Case No. A-21-277

IN THE NEBRASKA COURT OF APPEALS

RYSTA LEONA SUSMAN, both individually and as Natural Mother of SHANE ALLEN LOVELAND, a Protected Person, SHANE ALLEN LOVELAND, a Protected Person by and through his Temporary Guardian and Conservator, JOHN SAUDER, and JACOB SUMMERS,
PLAINTIFFS - APPELLANTS,

v.

KEARNEY TOWING & REPAIR CENTER, Inc., a Nebraska Corporation
DEFENDANT - APPELLEE.

AND

KEARNEY TOWING & REPAIR CENTER, Inc., a Nebraska Corporation
THIRD-PARTY PLAINTIFF - APPELLEE,

v.

KEARNEY TOWING & REPAIR CENTER, INC., Nebraska Corporation,
THIRD-PARTY DEFENDANT - APPELLEE,

ON APPEAL FROM THE DISTRICT COURT OF BUFFALO COUNTY, NEBRASKA
The Honorable John H. Marsh, District Judge
Case Number CI 19-158

BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

This Court is vested with jurisdiction under Neb. Rev. Stat. §§ 25-1911 and 25-1912 .

On March 2, 2021, the Buffalo County District Court ("District Court") entered an Order sustaining Kearney Towing & Repair Center, Inc.'s ("Kearney Towing") Motion to Reconsider Order on Motion for Summary Judgment, which granted Judgment in favor of Kearney Towing, dismissed the action, and found all other pending motions either moot or overruled. (T112-116).

On March 8, 2021, Rysta Leona Susman, both Individually and as Natural Mother of Shane Allen Loveland, a Protected Person, Shane Allen Loveland, a Protected Person, by and through his Temporary Guardian and Conservator, John Sauder, and Jacob Summers ("Appellants" or "Plaintiffs") filed Plaintiffs' Motion to Dismiss Cause of Action and Plaintiffs' Motion to Reconsider Judgment, or in the alternative, Motion to Alter or Amend Judgment. (T117-125). On March 18, 2021, the District Court overruled the Motion for Reconsideration but sustained the Motion to Dismiss Cause of Action, regarding their breach of contract claim, and Motion to Alter or Amend Judgment, dismissing Kearney Towing's third-party claim. (T126-128). Having resolved all claims, issues, and motions and dismissed the action in its entirety, the District Court's March 18, 2021 Order is a final order, pursuant to Neb. Rev. Stat. § 25-1902.

On March 31, 2021, Appellants timely filed their Notice of Appeal and paid the docket fee and cash in lieu of cost bond.

STATEMENT OF THE CASE

A. Nature Of The Case. On June 10, 2014, Kearney Towing installed a used tire on a truck owned by Dandee Concrete Construction, Inc. ("Dandee"). (T72-73, at ¶¶ 4-6, 10, 13-14). On May 1, 2015, Appellants Shane Allen Loveland and Jacob Summers were passengers in Dandee's truck when it was involved in a single vehicle accident. (T72, at ¶¶ 1, 3, 10). On April

12, 2019, Appellants filed suit against Kearney Towing. (T1-6; T73, at ¶ 22). Appellants asserted a claim of negligence against Kearney Towing for the direct injuries to their rights that occurred in the May 1, 2015 accident, which resulted from the failure of the used tire Kearney Towing installed. (*See* T2-4, at ¶¶ 7-16; T48-50, at ¶¶ 8-17). Appellants alleged Kearney Towing's acts or omissions, related to its installation of the used tire, were the wrongs that subsequently produced the direct injuries to their rights. (*See id.*). Kearney Towing asserted an affirmative defense that Appellants' claims were barred by the applicable statute of limitations. (T9, at ¶ 5; T58, at ¶ 6).

B. Issues Considered by the District Court. The relevant issues presented by Kearney Towing's Motion to Reconsider Order on Motion for Summary Judgment were (1) when a tort claim accrues under Nebraska law; (2) what statute of limitations governs Appellants' negligence claim; (3) when a claim accrues under the applicable statute of limitations; (4) what date Appellants' negligence claim accrued; (5) whether Appellants' negligence claim was barred by the applicable statute of limitations; and (6) whether Kearney Towing was entitled to summary judgment.

C. Disposition of Issues by the District Court. The District Court ruled (1) a tort action accrues when the act or omission occurs, (T113, 127; *but see* T86); (2) Appellants' negligence claim is governed by Neb. Rev. Stat. § 25-207(3) (Reissue 2016), (T86, 114); (3) a negligence claim governed by § 25-207(3) accrues when the defendant's act or omission occurs, (T113, 127; *but see* T86); (4) Appellants' negligence claim accrued on June 10, 2014, (T113-114, 127; *but see* T86); (5) Appellants' negligence claim was barred because it was not filed within four years of its accrual, despite "plaintiffs [only having] from May 1, 2015 until June 10, 2018 to file their action," (T127; *accord* T113-114; *but see* T86); and (6) Kearney Towing was entitled to summary judgment on Appellant's negligence claim, (T113-114, 126-127; *but see* T86).

D. Scope Of Appellate Review.

When a Tort Claim Accrues Under Nebraska Law Generally and Specifically for Tort Claims Governed by Neb. Rev. Stat. § 25-207(3). "When the cause of action accrues is a judicial question, and to determine it in any particular case is to settle a general rule of law for a class of cases which must be founded upon reason and justice." *Department of Banking v. McMullen*, 134 Neb. 338, 345, 278 N.W. 551, 555 (1938). "The meaning of a statute is also a question of law." *Harris v. Omaha Hous. Auth.*, 269 Neb. 981, 984, 698 N.W.2d 58, 62 (2005). "The interpretation and meaning of a prior opinion presents a question of law." *State v. Stolen*, 276 Neb. 548, 552, 755 N.W.2d 596, 600 (2008).

When Appellants' Negligence Claim Accrued. "If the facts of a case are undisputed, the issue as to when the statute of limitations begin to run is a question of law." *State v. Conn*, 300 Neb. 391, 393, 914 N.W.2d 440, 443 (2018).

Review of Summary Judgment. "Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law." *Colwell v. Mullen*, 301 Neb. 408, 412, 918 N.W.2d 858, 863 (2018).

Review of Questions of Law. "Appellate courts independently review questions of law." *Hike v. State Dept. of Rds.*, 297 Neb. 212, 216, 899 N.W.2d 614, 620 (2017).

STATEMENT OF ERRORS

1. The District Court erred in ruling all tort claims accrue when the wrongful act or omission occurs, rather than when the plaintiff has the right to institute and maintain suit, disregarding the requirements of Neb. Rev. Stat. § 25-201 (Reissue 2016).

2. The District Court erred in ruling negligence claims governed by Neb. Rev. Stat. § 25-207(3) (Reissue 2016) accrue when the wrongful act or omission occurs, rather than when the plaintiff suffers a direct injury to his or her rights resulting in actual damage.

3. The District Court erred in ruling Appellants' negligence claim accrued, under Neb. Rev. Stat. § 25-207(3) (Reissue 2016), on the date Kearney Towing's acts or omissions occurred, June 10, 2014, rather than the date Appellants' rights were directly injured and they sustained actual damage, May 1, 2015.

4. The District Court erred in ruling Appellants' negligence claim was time barred, under Neb. Rev. Stat. § 25-207(3) (Reissue 2016), despite admitting Appellants only had the right to institute and maintain suit for about three years, from May 1, 2015 to June 10, 2018.

5. The District Court erred in sustaining Kearney Towing's Motion to Reconsider Order on Motion for Summary Judgment on Appellant's negligence claim and granting Judgment to Kearney Towing.

PROPOSITIONS OF LAW

1. "When the cause of action accrues is a judicial question, and to determine it in any particular case is to settle a general rule of law for a class of cases which must be founded upon reason and justice." *Department of Banking v. McMullen*, 134 Neb. 338, 345, 278 N.W. 551, 555 (1938) (citing 37 C. J., Limitations of Actions, § 153, p. 810-11 (1925)).
2. "The meaning of a statute is also a question of law." *Harris v. Omaha Hous. Auth.*, 269 Neb. 981, 984, 698 N.W.2d 58, 62 (2005).
3. "The interpretation and meaning of a prior opinion presents a question of law." *State v. Stolen*, 276 Neb. 548, 552, 755 N.W.2d 596, 600 (2008).

4. "If the facts of a case are undisputed, the issue as to when the statute of limitations begin to run is a question of law." *State v. Conn*, 300 Neb. 391, 393, 914 N.W.2d 440, 443 (2018).

5. "Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law." *Colwell v. Mullen*, 301 Neb. 408, 412, 918 N.W.2d 858, 863-64 (2018).

6. "Appellate courts independently review questions of law decided by a lower court." *Hike v. State Dept. of Rds.*, 297 Neb. 212, 216, 899 N.W.2d 614, 620 (2017).

7. "Limitations are created by statute and derive their authority therefrom." *Markel v. Glassmeyer*, 137 Neb. 243, 246, 288 N.W. 821, 822 (1939).

8. "Statutes that effect a change in common law or take away a common-law right should be strictly construed, and a construction that restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it." *Vasquez v. Chiproperties, LLC*, 302 Neb. 742, 767, 925 N.W.2d 304, 323 (2019); *Fecht v. Christensen (In re Pierce Elevator)*, 291 Neb. 798, 816, 868 N.W.2d 781, 796 (2015).

9. A court should construe statutes governing limitations on actions to protect against "the injustice of barring meritorious claims." *Condon v. A. H. Robins Co.*, 217 Neb. 60, 66, 349 N.W.2d 622, 626 (1984).

10. Pursuant to Neb. Rev. Stat. § 25-201 (Reissue 2016), "[t]he accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the

aggrieved party has a right to apply to the proper tribunal for relief." *Heiden v. Adelung (In re Estate of Adelung)*, 306 Neb. 646, 671, 947 N.W.2d 269, 290 (2020); *Condon v. A. H. Robins Co.*, 217 Neb. 60, 64-65, 349 N.W.2d 622, 625 (1984).

11. "The party who has the right of action has the full period of the statute in which to enforce it." *Bohrer v. Davis*, 94 Neb. 367, 370, 143 N.W. 209, 210 (1913) *overruled on other grounds by Criswell v. Criswell*, 101 Neb. 349, 163 N.W. 302 (1917).

12. "In construing a statute, a 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." *Ash Grove Cement Co. v. Neb. Dep't of Revenue*, 306 Neb. 947, 955, 947 N.W.2d 731, 738 (2020).

13. Pursuant to the ordinary meaning of the language in Neb. Rev. Stat. § 25-201 (Reissue 2016), a claim only accrues once each of its elements have occurred and the claim can be maintained in a court of law. For a claim to be capable of being maintained each element must have occurred sufficiently to the proofs required for the class of actions. *See Markel v. Glassmeyer*, 137 Neb. 243, 246, 288 N.W. 821, 822-23 (1939).

14. "A negligent act is not actionable unless it results in injury to another. A negligence action is brought not to vindicate a right but to recover compensation for all damages sustained. Proof of actual damages should therefore be essential to a recovery. . . . Nominal damages to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred.'" *Beavers v. Christensen*, 176 Neb. 162, 166, 125 N.W.2d 551, 554 (1963) (citation omitted); *see also St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 792, 452 N.W.2d 746, 749 (1990).

15. "Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible." *Ronda R. v. Office of Pub. Guardian (In re Nicholas H.)*, 309 Neb. 1, 15, 958 N.W.2d 661 (2021).

16. The only reasonable construction of § 25-207(3)'s language demonstrates the Legislature intended for claims governed by it to accrue when a plaintiff sustains a direct injury to his or her rights causing actual damage. *See Omaha Paper Stock Co. v. Martin K. Eby Constr. Co.*, 193 Neb. 848, 851, 230 N.W.2d 87, 90 (1975); *Condon v. A. H. Robins Co.*, 217 Neb. 60, 66, 349 N.W.2d 622, 626 (1984).

17. "The term 'injury' has both a common and a legal meaning and when used in construing a statute of limitations, the term 'injury' is to be given its legal meaning." The ordinary meaning of the term "injury" in the context of limitations on actions is "something done against the right of the party, producing damage." *Rosnick v. Marks*, 218 Neb. 499, 504, 357 N.W.2d 186, 190 (1984).

18. "The general rule applicable to negligence actions is that the statute of limitations runs from the time of the negligent act or omission, even though the total damage sustained cannot be ascertained until a later date, but that if no cause of action accrues until injury or damage ensues, the statute runs from the injury or damage." 51 Am. Jur. 2d. Limitation of Actions § 136, p. 705-6 (1970) (citations omitted).

19. To decide whether to adhere to the principle of stare decisis, a court should consider "workability, the antiquity of the precedent, whether the decision was well reasoned,

[and] whether experience has revealed the precedent's shortcomings. . . ." *Heckman v. Marchio*, 296 Neb. 458, 467, 894 N.W.2d 296, 302 (2017).

20. "[R]emaining true to an intrinsically sounder doctrine better serves the values of stare decisis than following a more recently decided case inconsistent with the decisions that came before it." *Heckman v. Marchio*, 296 Neb. 458, 466-67, 894 N.W.2d 296, 302 (2017); *Porter v. Porter*, 309 Neb. 167, 174, __ N.W.2d __ (2021).

STATEMENT OF THE FACTS

Appellee Kearney Towing & Repair Center, Inc. ("Kearney Towing") is a Nebraska corporation that engages in the business of selling, inspecting, and installing automotive tires on automotives. (T47-48, at ¶ 4; T56, at ¶ 4; T72, at ¶ 2; Supp. T2.) Dandee Concrete Construction, Inc. ("Dandee") is a Nebraska corporation. (T48, at ¶ 5; T56, at ¶ 5.) At all relevant times, Appellants Shane Allen Loveland ("Loveland") and Jacob Summers ("Summers") were employees of Dandee. (T48, at ¶ 5; T56, at ¶ 5.) Appellant Rysta Leona Susman is Loveland's mother, and John Sauder is Loveland's Guardian and Conservator. (T1, at ¶ 2; T48, at ¶ 1.)

On June 10, 2014, Kearney Towing installed a used tire on a truck owned by Dandee. (T72-73, at ¶¶ 4-6, 10, 13-14; Supp. T2; E16,2-3(25:22-26:2):(9, 12), 87-88; E17,3-5(16:12-18:3):(9, 12), 98-100.) On May 1, 2015, Loveland and Summers were riding in Dandee's truck when the tire failed, causing the single vehicle accident. (T72, at ¶¶ 1, 3, 10.)

On April 12, 2019, Appellants filed this suit in the Buffalo County District Court (the "District Court"). (T1-6; T73, at ¶ 22; Supp. T2.) Appellants asserted negligence and breach of contract claims against Kearney Towing. (*See* T2-4, at ¶¶ 7-19; T48-50, at ¶¶ 8-20.) They alleged sustaining significant injuries when a tire on Dandee's truck failed and resulted in the May 1,

2015 accident and that the accident was caused by Kearney Towing's acts or omissions related to its installation of the used tire. (*See* T2-4, at ¶¶ 7-19; T48-50, at ¶¶ 8-20.)

Kearney Towing moved for summary judgment on its statute of limitations affirmative defense. (T66-67; *see* T9.) It filed a Statement of Undisputed Facts, which Appellants did not dispute for the purposes of the motion. (T71-73; Supp. T2.) On December 29, 2020, the District Court overruled Kearney Towing's motion for summary judgment on Appellants' negligence claim. (T86.) It ruled Appellants' claim was governed by Neb. Rev. Stat. § 25-207(3) (Reissue 2016), it accrued only once it was a complete and actionable claim, upon Appellants sustaining actual damage, and it was not barred because it did not accrue until May 1, 2015. (*Id.*)

Kearney Towing moved for reconsideration of the December 28, 2020 Order. (T89, 97; Supp. T48, 60.) No evidence was offered concerning Appellants' negligence claim. (*See* 30:20-31:7.) On March 3, 2021, the District Court sustained Kearney Towing's motion and ruled all tort claims accrue on the date of the wrongful act or omission. (T112-114.) Then, applying the occurrence rule to Appellants' claim, the District Court ruled the claim accrued on June 10, 2014 and was barred on June 10, 2018. (T112-113.) Accordingly, it ruled "[Appellants] had from the date of the accident May 1, 2015 until June 10, 2018 to file their action," acknowledging Appellants had only about three years to institute and maintain suit after the date they sustained a direct injury to their rights. (T112-113.) The District Court granted summary judgment to Kearney Towing and dismissed Appellants' claim and all pending motions. (T113.)

Appellants filed their Motion to Dismiss Cause of Action and Plaintiffs' Motion to Reconsider Judgment, or in the alternative, Motion to Alter or Amend Judgment. (T117-125). On March 18, 2021, the District Court overruled Appellants' Motion for Reconsideration of the Judgment but sustained their Motion to Dismiss Cause of Action, regarding their breach of

contract claim, and Motion to Alter or Amend Judgment, dismissing Kearney Towing's third-party claim. (T126-128). Appellants timely filed their notice of appeal on March 31, 2021.

SUMMARY OF THE ARGUMENT

The District Court erred as a matter of law by unjustly shortening the limitation period for Appellants to sue for direct injuries to their rights **from four years to about three years**--admitting Appellants could not institute suit until May 1, 2015 but satisfying itself that "plaintiffs had from May 1, 2015 until June 10, 2018 to file their action." (T127). Yet the District Court was unable to identify a single case that approved of depriving a plaintiff of the four years that Neb. Rev. Stat. § 25-207(3) (Reissue 2016) expressly provides to file a negligence claim.

The District Court's initial December 28, 2020 Order followed 150 years of Nebraska Supreme Court precedent (1) applying § 25-207(3) to grant plaintiffs four years to bring a negligence claim after suffering a direct injury causing actual damage and (2) unwaveringly adhering to the guiding principle of accrual in Neb. Rev. Stat. § 25-201 (Reissue 2016): "**[A] cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit**." *Condon v. A. H. Robins Co.*, 217 Neb. 60, 64, 349 N.W.2d 622, 625 (1984) (emphasis added). However, the District Court erroneously reversed that ruling to adopt the occurrence rule for all tort claims, finding all tort claims accrue when the act or omission occurs regardless of whether the claim is complete and actionable.

The District Court's adoption of the occurrence rule was an erroneous interpretation of a proposition that originated in the following dicta of *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 562-63, 279 N.W.2d 603, 606 (1979):

> The traditional rule is that the statute begins to run as soon as the action accrues, and the cause is said to accrue when the aggrieved party has the right to institute

> and maintain a suit. In a contract action this means as soon as breach occurs, and in tort, as soon as the act or omission occurs. These rules would apply even though the plaintiff was then ignorant of the injury sustained or could not ascertain the amount of his damages.

(Emphasis added) (citing 51 Am. Jur. 2d, Limitation of Actions, § 109, p. 681). This dicta does not support a broad application of the occurrence rule to all tort claims, as the emphasized text limits the application of the statement to instances where the wrongful conduct and a direct injury occur simultaneously. Further, the source the *Celotex* Court relied on for its dicta directly supports Appellants' argument that tort claims accrue only once they are complete, upon the plaintiff sustaining a direct injury. 51 Am. Jur. 2d. § 109, p. 681 (1970) ("As a general rule, the occurrence of an act or omission, whether it is a breach of contract or of duty, whereby one sustains a ***direct injury***, however slight, starts the statute of limitations running against the right to maintain an action.") (emphasis added); *see also* 51 Am. Jur. 2d. § 136, p. 705-6 (1970). Nevertheless, the meaning of the *Celotex* Court's dicta has been obscured through rote citations that fail to acknowledge the dicta's original context.

The progeny of cases citing the *Celotex* Court's dicta have not had occasion to test the validity of the now-isolated proposition because the occurrence rule and actual damage rule typically produce the same result, as wrongful conduct and a direct injury typically occur simultaneously. This case, however, presents an atypical scenario where the wrongful conduct and the resulting injury were separated by nearly a year. While Kearney Towing committed its negligent act in 2014, Appellants did not gain the right to bring suit until they were directly injured by the tire failure on May 1, 2015. Accordingly, this appeal presents a novel issue of the occurrence rule's suitability as a general accrual doctrine for tort claims and claims governed by

§ 25-307(3) in light of the requirements of § 25-201, the plain language of § 25-207(3), and the long-standing Nebraska precedent that ***never*** applied the occurrence rule in a single case before *Celotex*. As shown by the District Court's March 3, 2021 Order, however, the requirements of § 25-201 and the occurrence rule are diametric principles when applied to an atypical negligence claim and choosing the occurrence rule over § 25-201 creates a manifestly unjust result.

This Court should interpret *Celotex* consistently with its 150 years of precedent, holding tort claims accrue only when they are complete and negligence claims governed by § 25-207(3) are not complete until a direct injury causing actual damage occurs, and overrule the progeny of cases reciting the *Celotex* Court's dicta to the extent they impose the occurrence rule in contravention of § 25-201, § 25-207(3), and Nebraska Supreme Court precedent. Alternatively, Appellants request this Court either overrule *Celotex* or recognize an exception to the occurrence rule's application for atypical claims governed by § 25-207(3). As the underlying facts are undisputed, resolving this issue is dispositive; whether Appellants' negligence claim is barred depends only on whether this Court holds the occurrence rule governs the accrual that claim.

Thus, this Court should hold (1) tort claims accrue only when a plaintiff has the right to institute and maintain suit, (2) a negligence action governed by § 25-207(3) accrues only once the plaintiff's rights are directly injured to the level of actual damage, whether by construing it to impose the actual damage rule or by creating an exception to the occurrence rule for atypical claims, (3) Appellants' claim did not accrue until they sustained an injury to their rights on May 1, 2015, (4) Appellants' claim was not barred by § 25-207(3), and, consequently, (5) Kearney Towing was not entitled to summary judgment on Appellants' claim. Thus, this Court should reverse the District Court's opinion and remand this cause for further proceedings.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING TORT CLAIMS GENERALLY AND NEGLIGENCE CLAIMS GOVERNED BY NEB. REV. STAT. § 25-207(3) SPECIFICALLY ACCRUE WHEN AN ACT OR OMISSION OCCURS.

Tort claims accrue only once ***each*** of their elements have occurred, pursuant to § 25-201, and negligence claims under § 25-207(3) accrue only once a plaintiff suffers a direct injury resulting in actual damage. The Nebraska Supreme Court has adhered to these principles for over 150 years in applying Nebraska's statutes, which provide the only authority for imposing limitations on actions. However, some courts, including the District Court, have misapplied dicta from *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 562-63, 279 N.W.2d 603, 606 (1979) to inadvertently depart from this long-standing precedent with the novel position that the occurrence rule applies to all tort claims. This position, however, is neither based in statute nor reason and is simply a misinterpretation of a proposition removed from its original context. This Court should restore its adherence to statute and reasoned precedent by overruling the progeny of cases reciting the *Celotex* Court's dicta to the extent those opinions contravene the terms of §§ 25-201 and 25-207(3). And for the same reason this Court should reverse the District Court's ruling that the occurrence rule governs Appellants' negligence claim.

A. Time Limitations On Plaintiff's Rights To Litigate Did Not Exist At Common Law, So Any Limitation Must Be Based In Statute And Narrowly Construed.

There were no limits to the right to bring an action at common law, so a court should avoid imposing any limitations unless expressly required by statute. "Limitations are created by statute and derive their authority therefrom." *Markel v. Glassmeyer*, 137 Neb. 243, 246, 288 N.W. 821, 822 (1939). "They evidence a public policy formally declared by the legislative

department of government." *Id.* Consistent with this precedent, Scholars have described the origins of time limitations on actions as follows:

> At common law, there were no fixed time limits or periods for the filing of lawsuits, and parties could institute litigation at any time. Fixed limitations on actions are a product of modern legislative processes, representing legislative policy controlling the right to litigate. Time limitations during which a claim may be asserted exist only to the extent that they are created by a statute. Limitation periods thus are creatures of statute, and not of common law.

51 Am Jur 2d Limitation of Actions § 1 (2021) (citations omitted).

As limitations on the right to litigate are in degradation of the common law, courts must construe them narrowly to limit a plaintiff's right only as expressly directed by statute. "Statutes that effect a change in common law or take away a common-law right should be strictly construed, and a construction that restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it." *Vasquez v. Chiproperties, LLC*, 302 Neb. 742, 767, 925 N.W.2d 304, 323 (2019).

The Nebraska Supreme Court has applied this reasoning to limit statutory limitations to protect against "the injustice of barring meritorious claims." *Condon v. A. H. Robins Co.*, 217 Neb. 60, 66, 349 N.W.2d 622, 626 (1984). Specifically, it reasoned that equity supported applying the discovery rule to toll the accrual of certain claims, despite no statutory authority for the rule, when failing to do so would result in an unjust denial of a plaintiff's right to sue. *See id.* Conversely, the Nebraska Supreme Court has never intentionally broadened a statute of limitations in a manner that would deprive litigants of their right to file suit beyond the express

authority of the text. Accordingly, this Court must follow the doctrine of accrual providing litigants the broadest rights to bring their claims, limited only by express statutory authority.

B. Under The Plain Meaning Of Neb. Rev. Stat. § 25-201, A Tort Claim Accrues Only Once Each Of Its Elements Occurs Sufficiently To The Proofs Required To Permit The Plaintiff To Institute And Maintain Suit.

The fundamental principle of claim accrual compelled by § 25-201 is that a statute of limitations does not begin to run until a plaintiff has the right to institute and maintain suit. Section 25-201 provides that "[a] civil action shall be commenced only within the time prescribed in this chapter, **after the cause of action has accrued**." (Reissue 2016) (emphasis added). This language authorizes limitations on actions and concisely prohibits a statute of limitations from running until after accrual. Section 25-201 applies to all statutes limiting actions. *See Condon*, 217 Neb. at 64-65, 349 N.W.2d at 625.

For over 150 years, this statute, and the accrual of claims in general, has been interpreted to mean that a statute of limitations does not accrue until the claim is complete and actionable. "The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief." *Heiden v. Adelung (In re Estate of Adelung)*, 306 Neb. 646, 671, 947 N.W.2d 269, 290 (2020); *Condon*, 217 Neb. at 64-65, 349 N.W.2d at 625 (explaining this standard is imposed by § 25-201); *see also Celotex*, 203 Neb. at 563, 279 N.W. 2d at 606; *Department of Banking v. McMullen*, 134 Neb. 338, 278 N.W. 551 (1938); 51 Am. Jur. 2d Limitation of Actions §§ 126, 127 (2021) ("The statute of limitations begins to run upon the occurrence of the last event required to form the elements of the cause of

action."). Further, "[t]he party who has the right of action has the full period of the statute in which to enforce it." *Bohrer v. Davis*, 94 Neb. 367, 370, 143 N.W. 209, 210 (1913) *overruled on other grounds by Criswell v. Criswell*, 101 Neb. 349, 163 N.W. 302 (1917).

This long-standing construction is firmly rooted in § 25-201 and the ordinary meaning of "accrue." "In construing a statute, a 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." *Ash Grove Cement Co. v. Neb. Dep't of Revenue*, 306 Neb. 947, 955, 947 N.W.2d 731, 738 (2020). "Applied to a cause of action, the term to accrue means to arrive; to commence; to come into existence; to become a present enforceable demand." *Polizos v. Nationwide Mut. Ins. Co.*, 54 Conn. App. 724, 737 A.2d 946 (1999), *aff'd*, 255 Conn. 601, 767 A.2d 1202 (2001) (quotation omitted); *Strassburg v. Citizens State Bank*, 1998 SD 72, 9, 581 N.W.2d 510, 514 (1998) ("'Accrue' derives from the Latin words 'ad' and 'creso,' to grow to; thus it means to arise, to happen, to come into force or existence.") (citations omitted).

Accordingly, a claim in Nebraska only accrues once ***each*** of its elements have occurred and the claim can be maintained in a court of law. For a claim to be capable of being maintained, however, each element must have occurred sufficiently to the proofs required for the class of actions. As stated by the Nebraska Supreme Court, the application of statutes of limitations "to each classification made by it are based upon the similarity of the intrinsic or inherent elements which the causes of action so classified comprise, considered with reference to the nature of proof required to establish the existence of the same." *Markel*, 137 Neb. at 246, 288 N.W. at 822-823. This construction is also consistent with Nebraska's pleading rules that require a plaintiff to, at least, allege facts sufficient to suggest each element has occurred and will be provable upon discovery. *See Eadie v. Leise Props., LLC*, 300 Neb. 141, 147, 912 N.W.2d 715, 720-21 (2018).

The District Court's ruling is erroneous because it reversed its reliance on the principles compelled by § 25-201's terms and, instead, applied the occurrence rule to rule Appellants' negligence claim accrued ***before*** they could institute and maintain suit on it. This is not a case where Appellants suffered a direct injury simultaneously with the wrongful act or omission on June 10, 2014 but did not discover their injury until May 1, 2015; Appellants did not suffer a direct injury until May 1, 2015 and could not maintain a suit before that date. The District Court acknowledged this reality, stating "the defendant's act or omission occurred prior to any injury to plaintiffs" and finding Appellants' claims accrued on June 10, 2014 but "plaintiffs had [only] from May 1, 2015 until June 10, 2018 to file their action." (T127, 113).

There is no basis in § 25-201's concise language or the 150 years of precedent applying it for unjustly depriving Appellants of the full statutory period for bringing their claim. The District Court's ruling exceeds the statutory authority for limitations on actions in derogation of Appellants' common law rights. Accordingly, this Court should reaffirm its long-standing precedent by holding, as a matter of law, a claim accrues and the statute of limitations begins to run only after a plaintiff can maintain suit on his or her claim and reverse the District Court's application of the occurrence rule.

C. A Negligence Claim Governed By Neb. Rev. Stat. § 25-207(3) Accrues Only After A Plaintiff Suffers A Direct Injury Resulting In Actual Damage.

As shown above, § 25-201 does not impose a single period when all claims accrue but, instead, prohibits a claim from accruing until it is complete and actionable. Thus, accrual of a claim depends on its elements and the proofs required to establish those elements.

Certain classes of claims naturally accrue in a manner consistent with the occurrence rule as a consequence of their common law elements, in that a wrongful act or omission is of itself an

injury to the plaintiff's rights and actual damage is not required to make the claim complete. *See, e.g., Dorrington v. Minnick*, 15 Neb. 397, 403, 19 N.W. 456, 459 (1884) (explaining a breach of an affirmative duty in a contract creates a cause of action even if the plaintiff has not been damnified); *Cavanaugh v. City of Omaha*, 254 Neb. 897, 903, 580 N.W.2d 541, 546 (1998) (same); *Kochenthal v. Omaha & C. B. S. R. Co.*, 122 Neb. 244, 245, 240 N.W. 295, 296 (1932) (reversing defense verdict on trespass claim when defendant admitted act and entering judgment in favor of plaintiff for the nominal damage of $1.00).

However, for other classes of claims, like negligence claims, the mere breach of a duty is not actionable at common law, and a claim only becomes actionable when a plaintiff suffers a direct injury resulting in actual damage. Accordingly, a negligence claim could only accrue before becoming complete by explicit language modifying this accrual standard in the statute governing that class of claims. But the text of § 25-207(3) does not provide any basis for finding a modification of when negligence claims accrue and can only be reasonably construed to support the principle that a claim cannot accrue before a plaintiff has suffered a direct injury resulting in actual damage. And no reasoned Nebraska Supreme Court opinion has ever construed § 25-207(3) to impose any accrual standard but the actual damage ruled upon. Thus, this Court should affirm the long-standing construction compelled by § 25-207(3)'s language that a general negligence claim accrues only upon the occurrence of a direct injury causing actual damage, and it should reverse the District Court's contrary ruling applying the occurrence rule.

1. A Direct Injury Resulting In Actual Damage Is The Proof Required To Establish An Essential Element Of An Actionable Claim Of Negligence.

A plaintiff cannot institute and maintain a negligence claim unless he or she has sustained a direct injury of such a nature that actual damage can be alleged. "As a general matter, in order

to prevail in a negligence action, a plaintiff must establish the defendant's duty to protect the plaintiff from injury, a failure to discharge that duty, and damages proximately caused by the failure to discharge that duty." *Sundermann v. Hy-Vee, Inc.*, 306 Neb. 749, 763-764, 947 N.W.2d 492, 503 (2020). "In other words, [the plaintiff] must plead the four basic elements of negligence, namely, duty, breach of duty, proximate causation, and damages." *Brown v. Social Settlement Assn.*, 259 Neb. 390, 393, 610 N.W.2d 9, 11 (2000) (quotation omitted).

Further, it is a foundational principle of negligence that the injury must directly affect a plaintiff's rights and cause actual damage, not merely a technical injury. The Nebraska Supreme Court explained its adherence to this common law proof requirement in *Beavers v. Christensen*, 176 Neb. 162, 125 N.W.2d 551 (1963). There, the plaintiff sued in negligence for damages allegedly sustained in a motor vehicle accident where liability was admitted, but the jury returned a defense verdict. *Id.* at 163, 125 N.W.2d at 522. The plaintiff appealed and argued that, at least, nominal damages had to be awarded when the defendant's wrongful act was established to have caused an injury to the plaintiff's rights. *Id.* at 165-66, 125 N.W.2d at 553-54. The Nebraska Supreme Court rejected this argument and affirmed the jury's verdict. *Id.* at 166, 169, 125 N.W.2d at 554-55. The *Beavers* Court provided the following reasoning for its holding:

> A negligent act is not actionable unless it results in injury to another. **A negligence action is brought not to vindicate a right but to recover compensation for all damages sustained. Proof of actual damages should therefore be essential to a recovery**. The reason for the rule enunciated in cases so holding in other jurisdictions is stated as follows: 'Since the action for negligence developed chiefly out of the old form of action on the case, it retained the rule of that action, that proof of damage was an essential part of the plaintiff's

> case. Nominal damages to vindicate a technical right, cannot be recovered in a negligence action, where no actual loss has occurred.'

Id. at 166, 125 N.W.2d at 554 (emphasis added); *see also* 57A Am Jur 2d Negligence § 131 (2021). And the Nebraska Supreme Court has not strayed from these principles. *See*, *e.g.*, *Condon*, 217 Neb. at 64, 349 N.W.2d at 625 ("Actual damage is an essential element in the cause of action based on negligence or on fraud."); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 792, 452 N.W.2d 746, 749 (1990) ("[N]egligence is actionable only when it results in damages.").

Application of the actual damage rule to negligence actions is also based in feasibility and judicial economy. Every wrongful act or omission breaching a general duty of care to a community constitutes an indirect, technical injury to the rights of **all persons** that could be affected by that conduct. But no court would have allowed a party foreign to the June 10, 2014 transaction between Kearney Towing and Dandee to maintain a suit against Kearney Towing to rectify its breach of duty against the community at large; permitting such suits would flood the judicial system and waste judicial resources.

Further, the actual damage rule serves to protect the rights of both tortfeasors and injured parties. Eliminating the actual damage rule of accrual for negligence claims would militate against a tortfeasor's ability to avoid litigation by correcting his or her wrongful conduct before a direct injury and actual damage occurs. *See Slabaugh v. Omaha Electric Light & Power Co.*, 87 Neb. 805, 808-809, 128 N.W. 505, 506 (1910) (explaining plaintiff's claim accrued only upon suffering a direct injury and actual damage because the defendant could have altered the circumstances leading to the damage before they occurred). It would also be unfair to potential litigants who, under the occurrence rule, would be forced to anticipate which of the thousands of

indirect, technical violations of their rights might eventually directly injure them and file suit preemptively to preserve their claim. *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745, 747, 116 N.W. 859, 860 (1908) ("A man is not required to anticipate an injury from the probable negligence of some one [sic] else."); *see also Gledhill v. State*, 123 Neb. 726, 737, 243 N.W. 909, 914 (1932) (explaining a land owner could not sue at the time the bridge was constructed to recover damages to his crops from anticipated overflows); *Givens v. Anchor Packing, Inc.*, 237 Neb. 565, 575, 466 N.W.2d 771, 777 (1991) (Shanahan, J., dissenting) (quoting Prosser and Keeton on the Law of Torts, Negligence: Standard of Conduct § 30 at 165 (5th ed. 1984)).

Appellants note the actual damage element means only that the plaintiff suffered ***some direct harm***, as opposed to either the indirect harm from a breached duty owed to the community or a direct harm causing no damage (bumping someone while walking past them). It does not mean the full amount of damage, or even substantial damage, has occurred. *See McMullen*, 134 Neb. at 345, 278 N.W. at 555 ("We concede that there must be a wrong and damages as a consequence thereof, but the law cannot concede that no cause of action would arise until the damages could be exactly determined."); *Von Dorn v. Rubin*, 104 Neb. 465, 467, 177 N.W. 653, 653-654 (1920) ("It is the general rule, applicable here, that when, through a wrong committed, an injury is inflicted upon another, the statute of limitations attaches at once, even though at that time the plaintiff may not be fully advised of the extent of the damages suffered, and though subsequent substantial damages do not occur until a later date."). Accordingly, Dandee's negligence claim against Kearney Towing did accrue on June 10, 2014 when it suffered a direct injury, even though its damages were only the cost of an inspection or tire installation.

Accordingly, this Court should re-affirm the long-standing precedent that a negligence claim can only be maintained upon a plaintiff suffering a direct injury causing actual damage,

and it should reverse the District Court's ruling abandoning a direct injury and actual damage as an essential element of a negligence claim.

2. The Legislature Has Statutorily Modified The Accrual Doctrine Imposed By Neb. Rev. Stat. § 25-201 For Specific Classes Of Negligence Claims By Expressly Adopting The Occurrence Rule.

In the 1970s, the Legislature decided to modify when certain classes of negligence claims accrue by enacting specific statutes of limitations expressly adopting the occurrence rule. *See* Neb. Laws 1972, LB 1132, § 1 (codified as Neb. Rev. Stat. § 25-222); Neb. Laws 1976, LB 495, § 1 (codified as Neb. Rev. Stat. § 25-223). **Prior to these statutes, however, the Nebraska Supreme Court had *never* adopted or applied the occurrence rule to a negligence claim**. Instead, it unwaveringly held that the negligence claims now covered by these statutes accrued under the actual damage rule when they were still governed by § 25-207(3).

a. Claims Governed By Neb. Rev. Stat. § 25-223 Accrued Under The Actual Damage Rule When Governed By Neb. Rev. Stat. § 25-207(3).

One class of torts the Nebraska Supreme Court uniformly applied the actual damage rule to before § 25-223's enactment was claims arising from negligent construction of improvements to real property. The actual damage rule was explicitly applied in dozens of cases for damage to crops. *See, e.g.*, *Omaha v. Flood*, 57 Neb. 124, 131-132, 77 N.W. 379, 382 (1898) (citing cases); *Bunting v. Oak Creek Drainage Dist.*, 99 Neb. 843, 851, 157 N.W. 1028, 1031 (1916) ("[S]uch party's cause of action accrues at the date of the injury, and not at the date of the construction of the embankment and ditches."); *Asche v. Loup River Public Power Dist.*, 138 Neb. 890, 893, 296 N.W. 439, 441-442 (1941) ("The cause of action in this case did not accrue until damages had been sustained."); *Schmutte v. State*, 147 Neb. 193, 200, 22 N.W.2d 691, 695 (1946).

In *Omaha Paper Stock Co. v. Martin K. Eby Constr. Co.*, the Nebraska Supreme Court explicitly held that "**[a]n action for an injury to the rights of the plaintiff accrues under section 25-207[(3)] when the damage occurs** and not when plaintiff discovers the cause of the damage." 193 Neb. 848, 851, 230 N.W.2d 87, 90 (1975) (emphasis added). There, an October 1, 1968 fire substantially destroyed the owner's warehouse because the sprinkler system failed to discharge any water. *Id.* at 849, 230 N.W.2d at 88. In October 1971, the owner learned the reason the sprinkler system failed to discharge water was because the defendant negligently constructed a sewer interceptor over the waterline to the warehouse in 1960 that thereafter settled and severed the waterline, but the owner delayed filing suit until March 1973. *Id.* at 849-50, 230 N.W.2d at 88-89. The *Omaha Paper* Court held the owner's cause of action accrued under § 25-207(3) ***when the damage*** to the owner's warehouse ***occurred***, not when the negligent act or omission was performed in 1960. *Id.* at 851, 230 N.W.2d at 90. It also rejected the plaintiff's argument that the discovery rule applied because, in part, it would have only tolled the running of the statute of limitations until October 1, 1968 when the plaintiff learned of facts that would have led to the discovery of the direct injury sustained. *See id.* at 851, 230 N.W.2d at 89.

b. The Legislature Statutorily Replaced The Actual Damage Rule With The Occurrence Rule Through The Plain Meaning Of The Language It Employed In Neb. Rev. Stat. §§ 25-222 and 25-223.

The application of the occurrence rule to negligence actions is permissible only as expressly mandated by the Legislature through statute. After the cases in the previous section were decided, the Legislature enacted § 25-223, which states, in relevant part, the following:

> Any action to recover damages based on any . . . construction of an improvement to real property shall be commenced within four years **after any alleged act or omission** constituting such breach of warranty or deficiency.

(Reissue 2016) (emphasis added); *see* Neb. Laws 1976, LB 495, § 1. Shortly before this enactment, the Legislature enacted § 25-222, which states, in relevant part, the following:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next **after the alleged act or omission** in rendering or failure to render professional services providing the basis for such action.

(Reissue 2016) (emphasis added); *see* Neb. Laws 1972, LB 1132, § 1.

In *Rosnick v. Marks*, the Nebraska Supreme Court construed the "after the alleged act or omission" language as an intentional Legislative policy choice ***to replace the actual damage rule*** with the occurrence rule. 218 Neb. 499, 505, 357 N.W.2d 186, 190 (1984). The *Rosnick* Court held that "[t]he Legislature has made its choice between the occurrence rule and the damage rule. Under the circumstances we must honor that legislative selection and preference for one form of a statute of limitations over another." *Id.* at 507, 357 N.W.2d at 191.

However, the *Rosnick* Court also realized its construction of these statutes had to be in harmony with the requirements of § 25-201. Accordingly, it explained that "[b]y using this language the Legislature envisioned situations involving **a breach of duty as injury to the person** entitled to the particular professional service." *Id.* at 504, 357 N.W.2d at 190 (emphasis added). Accordingly, the *Rosnick* Court reasoned the language statutorily modified the proofs necessary to constitute a complete action from a direct injury to the rights of the plaintiff to a

breach of the duty of care, essentially substituting the proofs for negligence claims with those of trespass or breach of contract. *Id.* at 505, 357 N.W.2d at 190 ("Thus, tortious invasion of another's legal right is the triggering device for the statute of limitations.").

Accordingly, the occurrence rule was introduced into law concerning negligence claims only through statutory language expressly demonstrating a decision to depart from the actual damage rule, and has never been applied beyond the scope of this statutory authority by a reasoned decision of the Nebraska Supreme Court or when its application would result in a different result than applying the actual damage rule.

3. Neb. Rev. Stat. § 25-207(3) Should Be Construed To Prevent A Negligence Claim From Accruing Until The Plaintiff Suffers Actual Damage, As That Is The Proof Required To Establish An Injury For That Class Of Claims.

The plain text of § 25-207(3), read in pari materia with § 25-201, shows a clear intent to make the date a plaintiff suffers a direct injury resulting in actual damage the date a negligence claim accrues. Further, the meaning of § 25-207(3) is not ambiguous because a construction adopting the occurrence rule inserts meaning into a statute that must be construed narrowly to protect plaintiff's rights. Thus, this Court should reverse the District Court's Order ruling Appellants' negligence claim accrued before they suffered a direct injury as § 25-207(3) requires.

a. The Plain Meaning Of Neb. Rev. Stat. § 25-207(3) Results In The Actual Damage Rule Governing Claims Of Negligence.

The plain meaning of § 25-207(3)'s text demonstrates the Legislature intended for negligence claims to accrue only once a plaintiff suffers a direct injury and actual damage. Section 25-207 provides, in relevant part, the following:

> The following actions can only be brought within four years: . . . (3) an action for ***an injury to the rights of the plaintiff***, not arising on contract, and not hereinafter enumerated . . . .

(Emphasis added).

A statute must be construed in light of the Legislature's intent as can be ascertained from the statute's text and context with other statutes on similar subjects. "A court determines a statute's meaning based on its text, context, and structure." *Ash Grove*, 306 Neb. at 955, 947 N.W.2d at 738. "In construing a statute, a 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." *Id.* "Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible." *Ronda R. v. Office of Pub. Guardian (In re Nicholas H.)*, 309 Neb. 1, 15, 958 N.W.2d 661 (2021).

The only reasonable construction of § 25-207(3)'s language demonstrates that the Legislature's intent was for claims governed by it to accrue once the plaintiff sustains a direct injury to their rights causing actual damage. Section 25-207(3) is centered around the injury to the plaintiff's rights that is the subject of any cause of action. Unlike in the text of § 25-222, which does not include the term "injury," there is no mention in § 25-207(3) of the tortfeasor or his or her wrongful conduct. "The term 'injury' has both a common and a legal meaning and when used in construing a statute of limitations, the term 'injury' is to be given its legal meaning." *Rosnick*, 218 Neb. at 504, 357 N.W.2d at 190 (alterations omitted). The *Rosnick* Court approved of an ordinary meaning of the term "injury" the context of limitations on actions to be

that "injury means something done against the right of the party, producing damage." *Id.* (citation omitted). Under this definition it is clear that the text of § 25-207(3) does not permit a statute of limitations to run against a plaintiff until he or she suffers a direct injury to their rights and actual damage has been produced. Further, construing § 25-207(3) harmoniously with § 25-201 strengthens the construction of the ordinary meaning of the statute's text, as it too only permits a claim to accrue after the elements of negligence have sufficiently occurred. Thus, as a direct injury causing actual damage is an essential element for actionable negligence, the plain meaning of § 25-207(3) adopts the actual damage rule for negligence claims.

This construction is consistent with how the Nebraska Supreme Court has applied accrual for negligence claims governed by § 25-207(3) since its enactment. As shown above, claims from negligently constructed improvements were uniformly held to not accrue until the plaintiff suffered an injury amounting to actual damage. *See supra*, Section I.C.2.a. In fact, this construction is support by the *Omaha Paper* Court's express statement that "[a]n action for an injury to the rights of the plaintiff accrues under section 25-207[(3)] when the damage occurs . . . ." *Omaha Paper*, 193 Neb. at 851, 230 N.W.2d at 90.

And the Nebraska Supreme Court has continued its understanding that the actual damage rule governs accrual of negligence actions, absent Legislative modification, since issuing its opinion in *Celotex*. For example, in *Condon v. A. H. Robins Co.*, the Nebraska Supreme Court reaffirmed the principles of accrual that it had long-applied to tort claims generally. 217 Neb. 60, 349 N.W.2d 622. At issue in *Condon* was whether the discovery rule could toll the running of the statute of limitation for product liability claims despite no discovery rule being included in Neb. Rev. Stat. § 25-224. *See id.* at 61, 349 N.W.2d at 623. While the context of the opinion was a product liability claim, the *Condon* Court's relevant analysis was based in the general principles

of accrual applicable to all tort actions and in the equitable principles applicable to all claims. *See id.* at 62, 349 N.W.2d at 624.

In support of its analysis, the *Condon* Court quoted with approval an extra-territorial case finding that the principle of law codified in Nebraska at § 25-201 compelled a conclusion that negligence claims accrue only once an injury is sustained, when no direct injury occurs simultaneously with the wrongful conduct. *Id.* at 66, 349 N.W.2d at 626. It stated:

> Basically, there are three points in time when a tort claim may be said to accrue: (1) when negligence occurs, (2) when a resulting injury is sustained, and (3) when the injury is discovered. We have held that the time of the negligent act alone is not the key to accrual of tort claims. Traditionally, under Wisconsin law cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it.' **A tort claim is not capable of enforcement until both a negligent act and an accompanying injury have occurred.** Although the negligence and resulting injury are often simultaneous, occasionally an injury will not be sustained until a subsequent date. Therefore, we have held that tort claims accrue on the date of injury.

Id. at 66, 349 N.W.2d at 626 (quoting *Hansen v. A. H. Robins, Inc.*, 113 Wis. 2d 550, 554, 335 N.W.2d 578, 580 (1983)) (alterations omitted) (emphasis added). Based on the focus of accrual for tort claims on the injury and the equitable considerations against a meritorious claim being unjustly barred, the *Condon* Court held the discovery doctrine was applicable. *Id.* at 67-68, 349 N.W.2d at 626-27; *Teater v. State*, 252 Neb. 20, 26-27, 559 N.W.2d 758, 763 (1997) ("the focal point for determining when a cause of action accrues, even under the application of the discovery

rule, is when the actual injury occurs."). These rulings are consistent with *Celotex*, which likewise focused on actual injury. *See Celotex*, 203 Neb. at 563, 279 N.W.2d at 606 (“These rules would apply even though the plaintiff was then ignorant of the injury sustained.”).

As demonstrated in *Condon*, *Omaha Paper*, and a wealth of other precedent, the Nebraska Supreme Court has consistently applied § 25-207(3) to provide for the accrual of negligence claims only upon the plaintiff suffering a direct injury causing actual damage, and its application is supported by a reasonable construction of § 25-207(3). And as suggested in *Condon*, this application is especially warranted in atypical cases, as presented here, where the wrongful act and injury to the plaintiff do not occur simultaneously. Accordingly, this Court should reverse the District Court's ruling that Appellants' negligence claim accrued before Appellants suffered a direct injury or actual damage, as required by § 25-207(3).

b. Neb. Rev. Stat. § 25-207(3) Is Not Ambiguous Because There Is No Reasonable Alternative Construction.

As limitations on actions are purely statutory, the District Court's application of the occurrence rule to claims governed by § 25-207(3) cannot be affirmed unless its ruling has some basis in statute. Any construction of § 25-207(3) that incorporates the occurrence rule, however, would not be reasonable, so that statute should not be considered ambiguous. *See Lozier Corp. v. Douglas County Bd. of Equalization*, 285 Neb. 705, 714, 829 N.W.2d 652, 659 (2013).

There is no basis in § 25-207(3)'s text for finding the occurrence rule is applicable to claims it governs, and reading such meaning into the statute would violate the canons of statutory construction. "It is not within the province of a court to read a meaning into a statute that is not warranted by the language; neither is it within the province of a court to read anything plain, direct, or unambiguous out of a statute." *Saylor v. State*, 304 Neb. 779, 786, 936 N.W.2d 924,

929 (2020). "A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless." *Id.* Further, as limitations on actions are purely statutory and in contravention of the common law, an appellate court is only empowered to construe statutes governing limitations on actions; they are not permitted to engage in judicial legislation in further degradation of the common law. *See Heckman v. Marchio*, 296 Neb. 458, 466, 894 N.W.2d 296, 302 (2017).

Any construction of § 25-207(3) applying the occurrence rule to the claims it governs would be unreasonable judicial legislation in contravention of the actual text. The concise text of § 25-207(3) only references the injury to the rights of the plaintiff; it makes no reference to a tortfeasor or conduct. On one hand, construing § 25-207(3) to adopt the occurrence rule would read meaning into the statute that has absolutely no support in the ordinary meaning of the text, as opposed to § 25-222. On the other hand, reading the occurrence rule into it would improperly render the Legislature's explicit focus on the plaintiff's injury as the measuring point for the running of the limitation period in § 25-207(3) superfluous. Further, as demonstrated by the District Court's ruling, reading the occurrence rule into § 25-207(3) degrades the rights of plaintiffs in atypical negligence actions, where a direct injury does not occur simultaneously with wrongful conduct, to litigate their claims as compared to the actual damage rule. Accordingly, such a construction cannot be considered a reasonable interpretation of § 25-207(3).

D. Any Case Imposing The Occurrence Rule On Claims Governed By Neb. Rev. Stat. § 25-207(3) Should Be Overruled To Restore Adherence To Neb. Rev. Stat. § 25-201, § 25-207(3), And Nebraska Supreme Court Precedent.

The *Celotex* Court's dicta--read in the context of the entire opinion, other Nebraska Supreme Court opinions from that time, and the authority it relied on--should be construed

consistently with the long-standing precedent applying §§ 25-201 and 25-207(3) to employ the actual damage rule to negligence claims governed by § 25-207(3), rather than imposing a drastic change by adopting the occurrence rule. Any court that has applied the *Celotex* Court's dicta to rule a negligence claim can accrue and the statute of limitations in § 25-207(3) may begin to run **before** a plaintiff has suffered a direct injury has done so erroneously and should be overruled.

The issue presented in *Grand Island School Dist. #2 v. Celotex Corp.*, was ***not*** when a claim accrues under § 25-207(3) but, instead, was whether the discovery rule tolled the running of the statute of limitations on various claims related to the construction of a roof. 203 Neb. 559, 566-67, 569, 279 N.W.2d 603, 608-09 (1979). In *Celotex*, the plaintiff entered written contracts with a contractor ("Johnson") and architect ("Shaver") to construct a school and purchased materials from a supplier ("Celotex") (collectively the "defendants"). *Id.* at 561, 279 N.W.2d at 605-06. Construction on the roof was completed in 1967, and the first leaks appeared in 1968. *Id.* at 562-63, 279 N.W.2d at 606. In July 1976, a number problems with the roof's construction were identified, but a 1971 report had also noted signs of problems with the roof's construction. *Id.* at 563, 566-67, 279 N.W.2d at 606, 608. The plaintiff filed suit in August 1976, alleging breach of contract and warranty, as well as negligence claims against the defendants. *Id.* at 563, 279 N.W.2d at 606. The district court granted summary judgment to the defendants, ruling that each claim was barred by the applicable statute of limitations. *Id.* at 561, 279 N.W.2d at 606.

The *Celotex* Court identified that the dates the statutes of limitations in Neb. Rev. Stat. §§ 25-205, 25-206, and 25-207(3) began to run were dispositive issues and that each claim was barred unless tolled by the discovery doctrine. *Id.* at 562-563, 279 N.W.2d at 606-07. However, the *Celotex* Court held the discovery rule could not save the plaintiff's claims because the evidence demonstrated the plaintiff discovered its injuries more than two years before filing suit,

and it affirmed summary judgment. *Id.* at 566-567, 279 N.W.2d at 608. It noted that while § 25-223 had been enacted, the section was not applicable because each claim was barred before its enactment and was not subject to revival. *Id.* at 564, 279 N.W.2d at 607.

Even though the actual date the claims accrued was not relevant, as it was at least eight years before the suit, the *Celotex* Court nevertheless made the following statements regarding accrual:

> The traditional rule is that the statute begins to run as soon as the action accrues, and the cause is said to accrue when the aggrieved party has the right to institute and maintain a suit. In a contract action this means as soon as breach occurs, and in tort, as soon as the act or omission occurs. <u>These rules would apply even though the plaintiff was then ignorant of the injury sustained</u> or could not ascertain the amount of his damages.

Id. at 562-563, 279 N.W.2d at 606 (citing 51 Am. Jur. 2d, Limitation of Actions, § 109, p. 681).

This dicta should be interpreted to be consistent with the long-standing precedent applying the terms of §§ 25-201 and 25-207(3) to impose the actual damage rule for negligence claims, as set forth above. Notably, the *Celotex* Court did not express any intention to change Nebraska law in the above statement or purport to construe any statute. As the *Celotex* Court discussed *Omaha Paper* at length, it must be considered to have known of the *Omaha Paper* Court's acknowledgment that the actual damage rule had long been applied in crop damage cases and of the explicit statement that "[a]n action for an injury to the rights of the plaintiff accrues under section 25-207[3] when the damage occurs . . . ." *Omaha Paper*, 193 Neb. at 850, 851, 230 N.W.2d at 89, 90; *see Celotex*, 203 Neb. at 565-66, 279 N.W.2d at 607-608. Under the doctrine of stare decisis, the *Celotex* Court could not simply abandon this precedent without reason. And

similar "act or omission" language had ***never*** been used in a Nebraska Supreme Court case for accrual of negligence claims, so it could not be considered to be following older precedent. Accordingly, the context of the opinion suggests it did not intend to adopt the occurrence rule.

Additionally, as *Celotex* concerned a typical negligence action where the wrongful act or omission (negligent construction) occurred simultaneously with a direct injury causing actual damage (a defective roof), its dicta should be limited to such typical negligence claims. The emphasized text above acknowledges the *Celotex* Court was aware the direct injury occurred with the wrongful conduct, even if it had not been discovered. Accordingly, this dicta cannot be interpreted as speaking to atypical negligence actions, let alone changing when they accrue.

But more importantly, the source the *Celotex* Court cited explicitly noted its general rule is accurate only when the direct injury occurs simultaneously with the wrongful conduct. *See* 51 Am. Jur. 2d. § 109, p. 681 (1970) ("As a general rule, the occurrence of an act or omission, whether it is a breach of contract or of duty, ***whereby one sustains a direct injury***, however slight, starts the statute of limitations running against the right to maintain an action.") (emphasis added). And the section of 51 Am. Jur. 2d. discussing accrual of negligence actions further explains the actual damage rule governs negligence actions because of atypical cases, stating:

> The general rule applicable to negligence actions is that the statute of limitations runs from the time of the negligent act or omission, even though the total damage sustained cannot be ascertained until a later date, **but that if no cause of action accrues until injury or damage ensues, the statute runs from the injury or damage**. Thus, if there is a **coincidence of a negligent act *with the fact of some damage***, the cause of action comes into being and the statute of limitations begins to run even though the ultimate damage is unknown or unpredictable.

51 Am. Jur. 2d. § 136, p. 705-6 (emphasis added). This reasoning for the actual damage rule controlling the accrual of negligence claims is the exact same reasoning approved by the *Condon* Court only five years after *Celotex,* showing the prevailing understanding during the period these opinions were decided. *See Condon,* 217 Neb. at 66, 349 N.W.2d at 626 (quoting *Hansen,* 113 Wis. 2d at 554, 335 N.W.2d at 580).

Accordingly, there is no basis in *Celotex* for interpreting its dicta to be contrary to Nebraska's statutes or long-standing precedent by adopting the occurrence rule. Though different from previous discussion of tort accrual in precedent, the *Celotex* Court's dicta merely stated the timing that a typical negligence action accrues in terms of accrual for other actions--a distinction without a difference--pulling its language from a treatise rather than Nebraska law. Yet, it remained focused on when the plaintiff sustains a direct injury, making no indication of departing from accrual principles for atypical negligence claims not at issue in that case.

All subsequent "act or omission" statements regarding the accrual of torts and negligence claims governed by § 25-207(3) can be traced through their citations back to the *Celotex* Court's dicta. These subsequent cases have only cited this proposition in isolation and without analyzing its meaning in *Celotex* or suitability considering requirements the text of §§ 25-201 and 25-207(3) or precedent. While some cases citing this dicta have held the occurrence rule is properly based in statute, like *Rosnick,* those holdings are limited to the classes of claims governed by those specific statutes, not all tort claims and not claims governed by § 25-207(3).

Accordingly, this Court should overrule the progeny of cases reciting the *Celotex* Court's dicta to the extent they impose the occurrence rule in contravention of § 25-201, § 25-207(3), and precedent. And if this Court interprets the *Celotex* Court's dicta to itself adopt the occurrence rule, then Appellants request this Court overrule that opinion to the extent stated above as well.

The doctrine of legislative acquiescence is inapplicable here. The *Celetox* Court did not purport to construe any statute as a basis for its dicta and no subsequent case has either (beyond §§ 25-222 and 25-223), so there can be no presumption that the Legislature has acquiesced to any adoption of the occurrence rule for all tort claims or those governed by § 25-207(3). *See Heckman*, 296 Neb. at 466, 894 N.W.2d at 302. Further, as shown above, no statutes can be construed to justify the District Court's broad interpretation of the *Celetox* Court's dicta.

Further, the relevant factors for assessing whether to overrule precedent support overruling the *Celotex* Court's dicta or any case misinterpreting it, to the extent they could be read as allowing accrual prior to direct injury. To decide whether to adhere to stare decisis in this case, a court should consider "workability, the antiquity of the precedent, whether the decision was well reasoned, [and] whether experience has revealed the precedent's shortcomings. . . ." *Id.* at 467, 894 N.W.2d at 302. Critically, "remaining true to an intrinsically sounder doctrine better serves the values of stare decisis than following a more recently decided case inconsistent with the decisions that came before it."); *Porter v. Porter*, 309 Neb. 167, 174, __ N.W.2d __ (2021).

As shown above, application of the occurrence rule to all tort claims or those under § 25-207(3) is inconsistent with longer- precedent. *Heckman*, 296 Neb. at 466-67, 894 N.W.2d at 302. Additionally, if adopting the occurrence rule, the *Celotex* Court's dicta did so without reason or authority and, instead, merely by inaccurately summarizing its source, and any opinion interpreting that dicta to adopt the occurrence rule was similarly unreasoned.

Also, the occurrence rule's application to § 25-207(3) claims is not intrinsically workable because of the shortcomings revealed in the District Court's Order. While the occurrence and actual damage rules coincidentally lead to the same result for many negligence claims, the occurrence rule starkly contravenes the rights of plaintiffs with atypical negligence claims; an

incorrect standard is not workable just because it usually leads to a correct result for an incorrect reason. For atypical claims, a plaintiff who suffers a direct injury during the four year limitations period could have the period they are entitled to file suit limited to one day or even less.

And, under current precedent, a plaintiff who does not suffer an injury within the four year period would not be entitled to the benefit of the discovery rule because her injury did not exist during the statutory period. *See Neco, Inc. v. Larry Price & Assocs., Inc.*, 257 Neb. 323, 330, 597 N.W.2d 602, 607 (1999) ("As used in reference to a statute of limitations, 'discovery' means that an individual **acquires knowledge of a fact which existed but which was previously unknown** to the discoverer.") (emphasis added). Consequently, several areas of negligence, like premises liability, will be substantially curtailed by the application of the occurrence rule to § 25-207(3). *See, e.g.*, *Sundermann*, 306 Neb. 749, 947 N.W.2d 492 (premises liability claim where the wrongful conduct was parking lot design). Accordingly, the shortcomings of the occurrence rule will foreseeably impact claims far beyond Appellants' claim.

Thus, this Court should overrule any reading of the *Celotex* Court's dicta, and the progeny of cases citing it, to the extent that they contravene §§ 25-201 and 25-207(3) in order to restore adherence to those statutes and longer-standing precedent. Alternatively, this Court should, at a minimum, recognize an exception to the broad application of the occurrence rule to all tort actions in the *Celotex* Court's dicta for atypical negligence claims as the one presented here. Such an exception would be firmly rooted in the source that the *Celotex* Court relied on, as well as equity and Nebraska law. In either case, this Court should hold that the District Court erred in ruling that Appellants' claim accrued before they suffered a direct injury to their rights permitted them to institute and maintain suit.

II. THE DISTRICT COURT ERRED IN GRANTING KEARNEY TOWING SUMMARY JUDGMENT BY RULING PLAINTIFFS' NEGLIGENCE CLAIM WAS BARRED, AS A MATTER OF LAW, BY NEB. REV. STAT. § 25-207(3).

The facts underlying this appeal are undisputed, so this Court's holding in the foregoing section is dispositive. If this Court rules the District Court erred in applying the occurrence rule to Appellants' claim--whether as contrary to a construction of §§ 25-201 or 25-207(3), contrary to the Nebraska Supreme Court's long-standing precedent, or by an exception for atypical negligence claims--then it should find Appellants' claim did not accrue until May 1, 2015 and Appellants had until May 1, 2019 to file suit. Accordingly, it should reverse the District Court's ruling that Appellants' claim was barred by § 25-207(3) and that Kearney Towing was entitled to summary judgment.

It is undisputed Appellants did not suffer a direct injury to their rights until May 1, 2015. Kearney Towing's alleged negligent act or omission in installing the used tire on Dandee's truck occurred on June 10, 2014. (T72-73, at ¶¶ 4-6, 10, 13-14; Supp. T2; E16,2-3(25:22-26:2):(9, 12), 87-88; E17,3-5(16:12-18:3):(9, 12), 98-100.) Then, on May 1, 2015, Loveland and Summers were riding in Dandee's truck when it was involved in a single vehicle accident, causing significant injuries to their rights. (T72, at ¶¶ 1, 3, 10; T2, at ¶ 7; T48, at ¶ 8.) The District Court acknowledged this in stating that "the defendant’s act or omission occurred prior to any injury to plaintiffs" and finding Appellants' claims accrued on June 10, 2014 but "plaintiffs had [only] from May 1, 2015 until June 10, 2018 to file their action." (T127, 113).

If this Court rules Appellants' claims did not accrue until they suffered a direct injury to their rights or actual damage, under any basis, then it should find their claims were not barred. Under the actual damage rule or an exception to the occurrence rule for atypical negligence

actions, Appellants' claim did not accrue until May 1, 2015. So, under § 25-207(3), Appellants had four years to file suit, until May 1, 2019. Appellants filed this suit in the District Court on April 12, 2019. (T1-6; T73, at ¶ 22; Supp. T2.) Accordingly, Appellants timely brought their claim, and the District Court erred as a matter of law in granting summary judgment to Kearney Towing and dismissing Appellants' claim. Thus, this Court should reverse the District Court's ruling and remand this action for further proceedings.

CONCLUSION

The language of §§ 25-201 and 25-207(3), 150 years of reasoned Nebraska Supreme Court precedent, and equity all demand this Court hold an ordinary negligence claims governed by § 25-207(3) do not accrue until a plaintiff can institute and maintain suit, upon suffering a direct injury resulting in actual damage. Further, this Court should overrule any reading of the *Celotex* Court's dicta, and the progeny of cases citing it, to the extent that they contravene §§ 25-201 and 25-207(3) in order to restore adherence to those statutes and longer-standing precedent. Appellants respectfully request this Court overrule the District Court's Order and remand this matter for further proceedings.

RYSTA LEONA SUSMAN, both individually and as Natural Mother of SHANE ALLEN LOVELAND, a Protected Person, SHANE ALLEN LOVELAND, a Protected Person by and through his Temporary Guardian and Conservator, JOHN SAUDER, and JACOB SUMMERS,

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PROOF OF SERVICE

The undersigned certifies that the original of the foregoing Appellant's Brief was served via the Nebraska electronic filing system to the Clerk of the Nebraska Supreme Court and that a true and correct copy of the Appellant's Brief was served via electronic mail this 18th day of June, 2021, to counsel for all parties of record.

B: */s/ Michael F. Coyle*
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Certificate of Service

I hereby certify that on Friday, June 18, 2021 I provided a true and correct copy of this *Brief of Appellants Parties 1-3* to the following:

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