IN THE NEBRASKA COURT OF APPEALS

CASE A-21-277

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

Appellants/Plaintiffs,

vs.

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

Appellees/Defendants.

APPEAL FROM THE DISTRICT COURT OF BUFFALO COUNTY, NEBRASKA
HONORABLE JOHN H. MARSH, DISTRICT JUDGE, PRESIDING
Case No. CI 19-158

BRIEF OF APPELLEE

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Appellant seeks review of the District Court's Order dated March 2, 2021, which dismissed this case pursuant to the statute of limitations. (T112) Appellant also seeks review of the District Court's March 18, 2021 Order, which declined to modify the March 2, 2021 Order of dismissal. (T126). Appellee does not dispute the basis of jurisdiction stated by Appellants. Appellants Brief, 1.

IV. STATEMENT OF THE CASE

1. Nature of the case

The facts concerning Appellee's Motion for Summary Judgment and the corresponding Order that resulted in this dismissal of this case are not disputed. (T72-73) (Supp. T2) Appellant alleges that on June 10, 2014 Kearney 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, resulting in physical injuries to Loveland and Summers. (T72, at ¶¶ 1, 3, 10). On April 12, 2019, Appellants filed suit against Kearney claiming they were negligent and breached a contract when installing the tires. (T73, at ¶ 22) (T2-4, at ¶¶ 7-19).

The primary issue to be decided through this appeal is whether the statute of limitations for Appellants' negligence claim accrued on the date of Kearney Towing's alleged wrongful act or omission (June 10, 2014), as opposed to the date of the Appellants' injuries (May 1, 2015). If the four-year statute of limitations accrues on the date of the wrongful act or omission, the statute of limitations expired on June 10, 2018 and Appellants' claims against Kearney are barred because Appellants did not file this action until April 12, 2019.

2. Issues presented below

On October 29, 2020, Kearney Towing filed a Motion for Summary Judgment. (T66). It was argued that Appellants' cause of action was barred by the four-year statute of limitations for actions based upon oral contracts because Appellant's negligence and breach of contract actions both arise from the June 10, 2014 invoice. (T66; T74)

On December 29, 2020, the District Court entered any Order holding that Appellant's negligence claim is governed by Neb. Rev. Stat. § 25-207 and Appellant's breach of contract claim is governed by Neb. Rev. Stat. § 25-206. (T86-T87). The Court impliedly held that the four-year statute of limitations for a breach of oral contract action accrues on the date of the wrongful act or omission, June 10, 2014. (T86) But, then held that there is a question of fact as to whether Appellants discovered or in the exercise of reasonable diligence should have discovered, any issues regarding the tire installation within the applicable statute of limitations. (T87). As to Appellants' negligence action, the District Court conflated case law governing the accrual of the statute of limitations for a negligence action and the discovery rule, holding that the action accrued on the date of the injury, not the date of the allegedly wrongful act or omission. (T86).

Recognizing multiple errors within the December 29, 2020 Order, Kearny Towing filed a Motion to Reconsider. (T90). In doing so, Kearney identified the following issues:

a. Whether the December 29, 2020 Order erred in finding there was a question of fact as to whether Appellants discovered or in the exercise of reasonable diligence should have discovered, any issues regarding the tire installation within the applicable statute of limitations. (T89-90).

b. Whether the December 29, 2020 Order was erroneous in its legal conclusion that Appellants' discovery of issues regarding the tire installation is a material fact. (T91).

c. Whether the December 29, 2020 Order was erroneous in its holding that two separate statutes of limitations apply. (T96).

d. Whether December 29, 2020 Order was erroneous in its legal conclusion that the statute of limitations for negligence actions, as set forth in Neb. Rev. Stat. § 25-207, began to run on the date of Appellants' injury, not the date of the allegedly wrongful act or omission. (T97).

3. How the issues were decided

On March 2, 2021, the District Court reconsidered its holdings in the December 29, 2020 Order. (T112). The Court noted that, subsequent to the hearing on the Motion to Reconsider, the Court was advised that Appellants were dismissing their breach of contract claim. (T113); (T118); and (75:14-16).

The reason Appellants dismissed the breach of contract action is not insignificant. As explained in Kearney's Motion to Reconsider, there were no genuine issues of material fact based upon the Parties' submissions supporting and opposing Kearney's Motion for Summary Judgment. (See T72-73; Supp. T2). More specifically, it was not disputed that Appellants retained counsel to investigate their claims as of November 30, 2016. *Id.* And, it was not disputed that Appellants filed a separate action against Goodyear on or about August 7, 2017, long before the statute of limitations expired on June 10, 2018. (T73 ¶¶ 17-22; T90-91). Thus, December 29, 2020 holding that there was an issue of fact as to when Appellants knew or should have known about issues with the tire's installation generated an undesirable and untenable result

– going forward it would have required the Parties and the Court to determine how Kearney would be afforded a fair opportunity to obtain information about when Appellants' counsel knew or should have known about Appellants claims against Kearney. (T90-91; T96). Under Neb. Rev. Stat. § 25-221, this factual issue would have had to have been tried separately. (Supp. T48); (54:24 – 55:11). And, counsel for Appellants would have had to have been called as a witness during that proceeding. (T73 ¶¶ 17-22; T90-91). To avoid these issues, counsel for Appellant agreed to dismiss their breach of contract claim against Kearney. (T113) (75:14-16).

Following Appellants' voluntary dismissal of their contract claim, the Court was left to consider the sole issue of when the statute of limitations for Appellants' negligence action accrued. (T113). The District Court held "the Court's previous focus on the discovery of the defendant's act or omission, as opposed to the discovery of their injury is not supported by Nebraska case law. The beneficence of the discovery rule is not bestowed on a potential plaintiff when the potential plaintiff in fact discovers or in the exercise of reasonable diligence should have discovered the injury within the period of limitations running from the wrongful act or omission." (T113-114) Appellants' injuries were, in fact, discovered within the statute of limitations period running from the date of the wrongful act or omission. (T114). Because Appellants did not file this action until April 12, 2019 the District Court correctly held Appellants' action was barred by the statute of limitations under Neb. Rev. Stat. § 25-207.

4. Standard of Review

Appellate review of an order granting a motion for summary judgment requires that the appellate court determine whether the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to 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. Neb.

Rev. Stat. § 25-1332. If the defendant establishes a prima facie case, the burden of producing evidence to generate factual dispute transfers to the plaintiffs. *Lawrey v. Kearney Clinic, P.C.*, 2011 WL 13128700 at *3 (D. Neb. 2011); *Weaver v. Cheuneg*, 254 Neb. 349, 579 N.W.2d 773 (1998). For a statute of limitations defense, this requires a plaintiff to produce evidence as to why the cause of action could not reasonably have been discovered within the statutory period. *Id.*

The meaning of a statute is a question of law. *Harris v. Omaha Hous. Auth.* 269 Neb. 981, 984, 689 N.W.2d 58, 62 (2005). If the facts of a case are undisputed, the issue as to when the statute of limitations begins to run is question of law. *Reinke Mfg. Co., Inc. v. Hayes*, 256 Neb. 442, 453, 590 N.W.2d 380, 390 (1999). However, the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Id.*

V. PROPOSITIONS OF LAW

1. The meaning of a statute is a question of law. *Harris*, 269 Neb. at 984, 689 N.W.2d at 62.
2. If the facts of a case are undisputed, the issue as to when the statute of limitations begins to run is question of law. *Reinke Mfg. Co., Inc.*, 256 Neb. at 453, 590 N.W.2d at 390.
3. The decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Id.*
4. A cause of action sounding in negligence is governed by section (3) of Neb. Rev. Stat. § 25-207. *Omaha Paper Stock Co., Inc. v. Martin K. Eby Const. Co., Inc.*, 193 Neb. 848, 849, 230 N.W.2d 87, 89 (1975).
5. Statutory language is to be given its plain and ordinary meaning. *Turco v. Schuning*, 271 Neb. 770, 773, 716 N.W.2d 415, 417 (2006).
6. In the absence of ambiguity, courts must give effect to the statutes as they are written. *Id.*

7. If the language of a statute is clear, the words stated in the statute are the end of any judicial inquiry regarding its meaning. *Id.*
8. Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *Heckman v. Marchio*, 296 Neb. 458, 465, 894 N.W.2d 296, 301 (2017).
9. When Courts examine statutory language, terms of art are to be given their legal, technical meaning. *Wisner v. Vendelay Investments, L.L.C.*, 300 Neb. 825, 850, 916 N.W.2d 698, 720 (2018).
10. An "injury" in the legal sense is misconduct and "damage" is the legal term applied to the loss resulting from misconduct. *Rosnick v. Marks*, 218 Neb. 499, 504, 357 N.W.2d 186, 190 (1984).
11. Legislative intention is to be determined from a general consideration of a whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found. *Vasques v. Chi Properties, LLC*, 302 Neb. 742, 751, 925 N.W.2d 304, 314 (2019).
12. In construing a statute, courts look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. *Fisher v. PayFlex Systems, USA, Inc.*, 285 Neb. 808, 817-818, 829 N.W.2d 703, 712 (2013).
13. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose. *Id.*
14. Legislative intent deduced from the whole will prevail over that of a particular part considered separately. *Vasques*, 302 Neb. at 751, 925 N.W.2d at 314.

15. 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.*

16. 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. *Wisner,* at 850, 916 N.W.2d at 720.

17. Where general and special provisions of statutes are in conflict, the general law yields to the special provision or more specific statute. *Schaffer v. Cass County*, 290 Neb. 892, 898, 860 N.W.2d 143, 147 (2015).

18. When constructing a statute, it is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Johnson v. City of Fremont*, 287 Neb. 960, 967, 845 N.W.2d 279, 286 (2014).

19. An action for "an injury to the rights of the plaintiff" accrues under Neb. Rev. Stat. § 25-207(3) "when the initial wrong has been done." *Von Dorn v. Rubin*, 104 Neb. 465, 177 N.W. 653 (1920).

20. The fact that the loss has been continuous goes only to the issue of damages." *Id.*

21. 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. *Grand Island School Dist. No. 2 of Hall County v. Celotex Corp.*, 203 Neb. 559, 562-3, 279 N.W.2d 603, 606 (1979).

22. In a contract action this means as soon as breach occurs, and in tort, as soon as the act or omission occurs. *Id.*

23. These rules would apply even though the plaintiff was then ignorant of the injury sustained or could not ascertain the amount of his damages. *Id.*
24. The statute of limitations is enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has a the right to proceed. *Id.*
25. "Statutes of limitations have an important role in disposition of claims between individuals, because such statutes promote and produce finality and thereby stability in human affairs. *Rosnick*, at 501, 357 N.W.2d at 188.
26. In this manner statutes of limitations stimulate activity and punish unreasonable delay in prosecuting claims. *Id.*
27. If the discovery rule applies, the statute of limitations does not begin to run until the potential plaintiff discovers, or with reasonable diligence should have discovered the injury. *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 432, 730 N.W.2d 376, 385 (2007).
28. The benefice of the discovery rule is not bestowed on a potential plaintiff where the potential plaintiff in fact discovers the injury within the initial period of limitations running from the wrongful act or omission. *Id.*

VI. STATEMENT OF FACTS

Pursuant to Neb. Rev. Stat. § 25-1332(b), Kearney presented the following Statement of Undisputed Facts to the District Court. (T71-73).

1. This case revolves around a single vehicle auto accident that occurred on May 1, 2015. Complaint (T2 ¶ 7) (T71-73).
2. Appellants allege that Kearney "regularly engages in the business of selling, inspecting, and installing automotive tires and automotive component parts, including but not limited

to the tire at issue in the subject litigation." Complaint (T1 ¶ 4) (T71-73, at ¶¶ 4-6, 10, 13, 14).

3. Later, Appellants clarified the basis for their cause of action, alleging that Kearney "inspected, mounted, installed and balanced the used tires that were on the subject 2003 Chevrolet Silverado SC1 truck occupied by Plaintiff Loveland and Plaintiff Summers at the time of the accident." Complaint (T2 ¶ 9) (T71-73)
4. Attached as an Exhibit to and forming the basis for the Complaint was Kearney's Invoice No. 91571, which was dated June 10, 2014 and was issued to Appellants' employer, Dandee Concrete Construction ("Dandee"). Complaint Exhibit (T71-73) (Supp. T43).
5. Invoice No. 91571 stated that Kearney performed the following work:

   SCRAP TIRE 13-17 INCH TIRE

   MOUNT AND BALANCE TIRE Complaint Exhibit (T71-73) (Supp. T43)
6. Invoice No. 91571 further stated: "PROVIDED OWN USED TIRES." Complaint Exhibit (T71-73) (Supp. T43)
7. Invoice No. 91571 is not signed by Kearney or Dandee. (T71-73) (Supp. T43)
8. There is no admissible evidence suggesting that Kearney sold or leased the tires that are subject of this litigation. (T71-73)
9. There is no admissible evidence suggesting that Kearney sold or leased the truck that is the subject of this suit. (T71-73)
10. The vehicle involved in this incident was owned by Dandee, Appellants' employer. (T71-73) (E16,25-26:8-12)
11. With regards to the origin of the tire, Dandee's owner, Daniel Buser ("Buser") explained that when one of the vehicles in their fleet would become unusable, Dandee would have

the tires removed from that vehicle so they could be reused on another vehicle. (T71-73) (E16,35:8-12)

12. The tire involved in this incident most likely came from a different vehicle within Dandee's fleet, a brown truck that was wrecked following an incident with a deer. (T71-73) (E16,36:8-12) (E16,53-55:8-12)
13. Dandee's Shop Supervisor, Justin Underwood, further explained that when Dandee ask Kearney to mount and balance the tire, as set forth on the June 10, 2014 invoice, the most likely thing that transpired was:
    a. Dandee located a used tire either (1) on the rack in back of Dandee's shop that had used tires on it or (2) go at the salvage yard, Andersen Wrecking.
    b. Underwood would remove the tire off the vehicle and, then take the old tire and the new/used tire to Kearney, asking that they mount the used tire on the existing rim.
    c. Kearney mounted the used tire on the rim.
    d. Underwood then installed the tire/rim assembly on the truck.

    (T71-73) (E17,6:8-12) (E17,16-18:8-12)
14. Mr. Underwood is 90% certain that he installed the tire involved in this incident on the truck involved in this incident. *Id.*
15. There is no agreement between Dandee or Kearney through which Kearney agreed to provide scheduled inspections or maintenance on the truck or tire that was involved in this incident. (T71-73) (E16,29-30:8-12)
16. Farm Bureau was Dandee's workers' compensation carrier. (T71-73) (E18,1-2:8-12)
17. As of August 24, 2015, Farm Bureau adjusters evaluating this incident were aware of the allegation that Kearney installed the tires that were involved in this incident. (T71-73)

(E19,1:8-12)

18. As of May 18, 2016, Farm Bureau had "spoken with such counsel [with significant experience in similar cases against Goodyear] who may be willing to get involved in these cases, but would need to speak with [Appellants]." (T71-73) (E20,1:8-12)
19. By November 30, 2016, Appellants' counsel, Kyle Farrar, had been retained and was investigating Appellants' claims. (T71-73) (E21,1:8-12)
20. Farm Bureau assisted Appellants' counsel in investigating Appellants' claims by voluntarily providing Farrar with evidence and information from their files. (T71-73) (E21,1:8-12)
21. On or about August 7, 2017, Appellants filed a Complaint against Goodyear in the Court of Common Pleas of Philadelphia County, PA. Kearney's Third-Party Complaint (T71-73) (T14 ¶ 4)
22. On or about April 12, 2019, Appellants filed this separate and distinct action against Kearney setting forth negligence and breach of contract causes of action against Kearney. Complaint. (T71-73) (T2) (Supp. T2).

During the hearing on Kearney's Motion for Summary Judgment, Appellants did not dispute any fact set forth above. (Supp. T2) And, Appellants did not present additional facts for the Court's consideration. (Supp. T2).

Any facts alleged in Appellants' Brief, other than those set forth above, are not properly before the Court on this appeal. Issues not presented to or decided on by the trial court are not appropriate for consideration on appeal. *DMK Biodiesel v. McCoy*, 285 Neb. 974, 985, 830 N.W.2d 490, 499 (2013). Therefore, any facts alleged by Appellants beyond those set forth above should be disregarded. For example, Appellants' Brief suggests that Kearney's installation

of the subject tire on the vehicle is an undisputed fact. Appellants' Brief, p. 8. Nothing in the Statement of Undisputed Facts set forth above makes such an admission and Kearney declines to do so for purposes of this appeal.

Appellants also argue that "[n]o evidence was offered concerning Appellants' negligence claim." Appellants' Brief, p. 15 ¶ 2. This is inaccurate; Kearney offered Exhibits 24 through 31 as support for its Motion to Reconsider. (32:20 – 33:20) Appellants did not object to these Exhibits, and they were made part of the record. *Id.* As noted in Kearney's Motion to Reconsider, these Exhibits establish the following facts:

23. Appellants themselves, did what would be expected – they retained counsel by November 30, 2016. (T98 ¶ 3); see also (T71-73) (E21,1:8-12)
24. Appellants' counsel was hand-picked with the assistance of Farm Bureau to pursue claims against third-parties. (T98 ¶ 3); see also (T71-73) (E20,1:8-12).
25. Appellants' counsel is well versed in tire litigation; he encourages the use of "google" to confirm his success. (T99) (E24, 1:32-33)
26. A quick look at the website for Appellants' counsel, located at "thetirelawers.com" confirms "few if any lawyers have filed more tire-related lawsuits." (T99) (E25, 1:32-33).
27. Said counsel is also no stranger to intimidation tactics, as they have hurled threats of Kearney being in "crosshairs" and subjected to a judgment tin excess of Kearney's policy limits on three separate occasions. (T99) (E25, 1:32-33) (E26, 1:32-33) (E27, 1:32-33).
28. Appellants' counsel had access to the "evidence artifacts" in this case as of November 2016. (E21,1:8-12)
29. Appellants' counsel retained possession of the tires through December 2020 and/or control over who had access to the tires with a required "inspection protocol." (E30,1:32-33)

(E31,1:32-33)

30. Appellants' counsel offered no explanation whatsoever for why they delayed filing this suit until April 2019. (T99).
31. Appellants' counsel offered no explanation for why they did not add Kearney to their federal suit against Goodyear. (T99).
32. Appellants' counsel made a conscious decision to delay filing this suit against Kearney because they perceived strategic advantages associated with pursuing a separate, distinct, and subsequent litigation against Kearney. (T99).

VII. ARGUMENTS

The only issue to decide on this appeal is whether Appellants' claim is barred by the applicable statute of limitations; mainly, whether the statute of limitations accrued: (1) on the date of the allegedly wrongful act or omission (here June 10, 2014 when Kearney allegedly installed a tire on a vehicle) or (2) on the date that Appellants sustained physical injuries while occupying a vehicle upon which the tire was installed (May 1, 2015).

While many of the statutes set forth in Neb. Rev. Stat., Chapter 25 are relevant to the analysis, two statutes bear directly on the issue: Neb. Rev. Stat. §§ 25-201 and 25-207. Neb. Rev. Stat. §§ 25-201 states:

> A civil action shall be commenced only within the time prescribed in this chapter, after the cause of action has accrued. Notwithstanding any other provision in this chapter, when an action has been stayed by any court of competent jurisdiction or by statute, such action shall be commenced within the longer of (1) the time prescribed in this chapter, after the cause of action has accrued, or (2) one year after the date the stay is no longer in effect.

Neb. Rev. Stat. § 25-201 (reissued 2021). This statute was last amended in 2001, at which time the last sentence was added. 2001 LB 46.

Neb. Rev. Stat. § 25-207 states:

> The following actions can only be brought within four years: (1) An action for trespass upon real property; (2) an action for taking, detaining or injuring personal property, including actions for the specific recovery of personal property; (3) an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; and (4) an action for relief on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud, except as provided in sections 30-2206 and 76-288 to 76-298.

Neb. Rev. Stat. § 25-207 (reissued 2021) (emphasis added). This statute was last amended in 1975. A cause of action sounding in negligence is governed by section (3) of Neb. Rev. Stat. § 25-207. *Omaha Paper Stock Co., Inc. v. Martin K. Eby Const. Co., Inc.*, 193 Neb. 848, 849, 230 N.W.2d 87, 89 (1975).

1. Neb. Rev. Stat. §§ 25-201 and 207 are clear and unambiguous.

Statutory language is to be given its plain and ordinary meaning. *Turco v. Schuning*, 271 Neb. 770, 773, 716 N.W.2d 415, 417 (2006). In the absence of ambiguity, courts must give effect to the statutes as they are written. *Id.* If the language of a statute is clear, the words stated in the statute are the end of any judicial inquiry regarding its meaning. *Id.*

The language of Neb. Rev. Stat. §§ 25-201 and 207 is clear and unambiguous. This is evidenced by the fact that the language has been read the same way and applied in the same manner for more than forty years. As early as 1920 the Nebraska Supreme Court held an action accrues under Neb. Rev. Stat. § 25-207 "when the initial wrong has been done." *Von Dorn v. Rubin*, 104 Neb. 465, 177 N.W. 653 (1920). The fact that the loss has been continuous goes only to the issue of damages." *Id.* In 1974, the U.S. 8th Circuit Court of Appeals confirmed the same rule when interpreting Neb. Rev. Stat. § 25-207 in *Mattice v. Messer*, 493 F.2d 498, 499 (8th Cir. 1974).

In 1975, the Nebraska Supreme Court considered adopting the "discovery rule" to toll the statute of limitations for a negligence action under Neb. Rev. Stat. § 25-207(3) when the plaintiff did not discover the defendant's negligent act of severing a water sprinkler line, which resulted in the destruction of the plaintiff's warehouse building due to a fire. *Omaha Paper Stock Co., Inc.*, 193 Neb. at 849, 230 N.W.2d at 89. That Court "accepted the premise on which this case was presented by the parties. Did the statute commence to run on October 1, 1968 when the plaintiff was actually damaged [by the fire], or October 1971, when the plaintiff learned what caused the break in its waterline?" Accordingly, the accrual date in the *Omaha Paper* case was, by agreement of counsel, the date of the damage or the date of the discovery. *Id.* The *Omaha Paper* case did not consider whether the accrual date actually was the date of the wrongful act – the date the pipe was severed in 1960. Accordingly, any commentary in the *Omaha Paper* case concerning the date of accrual under Neb. Rev. Stat. §§ 25-201 and 207 is pure dicta, not binding precedent or even instructive on the issue at hand.

Nonetheless, the *Omaha Paper* case examines the possibility of applying the discovery rule to delay the accrual date or toll the statute of limitations for the benefit of the plaintiff, who filed its petition on March 7, 1973. The Court declined to apply the discovery rule because by October 1, 1968 (the date of the fire and damage to the warehouse) the plaintiff should have known that a break had occurred in its water line. *Id.* at 850, 230 N.W.2d at 89. The Court specifically held "[i]It would seem reasonable to believe when plaintiff discovered that no water flowed from the 8-inch water line to the automatic sprinkler systems some attempt would have been made to promptly trace the cause." *Id.* Because plaintiff "slept on whatever rights it may have had" the Court declined to apply the discovery rule to toll the statute. *Id.* The Court further explained the discovery rule had been statutorily adopted for fraud cases. *Id.* at 851, 230 N.W.2d

at 90*;* see also Neb. Rev. Stat. § 25-207(4). The discovery rule was judicially adopted for malpractice cases because of strong public policy considerations which set those cases apart from other torts. *Id.* Those same public policy considerations did not apply in the *Omaha Paper* case because, the Court reasoned "[t]o apply the discovery rule to a situation such as this would effectively defeat the purpose which is responsible for limitation of actions." *Id.*

In 1979, the Nebraska Supreme Court squarely considered the issue of accrual under Neb. Rev. Stat. § 25-207, as well as Neb. Rev. Stat. §§ 25-205, 206, and 223. *Grand Island School Dist. No. 2 of Hall County v. Celotex Corp.*, 203 Neb. 559, 562-3, 279 N.W.2d 603, 606 (1979). In *Celotex*, the Court explained:

> 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.

Id.; see also *Carruth v. State*, 271 Neb. 433, 438, 712 N.W.2d 575, 580 (2006) (this "principle has been referred to as the occurrence rule"). The Court further explained that in 1976, the legislature modified this traditional rule as it applies to improvements to real property and adopted a partial "discovery" rule through Neb. Rev. Stat. § 25-223. *Id.* Said statute provided in part: "[any action to recover damages based on any alleged breach of warranty on improvements to real property or based on any alleged deficiency in the design, planning, supervision, or observation of construction, or 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. If such cause of action is not discovered …within such four-year period, or within one year preceding the expiration of such four-year period, then the cause may be commenced within two years from the date of such discovery…"

Citing this statutory language as well as the *Omaha Paper* case, the *Celotex* Court again declined to apply the discovery rule to toll the statute of limitations when the plaintiff knew about the leaking roof within the four-year statutory period. Mainly, construction on Barr Junior School began in 1966 and the roof of the building was completed in 1967. The evidence confirmed that the plaintiff knew about the leaks in the building in late 1968 with buckets being utilized to catch the water in 1969. *Id.* at 567, 279 N.W.2d at 608. For several years the defendant attempted to repair the roof, but the attempts were not successful and suit was filed on August 4, 1976. Because the plaintiff knew about the leaks well within the four-year statute of limitations period (i.e. before 1971), the Court declined to apply the discovery rule to toll the statute of limitations for the plaintiff's breach of warranty action. The Court then applied the four-year statute of limitations prescribed by Neb. Rev. Stat. § 25-207(3) to the plaintiff's negligence action against Shaver, who was allegedly negligent when he inspected the roof. The Court held the same facts summarized above precluded the application of the discovery rule to save the plaintiff's negligence cause of action from the statute of limitations bar. *Id.* at 567, 279 N.W.2d 608-9.

On April 20, 1984, the Nebraska Supreme Court further explained the origins of the discovery rule because the legislature also modified the traditional rule through the adoption of Neb. Rev. Stat. § 25-224(1), which provides "[a]ll product liability actions…shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs." *Cordon v. A.H. Robins Co. Inc.*, 217 Neb. 60, 349 N.W.2d 622 (1984). Analyzing the

language of Neb. Rev. Stat. § 25-224(1), the Court explained that the purpose of a statute of limitations is to prevent recovery on stale demands. *Id.* at 63, 349 N.W.2d at 624. The statute of limitations is enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has a the right to proceed. *Id.* The Court held that by using the word "occur" the Nebraska Legislature adopted the discovery rule as the date of accrual for product liability action. *Id.* at 68, 349 N.W.2d at 627. Thus, under Neb. Rev. Stat. § 25-224, the statute of limitations for a product liability action "begins to run on the date on which the party holding the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the injury or damage." *Id.* Discovery, as applied in Neb. Rev. Stat. § 25-224 refers to the fact that one knows of the existence of an injury or damage and not that one knows he or she has a legal right to seek redress in the courts. *Id.*

On October 26, 1984, the Nebraska Supreme Court examined a plaintiff's contention that Neb. Rev. Stat. § 25-222 begins to run from the point at which actual damage results from malpractice, not from the act or omission. *Rosnick v. Marks*, 218 Neb. 499, 502, 357 N.W.2d 186, 188 (1984). Neb. Rev. Stat. § 25-222 requires that a malpractice action be commenced within 2 years "after the alleged act or omission" and contains a provision for deferred commencement "if the cause of action is not discovered and could not be reasonably discovered within such two years period." *Id.* at 503-4, 357 N.W.2d at 189-90. In analyzing this language, the Court explained that historically the term "injury" denoted the invasion of any legally protected interest of another. *Id.* at 504, 357 N.W.2d at 190. Frequently the words injury and damage are used interchangeably and synonymously, but there is a material difference between the terms. *Id.* While they bear the same relation to each other as a cause and effect, an "injury" in

the legal sense is misconduct and "damage" is the legal term applied to the loss resulting from misconduct. *Id.* The Court further explained:

> In formulating the statute of limitations for actions based on professional negligence, Nebraska's Legislature has expressly stated that such actions "shall be commenced within two years next after the alleged act or omission." When it selected the language "act or omission" found in the Neb. Rev. Stat. § 25-222, the Nebraska Legislature rejected actual damage as the index for inception of the time limit for a suit based on malpractice. Had the Nebraska Legislature desired actual damage to be an element of the statute of limitations and, at the risk emphasizing the obvious, the patently simple legislative course would have been insertion of such terminology into the statute, that is, malpractice actions 'shall be commenced within two years next after actual damage has been sustained by the claimant.' However, this court cannot indulge in substitutional injection of 'actual damage' into the malpractice statute of limitations, a phrase which would render 'alleged act or omission' meaningless and repudiate the manifest legislative intent found in the unambiguous language of § 25-222. In utilizing the language found in § 25-222, the Nebraska Legislature has opted for the occurrence rule, tempered or ameliorated by a provision for discovery.

Id. at 505, 357 N.W.2d at 190. Under the occurrence rule, the "tortious invasion of another's legal right is the triggering device for the statute of limitations. *Id.* at 502, 537 N.W2d. at 188. It was further noted that "statutes of limitations have an important role in disposition of claims between individuals, because such statutes promote and produce finality and thereby stability in

human affairs. *Id.* at 501, 357 N.W.2d at 188. In this manner statutes of limitations stimulate activity and punish unreasonable delay in prosecuting claims. *Id.*

Overall, the *Rosnick* case and its predecessors confirm that the word "accrue" as used in Neb. Rev. Stat. § 25-201 is a general statute further defined by later statutes in Chapter 25 for each specific type of case. Said cases also provide the historical context for the phrase "injury to the rights of the plaintiff" as used in Neb. Rev. Stat. § 25-207(3). Mainly, the word "injury" is a term of art with a precise technical and legal definition – the wrongful act or misconduct. When Courts examine statutory language, terms of art are to be given their legal, technical meaning. *Wisner v. Vendelay Investments, L.L.C.*, 300 Neb. 825, 850, 916 N.W.2d 698, 720 (2018) (citing 82 C.J.S. Statutes § 418). As explained in the Corpus Juris Secundum:

> The general rule that words should be construed according to their usual, natural, plain, ordinary, and commonly understood usage does not apply to technical words and phrases that have a peculiar meaning. Words and phrases that have acquired a technical meaning, whether by legislative definition or otherwise, generally are considered to have been used in their technical sense. Thus, when statutory words have both an ordinary meaning and a peculiar and appropriate meaning in law, courts prefer the technical meaning unless that construction is contrary to the legislative intent.

As a term of art the word "injury" is to be given its legal meaning, "misconduct" when interpreting a statute of limitations. Applying this legal definition to Neb. Rev. Stat. § 25-207(3), the phrase "injury to the right of the plaintiff" clearly and unambiguously references the misconduct of the defendant. This Court should prefer this technical meaning unless the construction is contrary to legislative intent.

With regards to legislative intent and, at the risk of stating the obvious, had the Nebraska Legislature desired "actual damage" to be an element of the statute of limitations, the patently simple legislative course would have been insertion of such terminology into Neb. Rev. Stat. §§ 25-201 and/or 207. The Nebraska Legislature amended Neb. Rev. Stat. § 25-207 in 1975 and it amended Neb. Rev. Stat. § 25-201 in 2001. Neither of those amendments took the course of action urged by Appellants in this appeal, to include "direct injury" or "actual damage" as an element of accrual for an action based upon "an injury to the rights of the plaintiff." In fact, when the Nebraska Legislature amended Neb. Rev. Stat. § 25-207 in 1975, it did so on the heels of the 1974 *Mattice* decision where the U.S. 8th Circuit Court of Appeals unambiguously interpreted "accrual" as used in Neb. Rev. Stat. § 25-207 to mean the date of the wrongful act or omission. In the same case, the 8th Circuit held "damages after accrual of a cause of action does not extend the time of the cause of action." *Mattice*, 493 F.2d at 499 (citing *Von Dorn v. Rubin*, 104 Neb. 465, 177 N.W. 653 (1920)). Being on notice of the interpretation of "accrue" and legal definition being assigned to "injury" by the Courts under Neb. Rev. Stat. §§ 25-201 and 207, the Nebraska Legislature could have acted in 1975 or 2001 to include "actual damages" in either of those statutes, but the Nebraska Legislature did not do so. The only reasonable conclusion to draw from this historical context is that the Nebraska Legislature acquiesced with the Nebraska Supreme Court's 1920 and the 8th Circuit's 1974 interpretation of "accrue" where the date the statute commences is defined by later statutes within Chapter 25, as well as defining "injury" as used in Neb. Rev. Stat. § 25-207(3) as "the date of the wrongful act or misconduct." *Heckman v. Marchio*, 296 Neb. 458, 465, 894 N.W.2d 296, 301 (2017) (where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent).

Overall, using the technical, legal definition for the word "injury" – the misconduct of the defendant – when reading the phrase "injury to the right of the plaintiff" as used Neb. Rev. Stat. § 25-207(3) is not contrary to the legislative intent for the statute. This is made clear through the Legislature's acquiescence in the construction provided by prior Courts, which has not evoked an amendment. Thus, the language of Neb. Rev. Stat. §§ 25-201 and 207 is clear and unambiguous. The words stated in these statutes should be the end of any judicial inquiry regarding the meaning of these statutes. *Id.*

2. If subject to construction, the term "accrue" is defined by subsequent statutes within Neb. Rev. Stat., Chapter 25.

The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent. *Id.* Legislative intention is to be determined from a general consideration of a whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found. *Vasques v. Chi Properties, LLC*, 302 Neb. 742, 751, 925 N.W.2d 304, 314 (2019). In construing a statute, courts look to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. *Fisher v. PayFlex Systems, USA, Inc.*, 285 Neb. 808, 817-818, 829 N.W.2d 703, 712 (2013). A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose. *Id.*

Legislative intent deduced from the whole will prevail over that of a particular part considered separately. *Vasques*, 302 Neb. at 751, 925 N.W.2d at 314 (interpreting the URLTA). 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.* A statute's clauses and phrases are not "detached and isolated expressions". *Id.* The whole and every part of the statute

must be considered in fixing the meaning of any of its parts. *Fisher*, 285 Neb. at 817-818, 829 N.W.2d at 712. 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. *Wisner,* at 850, 916 N.W.2d at 720. Where general and special provisions of statutes are in conflict, the general law yields to the special provision or more specific statute. *Schaffer v. Cass County*, 290 Neb. 892, 898, 860 N.W.2d 143, 147 (2015).

When constructing a statute, it is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Johnson v. City of Fremont*, 287 Neb. 960, 967, 845 N.W.2d 279, 286 (2014). However, terms of art are to be given their legal, technical meaning. *Wisner,* at 850, 916 N.W.2d at 720. Thus, when construing a statute of limitations, the term injury is to be given its legal meaning "misconduct". *Rosnick*, 218 Neb. at 504, 357 N.W.2d at 190.

Appellants urge the Court to interpret "accrue" as used in Neb. Rev. Stat. § 25-201 broadly as the date when the plaintiff has a right to maintain suit and "the last event required to form the elements of the cause of action" has occurred. Appellants' Brief, p. 15-16. In the case of a negligence action, Appellants argues that this would require reading in a "direct injury" or "actual damages" requirement for the statute of limitations to accrue under Neb. Rev. Stat. §§ 25-201 and/or 207.

Aside from being directly contrary to the rule of construction prohibiting courts from reading meaning into a statute that is not there, the argument fails because Chapter 25, subsection 200 provides a collection of statutes pertaining to statutes of limitations. As such, the different provisions within subsection 200 must be read conjunctively to ensure they are

interpreted in a manner that is consistent, harmonious, and sensible. Neb. Rev. Stat. § 25-201 is the first subsection within this collection of statutes concerning the broad topic "Civil actions; when commenced." The whole and every part of this statutory scheme must be considered in fixing the meaning of any of its parts.

The only way to construct Neb. Rev. Stat. § 25-201 so that its provisions are harmonious with subsequent parts of the collection is to interpret it as providing a general rule that "a civil action shall be commenced only within the time prescribed in this chapter, after the cause of action has accrued." The remaining subsections of Chapter 25 then provide the specific definition of the term "accrued" for each particular type of cause of action. For example, a negligence cause of action is governed by Neb. Rev. Stat. § 25-207(3), which defines "accrual" as "an action for an injury to the rights of the plaintiff", which must be commenced within four years. By referencing "an action for an injury to the rights of the plaintiff" the statute, in and of itself, defines the date of accrual as the date of the "misconduct" or the date of the defendant's wrongful act because that is the legal meaning for the term "injury." See *Rosnick*, 218 Neb. at 504, 357 N.W.2d at 190.

Construing the term "accrual" as a general term that yields to and is further defined by each subsequent and more specific subsection of Chapter 25 gives meaning to each subsequent statute with Chapter 25, subsection 200, rendering no portion superfluous. For example, Neb. Rev. Stat. § 25-224 prescribes the statute of limitations for a product liability action is four years "after the date on which the death, injury, or damage complained of occurs." Neb. Rev. Stat. § 25-224 (revised in 1978, 1981, and 2001). Thus, for a product liability action to "accrue" the death, injury, or damage must occur. If Neb. Rev. Stat. § 25-201 is interpreted to include a "direct injury" or "actual damage" requirement, the Legislature's use of the phrase "after the date

on which the death, injury, or damage complained of occurs" in Neb. Rev. Stat. § 25-224 would be duplicative, rendering the phrase superfluous because it would serve no purpose.

Moreover, injecting into Neb. Rev. Stat. § 25-201 a requirement that that each element of any cause of action be fulfilled before an action can "accrue", would repudiate the clear and unambiguous requirements of Neb. Rev. Stat. § 25-222 and 223. For example, if one must have "actual damages" to pursue a claim for professional negligence, Neb. Rev. Stat. § 25-222's refence to the date of the "alleged act or omission in rendering or failure to render professional services" would have no meaning because additional requirements beyond those specified in the statute would be imposed. Likewise, Neb. Rev. Stat. § 25-223's language providing that action for breach of warranty for improvements to real property "shall be commenced within four years after any alleged act or omission constituting such breach…" would be invalidated.

In a similar respect, if "accrue" as used in Neb. Rev. Stat. § 25-201 were interpreted to mean the date of "direct injury" or "actual damages" to the plaintiff, the phrase "injury to the rights of the plaintiff" as used in 25-207(3) would no longer enjoy its plain meaning. There would be no purpose served by the phrase "to the rights of the plaintiff" if all that was required were a physical injury. The legal meaning of the term "injury", which is "misconduct", would also have to be overlooked, despite the Legislature's acquiescence in the Court's definition of the term when it passed amendments to both statutes in 1975 and 2001.

The last sentence of Neb. Rev. Stat. § 25-207(4), which codifies and applies the discovery rule for claims based upon fraud would, likewise, have no meaning if accrue were interpreted to mean "direct injury." Said statute provides that a cause of action for fraud "shall not be deemed to have accrued until the discovery of the fraud." Neb. Rev. Stat. § 25-207(4). There would be no need for a discovery rule to toll the statute if a plaintiff must sustain a "direct

injury." This is because as used in Neb. Rev. Stat. § 25-207(4) discovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action. *Association of Commonwealth Claimants v. Moylan*, 246 Neb. 88, 100, 517 N.W.2d 94, 102 (1994). If "direct injury" were a requirement of accrual, the plaintiff would have the facts constituting the basis of the cause of action, there would be no need for a discovery rule to delay the date of accrual for fraud cases.

Constructing Neb. Rev. Stat. § 25-201 as a general statute defined by latter more specific statutes within the chapter also does not render the term "accrue" as used in Neb. Rev. Stat. § 25-201 superfluous because the text around the word within the statute confirms its purpose. Said text states: "[a] civil action shall be commenced only within the time prescribed in this chapter, after the cause of action has accrued." This language, in and of itself, contemplates that subsequent statutes within Chapter 25 prescribe the date by which the action must be commenced with the phrase "after the cause of action has accrued" clarifying that the time should run in a continuous sequence "after" the action accrued or commenced running. In other words, there should not be a gap in time between the date prescribed by subsequent statute for commencement and the date the action is deemed to have "accrued" or started to run.

In short, if the legislature had intended for all causes of action to "accrue" on the date all or some of the elements of a substantive claim were fulfilled, it would have placed such language into Neb. Rev. Stat. 25-201. If the legislature had intended for negligence actions, in particular, to be governed by the substantive elements of the claim, it would have inserted "after the death, injury, or damage complained of occurs" into Neb. Rev. Stat. § 25-207(3), in the same way it inserted such language into Neb. Rev. Stat. § 25-224, governing product liability actions. As

explained in *Johnson*, it is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. The interpretations urged by Appellants would require this Court to do both – read a "direct injury" and/or "actual damage" requirement into Neb. Rev. Stat. § 25-201 and/or 25-207(3), as well as read out the phrases "injury to the right of the plaintiff", "discovery of the fraud", "alleged act or omission", "date of the wrongful actor or omission", and "after the date on which the death, injury, or damage complained of occurs" as used in Neb. Rev. Stat. §§ 25-207(3), 207(4), 222, 223, and 224, respectively. Such an interpretation is far from a consistent, harmonious, and sensible interpretation that gives effect to every part and considers all statutes of limitations conjunctively. To hold otherwise would repudiate the intent of these subsequent statutes. Thus, as explained in *Shaffer*, the general word "accrue" as used Neb. Rev. Stat. § 25-201 must yield to the more specific provisions of sections 207, 222, 223, and 224.

Collectively, *Celetex, Cordon,* and *Rosnick* read conjunctively explain the decision tree for statutes of limitations under Neb. Rev. Stat. Chapter 25. There are specific definitions of "accrual" that have been legislatively mandated for cases involving fraud, professional negligence, breach of warranty on improvements to real property, and product liability actions. In those cases, specific circumstances dictate the date of accrual. For example, in product liability claims the date of accrual is the "date on which the death, injury, or damage complained of occurs"; whereas claims for professional negligence and breach of warranty on improvements to real property accrue on the date of the wrongful act or omission. See Neb. Rev. Stat. §§ 25-222, 223, and 224. When a case falls only into the broad categories of claims for breach of contract (Neb. Rev. Stat. §§ 25-205 or 206) or torts, including action for trespass, conversion, or other torts (Neb. Rev. Stat. § 25-207), the statute of limitations is governed by the traditional rule

where the "breach" or allegedly wrongful act commences the running of the statute of limitations.

Under this statutory scheme, Appellants claim that Kearney negligently installed a tire on a vehicle plainly falls within the broad range of claims intended to be governed by Neb. Rev. Stat. § 25-207(3) and the traditional interpretations thereof. The legislature's choice to use the date of "injury to the rights of the plaintiff" (i.e. the "wrongful act or omission") as the trigger for the commencement of the broader category of tort claims is logical because it provides an easily ascertainable date for when every action that falls within the broad category of claims accrues – the date of the alleged wrongful act.

As a practical matter, injecting an "all elements fulfilled" requirement into the definition of "accrue" would often result in a proverbial "fox in the henhouse" when applied to many of the claims governed by Neb. Rev. Stat. § 25-207. For example, in a nuisance case, a plaintiff must prove the defendant's conduct caused them to suffer "actual physical discomfort for one of ordinary sensibilities." *Goeke v. National Farms, Inc.*, 245 Neb. 262, 270, 512 N.W.2d 626, 271 (1994). Imposing a requirement that the statute run from the date the plaintiff suffered "actual physical discomfort" would allow plaintiffs to dictate when they suffered enough harm for the statute of limitations to start running. The U.S. District Court for Nebraska recently warned against such a result in *Haltom v. Parks*, 2018 WL 1033492 (D. Neb. 2018). More importantly, injecting an "all elements fulfilled" requirement into the statute of limitations for this broad category of cases would defeat the well recognized statutory purpose of encouraging all claims, no matter how unique or atypical the claim, are promptly filed without undue and unreasonable delay. Yet, through this appeal, Appellants seek to defeat the purpose of the statute, relieving

themselves of the obligation to promptly file claims and authorizing their unreasonable delay in filing this action.

Notably, there is no rule of construction suggesting that the intent of the legislature can be identified by subsequent developments in pleading rules or substantive law, which is essentially what Appellants is advocating for when it is argued that "accrue" should be defined based upon when a party has a "right to maintain an action" or the date each element of a cause of action is fulfilled. Appellants' Brief, p. 16. Appellants even argues that because Nebraska's pleading rules require a plaintiff to allege facts to suggest each element has occurred that statutes of limitations should impose a similar requirement. Appellants Brief, p. 16. This argument ignores the fact that the two sets of rules derive from completely different sources with pleading rules established by the Nebraska Supreme Court and the statutes of limitations prescribed by the Nebraska Legislature. As noted in Vasques, statutory construction requires reference to the whole statute with reference to the subject matter to which it applies and the particular topic under with the language in question is found. *Vasques*, at 751, 925 N.W.2d at 314. This rule of construction does not authorize venturing into rules promulgated by other authorities to read meaning into the subject statute.

Beyond that it strains credulity to suggest that in 1975 the legislature intended for the statute of limitations to be a "living" statute that grows and evolves as the court implements new rules for the practice of law and develops new substantive case law. And, as of 1975 Nebraska's rules of pleading were more stringent than the current liberal "notice pleading" rules that were first adopted in the early 2000's. See *Christianson By and Through Cristianson v. Educational Service Unit No. 16*, 243 Neb. 553, 560, 501 N.W.2d 281, 287 (1993) (whether to adopt notice pleading was "hotly debated" by members of the Supreme Court of Nebraska's Advisory

Committee on Rules of Practice", but ultimately code pleading remained in effect as of 1993); see also *Kellogg v. Nebraska Dept. of Correctional Services*, 269 Neb. 40, 43, 690 N.W.2d 574 (2005) (the new rules of notice pleading apply to civil actions filed on or after January 1, 2003). If the Nebraska Legislature intended to create a high bar for the applicable of the statute of limitations based upon the pleading rules and substantive elements of the claims, the Legislature would have done so by reference to the then existing code pleading rules when it last amended Neb. Rev. Stat. § 25-207 in 1975. Likewise, as of 2001, when the Legislature amended Neb. Rev. Stat. § 25-201, the issue of code versus notice pleading was a hotly debated topic. If the Legislature wanted to weigh-in on the debate through the statutes of limitations it was prescribing, the Legislature would have made reference to the pleading rules of the Nebraska Supreme Court in its 2001 amendments to Neb. Rev. Stat. § 25-201.

Overall, the rules of statutory construction support holding that Neb. Rev. Stat. § 25-201 is a general statute that must yield to the more specific provisions of Neb. Rev. Stat. §§ 25-207, 222, 223, and 224. Accordingly, the term "accrue" as used in 25-201 is further defined by the subsequent statutes. In the context of a negligence case the statute of limitations accrues on the date the of the "injury to the rights of the plaintiff", as set forth in Neb. Rev. Stat. § 25-207, meaning the date of the defendant's misconduct. This is the only interpretation that considers the whole of Chapter 25, giving effect to each part and subpart therein. And, it is the only construction that achieves the statutes' purpose of encouraging prompt filing of suits, rather than defeating said purpose.

3. The statute of limitations expired on Appellants' claim against Kearney on June 10, 2018 and, thus, was untimely when filed on April 12, 2019.

Whether based upon the plain language of Neb. Rev. Stat. § 25-207 or the statutory

construction of the same, the applicable rule remains that Appellants' negligence cause of action accrued or began to run on the date of the allegedly wrongful act. In this case, the undisputed facts establish that the date of Kearney's allegedly wrongful conduct was June 10, 2014. (T72-73) (Supp. T2). It is on this date, and this date alone, that Kearney was allegedly negligent when it: "inspected, mounted, installed and balanced the used tires that were on the subject 2003 Chevrolet Silverado SC1 truck occupied by Plaintiff Loveland and Plaintiff Summers at the time of the accident." (T2 ¶ 9) (T71-73) (Supp. T2). Accordingly, the statute of limitations for this action expired on June 10, 2018. Appellants' Complaint was filed on April 12, 2019, nearly nine months after the statute expired. Therefore, this action is barred because Appellants did not meet the requirements of Neb. Rev. Stat. §§ 25-201 and 207(3).

4. The "discovery rule" and other exceptions to the occurrence rule prevent an unjust result or unfair prejudice to plaintiffs.

Appellants argue that under the 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. Appellants' Brief, p. 36. The statement is contrary to established case law.

Since the turn of the twentieth century, cases interpreting and applying Neb. Rev. Stat. § 25-207 have consistently reiterated that the date of accrual for a tort action is the date of the allegedly wrongful act or omission. See *Van Dorn*, 104 Neb. at 465, 177 N.W. at 654. For the past four decades, Nebraska Courts have, after determining the date of the wrongful act, proceeded to a second step in the analysis: considering whether an exception to the rule (such as the discovery rule or the continuous tort doctrine) should apply to toll the statute to prevent an unfair or unjust result. This two-step analysis is demonstrated by more recent cases analyzing tort claims governed by Neb. Rev. Stat. § 25-207(3), summarized below:

- *Anonymous v. St. John Lutheran Church of Seward*, 14 Neb.App. 42, 703 N.W.2d 918 (2005) and *Kraft v. St. John Lutheran Church of Seward, Neb.*, 414 F.3d 943 (D. Neb. 2005). In these cases, the plaintiffs sued the church related to allegations of sexual abuse that they endured while students in the 1970's. Both the Nebraska Court of Appeals and the U.S. District Court for Nebraska held that the applicable statute was Neb. Rev. Stat. § 25-207(3) as the action was one for injuries to the rights of the plaintiffs. It was acknowledged that an action in tort generally accrues as soon as the act occurs. Both Courts declined to modify the discovery rule to allow the plaintiff time to discover the causal relationship between the abuse and their mental health problems. Both Courts, likewise, declined to apply Neb. Rev. Stat. § 25-213, which tolls the statute for persons suffering from a mental disorder or other incapacities.
- *Marmo v. Tyson Fresh Meats, Inc.* 457 F.3d 748, 757 (8th Cir. 2006). In this toxic tort case, the U.S. 8th Circuit Court of Appeals reiterated that under Nebraska law a four-year statute of limitations applies to negligence claims. The statute of limitations in a negligence action generally commences when the injurious act or omission occurs. Thus, the limitations period runs from the date the injured individual has the right to commence an action, even if the individual is ignorant about whether a cause of action exists or is unaware of the nature or extent of the damage. The plaintiff argued that the continuing tort doctrine should be adopted to toll the statute of limitations set forth in Neb. Rev. Stat. §25-207. The 8th Circuit disagreed and held that the action was barred because the initial actions giving rise to the claim occurred more than four years before the plaintiff filed suit.
- *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007). In this case, the

Nebraska Supreme Court applied the two-step traditional "accrual" rule and "discovery rule" analysis in the context of a toxic tort case. The defendant allegedly committed multiple wrongful acts or omissions exposing the plaintiff to hazardous smoke as early as 1990 or 1991 when the plaintiff inspected the defendant's meat packing facility as part of her job working for the USDA. *Id.* at 423, 730 N.W. 2d at 379. In May 1996, the plaintiff was hospitalized for her condition. *Id.* at 423, 730 N.W. 2d at 380. The plaintiff retired from her job in November 1999. The plaintiff filed suit on October 23, 2003. The plaintiff argued that under the continuous tort doctrine the statute of limitations ran from her most recent exposure in November 1999; while the defendant argued that the statute of limitations barred her claim because it accrued in the early 1990's and the discovery rule would not apply to toll the statute. Ultimately, the Nebraska Court, to some degree, held both parties were correct. First, the court adopted a version of the continuing tort doctrine to hold that that the plaintiff could recover for wrongful acts that occurred within the statute of limitations period. This was because any wrongful act that occurred after October 23,1999 (four years prior to the date the Complaint was filed) was a new wrongful act that gave rise to a new cause of action that was within the statutory period. On the other hand, the plaintiff's claims arising from conduct that occurred prior to October 23, 1999 (more than four years prior to the statute of limitations period) were barred because the statute of limitations expired on those claims and the discovery rule did not toll the statute. Accordingly, claims related to the plaintiff's 1996 hospitalization were necessarily barred. When deciding *Alston,* the Nebraska Supreme Court reasoned that the common law discovery rule was adopted because in certain categories of cases the injury is not obvious and the individual is wholly unaware that he or she has suffered

an injury or damage. *Id.*at 432, 730 N.W.2d at 385. If the discovery rule applies, the statute of limitations does not begin to run until the potential plaintiff discovers, or with reasonable diligence should have discovered the injury. *Id.* But, the Nebraska Supreme Court reiterated that the benefice of the discovery rule is not bestowed on a potential plaintiff where the potential plaintiff in fact discovers the injury within the initial period of limitations running from the wrongful act or omission. *Id.* Court further cautioned "a plaintiff is not free to delay suit with impunity. The plaintiff still risks losing damages as the limitations period runs as to various injuries…" *Id.* at 435, 730 N.W.2d at 387.

- *Mace-Main v. City of Omaha*, 17 Neb. App. 857, 773 N.W.2d 152 (2009). In this case, the plaintiff injured her foot and leg when she stepped on a defective manhole cover. She did not comply with the statutory requirement of notifying MUD of her tort claim within one year of the injury, as required by the applicable statute. The plaintiff argued that the discovery rule applied to extend the statute because she did not know MUD owned the manhole cover until after the City made her aware of that fact, which was more than one year after the incident. The Nebraska Court of Appeals disagreed. In doing so, they explained that the discovery rule applies when an individual's injury is not obvious and the individual is wholly unaware that he or she has suffered an injury or damage. The Court expressly held "the discovery rule does not operate to toll the statute of limitations until a potential plaintiff discovers the negligent party."
- *Clausen v. Reserve National Ins. Co.*, 2014 WL 12576234 (D. Neb. 2014). In this case, the plaintiff alleged the defendant was negligent in procuring insurance in March 2010. The plaintiffs discovered the insurance defect in February 2012 after the plaintiff had surgery that was not covered by the policy. The suit was filed in April 2014, on month

after the statute of limitations expired in March 2014. The Court held Neb. Rev. Stat. § 25-207(3) barred the plaintiff's claims. In doing so, the Court specifically noted the plaintiffs "are not entitled to the benefit of the discovery rule because they were aware of the alleged negligence within the 4-year limitations period."

- *Chafin v. Wisconsin Province of Society of Jesus*, 301 Neb. 94, 917 N.W.2d 821 (2018). In 2015, this plaintiff filed a complaint alleging the defendant kidnapped her newborn son and fraudulently concealed his adoption in 1969. The Court acknowledged the applicable statute of limitations was the 4-year statute of limitations provided by Neb. Rev. Stat. § 25-207. The Court held that the statute accrues on the date of the wrongful act and declined to modify the discovery rule to toll the statute until the plaintiff discovered the specific wrongful act that formed the basis for her complaint. In doing so, the Court held that the plaintiff knew about her *injury* in 1969, when her child was born and never returned to her. Therefore, the discovery rule did not apply. The only way the plaintiff's action could survive was if she could invoke the doctrine of fraudulent concealment, which was a high bar requiring a showing of who, what, when, where, and how the plaintiff was defrauded.
- *Haltom v. Parks*, 2018 WL 1033492 (D. Neb. 2018) (affirming *Alston*). In this 1983 action, the U.S. District Court for Nebraska applied Neb. Rev. Stat. § 25-207(3) and held the action was time barred because the defendant presented evidence establishing conclusively it engaged in no act of misconduct during the limitations period. The Court then considered applying the fraudulent concealment doctrine and declined to do so. *Id.* at *3. In rendering this holding, the Court noted that even under the fraudulent concealment doctrine, the plaintiff must show that he or she exercised due diligence to

discover his or her cause of action before the statute of limitations expired. *Id.* This is because if the statute were to begin to run only after a plaintiff became satisfied that he had been harmed enough, the expiration of the statute of limitations would be "placed solely in the hands of the party seeking relief." *Id.* at *3.

- *Mixon v. Esch*, 2021 WL 1192813 (D. Neb. Mar. 30, 2021). In this 1983 action the U.S. District Court refused to toll the statute of limitations due to the plaintiff being imprisoned. *Id.* In rendering the decision, the Court noted the first possible claim accrued on the date of the first wrongful act, November 16, 2015, and the last possible claim accrued on the date of the last wrongful act, December 25, 2015. *Id.* at 13. These were the dates of accrual because these were the dates that the defendant allegedly failed to provide the plaintiff with seizure medications during his incarceration. *Id.* at *1 and *15. The Court then evaluated whether any exception to the traditional accrual rule should be applied to toll the statute. Ultimately, the Court found no exception that allowed for the tolling of the statute. In rendering this holding, the Court noted that Nebraska recognizes the doctrine of equitable tolling, meaning "a court may excuse the party's failure to file within the limitations period if that failure was the result of circumstances beyond the party's control." *Id.*

This two-step accrual and exception analysis is so well-established and accepted by Nebraska Courts that it is now part of standards of review for a motion for summary judgment. Mainly, after a defendant has established a prima facie case that the statute of limitations has expired based upon the date of the wrongful act or omission, the burden of demonstrating that some exception applies shifts to the plaintiff. *Lawrey v. Kearney Clinic, P.C.*, 2011 WL 13128700 at *3 (D. Neb. 2011) (citing *Weaver v. Cheuneg*, 254 Neb. 349, 579 N.W.2d 773

(1998)). Meeting this burden requires that the plaintiff come forward with specific facts showing that there is a genuine dispute of material fact for trial. *Id.* Notably, in *Lawrey*, the Court found it significant that the plaintiffs consulted an attorney more than two years prior to the filing of the action. This evidence tended to show that the plaintiff knew, or at least was aware, of the facts underlying her cause of action before the statute expired, making the discovery rule (i.e. the equitable tolling doctrine) inapplicable. *Id.*

In short, if at any time in the last two decades, any Nebraska Court wanted to adopt a general exception for "atypical" cases that disregards the conduct of the plaintiff, it could have done so through any of the otherwise meritorious cases cited above. Instead, all of the cases above confirm that exceptions to the general rule are limited and narrowly applied to cases where circumstances beyond the control of the plaintiff prevented the plaintiff from filing suit. For example, the discovery rule applies if the plaintiff did not discover the injury within the original statute of limitations period (see *Alston*); but, this rule has narrow applicability because it specifically does not apply to toll the statute of limitations until the plaintiff discovers the negligent party (see *Mace-Main*). Similarly, the doctrine of fraudulent concealment applies if the plaintiff can meet the high bar of showing who, what, when, where, and how the plaintiff was defrauded (see *Chafin*). Even then, the doctrine of fraudulent concealment requires that a plaintiff show that he or she exercised due diligence to discover his or her cause of action before the statute of limitations expired (see *Haltom*). And, the more general equitable tolling doctrine only applies if circumstances beyond the control of the plaintiff prevent the plaintiff from filing suit (see *Mixon*).

Placement of these limits on the exceptions to the traditional accrual rule strikes a reasonable and logical balance between competing policies – discouraging delayed filing of

claims and allowing plaintiffs to proceed on meritorious claims, but not allowing plaintiffs to delay with impunity or disregard their obligation to exercise due diligence to discover their causes of action. As discussed in the next section of this Brief, the facts if this case do not support applying any recognized exception to the traditional accrual rule because the conduct of Appellants does not allow it.

5. Neither the "discovery rule" nor any other recognized exception apply.

Here, the undisputed facts establish that Appellants' cause of action accrued on June 10, 2014, the date that Kearney allegedly breached the standard of care when it "inspected, mounted, installed and balanced the used tires." (T2 ¶ 9) (T71-73) This is the single allegedly wrongful act as set forth in the Complaint. *Id.* As explained in *Alston, Lawrey, Haltom* and all other cases cited above the date of "accrual" is defined as the wrongful act or omission; therefore, the statute of limitations on Appellants' claim expired on June 10, 2018. Appellants' claim is barred because they waited until April 12, 2019 to file this action against Kearney. Considering the analysis in reverse, Appellants cannot identify any act committed by Kearney after April 12, 2015. In other words, Appellants cannot identify any allegedly wrongful act or omission committed by Kearney within the four years preceding the date Appellants filed this Complaint. Having established a prima facie statute of limitations defense, the burden shifted to Appellants, who were required to produce some facts to show that there is a genuine issue for trial to satisfy the burden and avoid the entry of summary judgment. *Lawrey v. Kearney Clinic, P.C.*, 2011 WL 13128700 at *3 (D. Neb. 2011).

As in *Lawrey*, the undisputed facts of this case establish that Appellants themselves, did what would be expected – they retained counsel by November 30, 2016. (T98 ¶ 3); see also (T72-73 ¶¶ 18 and 19) (E21,1:8-12) Any suggestion that Appellants' counsel was not capable of

discovering a cause of action against Kearney fails for factual and legal reasons. Because Appellants' counsel was being assisted by Farm Bureau, Appellants had the benefit of expert inspections completed on the tire as early as August 24, 2015. (T71-73) (E21,1:8-12). Appellants' counsel also had the benefit of information from Farm Bureau's claim notes that identified Kearney as having information concerning the tire. (T71-73) (E21,1:8-12) Appellants' counsel also had access to the "evidence artifacts" in this case as of November 2016. (E21,1:32-33) Said counsel retained possession of the tires through December 2020 and/or control over who had access to the tires with a required "inspection protocol." (E30,1:32-33) (E31,1:32-33).

Beyond that, Appellants filed a product liability litigation against Goodyear on August 7, 2017, again more than ten months prior to the date the statute of limitations for this case expired on June 10, 2018. (T72-73 ¶ 21) (Supp. T2) As noted in Exhibits 29 and 39, Appellants' counsel also retained Troy Cottles and David Southwell to perform a tire failure analysis for their federal case against Goodyear concerning the tire that is the subject of this suit. (E29,1:32-33) (E39,1:32-33) Appellants' counsel used the services of the same experts on multiple occasions for other tire cases before the statute of limitations expired in this case on June 10, 2018. See *Cone v. Hankook Tire Company, Ltd.*, 2017 WL 5972893 * 1 (W.D. Tenn. 2017); *Logan v. Cooper Tire & Rubber Co.*, 2011 WL 2453491 at *3 (E.D. Ky. 2011). In the *Cone* case, Appellants' counsel, including Mr. Farrar, designated Troy Cottles and David Southwell as tire experts in February 2016. In the 2011 *Logan* case, Appellants' counsel again hired Troy Cottles as a "tire expert."

The only reasonable inference to be drawn from this undisputed evidence is that Appellants' counsel had access to both the, information, evidence, and the experts needed to investigate potential claims against Kearney. Appellants' counsel is also seemingly well versed

in tire litigation. (T99) (E24, 1:32-33) He even encourages the use of "google" to confirm his success in other tire litigations. *Id.* And, said counsel is no stranger to intimidation tactics, as they've hurled threats of Kearney being in "crosshairs" and subjected to a judgment in excess of Kearney's policy limits on three separate occasions. (T99) (E25, 1:32-33) (E26, 1:32-33) (E27, 1:32-33) The only reasonable inference to be drawn from the totality of the evidence is that Appellants' counsel, if acting with reasonable diligence, could have discovered Kearney's allegedly wrongful conduct before the statute of limitations expired on June 10, 2018. Appellants are not entitled to the benefit of the discovery rule because they knew about their physical injuries, in addition to Kearney's possible involvement in bringing about those injuries, before the statute of limitations expired. Similarly, any suggestion that Appellants' counsel was unable to discover the precise negligence cause of action against Kearney has already been determined to be an unacceptable basis for applying the discovery rule under *Mace-Main*, at 857, 773 N.W.2d at 152 (the discovery rule does not operate to toll the statute of limitations until a potential plaintiff discovers the negligent party).

For similar reasons no other recognized exception to the traditional rule would apply. Primarily, there is no evidence in the record to suggest that circumstances beyond Appellants' control prevented them from filing the present litigation. The fact that Appellants filed other litigation concerning the May 1, 2015 incident on August 7, 2017, before the statute of limitations for this action expired on June 10, 2018 confirms that Appellants were well aware of their actual and legal injuries before the statute of limitations expired. Not only did Appellants have at least three years from the date the injury occurred to file litigation, they actually did file litigation regarding those injuries on August 7, 2017, ten months before the statute expired. By August 7, 2017, Appellants were required to exercise due diligence to discover their causes of

action and file any of their negligence actions before the statute of limitations expired, as explained in *Haltom*.

To that end, Appellants have not even attempted to argue that some circumstance out of Appellants' control prevented Appellants from timely filing this litigation against Kearney. Instead, Appellants argue for complete abandonment of the traditional two-step statute of limitations analysis through the adoption of a new and novel definition of "accrual"; alternatively, Appellants request a sweeping and broad exception to the traditional accrual rule for "atypical" cases for policy reasons. For reasons discussed below, it would be ill-advised to do so.

6. There is no reasonable basis for overturning binding precedent and adopting a new exception to the traditional, occurrence rule.

Appellants urge the Court to ignore and overturn 40 years of precedent for various reasons. Appellants' Brief, p. 30-31, 34. For example, it is argued that the occurrence rule should not apply to "atypical" cases where the wrongful act and the injury do not occur simultaneously. Appellants' Brief, p. 33. Appellants also suggest that the Nebraska Courts have never adopted or applied the occurrence rule in a negligence claim. Appellants' Brief, p. 22.

The arguments are misplaced. The case at hand is not "atypical." As noted by the summation of cases above, in the past forty years courts and attorneys, alike, have analyzed dozens of cases where the wrongful act precedes a "direct injury" or "actual damages" in the context of negligence and other cases governed by Neb. Rev. Stat. § 25-207(3). In *Celotex*, the building's construction was completed in 1967. The evidence did not show that the leaks existed at the time construction was completed; rather, the leaky roof was first discovered in 1968. In *Alston*, another negligence case, the plaintiff was exposed to the defendant's toxic materials as

early as 1990, but she was first hospitalized regarding her symptoms in 1996. *Clausen* involved the alleged negligent procurement of an insurance policy in March 2010 where the actual damages were not actually incurred until the policy failed to cover a February 2012 surgery. The point being - Nebraska courts have encountered similar fact patterns on multiple other occasions and not determined the circumstances to be so unique or novel that they warranted a new exception to the traditional accrual rule in negligence cases, even when those cases involved personal injuries that manifested themselves at a later date.

As a practical matter, the *Haltom* case demonstrates the fallacy of Appellants' request for an exception when the wrongful act and "direct injury" or "actual damages" do not occur on the same date. Mainly, the terms "direct injury" and "actual damages" are too vague; adopting those terms would result in infinite potential dates that the statute could be deemed to accrue, depending upon the date the plaintiff perceives to be the date of injury or actual damages. Such a definition would bestow upon the defendant little, if any, ability to investigate or prove a statute of limitations defense; rather, it would bestow upon plaintiffs the ability to delay filing, depending upon when they become satisfied that they've been harmed enough. For example, in toxic tort cases, a plaintiff would merely have to allege that s/he did not sustain an "actual injury" until the toxins reached a certain level to delay the commencement of the statutory period. The entire holding of *Alston* and, frankly, all statutes of limitations cases decided in the last 40 years would be completed overturned by such a decision.

Conversely, defining the date of accrual based solely upon the date of the wrongful act or omission creates a finite amount of potential accrual dates depending upon the pleadings. This gives the defendant a fair opportunity to discover and present evidence as to when that activity occurred and a clear rule for whether the claim is barred. In other words, this definition prevents

the running of the statute from resting solely in the hands of the party seeking relief, the plaintiff. See *Haltom v. Parks*, 2018 WL 1033492 (D. Neb. 2018).

It is also argued that statute of limitations, particularly Neb. Rev. Stat. § 25-207(3), should be dependent upon the substantive elements of the claim being fulfilled. Appellants' Brief, p. 18. Neb. Rev. Stat. § 25-207(3) is not dependent upon the substantive elements of a claim being fulfilled. That is, indeed, why substantive elements of a claim exist, they set forth the substantive bars that must be met to have a meritorious and successful claim. Conversely, statutes of limitations provide a procedural bar based upon the timeliness of the Complaint. Conflating the two concepts would result in bizarre and inconsistent results. Toxic tort cases (cases typically sounding in negligence) provide an obvious example. A plaintiff in a toxic tort case must prove general and specific causation, which typically requires expert testimony. *King v. Burlington Northern Santa Fe Ry.Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009). One could certainly foresee a situation where the elements of general and specific causation were lacking in evidence as to the specific date that the plaintiff was exposed to enough toxins to cause the alleged injury. *Id.* If the statute of limitations were tied to fulfillment of the substantive elements of a toxic tort cause of action, there would potentially be no date by which the statute of limitations would run in this types of cases.

The complexity of the analysis is further demonstrated by the broad range of cases to which Neb. Rev. Stat. § 25-207(3) applies. The statute is supposed to govern negligence cases (like *Celotex, Alston,* and *Clausen*), intentional sexual abuse (*Kraft*), nuisance and toxic torts (*Marmo* and *Alston*), premises liability (*Mace-Main*), and even cases prescribed by substantive federal law, such as 1983 actions (*Haltom* and *Mixon*). This is a very broad range of wrongful acts governed by Neb. Rev. Stat. § 25-207, with each cause of action bearing its own unique set

of substantive requirements that must be met to succeed on the merits. Tying the statute of limitations to fulfillment of each substantive element of each of these causes of action would undoubtedly lead to a mass of inconsistent results, dependent upon the type of action being pursued.

Appellants also argue that an actual damage exception to the traditional rule would be based on "feasibility and judicial economy." Appellants' Brief, p. 26. In doing so, it is argued that "no court would have allowed a party foreign to the June 10, 2014 transaction between Kearney and Dandee to maintain a suit against Kearney to rectify its breach of duty against the community at large; permitting such suits would "flood the judicial system and waste judicial resources." *Id.* Again, Appellants are conflating the legal precedent on two separate and distinct areas of the law – the substantive elements of any given claim and the statute of limitations. The only thing this argument demonstrates is that Nebraska's legal system has multiple mechanisms to prevent overwhelming the judicial system with substantive elements providing substantive bars to claims based upon the merits and statutes of limitations providing a procedural bar based upon the timeliness of the action. There is no good reason for conflating the substantive bars with the procedural bar. Beyond that, it is disingenuous to suggest that by allowing this claim to survive the statutory procedural bar, that other plaintiffs would not seek similar exceptions to evade the statutory bar of their claims. No reasonable person would conclude that Appellants' proposed "exception" to the traditional rule, whether based upon the elements of the claim, "direct injury", or "actual damages", would do anything but flood the system with additional untimely claims and halt judicial economies by imposing upon court the overly tedious task of determining the date some or all substantive requirements occurred to determine whether a claim is procedurally barred.

Appellants also argue that plaintiffs will be unfairly deprived of a right to bring a meritorious negligence claim unless a "direct injury" or "actual damages" requirement is read into the statute of limitations. Appellants' Brief, p. 27-29. The argument is, again, illogical given that Appellants were, in fact, able to bring a meritorious claim against Goodyear. They were even able to obtain a settlement of that claim. Depriving Appellants of their second claim against a second entity is not an unfair or unjust result, it is the consequence of Appellants choice to delay filing this litigation until after the Goodyear suit was well underway.

It is even alleged that "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." Appellants' Brief, p. 36. This issue is squarely addressed by the discovery rule. This is the precise reason the discovery rule was judicially adopted – it is an equitable doctrine that prevents a plaintiff from being deprived of the right to file a meritorious claim in the limited situation where the plaintiff did not know of their actual injuries before the statute expired. But, as explained in *Alston*, the discovery rule is not an open invitation to delay with impunity. The doctrine has limits in its application with the primary limit being that the discovery rule does not apply when a plaintiff knows of his or her actual injury before the statue expires.

Finally, Appellants focus on a theory that because statutes of limitations effect a change on common law or take away a common-law right they should be narrowly construed to protect against the "the injustice of barring meritorious claims." Appellants' Brief, p. 15. Appellants argue that statutes should be construed to provide litigants "the broadest rights to bring their claims, limited only by express statutory authority." Appellants' Brief, p. 15. The argument contradicts the obvious purpose of statutes of limitations – to encourage the prompt filing of suit

for known injuries to prevent prejudice to the defendant and the general inconvenience resulting from the delay. *Anonymous*, 14 Neb.App. at 48-9, 703 N.W.2d at 924-5. Doing this promotes and produce finality and thereby stability in human affairs. *Rosnick*, at 501, 357 N.W.2d at 188.

Here, allowing Appellants an exception so that they can delay filing an action beyond what the legislature and case law have defined as a reasonable timeframe for the past 40 years would defy these well-established policies. Adhering to the traditional rule would serve the purpose of the rule. It promotes prompt filing of suits for known injuries; prevents prejudice to Kearney resulting from Appellants' delay; and it produces finality and, thereby stability concerning human transactions similar to the one at issue in this lawsuit.

Finality in human affairs is an important policy and is particularly necessary in this case. Here, the undisputed facts confirm that the vehicle involved in this incident was owned by Appellants' employer, Dandee Concrete Construction ("Dandee"). (T72-73 ¶ 4). Kearney did not sell the truck or tires involved in the incident to Dandee. (T72-73 ¶ 8 and 9). With regards to the origin of the tire, Dandee's owner, Daniel Buser ("Buser") explained that when one of the vehicles in their fleet would become unusable, Dandee would have the tires removed from that vehicle so they could be reused on another vehicle. (T71-73) (E16,35:8-12) The tire involved in this incident most likely came from a different vehicle within Dandee's fleet, a brown truck that was wrecked following an incident with a deer. (T71-73) (E16,36:8-12) (E16,53-55:8-12) Dandee's Shop Supervisor, Justin Underwood, further explained that when Dandee ask Kearney to mount and balance the tire, as set forth on the June 10, 2014 invoice, the most likely thing that transpired was:

e. Dandee located a used tire either (1) on the rack in back of Dandee's shop that had used tires on it or (2) go at the salvage yard, Andersen Wrecking.

f. Underwood would remove the tire off the vehicle and, then take the old tire and the new/used tire to Kearney, asking that they mount the used tire on the existing rim.

g. Kearney mounted the used tire on the rim.

h. Underwood then installed the tire/rim assembly on the truck.

(T71-73) (E17,6:8-12) (E17,16-18:8-12) Mr. Underwood is 90% certain that he installed the tire involved in this incident on the truck involved in this incident. *Id.* There is no agreement between Dandee or Kearney through which Kearney agreed to provide scheduled inspections or maintenance on the truck or tire that was involved in this incident. (T72-73 ¶ 15) (Supp. T2). Based upon these undisputed facts Kearney did not have a duty, contractual or otherwise, to perform any further actions regarding the tire that is the subject of this suit after the services identified in the June 10, 2014 invoice were completed. *Bell v. Grow With Me Childcare & Preschool, LLC*, 299 Neb. 136, 155, 907 N.W.2d 705, 718 (2018). In light of this evidence, there is no basis to conclude that Kearney could have done anything to prevent Mr. Underwood from placing the tire on the vehicle in question or preventing Appellants from entering the vehicle in question, let alone that Kearney had a legal duty to do so. Applying Appellants "all elements" theory the facts of this case warrants the same result – the case should be dismissed because as of April 12, 2015 Kearney had no duty to prevent the incident in question. More importantly, these facts demonstrate that there is a legitimate need for providing finality in human transactions. After the tire left the hands of Kearney there was nothing more Kearney could have done to prevent this incident. They should be allowed finality as to the June 10, 2018 transaction, not subject to endless claims filed by savvy plaintiff attorneys whenever they get around to developing a new legal theory. Such is precisely what occurred here.

To that end, Appellants' counsel offered no explanation whatsoever for why they delayed

filing this suit until April 2019. (T99). Specifically, Appellants' counsel offered no explanation for why they did not add Kearney to their federal suit against Goodyear (claiming the tire was defectively designed and manufactured), which was filed on August 12, 2017, well before the statute expired on this action on June 10, 2018. (T99). The only reasonable inference that can be drawn from these undisputed facts is that Appellants' counsel made a conscious decision to delay filing this suit against Kearney because they perceived strategic advantages associated with pursuing a separate, distinct, and subsequent litigation against Kearney. (T99). There is no public policy mandating that such gamesmanship be allowed.

VIII. CONCLUSION

For the reasons discussed above, this Court should hold that the language of Neb. Rev. Stat. §§ 25-201 and 207 clearly and unambiguously provide that Appellants' negligence cause of action accrued on June 10, 2014, the date of Kearney's allegedly wrongful act or omission. Even if subject to construction, the term "accrue" should be defined by subsequent statutes within Neb. Rev. Stat., Chapter 25, in which case Appellants' negligence cause of action accrued on June 10, 2014, the date of Kearney's allegedly wrongful act or omission. Per this statutory construction, Appellants' claim against Kearney expired on June 10, 2018 and, thus, was untimely when filed on April 12, 2019. There is no basis for applying any recognized exception to this rule such as the discovery rule or doctrine of fraudulent concealment to toll this statute. And, there is no basis for adopting a new broad exception for the sole purpose of allowing Appellants' claim to survive the statute of limitations bar of this claim. Therefore, Kearney requests that the District Court's decision, as set forth in its March 2, 2021 Order, be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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Certificate of Service

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