by which courts of equity work out equity and prevent or circumvent fraud and overreaching." [Citation omitted.]
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> . . . .
>
> . . . "A constructive trust is a relationship with respect to property subjecting the person by whom the title to the property is held to an equitable duty to convey it to another on the ground that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if he were permitted to retain the property."

In *Nelson, supra* at 527-28, 10 N.W.2d at 352, we further cited from the Restatement of Trusts § 44 (1935), noting:

> "(1) Where the owner of an interest in land transfers it *inter vivos* to another in trust for the transferor, but no

memorandum properly evidencing the intention to create a trust is signed, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the transferor, if

"(a) the transfer was procured by fraud, duress, undue influence or mistake, or

"(b) the transferee at the time of the transfer was in a confidential relation to the transferor."

And in *Guynan v. Guynan*, 208 Neb. 775, 779, 305 N.W.2d 882, 885 (1981), we noted:

"Constructive trusts arise from actual or constructive fraud or imposition, committed by one party on another. Thus if one person procures the legal title to property from another by fraud or misrepresentation, or by an abuse of some influential or confidential relation which he holds toward the owner of the legal title, obtains such title from him upon more advantageous terms than he could otherwise have obtained it, the law constructs a trust in favor of the party upon whom the fraud or imposition has been practiced."

The question that we must then determine is whether Breault acquired title to these funds by reason of some fraud or overreaching. We think not. At the time she cashed the certificates of deposit, Breault had the absolute right to do so, and none of the appellees could have maintained any action or obtained any relief. The evidence is clear that none of the appellees had contributed in any manner to the purchase of the certificates of deposit and that they had been placed in the name of Ruppert and the various appellees solely by Ruppert. Having made that decision in the first instance, he was at liberty to change his mind at any time he chose, and, had he done so, none of the appellees would have been in a position to maintain an action or seek to have a constructive trust impressed upon the proceeds in the hands of Ruppert. By Ruppert's having given Breault a durable power of attorney, Breault stood in the same shoes as Ruppert, and just as Ruppert could not have been required to pay the proceeds over to the five appellees during his lifetime, *Craig v. Hastings State Bank*, 221 Neb. 746, 380 N.W.2d 618 (1986), neither could Breault have been required to

pay the proceeds over to the five appellees so long as Ruppert was alive. Nor could the appellees in this case have prevented Breault from cashing the certificates of deposit and placing the proceeds in an account in Ruppert's name. Neb. Rev. Stat. § 30-2703 (Reissue 1979).

Had Breault not held a durable power of attorney or not placed the proceeds in Ruppert's name but, rather, in her own, we might have a different situation. But she did not do that. Breault's actions during Ruppert's last illness were in all respects legal and proper and clearly within what everyone concedes were Ruppert's instructions to Breault. What caused the disruption was not what Breault did pursuant to Ruppert's instructions but, rather, that, contrary to what Ruppert's doctor told Breault, Ruppert did not survive for a very long time. Instead, he died shortly thereafter. The record is clear, however, that when Breault cashed the certificates of deposit she did not know that Ruppert would soon die but, rather, believed he would survive in a coma for some long time. These facts are not an appropriate situation for imposition of a constructive trust.

Appellees seem to maintain, however, that despite all this, because the proceeds of the certificates of deposit were in the name of Ruppert at the time of his death and therefore passed to Breault and her sister by reason of Ruppert's last will and testament, somehow a constructive trust should be imposed. We have, however, said many times that the burden of establishing a constructive trust is always upon the person who bases his rights thereon, and he must do so by evidence that is clear, satisfactory, and convincing. See, *Slocum v. Bohuslov*, 164 Neb. 156, 82 N.W.2d 39 (1957); *Peterson v. Massey*, 155 Neb. 829, 53 N.W.2d 912 (1952). The evidence in this case simply does not establish clearly, satisfactorily, or convincingly that Breault acquired the property by reason of any improper act. Absent such evidence to the required degree, the imposition of a constructive trust is inappropriate.

In *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976), this court was presented with a situation not too dissimilar from the instant case. The appellee, Dorothy Marco, married Lawrence Marco following the death of Lawrence Marco's first

wife, who was the mother of his two sons, Jerry and Jim. Together, Lawrence and Dorothy had 12 children. The evidence further reflected that Lawrence Marco's sons by his previous marriage each, from a very early age, began to work for his father in his various auto businesses and continued to do so throughout his adult life. Each of them constructed homes or businesses on properties owned by Lawrence and Dorothy but maintained by the two sons. The evidence further disclosed that, with regard to one of the parcels, the son furnished the money for the improvements. There was also evidence that the father had said that when he died the properties would belong to his sons. The properties were referred to as the sons' property, though legal title was not in their names. Following the father's death, the sons filed suit to impose constructive trusts on the real estate on which they lived or worked, maintaining that they had occupied the premises for all these years under the representations and assurances from their father that the property would be theirs, even though legal title was otherwise. Nevertheless, this court refused to impose a constructive trust, noting at 325-26, 242 N.W.2d at 875-76:

> The record is completely devoid of any evidence, direct or by inference, to show that Dorothy was named as a grantee in the deeds through some abuse of a confidential relationship. . . .
>
> The evidence therefore does not establish prima facie that Dorothy obtained title by virtue of a confidential relationship, under such circumstances that she ought not, according to the rules of equity and good conscience as administered in chancery, hold and enjoy the benefits of title to the property in question. Under the circumstances shown, equity need not raise a trust by construction upon the legal title to the real estate in question.
>
> Lawrence may well have intended, and we must accept on the basis of the record, that he did orally express his intention that Jerry was to have his home and building and Jim his home, but this alone is not enough to raise a constructive trust in the real estate. If it were, then no deed and no will would be secure. There is nothing in the record to show that such intention was communicated to

Dorothy or that she took title with some agreement with reference thereto.

To the same extent, in the instant case there is no evidence to indicate that Breault either acquired the durable power of attorney or transferred the certificates of deposit into Ruppert's name through either a fraudulent act or in violation of a confidential relationship. At the time that the action was taken, Breault had every reason to believe that Ruppert might remain in a coma for some long time. While one may question in hindsight whether Breault's decisions were the wisest ones, she was simply acting in accordance with the instructions she had previously been given by Ruppert, and in accordance with the legal documents delivered to her by Ruppert. It is clear that, by reason of Ruppert's suffering a stroke before dying, the appellees lost the potential benefit they might have otherwise acquired. But, until Ruppert died, they did not have any present right in that property superior to Ruppert or Breault under the durable power of attorney. Once Ruppert died, the title to the property, having properly passed into Ruppert's name alone, transferred to Breault and Fenny by reason of Ruppert's last will and testament. We do not believe that such evidence meets the test of clearly, satisfactorily, and convincingly establishing the fact that Breault took advantage of some confidential relationship to the detriment of the appellees and in some manner acquired title to property which they lawfully should otherwise have had. See *In re Estate of Lienemann, ante* p. 169, 382 N.W.2d 595 (1986). For that reason we believe that the district court erred in imposing a constructive trust and order that the judgment be reversed and the cause remanded with instructions to dismiss.

There are several other issues raised by this appeal. In view of the fact, however, that we have determined that a constructive trust should not have been imposed and that the property should have remained with Breault and Fenny, we do not address these other issues.

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

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

PAUL S. BESHORE, APPELLANT, V. JEAN SIDWELL, TREASURER OF BUFFALO COUNTY, NEBRASKA, APPELLEE.
GRENOBLE PARTNERSHIP, A SOUTH DAKOTA LIMITED PARTNERSHIP, APPELLANT, V. JEAN SIDWELL, TREASURER OF BUFFALO COUNTY, NEBRASKA, APPELLEE.

384 N.W.2d 290

Filed April 4, 1986. Nos. 85-084, 85-085.

1. **Taxation.** When the tax is void, either because the person assessed was not subject to taxation, or because it was assessed for an unlawful purpose, or without compliance with provisions of law imposed, it can be recovered back or treated as void in proceedings to enforce payment of tax.
2. **Taxation: Valuation.** In cases where property is assessed at a higher proportion of its actual value than other property similarly located, the taxpayer should first apply to the board of equalization to correct any errors therein. This appears to be a prerequisite to bringing legal action.
3. **Taxation: Valuation: Collateral Attack.** The claim that property is assessed too high for taxation purposes cannot be made in the first instance by direct application to any other body or by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void.

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

Patrick J. Nelson of Jacobsen, Orr & Nelson, P.C., for appellants.

Gerald R. Jorgensen, Deputy Buffalo County Attorney, for appellee.

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

KRIVOSHA, C.J.

In this appeal we are presented with two cases which have been consolidated for argument before this court. The relevant facts and legal principles applicable thereto in each case are identical. Both appellants, one an individual, the other a limited partnership, brought suit in the district court for Buffalo County, Nebraska, alleging that they had paid property taxes within the 2 years preceding the filing of their respective actions

in Buffalo County, Nebraska. The appellants also each alleged that, by reason of this court's decision in *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), a portion of the total tax paid was invalid and that, therefore, each appellant is entitled to a refund in such amount as would be determined by the district court. Appellants further alleged that a portion of the tax was invalid for all of the reasons more particularly raised in the case of *Kearney Convention Center v. Board of Equal., supra*, and ruled upon by us in that case.

Subsequently, the district court for Buffalo County, Nebraska, sustained a demurrer filed by appellee. While we may disagree with the basis upon which the district court sustained the demurrer, we do believe that its conclusion in that regard was correct, and for that reason the judgment of the district court must be affirmed.

As the basis of their appeal, appellants argue that prior to amendment, Neb. Rev. Stat. § 77-1735 (Reissue 1981) provided in pertinent part as follows:

> If a person, who claims a tax, or any part thereof, to be invalid for any reason, shall have paid the same to the treasurer, or other proper authority, in all respects as though the same was legal and valid, he may, at any time within two years after such payment, demand the same in writing from the county treasurer to whom paid. If the same shall not be refunded within ninety days thereafter, he may sue such county treasurer for the amount so demanded.

In 1984, following our decision in *Kearney Convention Center v. Board of Equal., supra*, the Nebraska Legislature amended § 77-1735 (Cum. Supp. 1984) to provide in part, after amendment, as follows:

> If a person who claims a tax or any part thereof to be invalid for any reason other than the valuation of the property shall have paid the same to the treasurer or other proper authority in all respects as though the same was legal and valid, he or she may, at any time within thirty days after such payment, demand the same in writing from the county treasurer to whom paid. If the same shall

> not be refunded within ninety days thereafter, he or she may sue such county treasurer for the amount so demanded.

See 1984 Neb. Laws, L.B. 835, § 15. The amendment to § 77-1735 became effective on July 10, 1984.

Appellants argue that they had a vested right to make demand within 2 years of payment and, therefore, to have reduced that right to 30 days after payment when the 30 days had already expired would be wholly improper.

While we might agree with appellants in that regard, we never reach that issue. The reason we do not is that the law in Nebraska is clear that, even before the amendment of § 77-1735, appellants could not have maintained the action they brought here. In the case of *Xerox Corp. v. Karnes*, 217 Neb. 728, 350 N.W.2d 566 (1984), we held that a declaratory judgment was a proper remedy to determine the constitutionality of a statute and that Neb. Rev. Stat. § 77-1301(1) (Reissue 1981) was invalid as being contrary to the Nebraska Constitution. We remanded the cause with directions to enter a judgment in conformity with the opinion. Upon remand the district court entered a judgment upon the mandate which conformed to our opinion. Xerox then sought to recover that portion of the taxes paid by it and which it maintained was now invalid by reason of our decision in *Xerox Corp. v. Karnes, supra*. The district court refused to do so, and Xerox again appealed to this court.

In rejecting Xerox's action seeking to have the judgment on the mandate order the return of taxes allegedly paid in excess of those which were due, we said:

> While it is true that property is to be valued at its actual value for purposes of taxation, and taxes are to be levied by valuation uniformly and proportionately upon all tangible property, it does not follow that taxes levied upon property in excess of its actual value are void and unenforceable. In fact, the rule in this state is to the contrary.

Xerox Corp. v. Karnes, 221 Neb. 691, 692, 380 N.W.2d 277, 278 (1986).

We then proceeded to quote from *Power v. Jones*, 126 Neb.

529, 532-33, 253 N.W. 867, 868 (1934), wherein we said:

> "When the tax is void, either because the person assessed was not subject to taxation, or because it was assessed for an unlawful purpose, or without compliance with provisions of law imposed, it can be recovered back or treated as void in proceedings to enforce payment of tax." [Citation omitted.]
>
> . . . .
>
> . . . In cases where property is assessed at a higher proportion of its actual value than other property similarly located, the taxpayer should first apply to the board of equalization to correct any errors therein. This appears to be a prerequisite to bringing legal action.

In *Riha Farms, Inc. v. Dvorak*, 212 Neb. 391, 322 N.W.2d 801 (1982), we held that the exclusive remedy for relief from the overassessment of property for tax purposes is by appeal to the district court from the order of the county board of equalization fixing the assessed value of the property. Specifically, in *Riha, supra* at 393, 322 N.W.2d at 803:

> The claim that property is assessed too high for taxation purposes cannot be made in the first instance by direct application to any other body or by a collateral attack in law or equity in the event of failure to bring the matter before the county board of equalization and to appeal therefrom in case of an adverse determination. A collateral attack may be made upon an assessment of property for tax purposes only if the assessment, or some part thereof, is wholly void.

Neither the amount of the assessment in *Xerox Corp. v. Karnes*, 221 Neb. 691, 380 N.W.2d 277 (1986), or in *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), was determined by this court to be wholly void. For that reason appellants' only avenue of relief was to have appealed the assessments, in the first instance, to the county board of equalization and, thereafter, to the district court if no relief was obtained from the county board of equalization. Since appellants here failed to do so, the district court was without jurisdiction.

Until the board of equalization determines that the

assessments in this case were excessive and determines what the correct valuation should be, the district court is without jurisdiction. Under § 77-1735 the taxpayer must be in a position to make demand upon the county treasurer for a specific amount claimed to have been paid improperly, and not for such amount as the county treasurer, in the first instance, and the district court, on appeal, might determine, because the county treasurer has no authority to reassess the property and reduce the taxes. In this case the appellants imposed upon the district court the obligation of determining what the correct value should be. That authority, however, initially vested in the county board of equalization. Since appellants failed to ask for such relief before the county board, the district court was without jurisdiction to grant it through a collateral proceeding.

This lack of jurisdiction, however, is not by reason of the language of § 77-1735, either before its amendment or after, but, rather, by the declarations of this court as to the proper procedure to follow in seeking relief for property assessed in excess of the manner prescribed by statute.

Appellants argue to us that the Legislature would not have amended § 77-1735 unless it believed that such amendment was necessary to preclude claims for refund being made. Such argument must be rejected. As we have already said, even before § 77-1735 was amended to specially preclude an action such as the one brought here, such an action could not be maintained. The amendment to § 77-1735 merely made clear by statute what was already the law. The fact that the Legislature may have believed that such amendment was necessary does not change the law nor permit such action to be brought directly in the district court. The decision of the district court in sustaining the demurrer was correct. The judgment is affirmed.

AFFIRMED.

SCHOOL DISTRICT OF SANTEE, KNOX COUNTY, NEBRASKA, ALSO KNOWN AS SCHOOL DISTRICT NO. C-5, APPELLANT, V. RANDALL ANDERSON, COUNTY SUPERINTENDENT OF SCHOOLS, KNOX COUNTY, NEBRASKA, ET AL., APPELLEES.

384 N.W.2d 293

Filed April 4, 1986. No. 85-134.

Schools and School Districts. When any territory not included in a school district offering secondary education becomes a part of such a district, the territory's proportionate share of any balance remaining in the nonresident tuition fund as of September 15 shall be credited to the district of which the territory has become a part.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Affirmed in part, and in part reversed.

John M. Peebles of Peebles, Smith & Farrell, for appellant.

Dale P. Riesberg, for appellees school districts, and Gregory M. Neuhaus, for appellees Anderson et al.

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

WHITE, J.

This is an appeal involving the disposition of the free high school fund of Knox County, Nebraska, 9 years after the dissolution of the sole remaining Class I district in that county.

The district court distributed the fund but denied the appellant, Santee district No. C-5, any share on the authority of *School District of Murray v. Lancaster*, 203 Neb. 109, 277 N.W.2d 558 (1979). Santee district had admittedly drawn from the fund an amount substantially in excess of the amount contributed from the proceeds of the levy. Santee appeals.

At first blush the case appears indistinguishable from *Murray, supra*. However, certain differences require a result entirely different from the result in that case. At issue again is the language of a part of Neb. Rev. Stat. § 79-4,104 (Reissue 1981), which reads as follows:

> When any territory not included in a school district offering secondary education becomes a part of such a district, the territory's proportionate share of any balance

remaining in the nonresident tuition fund as of September 15 shall be credited to the district of which the territory has become a part.

In *Murray, supra*, we determined that a dissolved Class I district's "proportionate share" depended on whether the district had contributed more to the fund than withdrawn from the fund on its behalf. A brief recitation of the facts surrounding Santee's application for distribution is necessary to an understanding of the matter.

On August 2, 1976, Center district No. C-24 and Sparta district No. 50 were dissolved, leaving the Santee district the only Class I district in Knox County. On September 15, 1976, following the dissolutions, the free high school fund had a balance in the office of the county treasurer in the amount of $44,018.02. No application for distribution of its proportionate share was made by the Center or Sparta district, nor had there been any application for distribution by any of the other former Class I districts in Knox County, four of which had been dissolved between 1971, when the fund had a zero balance, and May of 1976. Santee was dissolved in June of 1977. Santee does not seriously assert that it is entitled to any part of the amount on hand on September 15, 1976, since it had drawn from the fund more than it had contributed to that point. It does, however, assert two main points.

First, the extent of the withdrawal of contributions of a dissolved Class I district is limited to the funds on hand September 15 following dissolution and, second, that as the last district dissolved, it is the only district eligible to receive the funds accumulated in the fund after September 15, following the dissolution of the second to last district.

The appellees strenuously suggest that this would provide a windfall for Santee, that it would be collecting money paid into the fund by others, and that this result would not be "proportionate" to its contribution. This argument has a certain validity; however, we are not free to formulate a logical and just scheme for the distribution when the language of the Legislature is unambiguous. *Wang v. Board of Education*, 199 Neb. 564, 260 N.W.2d 475 (1977).

It is abundantly clear that the entitlement of the dissolving

district is determined by the condition of the fund on September 15 after dissolution. It is also abundantly clear that the Legislature intended that the money be transferred to an existing K-12 district and not forfeit to the county general fund.

We can only conclude that in the absence of any other direction by the Legislature, the "proportionate share" of the last Class I district (Santee) is the entire fund accumulated since September 15 of the year in which the second to the last district was dissolved.

AFFIRMED IN PART, AND IN PART REVERSED.

THE FEDERAL LAND BANK OF OMAHA, A CORPORATION, APPELLEE, V. GORDON E. MCELHOSE AND VLASTA MCELHOSE, HUSBAND AND WIFE, APPELLANTS, IVADELLE SEDIVY ET AL., APPELLEES.

384 N.W.2d 295

Filed April 4, 1986. No. 85-154.

1. **Judgments: Equity.** The judgment of a court of equity is called a decree.
2. **Jurisdiction: Time: Appeal and Error.** The time within which an appeal must be taken is mandatory and must be met in order for an appellate tribunal to acquire jurisdiction of the subject matter.
3. **Judgments.** A judgment is the final determination of the rights of the parties.
4. _____. The rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket.
5. _____. Failing a notation on the trial docket, a judgment is rendered when some written notation is made and filed in the records of the court.
6. _____. Where a second judgment in part contradicts an earlier judgment, the time for appeal from that portion of the second judgment which contradicts the earlier judgment, and that portion only, runs from the rendition of the second judgment.
7. **Judgments: Courts.** A trial court should limit itself to entering but one final determination of the rights of the parties in a case.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Appeal dismissed as to first decree. Affirmed as modified as to second decree.

John Thomas, for appellants.

Charles Caldwell, for appellee Federal Land Bank.

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

CAPORALE, J.

Plaintiff-appellee, The Federal Land Bank of Omaha, a corporation, obtained two decrees foreclosing its mortgage upon land owned by the defendants-appellants, Gordon E. and Vlasta McElhose, husband and wife. In their appeal to this court the McElhoses assign as error the trial court's (1) inclusion in the second of its decrees a certain 80-acre parcel of land which had been exempted by the parties and had been excluded from the operation of the court's earlier decree, and (2) impliedly ruling in both decrees that the variable interest rate mortgage note the McElhoses executed was valid and enforceable. The bank asserts this court lacks jurisdiction to entertain the appeal because the McElhoses did not perfect it in time. We dismiss the appeal as to the trial court's first decree and affirm as modified as to its second decree.

In consideration of a $94,000 loan, the McElhoses executed and delivered to the bank a written promissory note which provided for a rate of interest which could vary in accordance with the bank's wishes. As a part of the same transaction and to secure the loan, the McElhoses executed and delivered to the bank a mortgage on approximately 598 acres of land in Knox County. Upon the McElhoses' default on the note, the bank brought this action against the McElhoses and other lienholders to foreclose the bank's mortgage and have it declared a first lien on the land.

The bank's petition excluded from its prayer, however, a certain 80-acre parcel of land, as the bank had previously released its mortgage thereon. During the course of the action, the other lienholders also excluded that 80-acre parcel from their various foreclosure proceedings against the McElhoses.

In their answer to the bank's petition, the McElhoses alleged that the unconscionability of a variable interest rate rendered the note void and unenforceable, and prayed for dismissal of

the bank's action. The McElhoses also answered the cross-petitions of, and prayed for dismissal of the proceedings brought by, the other lienholders.

In announcing its decision on December 4, 1984, the trial court found that the McElhoses were in default of the bank's note and mortgage and that the bank had a first lien on the land described in its petition, save and except for the 80-acre parcel which it had previously released from operation of the mortgage. The decision also excluded the aforesaid 80-acre parcel from the liens decreed in favor of the other lienholders. On the same day as the decision was announced, it was typed on the court's trial docket.

On January 25, 1985, a more formal statement of its decision, entitled "Decree," was signed by the trial judge. This second decision does not exclude the 80-acre parcel from the operation of the various liens established in accordance with the trial court's decision as announced on December 4, 1984, but otherwise conforms with that earlier decision. No further notation was made on the trial docket concerning the January decision.

The McElhoses filed their notice of appeal on February 19, 1985.

We first address the bank's contention that this court lacks subject matter jurisdiction. The bank's position rests on the premise that the only operative judgment, or decree, as the judgment of a court of equity is called, Black's Law Dictionary 369 (5th ed. 1979), was the one rendered in December when the trial court announced its decision and caused it to be typed on the trial docket. Thus, it argues, the McElhoses' notice of appeal is untimely, as it was not filed within 1 month of that date, as required by Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1984). See *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985), which holds that an appellate court acquires no jurisdiction if that mandatory time limit is not met. The McElhoses, on the other hand, argue that the operative decree was the second one rendered the following January when the trial court signed the more formal document evidencing its decision; thus they contend their appeal is timely. Neither position is entirely correct.

Neb. Rev. Stat. § 25-1301 (Reissue 1979) defines a judgment as the final determination of the rights of the parties and defines the rendition of a judgment as "the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket . . . ." *Sederstrom v. Wrehe*, 215 Neb. 429, 339 N.W.2d 74 (1983), holds that an entry reading "Intervenor's Mot. for S.J. Sustained" made on the trial docket constituted a judgment and that a later document setting out the sustainment of the motion for summary judgment in greater detail merely confirmed the docket entry. *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984), holds that failing a notation on the trial docket, a judgment is rendered when some written notation is made and filed in the records of the court, in that case a document entitled "Judgment," which was signed by the judge and filed with the court's clerk.

In the present case the trial court's December pronouncement, followed by the docket entry of that day, finally determined the rights of the parties and constituted the rendition of a decree. The signing and subsequent filing of the more formal statement of its decision the following January also constituted the rendition of a decree, for it, too, undertook to finally determine the rights of the parties, was signed by the judge, and was filed in the court's records. The difficulty is that, unlike the situation in *Sederstrom v. Wrehe, supra*, the second decree did not merely confirm the earlier one; the January decree in part confirmed but in part contradicted the decree rendered the preceding December by foreclosing upon land expressly exempted in the December decree.

Under such a circumstance the notice of appeal was timely with respect to that portion of the January decree which contradicted the December decree but untimely with respect to those portions of the January decree which confirmed the earlier decree. Thus, we have jurisdiction with respect to the McElhoses' first assignment of error, which deals with that portion of the second decree which contradicts the first decree, but not with respect to the second assignment of error, which deals with those portions of the first and second decrees which are consistent with each other.

The record does not support foreclosure upon the 80-acre parcel of land which the bank had previously released from the operation of its mortgage. To that extent the trial court's second decree is erroneous. Accordingly, the trial court is directed to modify its January decree so as to exclude from its operation the aforesaid 80-acre parcel of land and thereby conform its January decree to its previous decree.

We observe that the confusion presented by this case can be avoided if trial courts will, as they should, limit themselves to entering but one final determination of the rights of the parties in a case.

APPEAL DISMISSED AS TO FIRST DECREE.
AFFIRMED AS MODIFIED AS TO SECOND DECREE.

SUZANNE BRECKENRIDGE, ADMINISTRATRIX OF THE ESTATE OF ALBERT BRECKENRIDGE, DECEASED, APPELLANT, V. MIDLANDS ROOFING COMPANY, APPELLEE.

384 N.W.2d 298

Filed April 4, 1986. No. 85-300.

1. **Workmen's Compensation: Appeal and Error.** 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. If the findings are supported by sufficient evidence, they will not be disturbed on appeal unless clearly wrong.
2. **Workmen's Compensation: Proof.** In an action to obtain an award of benefits under the Nebraska workmen's compensation law, the burden of proof is on the plaintiff to establish by a preponderance of the evidence that the injury or death was sustained by an accident arising out of and in the course of the employment.
3. **Workmen's Compensation: Death: Presumptions.** Where a violent death is shown under circumstances indicating that death occurred within the time and place limits of the employment without evidence as to the cause of death, there is no presumption that the death arose out of and in the course of the employment by virtue of Neb. Rev. Stat. § 48-151 (Reissue 1984).

4. **Death: Evidence: Presumptions.** There exists in Nebraska a presumption against death by suicide, but that presumption is rebuttable and is overcome and disappears when either direct or circumstantial evidence is introduced showing that the death was caused by suicide. The burden is then upon the party asserting such to adduce evidence that the death was accidental and not from suicide.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Richard J. Bruckner, for appellant.

Harry R. Henatsch of Katskee & Henatsch, for appellee.

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

WHITE, J.

This is an appeal from an order of dismissal on rehearing by the Nebraska Workmen's Compensation Court entered on March 27, 1985. A previous single-judge hearing resulted in a dismissal on April 16, 1984. Appellant, Suzanne Breckenridge, administratrix of her deceased husband's estate, alleged in her petition for benefits that decedent died accidentally from carbon monoxide poisoning on October 18, 1983, while in the course of his employment. Appellee, Midlands Roofing Company, admitted decedent's death was the result of carbon monoxide poisoning but denied that death arose out of and in the course of employment. Appellee alleged that decedent came to his death by his own willful negligence. The Workmen's Compensation Court dismissed appellant's petition, finding that a preponderance of the evidence indicated death by suicide rather than by accident.

The decedent, Albert Breckenridge, died of carbon monoxide poisoning in the garage of his employer's building sometime before 7 a.m. on October 18, 1983. The decedent was the first employee to report to work on the morning of his death. He started the engines of four company vehicles, without opening the garage doors. He was found slumped down against a wall by another employee. The rescue squad was called, but decedent was already dead when he was discovered. Whether starting the vehicles that morning to prepare them for the day's work was in the nature of decedent's employment

duties was disputed at trial. Also in dispute were the decedent's emotional state in the days prior to his death, and the severity of his family problems. He had been separated from his wife for several days prior to his death. No suicide note was found.

Appellant assigns as error six items which can be summarized as the court below erred in finding that decedent's death was caused by suicide rather than by an accident within the scope of his employment.

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. Neb. Rev. Stat. § 48-185 (Reissue 1984). If the findings are supported by sufficient evidence, they will not be disturbed on appeal unless clearly wrong. *Friedeman v. State,* 215 Neb. 413, 339 N.W.2d 67 (1983). We find no evidence that the Workmen's Compensation Court was clearly wrong in its findings, and we affirm its decision.

The following provisions of the workmen's compensation law are relevant in this case. Neb. Rev. Stat. § 48-101 (Reissue 1984) states:

> When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.

Neb. Rev. Stat. § 48-151 (Reissue 1984) provides in part:

> (2) The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment.
>
> . . . .

> (7) For the purpose of this act, willful negligence shall consist of (a) deliberate act, (b) such conduct as evidences reckless indifference to safety . . . .

The facts of this case lead to an initial conclusion of unexplained death. In an action to obtain an award of benefits under the Nebraska workmen's compensation law, the burden of proof is on the plaintiff to establish by a preponderance of the evidence that the injury or death was sustained by an accident arising out of and in the course of the employment. *Hannon v. J. L. Brandeis & Sons, Inc.*, 186 Neb. 122, 181 N.W.2d 253 (1970). Where a violent death is shown under circumstances indicating that death occurred within the time and place limits of the employment without evidence as to the cause of death, there is no presumption that the death arose out of and in the course of the employment by virtue of § 48-151. *Id.* There also exists in Nebraska a presumption against death by suicide, but that presumption is rebuttable and is overcome and disappears when either direct or circumstantial evidence is introduced showing that the death was caused by suicide. The burden is then upon the party asserting such to adduce evidence that the death was accidental and not from suicide. *Mustard v. St. Paul Fire & Marine Ins. Co.*, 183 Neb. 15, 157 N.W.2d 865 (1968).

Appellee in this case produced sufficient evidence to show that death could have been caused by suicide. It is clear that appellant had the burden of proving (1) that death was accidental and (2) that death arose out of and in the course of decedent's employment. The court below found that the preponderance of evidence indicated death by suicide. Absent extraordinary circumstances, suicide constitutes willful negligence under § 48-151. See *Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983). Death due to willful negligence causes the claim for benefits under the workmen's compensation law to fail, and appellant is precluded from recovering.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN W. SCHOTT, APPELLANT.

384 N.W.2d 620

Filed April 4, 1986. No. 85-313.

1. **Intent: Words and Phrases.** Intentionally means willfully or purposely, and not accidentally or involuntarily.
2. _____: _____. Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. Neb. Rev. Stat. § 28-109(19) (Reissue 1979).
3. _____: _____. The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
4. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury—all of which is within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.
5. **Circumstantial Evidence.** 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.
6. **Evidence: Verdicts: Appeal and Error.** The Supreme Court will not interfere with a guilty verdict based on evidence, unless that evidence, so lacking probative force, is insufficient to support a verdict beyond a reasonable doubt.
7. **Criminal Law: Courts: Appeal and Error.** Appeals in criminal cases tried in a county court are governed by Neb. Rev. Stat. § 29-613 (Reissue 1979), and are restrictively disposed on the basis of the record made in the county court.
8. _____: _____: _____. A district court's review of criminal cases tried in a county court is limited to an examination of the record for error or an abuse of discretion which occurred in the county court.
9. **Criminal Law: Sentences: Courts: Appeal and Error.** A district court may modify a sentence imposed by a county court only where the county court has so abused its discretion as to render its sentence an error upon the record presented.

Appeal from the District Court for Polk County: ORVILLE L. COADY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Cunningham, Blackburn, VonSeggern, Livingston & Francis, for appellant.

Robert M. Spire, Attorney General, and Dale D. Brodkey, for appellee.

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

SHANAHAN, J.

A jury in the county court for Polk County convicted John W. Schott of two counts of cruelty to animals in violation of Neb. Rev. Stat. § 28-1002 (Reissue 1979). Schott appealed his conviction and sentence to the district court, which affirmed Schott's conviction but modified the sentence imposed by the county court. We affirm in part and in part reverse and remand for further proceedings.

The complaint filed against Schott charged him with two counts of cruelty to livestock in the winter of 1983-84.

Section 28-1002 provides in part:

> (1) A person commits cruelty to animals if, except as otherwise authorized by law, he intentionally or recklessly:
>
> (a) Subjects any animal to cruel mistreatment; or
>
> (b) Subjects any animal in his custody to cruel neglect
>
> . . . .

Statutory definitions applicable to the charges against Schott are:

> (2) Cruel mistreatment shall mean every act or omission which causes, or unreasonably permits the continuation of, unnecessary or unjustifiable pain or suffering;
>
> (3) Cruel neglect shall mean failure to provide food, water, protection from the elements, opportunity to exercise, or other care normal, usual, and proper for an animal's health and well-being . . . .

Neb. Rev. Stat. § 28-1001 (Reissue 1979).

Schott, 49, has raised cattle and hogs for 30 years and conducted his livestock operations on a 400-acre tract 5 miles from his residence near Osceola. That tract included a 185-acre pasture of native grasses and buildings for hogs. In the autumn of 1983 Schott had to supplement his pasture because cattle had grazed to the point that the grasses were "short," approximately 1 inch. On the weekend after Thanksgiving

1983, a blizzard struck Schott's operations. Between Thanksgiving and January 1984, according to Schott, 10 of his hogs and 34 head of cattle died.

On December 9, 1983, Timothy Siemek, Polk County sheriff, received a telephone call from one of Schott's neighbors, informing the sheriff that several dead or starving cattle were visible from the county road near Schott's pasture. From the road at Schott's livestock operations, Sheriff Siemek saw two cattle carcasses in the pasture, contacted Schott, and asked about his care given to the cattle. Schott responded that he was taking care of his livestock with daily watering and feeding, although he was having trouble with snowmobilers on his property. As Sheriff Siemek and a deputy drove past Schott's pasture and hog facility on December 12, they saw four dead cattle, including two carcasses which had been observed on December 9. The sheriff, in the company of his deputy and Schott, who had consented to the entry, went into the pasture, where there were eight or nine cattle carcasses and a cow alive but "extremely thin and boney." A frozen pond was the only water supply. No action was taken until a neighbor's second complaint on December 19, after which the sheriff again contacted Schott about care of his cattle. Schott said he would have the cattle removed to a commercial feedlot.

After another neighbor's complaint, this time about Schott's hogs, on January 11 the sheriff paid his third visit to Schott's, where he saw two dead cattle near a driveway and some "very thin" hogs. Siemek directed Schott to "dispose of the hogs or move them back to his home place where he could take better care of them." When Siemek drove by the livestock area on January 23, he neither saw nor heard hogs on the place. With a search warrant and Dr. James Varney, a local veterinarian, Sheriff Siemek went to Schott's cattle and hog operation on January 25, entered the pasture, discovered 40 dead cattle, with "very thin, skin . . . pulled tight [with] pin bones . . . very noticable [sic] in the larger cattle." Cedar trees in the pasture were "devoid of any foliage" and had "no needles, cedar needles," to a height of 6 feet. Thorny gooseberry bushes, normally 3 to 4 feet tall, were eaten to a height of 1 foot. There were no cattle alive. While inspecting buildings used for hogs,

Siemek found four dead hogs in one building, three other carcasses in a second building, no food in the feeders, no bedding for the hogs, and partially eaten hog carcasses. One hog was eating the remnants of another hog. On later inquiry by the sheriff, Schott said that several hogs had died after they had fallen from an elevated feeding platform and were unable to reach food.

With another search warrant Sheriff Siemek returned to Schott's on January 26. Accompanying the sheriff were an investigator for the Nebraska Brand Committee, Dr. Varney, and two additional veterinarians, Dr. Alan Doster and Dr. Rodney Moxley, both professors in the College of Agriculture at the University of Nebraska-Lincoln.

Dr. Doster, a veterinarian-pathologist, was called upon to perform necropsies on the animals. A necropsy is the "animal term for autopsy," or a post mortem examination to determine the cause of an animal's death. During necropsies, Dr. Varney used a stick to drive off hogs trying to eat the organs eviscerated from the "posted" animals. Necropsies disclosed that some hogs had empty stomachs except for feces which had been eaten. There was no running water or bedding, and the depth of manure was 6 inches at the hog facilities. The ribs on cattle carcasses protruded "very much." Tree branches had been eaten to a height of 5 or 6 feet above ground. Cedar branches had been eaten—an extraordinary occurrence. Because cedars have aromatic hydrocarbons, such as those found in turpentine, "animals will not eat cedar trees unless they absolutely have to." The contents of rumen (the first compartment of a bovine stomach) usually have the "consistency of watery oatmeal," but in the carcasses at Schott's the rumen contents were "all balled up," an indication of dehydration. Dr. Doster concluded that Schott's "animals had been suffering from malnutrition; and, probably had died as a result of malnutrition, coupled with the weather, management procedures, and also the lack of water." As explained by Dr. Doster, animals need a greater quantity of food during cold weather in order to generate and maintain energy for suitable body temperature. Cold weather produces an increase in an animal's appetite and a decrease in the animal's efficiency in converting food into energy.

Malnutrition causes pain to animals. When Schott's animals were deprived of sufficient food, water, care, and shelter, the extreme cold weather brought "everything to an apex and killed these animals." Normal death loss, under weather conditions prevailing when Schott's livestock died, was less than 3 percent. Death loss at more than 3 to 4 percent indicated "there is something wrong."

Dr. Rodney Moxley, a diagnostic veterinarian, found nothing toxic or infectious as a result of necropsies. Intestinal tracts of the cattle carcasses were "devoid of food contents." Dr. Moxley noted carcasses in a state of "sternal recumbency"—an animal's position on the ground with its chest "straight up and down" and its "hind limbs pointing straight backwards, where the knees of the hind legs were behind" the animal. Such position is attributable to weakness preventing the animal from getting its "legs up underneath them." Dr. Doster had also observed that state in the carcasses of Schott's cattle and recognized such position as one of the characteristics of cattle death by starvation. Having seen hogs "cannibalizing carcasses" of dead swine at Schott's, Dr. Moxley testified: "Cannibalism in swine occurs with pica or abnormal appetite" which "comes about when there is starvation." According to Dr. Moxley, the cause of death for Schott's cattle was "emaciation" as a result of an "inadequate food supply." Absence of food produces abdominal cramping and pain in animals.

Dr. Ernest R. Peo, Jr., a professor of animal science at the University of Nebraska-Lincoln, characterized "animal husbandry" as management, feeding, and care of animals. In Dr. Peo's opinion Schott had not adhered to proper animal husbandry regarding his cattle and swine, and the animals were "grossly deficient in energy nutrition." If swine are not well fed, they will eat the carcasses of dead animals and feed on feces. In his 28 years' experience Dr. Peo had never seen malnutrition and dehydration to the extent found in Schott's livestock.

According to Dr. Varney, the local veterinarian, Schott's livestock died from "a combination of malnutrition and dehydration, with subzero temperatures exacerbating the situation." A neighbor and commercial cattle feeder saw some

of Schott's cattle dead during the cold weather and "curled around the trees . . . it was a sin to see it."

Climatological data reflected a severe winter in the Osceola area, including 13 inches of snow on November 29, the Tuesday following Thanksgiving, and a low temperature of -23 °F on December 22.

A veterinarian with the diagnostic laboratory of Kansas State University testified for Schott and expressed an opinion that the cause of death of Schott's livestock was a "limited state of nutrition" before the severe weather in November, that Schott's inability to feed his livestock "initiated the demise of [Schott's] cattle," and that "the severe weather had a great deal to do with the loss of the swine."

Before arrival of Sheriff Siemek and the veterinarians on January 26, Schott had taken 97 head of cattle to a local commercial feeder, who testified 13 of Schott's dehydrated cattle died in the first 4 days after delivery to the feedlot.

Schott's defense was based on the extreme weather conditions which, he claimed, prevented appropriate attention to his livestock and, therefore, resulted in their death. Schott testified about his difficulties in taking feed to his livestock. The blizzard had prevented Schott's going to his livestock operations for 3 days. Schott provided water by daily breaking two holes in the ice on the pond, but the water froze shortly after each opening. According to Schott, weather conditions hindered his care for his livestock. Although Schott knew several of his cattle had died in the first few weeks of December and realized his cattle were not "eating well" and "lacked enthusiasm," he never called a veterinarian.

The jury returned a verdict of guilty on each count of cruelty to animals. Schott appealed to the district court.

The trial lasted 4 days. The bill of exceptions includes 551 pages of testimony and 96 exhibits, including Sheriff Siemek's 36 color photographs of Schott's facilities, dead cattle in the pasture, gaunt or dead hogs, and cannibalized carcasses of livestock. Dr. Doster presented 41 color slides in conjunction with his testimony. We have examined and reviewed all the record.

Four of Schott's five assignments of error question the

quantity of evidence; for example, insufficient evidence to submit the case to the jury, to support the verdict, and, as a matter of law, to establish guilt beyond a reasonable doubt.

Intentionally means willfully or purposely, and not accidentally or involuntarily. *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983).

By statute, as a part of the criminal code of Nebraska,

> Recklessly shall mean acting with respect to a material element of an offense when any person disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Neb. Rev. Stat. § 28-109(19) (Reissue 1979).

"The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident." *State v. Thielen,* 216 Neb. 119, 125, 342 N.W.2d 186, 191 (1983).

In determining whether evidence is sufficient to sustain a conviction in a jury trial, this court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury—all of which is within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict. See, *State v. Joy*, 220 Neb. 535, 371 N.W.2d 113 (1985); *State v. Goodon*, 219 Neb. 186, 361 N.W.2d 537 (1985); *State v. Thielen, supra.*

We reaffirm the rule: "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." *State v. Buchanan*, 210 Neb. 20, 28, 312 N.W.2d 684, 689 (1981); *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984).

There is sufficient evidence to support a verdict that Schott intentionally or recklessly subjected his livestock to cruel mistreatment or subjected his custodial animals to cruel neglect. We will not interfere with a guilty verdict based on evidence, unless that evidence, so lacking probative force, is insufficient to support a verdict beyond a reasonable doubt. *State v. Joy, supra.* The evidence in this case spoke of two Schotts. The first Schott was intentionally or recklessly cruel to his livestock. The second Schott, hindered by weather, was prevented from caring for his animals. As reflected by the verdict, the jury did not hear the second Schott. Judgment of Schott's conviction is affirmed.

Schott's second assignment of error is an allegation that the district court abused its discretion by imposition of an excessive sentence.

After Schott's conviction the county court sentenced him to probation and ordered, inter alia, that Schott pay a $750 fine on each of the two counts; that Schott not purchase, possess, or raise livestock for 6 months, after which any livestock operations would be subject to inspection by the probation officer and a veterinarian; that Schott complete 24 hours of college credit concerning animal husbandry; and that Schott be imprisoned for 30 days in the county jail, such sentence to be served in three intervals of 10 days each commencing on February 1 and June 1, 1985, and on February 1, 1986. Sentence to the county jail "may be waived by the Court upon good cause shown, and at the discretion of the Court prior to each jail term."

Each crime of which Schott has been convicted is a Class II misdemeanor punishable by imprisonment for a maximum term of 6 months, a maximum fine of $1,000, or both such imprisonment and fine. No minimum penalty is specified. See Neb. Rev. Stat. § 28-106 (Cum. Supp. 1984).

Upon Schott's appeal the district court found and ordered as follows:

> Time, from and after the date of sentencing in the Trial Court, has revealed additional information to this Court on Appeal which demands, for the good of both John Schott and the State of Nebraska, that the Trial Court's

sentence be modified.

> Therefore, Mr. Schott is sentenced to be incarcerated in the County Jail for thirty days on Count I and for 30 days on Count II (sentences to be served concurrently) and is ordered to pay the costs herein.

Appeals in criminal cases tried in a county court are governed by Neb. Rev. Stat. § 29-613 (Reissue 1979) and are restrictively disposed on the basis of the record made in the county court. See *State v. Clark*, 194 Neb. 487, 233 N.W.2d 898 (1975).

"The district court shall hear and determine any cause brought by appeal from a county or municipal court upon the record, and may affirm, modify, or vacate the judgment, or may remand the case to the county or municipal court for a new trial." § 29-613.

> In all cases other than appeals from the Small Claims Court, the district court shall review the case for error appearing on the record made in the county . . . court. The district court shall render a judgment, which may affirm, affirm but modify, or reverse the judgment or final order of the county . . . court. If the district court reverses, it may enter judgment in accordance with its findings, or remand the case to the county . . . court for further proceedings consistent with the judgment of the district court.

Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982).

A district court's review of criminal cases tried in a county court is limited to an examination of the record for error or an abuse of discretion which occurred in the county court. See *State v. Smith*, 199 Neb. 368, 259 N.W.2d 16 (1977).

A district court may modify a sentence imposed by a county court only where the county court has so abused its discretion as to render its sentence an error upon the record presented. *State v. Olson*, 217 Neb. 130, 347 N.W.2d 862 (1984).

The district court in this case, in its appellate jurisdiction and review of county court proceedings, did not determine there had been an abuse of discretion by the county court in imposing an otherwise permissible sentence authorized by law. By the district court's considering "additional information," we can

only construe the district court's action as a de novo disposition of the question raised regarding Schott's sentence, a disposition inconsistent with the statutes governing appeals from a county court in criminal cases. Therefore, the judgment of the district court regarding Schott's sentence is reversed. This matter is remanded to the district court for further proceedings regarding the county court's sentence imposed on Schott.

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

BOSLAUGH, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. RICHARD E. STICKNEY, APPELLANT.

384 N.W.2d 301

Filed April 4, 1986. No. 85-544.

Right to Counsel. If a defendant in a criminal case chooses to represent himself, he must be held responsible for his ineptness of counsel even though that counsel was himself.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Appeal dismissed.

Richard E. Stickney, pro se.

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

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

GRANT, J.

Defendant-appellant, Richard E. Stickney, appeals from an order of the district court denying his motion for post conviction relief. We dismiss the appeal.

Stickney's direct appeal, challenging solely the excessiveness of his sentence after his plea of guilty to attempted first degree sexual assault, was affirmed in *State v. Stickney*, 216 Neb. xxi (case No. 83-571; Jan. 18, 1984). On December 3, 1984,

Stickney filed his 14-page pro se "MOTION TO VACATE AND SET ASIDE CONVICTION," "pursuant to the provisions of the Nebraska Post Conviction Relief Act, sections 29-3001 to 29-3004 (Reissue 1979) . . . ." A hearing was held by the district court on this motion on April 16, 1985. Defendant was present at this hearing with privately retained counsel. On May 15, 1985, the district court filed its order denying the relief requested. Stickney filed his notice of intent to appeal on July 5, 1985. In his notice of intent to appeal and in his pro se brief, Stickney refers to an order dated June 25, 1985, purportedly overruling a motion for new trial. No such motion for new trial nor order overruling such a motion appears in the transcript before us.

Neb. Rev. Stat. § 29-3002 (Reissue 1979) requires that an appeal from an order overruling a motion for post conviction relief be taken "as provided for in appeals in civil cases." Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1984) requires that a notice of appeal to obtain a reversal, vacation, or modification of a final order be filed with the clerk of the district court within 1 month of that order or within 1 month from the overruling of a motion for new trial.

The record before us shows no motion for new trial in the transcript that would extend the filing date beyond 1 month after May 15, 1985. Stickney filed his notice of intent to appeal more than 1 month after the order denying his motion for post conviction relief was entered. Where a notice of appeal is not filed within 1 month of the entry of the final order appealed from as required by § 25-1912(1), this court obtains no jurisdiction to hear the appeal, and the appeal must, therefore, be dismissed. *State v. Harrington*, 214 Neb. 696, 335 N.W.2d 316 (1983).

We also note that no bill of exceptions containing the testimony of the April 16, 1985, hearing is before us and that no praecipe directed to the clerk of the district court or the court reporter requesting that bill of exceptions is in the record. We further note that Stickney had counsel at his post conviction hearing of April 16, 1985, but apparently chose to proceed pro se, and on July 8, 1985, specifically obtained leave to proceed in forma pauperis without requesting counsel on appeal. In that

situation we have uniformly held that if a defendant chooses to represent himself he "must be held responsible for his ineptness of counsel even though that counsel was himself." *State v. Brashear*, 201 Neb. 582, 584, 270 N.W.2d 924, 925 (1978). See, also, *State v. Wyman*, 215 Neb. 537, 339 N.W.2d 756 (1983); *Dobrovolny v. Dunning*, 221 Neb. 67, 375 N.W.2d 123 (1985).

APPEAL DISMISSED.

WILLIA BADGETT, APPELLANT, V. ST. JOSEPH HOSPITAL, APPELLEE.
384 N.W.2d 302

Filed April 4, 1986. No. 85-651.

1. **Workmen's Compensation: Proof.** In a workmen's compensation case the claimant must establish that the injury for which compensation is sought arose out of and in the course of the employment.
2. **Workmen's Compensation: Appeal and Error.** The findings of fact by the compensation court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. The decision after rehearing must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

David T. Siegel of Weinberg & Weinberg, for appellant.

Arthur J. Nevins of Gaines, Otis, Mullen & Carta, for appellee.

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

HASTINGS, J.

Plaintiff has appealed an order of dismissal on rehearing entered by the Workmen's Compensation Court. She assigns as error the failure of the court to find that she suffered an accident and injury which arose out of and in the course of her employment, and its failure to find that she was temporarily totally disabled and therefore entitled to disability and medical

and vocational rehabilitation benefits.

The plaintiff was continuously employed by St. Joseph Hospital as a nurse's aide from 1968 until approximately April 1, 1984. She then commenced working as a patient escort. On April 23, 1984, she noticed a dull, aching pain in her lower back after she got off work. However, she continued to work. On April 26 she performed her duties as a patient escort and did not notice any extreme or sharp pains in her back. However, after she finished work for the day, she went home. After that, on getting up and sitting down, she had sharp pains in the lower coccyx. She worked the next day but has not worked since.

Following a series of therapy treatments, she underwent surgery for a herniated disk. According to her surgeon, Dr. Ries, she has approximately a 15-percent permanent disability of the body as a whole.

Dr. Stanosheck, the original attending physician, in a report letter, stated the patient had given a history of pain coming on while pushing carts as part of her occupation as a nursing assistant. However, this contrasts with the testimony of the plaintiff herself, who at no time indicated she suffered pain while pushing carts. Dr. Ries reported that plaintiff had told him that her problem started after she changed jobs in April of 1984. In that same letter he says there was no clear-cut injury or incident that started her problem.

Dr. Gross examined the plaintiff for the defendant and testified by deposition. He related a history taken from the plaintiff which agrees substantially with the plaintiff's testimony at trial. Essentially, she had told Dr. Gross that on April 26, after she had completed her work and had gone home, she sat down and rested, and when she got up she had a sharp pain in the coccyx. She also stated to him that nothing unusual had happened to her at work that day and that she experienced no pain until after she had gotten home. It was the conclusion of Dr. Gross that there was no causal connection between plaintiff's work and her injury.

In *Gray v. State*, 205 Neb. 853, 857, 290 N.W.2d 651, 653-54 (1980), this court stated:

> In a workmen's compensation case, the claimant must establish that the injury for which compensation is sought

> arose out of and in the course of the employment. § 48-101, R.R.S. 1943. The term "in the course of" refers to the time, place, and circumstances of the accident. [Citations omitted.] "The course of employment requirement tests work-connection as to time, place and activity; that is, it demands that the injury be shown to have arisen within the time and space boundaries of the employment, and in the course of an activity whose purpose is related to the employment."

The most that can be said in support of the plaintiff's position is that the medical evidence on the question of whether the injury arose out of and in the course of employment ranged from no to maybe. We must bear in mind that the findings of fact by the compensation court after rehearing have the same force and effect as 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). The decision after rehearing must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor. *Scott v. State, supra.*

There was sufficient competent evidence to sustain the findings and order of the compensation court. Its judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GRADY BONAPARTE, APPELLANT.
384 N.W.2d 304

Filed April 4, 1986. No. 85-656.

1. **Appeal and Error.** A party cannot be heard to complain of an error which he himself has been instrumental in bringing about.
2. **Jury Misconduct: New Trial.** Where the defendant initiates and causes jury misconduct, the defendant is estopped from maintaining that such misconduct entitles the defendant to a new trial.
3. _____: _____. In order for alleged jury misconduct to be a basis for a new trial,

the conduct must have been prejudicial to the defendant.

4. _____: _____. Where a defendant causes jury misconduct, he cannot thereafter be heard to maintain that such misconduct was prejudicial.

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

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

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

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

KRIVOSHA, C.J.

The present appeal can best be described as the height of "chutzpah." This Yiddish word appears in modern dictionaries as meaning "colossal effrontery" or "brazen gall," but is best exemplified by the young man who, having killed his father and mother, throws himself at the mercy of the court because he is an orphan. See, also, *Williams v. State*, 126 Ga. App. 350, 190 S.E.2d 785 (1972).

The appellant, Grady Bonaparte, was charged and convicted by a jury of the crime of possession of a controlled substance with intent to deliver in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1984). This is a Class III felony, punishable by imprisonment of not less than 1 nor more than 20 years, a fine of not more than $25,000, or both imprisonment and fine. Neb. Rev. Stat. § 28-105 (Reissue 1979). After the verdict was returned Bonaparte moved for a new trial on the ground of jury misconduct. The motion was overruled, and Bonaparte was ultimately sentenced to a term of not less than 4 nor more than 7 years in the Nebraska Penal and Correctional Complex. Bonaparte's claim of jury misconduct is nearly unbelievable and borders on being outrageous.

The evidence discloses that, during the course of the trial, Bonaparte approached one of the jurors as she was leaving the courthouse to go home at the end of the day and offered her a ride. The juror, at first, refused, saying that she could catch the bus home, but Bonaparte told her it would be no problem. The

juror then accepted the ride home. During the ride, Bonaparte asked the juror what she thought of the case and took her by the scene of his arrest. The juror told Bonaparte that, as far as she was concerned, at that time he was guilty of possession, since the officers found the marijuana in his car. Bonaparte agreed. The juror further told Bonaparte that, until intent to deliver could be proven, in her eyes he was guilty only of possession.

The next day, as the juror was going outside for a court recess, Bonaparte again stopped her and asked her about the case and what the jury thought. The juror told him that the jury had not discussed the case yet, so she did not know. Bonaparte then asked the juror to go to Burger King with him, but she refused.

Bonaparte now maintains that the verdict of the jury finding him guilty must be set aside because of jury misconduct. The misconduct was that the juror permitted Bonaparte to approach her, talk to her, offer her a ride, and take her by the scene of the crime.

Bonaparte maintains that, while at first blush, it seems strange that he should be permitted to take advantage of the situation which he created, he is vitally concerned in maintaining the integrity of the judicial system, and, therefore, the verdict should not be permitted to stand when he has tampered with the jury. He further maintains that the juror should have known better than to permit him to have contact with her and that she was dutybound to report him. While it may be that the juror, by failing to report Bonaparte's contact, violated the district court's admonishments, see Neb. Rev. Stat. § 29-2022 (Reissue 1979), Bonaparte, by tampering with the jury, committed a further crime, see Neb. Rev. Stat. § 28-921 (Reissue 1979). We cannot conceive of any reason why Bonaparte should benefit from that fact.

It has always been the rule in this jurisdiction that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about. See, *Missouri P. R. Co. v. Fox*, 60 Neb. 531, 83 N.W. 744 (1900), *overruled on other grounds, Callahan v. Prewitt*, 143 Neb. 793, 13 N.W.2d 660 (1944); *Regier v. Nebraska P. P. Dist.*, 189 Neb. 56, 199 N.W.2d 742 (1972); *Foreman & Clark of Nebraska, Inc. v. City of*

Omaha, 203 Neb. 746, 280 N.W.2d 892 (1979); *Kluender v. Mattea*, 214 Neb. 327, 334 N.W.2d 416 (1983).

It would be a strange, if not ridiculous, rule of law which would hold that a criminal defendant may be entitled to a new trial based upon jury misconduct when such misconduct is initiated by the defendant himself. The argument raised by Bonaparte is so novel that we are unable to find a single case similar to the facts in this case. Nor are we impressed by Bonaparte's concern for the integrity of the jury system. Bonaparte should have worried about our jury system before he set out to improperly contact the juror. We believe, therefore, that the rule must be to the effect that where the defendant initiates and causes jury misconduct, the defendant is estopped from maintaining that such misconduct entitles the defendant to a new trial. Such a rule would be a logical extension of the already existing rule that in order for alleged jury misconduct to be a basis for a new trial, the conduct must have been prejudicial to the defendant. See *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982). We believe that it naturally follows that where a defendant causes the misconduct, he cannot thereafter be heard to maintain that such misconduct was prejudicial. He had the sole ability to prevent the misconduct, and, having elected to cause the misconduct, he cannot now maintain it was prejudicial so as to entitle him to a new trial.

The judgment of the district court overruling his motion for new trial is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, APPELLEE AND CROSS-APPELLANT, V. J.H. SCHROEDER, APPELLANT AND CROSS-APPELLEE.

384 N.W.2d 626

Filed April 4, 1986. No. 85-673.

1. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court will not consider a constitutional question in the absence of a specification of the constitutional provision which is claimed to be violated.
2. **Constitutional Law: Juries.** The right to a jury trial under the seventh amendment to the U.S. Constitution does not apply in state courts.
3. _____: _____. The purpose of article I, § 6, of the Nebraska Constitution is to preserve the right to a jury trial as it existed at common law and under the statutes in force when the Constitution was adopted.
4. **Consumer Protection: Equity: Trial.** The Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), is equitable in nature; as such, trials thereunder are to the court.
5. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the sound discretion of the trial court; the trial court's ruling on such a motion will not be disturbed on appeal in the absence of an abuse of that discretion.
6. **Trial: Appeal and Error.** An abuse of discretion takes place where the trial court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
7. **Consumer Protection: Attorney Fees: Appeal and Error.** The awarding and amount of an attorney fee under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), rest in the sound discretion of the trial court; the Nebraska Supreme Court will only interfere where the allowance is clearly excessive or insufficient.
8. **Statutes: Words and Phrases.** Generally, the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless the intent of the drafters would be defeated by the application of such a meaning.
9. **Trial: Consumer Protection: Appeal and Error.** Restoration of the purchase price under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), rests within the discretion of the trial court; its ruling thereon will not be disturbed on appeal in the absence of an abuse of that discretion.

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

Curtis A. Sikyta, for appellant.

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

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

CAPORALE, J.

The plaintiff-appellee, State of Nebraska, through its Attorney General, brought an action under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1984), alleging that defendant-appellant, J.H. Schroeder, made false or misleading statements during the promotion and sale of certain purported trust forms. The State sought to enjoin Schroeder from making such misrepresentations and to require him to restore the purchase price to the buyers, to pay civil penalties, and to pay the costs of the action, including a reasonable attorney fee. At an earlier time in the proceedings, the trial court, as a sanction for Schroeder's refusal to comply with a discovery order, struck his answer and permanently enjoined him from making specified misrepresentations. Thereafter, following a nonjury trial on the remaining issues, the trial court reaffirmed its earlier injunction and awarded the State an attorney fee of $3,000 and costs in the sum of $79.50. In this appeal Schroeder assigns as error the trial court's (1) failure to find the act unconstitutional, (2) denial of a jury trial, (3) denial of a continuance, and (4) award of an attorney fee to the State. The State, in its cross-appeal, assigns as error the trial court's failure to order Schroeder to make restoration. We affirm and award an additional attorney fee.

The act, among other things, renders unlawful "unfair" or "deceptive" acts or practices in the conduct of any trade or commerce. § 59-1602. It empowers the Attorney General to bring an action to restrain such conduct and permits the prevailing party to recover, in the discretion of the court, the costs of suit, including a reasonable attorney fee. The trial court may also make such additional orders as may be necessary to restore to any person in interest any money or property which may have been obtained by the unlawful conduct. § 59-1608. The act further provides that, with certain exceptions not involved in this case, one who engages in unlawful conduct shall pay a civil penalty of not more than $2,000 for each violation. § 59-1614.

Schroeder employed unfair and deceptive acts and practices by misrepresentation in connection with the promotion and sale of certain purported trust forms. The claimed trusts, which were to result once the forms were completed, were to reduce or eliminate income taxes by passing one's earned income to the trust and deducting from said income his or her personal living expenses.

In connection with the first assignment of error, Schroeder argues that the entire act is unconstitutional as applied to him, in that it is both overbroad and vague. Yet, he does not tell us what section of which Constitution, that of our nation, that of this sovereign state, or perhaps both, he claims the act violates.

It has long been the rule that this court will not consider a constitutional question in the absence of a specification of the constitutional provision which is claimed to be violated. *Blackledge v. Richards*, 194 Neb. 188, 231 N.W.2d 319 (1975); *Radil v. State*, 182 Neb. 291, 154 N.W.2d 466 (1967); *Metropolitan Utilities Dist. v. City of Omaha*, 171 Neb. 609, 107 N.W.2d 397 (1961); *State v. Bryant*, 94 Neb. 754, 144 N.W. 804 (1913).

Thus, we do not consider the first assignment of error.

The second assignment of error contends that the denial of a jury trial violates both the seventh amendment to the U.S. Constitution and article I, § 6, of the Nebraska Constitution.

The seventh amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." That federal constitutional provision, however, does not apply in state courts. *Minn. & St. Louis R. R. v. Bombolis*, 241 U.S. 211, 36 S. Ct. 595, 60 L. Ed. 961 (1916); *Pearson v. Yewdall*, 95 U.S. 294, 24 L. Ed. 436 (1877); *Woods v. Holy Cross Hospital*, 591 F.2d 1164 (5th Cir. 1979); *Wartman v. Branch 7, Civ. D., Cty. Ct., Milwaukee Cty., Wis.*, 510 F.2d 130 (7th Cir. 1975).

Thus, we concern ourselves only with article I, § 6, of the Constitution of Nebraska and the relevant statutory and case law.

Article I, § 6, provides: "The right of trial by jury shall remain inviolate . . . ." Our cases state that the purpose of that constitutional provision is to preserve the right to a jury trial as

it existed at common law and under the statutes in force when the Constitution was adopted. *State v. Young*, 194 Neb. 544, 234 N.W.2d 196 (1975); *Schroeder v. Oeltjen*, 184 Neb. 8, 165 N.W.2d 81 (1969); *State v. Hauser*, 137 Neb. 138, 288 N.W. 518 (1939).

Our Constitution was adopted in 1875, 99 years prior to enactment of the Consumer Protection Act. 1974 Neb. Laws, L.B. 1028. However, Neb. Rev. Stat. § 25-1104 (Reissue 1979) provides that "[i]ssues of fact arising in actions for the recovery of money . . . shall be tried by a jury . . ." unless waived or referred to a referee. Traditionally, this court has denied jury trials in equitable actions, *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978), *State Securities Co. v. Corkle*, 191 Neb. 578, 216 N.W.2d 879 (1974), and *Sharmer v. McIntosh*, 43 Neb. 509, 61 N.W. 727 (1895), and provided them as a matter of right in legal actions, *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 89 N.W.2d 245 (1958), and *Lett v. Hammond*, 59 Neb. 339, 80 N.W. 1042 (1899).

The task thus becomes one of determining whether the act is of an equitable or of a legal nature.

Nei v. Burley, 388 Mass. 307, 446 N.E.2d 674 (1983), and *Kugler v. Market Dev. Corp.*, 124 N.J. Super. 314, 306 A.2d 489 (1973), both involved questions of the right to a jury trial under consumer protection acts. Both courts held there was no such right. In *Nei* the applicable act originally provided that a consumer could bring an action "in equity" for damages and such equitable relief as the court deems necessary. After the procedural merger of law and equity, the Legislature struck the words "in equity." The court, in reaching its decision, stated the "elimination of the words 'in equity' does not conclusively or even persuasively remove the equitable nature of consumer actions." 388 Mass. at 314, 446 N.E.2d at 678.

The court in *Kugler* summarily disposed of the jury trial issue, stating, "The present cause of action and right to seek redress are foreign to the common law, being modern day creations of the Legislature for the relief and cure of a current mischief." 124 N.J. Super. at 319, 306 A.2d at 492.

While the act permits the recovery of an attorney fee, restoration of the purchase price, and the imposition of civil

penalties, its principal thrust is to prevent unfair or deceptive acts or practices in trade or commerce. Consequently, the act is equitable in nature, in the sense that it seeks to prevent prejudicial conduct rather than merely compensate such damage as may flow therefrom. The monetary consequences imposed to discourage future like acts and practices are ancillary to the act's principal equitable thrust.

We conclude, therefore, that the trial court was correct in denying Schroeder a jury trial.

In the third assignment of error Schroeder complains that he was denied a trial continuance. The June 22, 1984, trial date was set on May 16, 1984. On June 19 Schroeder moved for a continuance and moved for a court-appointed attorney on the very day of trial. His motion for a court-appointed attorney recites that his retained counsel had filed a motion to withdraw "some time ago." The trial court overruled the motion for a continuance, as well as the motion for appointment of counsel. While the trial court did not grant retained counsel leave to withdraw, Schroeder proceeded to trial without him.

The trial was not completed on the day it commenced and, consequently, was ultimately continued to and completed on October 26, 1984, by which time Schroeder had obtained the services of his present attorney.

Schroeder's own recitation that his first retained counsel sought to withdraw "some time" before the scheduled trial date indicates that Schroeder had ample opportunity to obtain the services of another attorney had he so wished. See *State v. Richter*, 221 Neb. 487, 378 N.W.2d 175 (1985). Moreover, Schroeder's first retained counsel was not permitted to withdraw. The record does not tell us why that attorney did not participate at the first day of trial.

A motion for continuance is addressed to the sound discretion of the trial court, and the trial court's ruling on such a motion will not be disturbed on appeal in the absence of an abuse of that discretion. *First Nat. Bank v. Schroeder, ante* p. 330, 383 N.W.2d 755 (1986); *State v. Richter, supra.* An abuse of discretion takes place where the trial court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Bump v. Firemens Ins. Co.*,

221 Neb. 678, 380 N.W.2d 268 (1986).

Under the circumstances it cannot be said that the trial court abused its discretion in denying Schroeder a continuance of the commencement of trial.

In the fourth and last assignment of error, Schroeder argues the trial court erred in awarding the State an attorney fee, both because, since the court did not order restoration, he was at least a partial winner and because there was no evidence as to the amount of time the Attorney General spent on the case.

It is true, as noted earlier, that § 59-1608 states that "the prevailing party" may, in the discretion of the court, recover reasonable attorney fees. It is also true that the State was unsuccessful in its effort to obtain restoration of the purchase price to the buyers. Nonetheless, the State did obtain an injunction which prohibits Schroeder from engaging in certain specified unfair and deceptive acts and practices. That is not an insignificant success. There is no requirement that the State obtain all the relief it sought. Thus, the State was the prevailing party, and whether to award an attorney fee was a question within the discretion of the trial court.

As to the argument that the State adduced no evidence concerning the amount of time the Attorney General spent on the case, under the circumstances nothing more than the record in the case itself was needed.

The record clearly demonstrates that this has been a protracted, hotly contested, and complicated piece of litigation which the Attorney General prepared diligently and handled with great skill. The case involved substantial pretrial preparation and courtwork, both in the trial court and in this court. See *State ex rel. Douglas v. Schroeder*, 212 Neb. 562, 324 N.W.2d 391 (1982). Its trial took place on 2 separate days over a period of 4 months.

Notwithstanding the absence of time records, *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981), affirmed a $5,000 attorney fee under the provisions of Neb. Rev. Stat. § 44-359 (Reissue 1984) in a suit against an insurer. In so ruling this court noted the record in the case revealed that counsel had conducted the litigation with great skill, diligence, and ability. We have also approved attorney fees

in dissolution cases notwithstanding the fact there was no showing of the time spent. *Applegate v. Applegate*, 219 Neb. 532, 365 N.W.2d 394 (1985); *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980).

In both insurance policy cases, *Smith v. Union Ins. Co.*, 218 Neb. 797, 359 N.W.2d 113 (1984), *Lane v. State Farm Mut. Automobile Ins. Co., supra*, and *Schmer v. Hawkeye-Security Ins. Co.*, 194 Neb. 94, 230 N.W.2d 216 (1975), and dissolution cases, *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985), and *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984), we have said the amount of an attorney fee rests in the sound discretion of the trial court and that this court will only interfere where the allowance is clearly excessive or insufficient.

We consider the matter of an attorney fee under the act to be analogous and find no abuse of discretion in the amount of the fee awarded the State.

In its cross-appeal the State assigns as error the trial court's failure to order restoration of the purchase price to buyers of the forms in question.

Section 59-1608(2) provides that the court "*may* make such additional orders or judgments as may be necessary to restore to any person in interest any money" which may have been acquired by means of any prohibited act. (Emphasis supplied.) Generally, the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning. *Buhrmann v. Sellentin*, 218 Neb. 288, 352 N.W.2d 907 (1984); *State v. Noll*, 171 Neb. 831, 108 N.W.2d 108 (1961); *County of Keith v. Triska*, 168 Neb. 1, 95 N.W.2d 350 (1959).

As our earlier discussion reveals, restoration of the purchase money is ancillary to the primary thrust of the act. Thus, it cannot be said that the use of the word "may," defined in its ordinary, permissive, and discretionary sense, defeats the object of the act.

The evidence is that the buyers' checks went to a corporation which then paid Schroeder commissions, the amounts of which are not shown. While it would not have been an abuse of discretion to order restoration under those circumstances,

neither can it be said there was an abuse of discretion in not ordering restoration.

For the reasons above stated the judgment of the trial court is affirmed.

The State is awarded an attorney fee of $1,500 for services rendered to it by the Attorney General in this court.

AFFIRMED.

AMERICAN SECURITY SERVICES, INC., A NEBRASKA CORPORATION, APPELLANT, V. ROBERT W. VODRA, APPELLEE.

385 N.W.2d 73

Filed April 11, 1986. No. 84-748.

1. **Contracts.** When contractual language is ambiguous, a court will construe such language against the party preparing the contract, especially where the language is embodied in a preprinted form.
2. **Restrictive Covenants: Employer and Employee.** There are three general requirements relating to partial restraints of trade: First, is the restriction reasonable in the sense that it is not injurious to the public? Second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest? And, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee?
3. _____: _____. An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.
4. _____: _____. In reference to an employer-customer relationship, good will is that value which results from the probability that old customers will continue to trade or deal with the members of an established concern.
5. _____: _____. Reasonableness of a specific restrictive covenant must be assessed upon the facts of a particular case and must be determined on all the circumstances.
6. _____: _____. The restriction imposed by a covenant not to compete must be no wider in scope than is necessary to protect the business of the employer.
7. _____: _____. A balancing test is applied in determining whether the restraint of a postemployment covenant not to compete is unduly harsh or oppressive and, therefore, unenforceable.
8. **Equity: Accounting.** Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to show a fiduciary or trust relationship between the parties, or a complicated series of accounts, making the remedy at law inadequate.

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

William E. Naviaux and H. Jerome Kinney, and J. Patrick Green, for appellant.

James P. Fitzgerald of McGrath, North, O'Malley & Kratz, P.C., for appellee.

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

SHANAHAN, J.

American Security Services, Inc., appeals the judgment of the district court for Douglas County denying American's requested injunction and accounting as a result of Robert W. Vodra's breach of a restrictive covenant in conjunction with Vodra's employment with American. We reverse and remand for further proceedings.

On appeal to this court an equitable action seeking an injunction to enforce a postemployment covenant not to compete is a trial of factual questions de novo on the record, requiring this court to reach a conclusion independent of the findings of the trial court. See, Neb. Rev. Stat. § 25-1925 (Reissue 1979); *National Farmers Union Serv. Corp. v. Edwards*, 220 Neb. 231, 369 N.W.2d 76 (1985). Our de novo review of the record is subject to the rule that, where credible evidence is in conflict on material issues 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. *In re Estate of Lienemann, ante* p. 169, 382 N.W.2d 595 (1986).

Before graduation from college Vodra had only part-time employment, no special vocational training, and no experience in the field of security services for businesses, as well as no background in sales or marketing. In 1977 Vodra, age 27, was graduated from the University of Nebraska-Omaha with a degree in criminal justice and minors in political science and economics. In November 1977 Vodra entered employment with American, which provided security service and guards for various types of businesses. In conjunction with employment

contracts American required all employees to sign a noncompetition agreement in a printed form:

> During the time of your employment with American Security Services and for three (3) years thereafter you shall not, in the contract guard field, directly or indirectly solicit business from, contract with or take employment with any customer or former customer of the American Security Services or any other guard company or individual where you have (a) worked physically upon said customers premise (b) acted in a supervisory capacity with respect to said premises (c) acted as a salesman for the American Security Services in soliciting said customers business.

After signing that restrictive covenant Vodra received a monthly salary of $800 for his position as shift supervisor in Omaha, responsible for visiting American's customers and seeing that guards "were doing their jobs." In 1978 Vodra was promoted to operations manager in charge of supervisors and responsible for "hiring and firing . . . guard personnel." Vodra became regional manager in 1980, received a monthly salary of $1,500, moved to American's Lincoln office to "enlist new clients" and "ensure that the clients we did have were being serviced adequately."

While Vodra was regional manager at Lincoln, American's vice president and general manager in Lincoln, Nicholas J. Sloan, and Vodra obtained a contract on July 7, 1981, between American and the Nebraska State Board of Agriculture for security services at the State Fairgrounds, which included the split season for horseraces. With the state contract as background, Sloan made the initial contact with the Hall County Livestock Improvement Association, "Fonner Park," in Grand Island, regarding security services for the 1982 racing season. American, pursuant to its contract signed by Vodra as regional manager, supplied Fonner Park with security personnel for the 1982 racing season. During that season, Vodra visited Fonner Park at least "once a week," kept in contact with the racetrack's management, handled any major complaints from Fonner Park, hired security personnel for that track, and, generally, assured that the "client was still happy." American

also supplied security service at the State Fairgrounds during the 1982 racing season. American's business involving the two racetracks was conducted through its Lincoln office where Vodra was stationed.

In the summer, 1982, Sloan left American and went to work for a security service in Texas. Vodra became American's director of marketing and was responsible for developing a marketing plan and calling on potential customers. Vodra's territory was bounded by Des Moines on the east, the state lines on the north and south, and Lexington on the west. Vodra contacted Atokad racetrack in South Sioux City, as well as other businesses located within his territory. During a telephone call to Texas, Vodra asked Sloan what "[Sloan] thought of the idea of [Vodra's] going into the race track security business." When Sloan responded that the noncompetition agreement was a problem, Vodra stated his attorney had examined the restrictive covenant and indicated that Vodra did not "have to pay very much thought" to such agreement.

On January 12, 1983, through a contract signed by Vodra on behalf of American, Fonner Park again obtained security services for the 1983 season. American supplied personnel at $5.34 per hour for each guard required by Fonner Park and was responsible for "money transfer . . . from the track to the bank." In May 1983, shortly after the racing season, the general manager of Fonner Park contacted Vodra and inquired whether in 1984 American would provide the same security services at the same rate as had existed under the 1983 contract. Fonner Park did not contact any others concerning security services for the 1984 season. As directed by American's officers, on May 3 Vodra wrote a letter to Fonner Park's general manager, stating that the basic and essential terms of the 1983 contract would apply to any contract for the 1984 season. There was no response from Fonner Park at that time. American again provided security personnel for the racing season at the State Fairgrounds in 1983.

In December 1983 Sloan returned to Nebraska employment with American as its vice president of marketing and development. American demoted Vodra to a position as Sloan's subordinate. In the course of a conversation, Sloan asked

Vodra: "[W]hat is the status on the Grand Island races?" Vodra answered that he "hadn't totally given up the idea" of forming a security business to provide for Fonner Park because he had his "connection with Grand Island race people" and "knew the powers that be."

Although he had indicated he might leave employment with American, after taking a brief vacation, Vodra, on January 24, 1984, told Jack Owens, American's general manager, that he would remain with American.

During his vacation, Vodra visited in Grand Island with Fonner Park's general manager concerning some additional specifications for security services to be rendered by American during the 1984 racing season. When Vodra returned from his vacation, Sloan inquired about the status of the "Grand Island contract," and Vodra stated that "it was taken care of." However, Vodra later acknowledged he had "probably not" used his best efforts to obtain the 1984 Fonner Park contract for American.

On January 31 Vodra informed Owens: "I'm terminating my employment." Vodra telephoned the general manager for Fonner Park on February 2 and said he was no longer associated with American but would like to discuss security services for Fonner Park's 1984 season. Because the racing season at Grand Island would commence in approximately 3 weeks, the general manager invited Vodra to submit a proposal for security services at the racetrack. On February 3 Fonner Park's general manager visited with Sloan and Owens about security services from American for the 1984 season. In the office of the Nebraska Secretary of State on February 6, Vodra filed articles of incorporation for his corporation, Pegasus Security Corporation, organized to supply security services and services as a private detective agency. American submitted its proposal to Fonner Park on February 7 with the same terms as had existed in the 1983 contract with Fonner and which had been stated in American's still unanswered letter of May 3, 1983, sent to Fonner Park. On February 9 Vodra negotiated and obtained a contract between Pegasus and Fonner Park for the 1984 season. The rate "per man hour" under the Pegasus contract was 4 cents per hour less than the rate submitted to

Fonner Park in American's proposal of February 7.

Regarding selection of Pegasus rather than American, the general manager for Fonner Park explained that Pegasus had guaranteed its rate through the 1985 racing season, that "Vodra was familiar with our, the past services of handling the Fonner Park account," and that "[our] race track security is a little bit more sophisticated than just passing it around as far as the handling of the account." As the result of enlarged operations and construction at Fonner Park, payments to Pegasus were approximately $5,000 per week for the 10-week racing season in 1984.

At the time of trial Vodra was 33 years old, unmarried, resided in Omaha, and was in good health. Vodra had no dependents and was born and raised in Omaha.

American filed suit against Vodra, seeking an injunction and an accounting. American based its claim on the restrictive covenant signed by Vodra. In his answer Vodra alleged the postemployment covenant not to compete was void because the restrictive covenant was unduly harsh, was more restrictive than reasonably necessary to protect American's interests, and was unreasonable in time and space. Owens testified that the "three stipulations," or situations activating the covenant, were an employee's "work physically upon said customer's premises; act in a supervisory capacity with respect to said premises, and act as a salesman for American Security in soliciting said customer's business." The district court, finding the restrictive covenant to be "unreasonable and unenforceable," dismissed American's action. American contends the postemployment restrictive covenant is reasonable and will not inflict hardship on Vodra. Also, American claims the district court was erroneous in its denial of an accounting under the circumstances.

What is the catalyst for the covenant not to compete? The covenant's language contains no conjunctive word designating the relationship of the three situations or conditions activating the covenant. With insertion of the conjunction *or* into the covenant in reference to the three situations, the covenant is activated when any of the three conditions exists. However, if the conjunction *and* is used, the covenant requires existence of

the three conditions in combination before the covenant is activated. Thus, the covenant is reasonably susceptible to more than one interpretation and, consequently, is ambiguous. "When contractual language is ambiguous, a court will construe such language against the party preparing the contract, especially where the language is embodied in a preprinted form." *Craig v. Hastings State Bank*, 221 Neb. 746, 750, 380 N.W.2d 618, 621 (1986). Construing the provisions of the covenant not to compete, we conclude that there must be combined existence of all three conditions or situations before the covenant is activated. The undisputed facts establish existence of each condition in the present case.

As stated in *Securities Acceptance Corp. v. Brown*, 171 Neb. 406, 417, 106 N.W.2d 456, 463 (1960), there are three general requirements for a valid, partial restraint of trade such as a postemployment covenant not to compete, namely:

> First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.

The first inquiry is whether the restraint imposed by the restrictive covenant is reasonable "in the sense that it is not injurious to the public." *Id.* The record does not demonstrate that enforcement of the covenant not to compete will be detrimental to the public. Therefore, we shift our focus to another aspect of reasonableness; that is, the restrictions in space and time must be "no greater than is reasonably necessary to protect the employer in some legitimate interest." *Id.*

In *Boisen v. Petersen Flying Serv., ante* p. 239, 383 N.W.2d 29 (1986), we stated an employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee. Distinguishing the two types of competition, we stated:

> To distinguish between "ordinary competition" and "unfair competition," courts and commentators have

> frequently focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. Where an employee has substantial personal contact with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair, and the employer has a legitimate need for protection against the employee's competition.

Id. at 245-46, 383 N.W.2d at 33.

Thus, a key for distinguishing "unfair competition" from "ordinary competition" is an employee's appropriation of "good will" properly belonging to the employer.

In reference to an employer-customer relationship, good will is that

> value which results from the probability that old customers will continue to trade or deal with the members of an established concern. [Good will] is the probability that old customers will resort to the old place or seek old friends, and the likelihood of new customers being attracted to well advertised and favorably known services
> . . . .

Jackson v. Caldwell, 18 Utah 2d 81, 85, 415 P.2d 667, 670 (1966).

Good will may also be characterized as "the habit of customers to return to the concern with which they have been previously dealing. The more ingrained the habit, the greater the number of such customers, the more valuable is the goodwill." *Meeker v. Stuart*, 188 F. Supp. 272, 275 (D.D.C. 1960).

Some commentators have recognized the unique opportunity of a salesperson to appropriate customer good will of an employer and use that good will to the employer's disadvantage in subsequent transaction; for example, where a former employer's customer transacts with the former employee in that employee's individual or representative capacity.

The employer's sole or major contact with buyers is

> through these agents and the success or failure of the firm depends in part on their effectiveness. . . . [T]he possibility is present that the customer will regard, or come to regard, the attributes of the employee as more important in his business dealings than any special qualities of the product or service of the employer, especially if the product is not greatly differentiated from others which are available. Thus, some customers may be persuaded, or even be very willing, to abandon the employer should the employee move to a competing organization or leave to set up a business of his own.

Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 654 (1960).

An employer may view customers or clientele as "an asset of value which has been acquired by virtue of effort and expenditures over a period of time," and, according to Blake, "under traditional agency concepts, any new business or improvement in customer relations attributable to [an employee] during his employment is for the sole benefit of the principal." *Id.* Corbin makes the following observation about salespersons:

> Salesmen and solicitors are generally hired and paid a salary in order that they may help to build up custom, getting acquainted with customers and acquiring their good will. A promise to forbear to solicit such customers and to deprive the employer of the advantage of that good will is reasonable.

6A A. Corbin, Corbin on Contracts § 1394 at 98 (1962).

Clientele or customer contact is one of the most important assets, sometimes the stock, of a business. Protection of customer good will against appropriation by an employee is, generally, recognized as an employer's valid interest. See, *Borden, Inc. v. Huey*, 261 Ark. 313, 547 S.W.2d 760 (1977); *Manpower, Inc. v. Hedgecock*, 42 N.C. App. 515, 257 S.E.2d 109 (1979).

In the case before us American employed Vodra, who had no background in the field of security services. Displaying enhanced credentials in the racetrack security field as a result of its successful performance at the State Fairgrounds, American

submitted its proposals to provide security at Fonner Park. In the course of such transactions, Vodra was introduced to Fonner Park's management. It was American's ostensibly good reputation as a provider of security services, not Vodra's personal efforts, which more than likely induced Fonner Park to enter contracts with American for security services. The good will in this case is consequent to the business conducted by American and, as far as we can see in the record, would have been obtained without Vodra's presence or participation. Early in 1983, Fonner Park inquired whether American would provide services in 1984 on the basis of the 1983 contract, a manifest indication that Fonner Park would return to American for security services in 1984. Such demonstrated disposition cannot be disregarded or ignored as evidence of American's good will regarding Fonner Park. Vodra attempted to capitalize on a relationship built on American's expenditures of time and effort, thereby appropriating American's good will. Under the circumstances we find that Vodra's actions were unfair competition to American and that the postemployment covenant not to compete was reasonably necessary to protect American's legitimate business interest in customer good will. "A covenant not to compete, as a partial restraint of trade, is available to prevent unfair competition by a former employee . . . ." *Boisen v. Petersen Flying Serv., ante* p. 239, 248, 383 N.W.2d 29, 34 (1986).

Reasonableness of a specific restrictive covenant must be assessed upon the facts of a particular case and must be determined on all the circumstances. See *U-Haul Co. of Central Illinois v. Hindahl*, 90 Ill. App. 3d 572, 413 N.E.2d 187 (1980). The restriction imposed by a covenant not to compete must be "no wider in scope than is necessary to protect the business of the employer." *Manpower, Inc. v. Hedgecock, supra* at 521, 257 S.E.2d at 114. "[A] restraint is reasonable only if, taken as a whole, its dimensions are proportioned in relation to each other so as to keep the burden on the employee down to the minimum consistent with reasonable protection to the employer's legitimate interests." Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 675 (1960). "[A] contract to restrict a laborer from engaging in an occupation, if valid at all,

must be restricted to the area in which the personal service was performed." *Brewer v. Tracy*, 198 Neb. 503, 506, 253 N.W.2d 319, 322 (1977).

Time and space restraints of the covenant not to compete in this case were triggered upon existence of the three situations or conditions specified in the covenant. The restrictive covenant precluded Vodra's acquisition of only two customers—Fonner Park and the State Fairgrounds. Vodra was not unconditionally prohibited from seeking customers within the sales territory covered during his employment with American. Rather, the covenant not to compete prohibited Vodra's soliciting American's customers contacted in the combined circumstances, conditions, or situations specified in that covenant. Such restriction on Vodra, as a former employee of American, provides minimal restraint on competition and is reasonable. The covenant's time restriction is also valid because, given an applicable customer or former customer, American has a legitimate interest in protecting its customer good will for a reasonable period of time. Under the circumstances a 3-year restriction was reasonable to protect American's significant good will with its racetrack customers.

This brings us to the final question, whether the restriction is "reasonable in the sense that it is not unduly harsh and oppressive on the employee." *Securities Acceptance Corp. v. Brown*, 171 Neb. 406, 417, 106 N.W.2d 456, 463 (1960).

In *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982), this court recognized a "balancing test" to be applied in determining whether the restraint of a postemployment covenant not to compete is unduly harsh or oppressive and, therefore, unenforceable. The factors or considerations involved in such balancing test, required by *Philip G. Johnson & Co. v. Salmen, supra* at 128, 317 N.W.2d at 904, are

> the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business

position held by the covenantor; the covenantor's training, health, education, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee.

As required by *Philip G. Johnson & Co. v. Salmen, supra*, harshness and oppressiveness on the covenantor-employee is weighed against protection of a valid business interest of the covenantee-employer. However, in the balancing test applied to a postemployment covenant not to compete, there is no arithmetical computation or formula required in a court's consideration of the factors involved or to be considered. The factors or considerations to be used in that balancing test are not weighted; that is, there is no prescribed method by which more or less weight is assigned to each factor to be considered in the balancing test required by *Philip G. Johnson & Co. v. Salmen, supra*.

Applying the balancing test to the present case, protection of American's good will outweighs any hardship which enforcement of the covenant may have on Vodra. Vodra had no training nor experience in security service before his employment with American. Any knowledge acquired by Vodra concerning security work was gained through on-the-job training as an American employee. Vodra is 33 years old, unmarried, and in good health. Enforcement of the covenant will not require Vodra to move from his home in Omaha, nor will enforcement absolutely and totally restrict Vodra's activities within his former sales territory for American. While at American, Vodra participated in the acquisition of the Fonner Park account and serviced that account for 2 years. It was, however, the market position and good will of American which was instrumental in American's acquiring the Fonner Park account. The record discloses nothing to prevent the inference that Fonner Park would have chosen American regardless of Vodra's participation in the process of providing security services for Fonner Park. American acted in good faith in drafting a narrow covenant not to compete. Vodra's actions in acquiring the Fonner Park account are somewhat suspect.

Vodra admittedly failed to expend his best efforts to secure the 1984 Fonner Park contract for American and then subsequently capitalized on his American-based relationship with the Fonner Park management by obtaining a contract for his own corporation.

The restriction imposed upon Vodra by the postemployment covenant not to compete is not unduly harsh and oppressive on Vodra and is, therefore, reasonable. American is entitled to injunctive relief. We reverse the judgment of the district court and remand this matter to the district court with direction to grant the appropriate injunctive relief pursuant to the request by American.

Finally, American requested an accounting, which was denied when the district court denied injunctive relief.

> An action for accounting may, under one set of circumstances, find its remedy in an action at law and, under another, find it within the jurisdiction of equity. Where . . . the intimate relationships of the parties are involved, an adequate remedy was available only within the equitable jurisdiction of the court.

Philip G. Johnson & Co. v. Salmen, 211 Neb. 123, 124, 317 N.W.2d 900, 902 (1982). Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to show a fiduciary or trust relationship between the parties, or a complicated series of accounts, making the remedy at law inadequate. *Jasa v. City of Omaha*, 218 Neb. 314, 352 N.W.2d 913 (1984). See, also, *Lustgarten v. Jones*, 220 Neb. 585, 371 N.W.2d 668 (1985). An action for an accounting must generally allege the plaintiff demanded and the defendant refused to render an accounting. *Harmon Care Centers v. Knight*, 215 Neb. 779, 340 N.W.2d 872 (1983). In an accounting action the burden is upon the plaintiff to establish his right to the accounting. *Barthuly v. Barthuly*, 192 Neb. 610, 223 N.W.2d 429 (1974). American in its petition raised its claim for an accounting. Evidence in this case has established the "intimate, fiduciary, or trust" relationship between American and Vodra, a former supervisor and manager who had close personal contact with American's customers. American is entitled to an equitable accounting, and we remand this matter to the district

court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

KRIVOSHA, C.J., concurring.

I concur in the result reached by the majority in this case and, in the main, agree with the majority's analysis. I would not, however, have determined, as the majority has, that the three situations or conditions activating the covenant were inclusive. The evidence in this case establishes that such a decision is not necessary in view of the fact that all three conditions were met. I would not wish to leave the impression that in every instance in which a contract contains a series of conditions preceded by letter that the conditions are inclusive rather than exclusive.

DALE W. REES ET AL., APPELLANTS, V. M.B. HUFFMAN, APPELLEE.

384 N.W.2d 631

Filed April 11, 1986. No. 84-811.

1. **Contracts.** A written contract expressed in unambiguous language is not subject to interpretation or construction, and the intention of the parties must be determined from its contents alone. A trial court is not free to rewrite a contract for the parties or speculate as to the terms of a contract which the parties have not seen fit to set out or are contrary to the express terms of the contract.
2. _____. In construing a contract, words must be given their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them, and the contract must be viewed as a whole.
3. **Debtors and Creditors: Accord and Satisfaction.** Where a certain sum of money is tendered by a debtor to a creditor on condition that the creditor accept it in full satisfaction of the demand, the sum being in dispute, the creditor must either refuse the tender or accept it as made subject to the condition. If the creditor accepts it, he or she accepts the condition also, notwithstanding any protest made to the contrary.
4. **Accord and Satisfaction.** In order to work an accord and satisfaction, it is essential that there be a bona fide dispute between the parties, that the substituted performance be tendered in full satisfaction of the claim, and that the tendered performance be accepted.
5. _____. A condition that a check be considered as full satisfaction must either be recited upon the check or otherwise declared.

Appeal from the District Court for Rock County: EDWARD E. HANNON, Judge. Reversed and remanded with directions.

Boyd W. Strope and Wally Eklund, for appellants.

Stephen K. Yungblut of Hughes & Luce, for appellee.

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

PER CURIAM.

The plaintiffs-appellants appeal a ruling of the district court for Rock County, Nebraska, denying their claim for breach of contract damages arising out of an agreement to sell stock. We reverse.

Dale Rees was an employee of Commercial Bank in Bassett, Nebraska. Rees and his wife, the plaintiffs, signed an agreement in 1966 whereby they purchased 60 shares of stock in Commercial Bank from the defendant, M.B. Huffman. The agreement also provided for the Reeses to sell the stock back to the defendant when they decided to sell their interest.

Rees terminated his employment with Commercial Bank in June of 1979, and in conjunction therewith the parties arranged for Huffman to purchase the stock. At that time the original 60 shares had grown to 180 shares due to a 3-for-1 stock split. The parties agreed that 90 shares would be sold in July of 1979, and the other 90 shares would be sold in January of 1980.

Pursuant to the contract, the plaintiffs elected to have the value of the July stock sale determined as of June 30, 1979. The purchase price of the stock was to be based on the book value of the bank. Neither party complains regarding the first transaction.

In a letter dated December 27, 1979, Dale Rees tendered the 90 remaining shares and requested payment based on the January 2, 1980, valuation of the bank. Huffman responded by sending two checks, totaling $38,096.10, accompanied by a letter which indicated the payments were based on the June 29, 1979, valuation. Rees cashed the checks on January 8.

Thereafter, in the *latter part of January*, Rees, who was living in Arizona, came across the bank's statement of condition as of December 31, 1979, in the Rock County Leader,

a weekly newspaper. Based on the bank's financial condition at that time, the plaintiff determined that he had been underpaid $4,881.56 for the second stock sale. Rees corresponded with Huffman, demanding payment based on the later valuation. The defendant indicated that he had given the plaintiffs "a break on the price" and stated that they had received a fair price for their stock.

The Reeses brought this action in the district court for Rock County to recover the balance they claim is due and owing on the second stock transfer. The district court ruled for the defendant, holding that the contract provided for the choosing of one date for the valuation of the stock, and also that an accord and satisfaction had been reached. The plaintiffs assign as error both of these findings.

Paragraph 3 of the 1966 stock purchase agreement reads as follows:

> The first party, M. B. Huffman, his heirs, or assigns, hereby agrees to buy all of second parties [Dale and Mary Rees'] stock for cash at a price to be hereafter computed at book value. Book value of the stock to be the total of the capital, surplus, undivided profits and reserve for losses divided by the number of outstanding shares of the capital stock of said corporation. The book value is to be computed as of the 1st of January during the year which the parties of the second part desire to sell, or at any other date thereafter at the election of the party [sic] of the second part.

It is the last sentence of the paragraph which has given rise to this dispute. The plaintiffs argue that they are empowered to choose the valuation date for *each* sale, while the defendant asserts that the language provides for one, and only one, valuation date.

> We have previously said on a number of occasions that a written contract expressed in unambiguous language is not subject to interpretation or construction, and the intention of the parties must be determined from its contents alone . . . and that a trial court is not free to rewrite a contract for the parties or speculate as to the terms of a contract which the parties have not seen fit to

> set out or are contrary to the express terms of the contract
> . . . .

(Citations omitted.) *Kansas-Nebraska Natural Gas Co. v. Swanson Bros.*, 215 Neb. 398, 400, 338 N.W.2d 774, 775 (1983).

Further, in construing a contract, words "must be given their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them," and "the contract must be viewed as a whole." *Bass v. Dalton*, 213 Neb. 360, 362-63, 329 N.W.2d 115, 117 (1983).

In viewing the contract as a whole, it is clearly the intent of the parties that the stock would revert back to the defendant at such time as "the parties of the second part desire to sell." In looking at paragraph 5 of the agreement, is it also clear that the parties contemplated a situation wherein the Reeses may have wanted to sell some, but not all, of their stock at a time. This provision states: "The second parties agree not to sell said stock *or any portion thereof* to any person other than the [defendant] . . . ." (Emphasis supplied.) Additionally, paragraph 4 binds the plaintiffs, their heirs or assigns, to offer their stock to the defendant "should they exercise their election or demand upon the [defendant] . . . ." This language contemplates that the Reeses have the power to initiate sales.

Evaluating paragraph 3 in light of the agreement's other provisions, there is no apparent limitation on the plaintiffs' ability to determine the timing and quantity of any sale. Consistent with this is the provision empowering the plaintiffs to set the valuation date for a sale. The price is to be set, based on book value, "as of the 1st of January during the year which the parties of the second part desire to sell, or at any other date thereafter at the election of the party [sic] of the second part." This language in no way limits the plaintiffs to one sale or to one selling price. To the contrary, the contract provides that the price is to be set based in some part on *when* it is sold.

In light of the parties' contemplation of multiple sales and the contractual relationship between the time of sale and the price, a consistent reading of the agreement requires a finding that the parties provided for a separate determination of price for each sale. We believe this is the meaning ordinary, reasonable persons would derive from this agreement.

Consequently, we reverse the district court's ruling that the contract provided for a single determination of price.

The plaintiffs' second assignment of error urges that the lower court wrongly found that an accord and satisfaction was reached.

> Here applicable is a well-settled principle of Nebraska law that where a certain sum of money is tendered by a debtor to a creditor on condition that he accept it in full satisfaction of his demand, the sum due being in dispute, the creditor must either refuse the tender or accept it as made subject to the condition. *If he accepts it, he accepts the condition also, notwithstanding any protest he may make to the contrary.*

(Emphasis in original.) *Langness v. "O" Street Carpet Shop*, 217 Neb. 569, 575, 353 N.W.2d 709, 713 (1984).

Further, "[i]t is essential that there be a bona fide dispute between the parties, that the substituted performance be tendered in full satisfaction of the claim, and that the tendered performance be accepted." *High-Plains Cooperative Assn. v. Stevens*, 204 Neb. 664, 667, 284 N.W.2d 846, 849 (1979).

It is apparent from the record that the defendant did not meet his burden of proof in showing that the substituted performance was tendered in full satisfaction of the claim. His tender was accompanied by a letter stating: "You will find enclosed my checks totaling $38,096.10 for 90 shares of Commercial Bank stock @ $423.29 per share based on 29 June 1979 valuation." The only notation on the check referenced the certificate numbers and amount of stock being paid for. The defendant made no condition that the money be accepted as a full payment or not be accepted at all.

As noted in *Langness v. "O" Street Carpet Shop, supra* at 575, 353 N.W.2d at 714: "We think the better rule is that such condition must either be recited upon the check or otherwise declared." Since no condition was declared, there was no accord and satisfaction.

The defendant contends that the conduct of the parties modified the contract. He urges that plaintiffs' submission of the stock was an offer which defendant rejected and thereafter made a counteroffer which plaintiffs accepted by cashing the

checks without protest. The rule of law in Nebraska is that " '[a] written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration . . . .' " *Cole v. Hickey*, 215 Neb. 728, 732, 340 N.W.2d 418, 420 (1983).

Huffman's argument ignores two critical factors. First, his rejection of the Reeses' tender would constitute a breach of the agreement. The contract gives him *no* discretion to determine the selling price of the stock. Resultingly, his failure to honor the plaintiffs' demand breached the contract. Second, neither party intended to modify the contract. Both parties testified that they were acting under the terms of the agreement. Huffman specifically indicated that, to his knowledge, the agreement was never modified, changed, canceled, or rescinded. The defendant conceded his point.

The plaintiffs claim damages in the amount of $4,881.56, based on the difference in the amount paid and the valuation of the stock as determined from the bank's statement of condition at the close of business December 31, 1979. The defendant contends that an adjustment must be made to the book value to obtain the bank's condition as of January 2, 1980, to reflect 1979 tax liability. The only evidence of this is defendant's testimony, which indicates that the January 2, 1980, valuation would be approximately $6.25 per share lower. No supporting documents or evidence of the figure's derivation was offered. Without more, the defendant has failed to adequately prove a change in the bank's financial position between December 31, 1979, and January 2, 1980.

The decision of the district court is reversed, and the cause is remanded with directions to enter judgment in favor of the plaintiffs in the amount of $4,881.56.

REVERSED AND REMANDED WITH DIRECTIONS.