Case No. A-21-277

IN THE NEBRASKA COURT OF APPEALS

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

v.

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

AND

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

v.

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

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

REPLY BRIEF OF APPELLANTS

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PROPOSITIONS OF LAW

1. "The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief." *Heiden v. Adelung (In re Estate of Adelung)*, 306 Neb. 646, 671, 947 N.W.2d 269, 290 (2020); *Parker v. First Nat'l Bank*, 118 Neb. 96, 103, 223 N.W. 651 (1929).

2. "An action for an injury to the rights of the plaintiff accrues under section 25-207[(3)] when the damage occurs . . . ." *Omaha Paper Stock Co. v. Martin K. Eby Constr. Co.*, 193 Neb. 848, 851, 230 N.W.2d 87, 90 (1975).

3. "[I]f no cause of action accrues until injury or damage ensues, the statute runs from the injury or damage. Thus, if there is a coincidence of a negligent act with the fact of some damage, the cause of action comes into being and the statute of limitations begins to run . . . ." 51 Am. Jur. 2d. § 136, p. 705-6 (1970).

4. Under Neb. Rev. Stat. § 25-201, a claim does not accrue until all of its elements have mature, which in negligence actions, under Neb. Rev. Stat. § 25-207(3), is when the plaintiff suffers actual damage. *Condon v. A. H. Robins Co.*, 217 Neb. 60, 64-65, 349 N.W.2d 622, 625 (1984); *Omaha Paper Stock Co. v. Martin K. Eby Constr. Co.*, 193 Neb. 848, 851, 230 N.W.2d 87, 90 (1975).

5. The legal meaning of the term "injury" is "something done against the right of the party, producing damage." *Rosnick v. Marks*, 218 Neb. 499, 504, 357 N.W.2d 186, 190 (1984); *Injury*, Black's Law Dictionary (11th ed. 2019); Restatement (Second) of Torts § 7 cmt. a (1965); *Hoever v. Marks*, 993 F.3d 1353, 1371 (11th Cir. 2021).

ARGUMENT

In the 48 pages of its brief, Kearney Towing never addresses the central error in the District Court's March 3, 2021 Order: that the District Court ruled Appellants' negligence claim accrued **before** Appellants suffered any injury to their rights or had the right to institute and maintain suit. And, just as the District Court was unable to do, Kearney Towing failed to identify a single Nebraska case holding that a plaintiff can be deprived of the full four-year statutory period to bring his or her negligence claim after sustaining such an injury to his or her rights.

Instead, Kearney Towing distracts from these glaring deficiencies in the District Court's March 3, 2021 Order by misconstruing Appellants' arguments and attacking their counsel (*see* Appellee's Brief, at 39-40), ignoring the wealth of long-standing Nebraska Supreme Court authority cited by Appellants, and introducing the discovery rule to this appeal as a red herring. Further, Kearney Towing spends page upon page detailing cases in which the wrongful conduct and the injury to the plaintiff's rights occurred **simultaneously** and the court declined to apply the discovery rule--these cases are wholly irrelevant to the instant appeal.

Here, Appellants were permitted only about three years after their rights were first touched by Kearney Towing's negligence to institute suit--from May 1, 2015 until June 10, 2018 (T127)--rather than the four years explicitly granted by § 25-207(3). This result is contrary to over a century of Nebraska Supreme Court precedent applying both §§ 25-201 and 25-207(3). Taken to its logical conclusion, under the reasoning of the District Court's ruling, if the accident had occurred on June 9, 2018, then Appellants would have had only one day to file suit. This unconscionable result cannot stand, and neither the District Court nor Kearney Towing has presented any basis for affirming the District Court's March 3 or 18, 2021 Orders. Thus, this Court should reverse the District Court's opinions and remand this cause for further proceedings.

I. NEB. REV. STAT. § 25-201 PREVENTS A CLAIM FROM ACCRUING UNTIL A PARTY'S CLAIM IS COMPLETE AND HE OR SHE HAS THE RIGHT TO INSTITUTE AND MAINTAIN SUIT.

The guiding principle of claim accrual in Nebraska is as follows:

> The accrual of a cause of action means the right to maintain and institute a suit, and whenever one person may sue another, a cause of action has accrued and the statute begins to run, but not until that time. So whether at law or in equity, the cause of action arises when, and only when, the aggrieved party has a right to apply to the proper tribunal for relief.

Appellants' Brief, at 15-17 (quoting *Heiden v. Adelung (In re Estate of Adelung)*, 306 Neb. 646, 671, 947 N.W.2d 269, 290 (2020)). The Nebraska Supreme Court has followed this principle for over a century. *See, e.g.*, *Parker v. First Nat'l Bank*, 118 Neb. 96, 103, 223 N.W. 651, 653 (1929) ("It is a well-recognized rule that the statute of limitations will not run against a cause of action until the party asserting it has the right to bring and maintain such action."). And scholars have also recognized this guiding principle. 5 Neb. Prac., Civil Procedure § 5:1 ("A claim accrues when the party has the right to institute and maintain suit on the claim. A party has a right to do so once all of the elements of the party's claim have matured."); 37 C.J. §§ 152-53, pp. 807-811 (1925) (cited by *Department of Banking v. McMullen*, 134 Neb. 338, 278 N.W. 551 (1938)).

Kearney Towing fatally fails to grapple with this precedent or that it is diametrically opposed to the District Court's ruling that **Appellants' claim accrued almost one year <u>before</u> they had the right to institute and maintain suit**. Instead, Kearney Towing disingenuously asserts this precedent is "new substantive case law" and Appellants' are improperly attempting to inject it into the meaning of § 25-201. Appellee's Brief, at 29, 23. But as Appellants showed in

their opening brief, it is the Nebraska Supreme Court who has explicitly stated that this guiding principle of claim accrual is draw from the text of § 25-201. Appellants' Brief, at 15 (citing *Condon v. A. H. Robins Co.*, 217 Neb. 60, 64-65, 349 N.W.2d 622, 625 (1984)). Further, this principle is firmly rooted in the plain meaning of the term "accrue." *See id.* at 16.

Kearney Towing also mistakenly argues that § 25-201 is an entirely superfluous statute, which exists only to yield to the other statutes in Chapter 25, Title 200. *See* Appellee's Brief, at 24, 26. Kearney Towing fails to identify a single case that has ever approved of this position, and, instead, attempts to justify this novel concept with the proposition that a general statute yields to a specific statute. In the context of statutes of limitations, however, this concept has only been applied to mean that general statutes of limitations, like § 25-207(3), yield to specific statutes of limitations, like Neb. Rev. Stat. § 25-223, for claims specifically covered by the more specific statute. *See Andres v. McNeil Co.*, 270 Neb. 733, 742, 707 N.W.2d 777, 785 (2005).

Accordingly, Kearney Towing's argument that Appellants invented the concept that a claim must become complete, meaning all elements have matured, before it accrues is without merit. The Nebraska Supreme Court's century of precedent applying § 25-201 is dispositive in this appeal, as it is directly contrary to the District Court's ruling that Appellants' claim accrued before they suffered any injury to their rights and were able to institute and maintain any suit.

II. KEARNEY TOWING'S CONSTRUCTION OF NEB. REV. STAT. § 25-207(3) FINDS NO BASIS IN TEXT OR PRECEDENT.

A. Kearney Towing Failed To Identify A Single Case Applying The Occurrence Rule To A Negligence Claim Governed By Neb. Rev. Stat. § 25-207(3).

In their opening brief, Appellants identified a number of Nebraska Supreme Court cases explicitly holding that an atypical negligence claim (one where the injury to the rights of the

plaintiff occurs after the negligent wrong) accrues under § 25-207(3) only once the plaintiff suffers a direct injury resulting in actual damaged. Appellants' Brief, at 21, 22-23. **Kearney Towing entirely ignored these cases, which are dispositive of the issue in this appeal**. Instead, it hastily concluded that the Nebraska Supreme Court's statement in *Omaha Paper Stock Co. v. Martin K. Eby Constr. Co.*--that "[a]n action for an injury to the rights of the plaintiff accrues under section 25-207[(3)] when the damage occurs . . ."--was irrelevant dicta. 193 Neb. 848, 851, 230 N.W.2d 87, 90 (1975); *see* Appellee's Brief, at 15. But even if this pertinent proposition was without precedential value, Kearney Towing's flippant analysis fails to dispute the wealth of authority the *Omaha Paper* Court referenced in support of the proposition.

Further, Kearney Towing failed to dispute that *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 562-63, 279 N.W.2d 603, 606 (1979), and the authority it relied on, support--not overrule--the long-standing precedent referenced by Appellants and the *Omaha Paper* Court. As stated in their opening brief, the authority cited by the *Celotex* Court provides:

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

See Appellants' Brief, at 33 (quoting 51 Am. Jur. 2d. § 136, p. 705-6 (1970)). And Kearney Towing failed to dispute the same statement of law regarding claims of general negligence in *Condon v. A. H. Robins Co.* 217 Neb. at 66, 349 N.W.2d at 626 (citation omitted).

Instead, the sole Nebraska case Kearney Towing cites for its theory that § 25-207(3) imposes the occurrence rule is *Von Dorn v. Rubin*. 104 Neb. 465, 177 N.W. 653 (1920). Appellee's Brief, at 14, 21. In *Von Dorn*, a woman brought a claim against Nellie Rubin for damages for alienation of the affections of her husband. *Id.* at 465-66, 177 N.W. at 653. The Nebraska Supreme Court ruled plaintiff's claim accrued in 1911, when her husband deserted her and withdrew his support, and her claim was barred when she filed suit in 1918. *Id.* at 466-67, 177 N.W. at 653. In that case, where the wrongful conduct occurred ***simultaneously*** with the injury to the plaintiff's rights, the *Von Dorn* Court substantively stated the proposition set forth above in 51 Am. Jur. 2d. § 136: "It is the general rule, applicable here, that when, through a wrong committed, **an injury is inflicted upon another**, the statute of limitations attaches at once. . . ." *Id.* at 467, 177 N.W. at 653-54 (emphasis added). Accordingly, this case focuses on when the injury is inflicted upon the plaintiff and provides no support for the occurrence rule.

Accordingly, Kearney Towing has failed to show that the Nebraska Supreme Court has ever explicitly imposed any standard of accrual for a negligence action governed by § 25-207(3) other than when a plaintiff suffers a direct injury to their rights resulting in actual damage, and it has failed to demonstrate any basis for this Court to overrule its long-standing precedent.

B. Legislative Acquiescence Does Not Support Applying The Occurrence Rule To Neb. Rev. Stat. § 25-207(3).

Kearney Towing asserts the Legislature has acquiesced to judicial legislation injecting the occurrence rule into § 25-207(3). *See* Appellee's Brief, at 21-22, 25. However, the doctrine of judicial acquiescence lends no support to that position because no appellate court has construed the text of either §§ 25-201 or 25-207(3) to adopt the occurrence rule. *See* Appellants' Brief, at 35. Kearney Towing offered no rebuttal to this argument and failed to identify any case

construing either statute's text to impose the occurrence rule, as occurred with Neb. Rev. Stat. § 25-223. *See Rosnick v. Marks*, 218 Neb. 499, 505, 357 N.W.2d 186, 190 (1984). Instead, any application of the doctrine of judicial acquiescence would only support Appellants' constructions, as § 25-201 means a claim does not accrue until all elements have mature, which in negligence actions, under § 25-207(3), is when the plaintiff suffers actual damage. *Condon*, 217 Neb. at 64-65, 349 N.W.2d at 625; *Omaha Paper*, 193 Neb. at 851, 230 N.W.2d at 90.

Further, Kearney Towing's argument that the occurrence rule applies to § 25-207(3) because the Legislature has not added the text "actual damage" to it is absurd. Appellants' argue §§ 25-201 and 25-207(3) impose an accrual standard based on when all elements of a claim have matured, which for negligence claim under § 25-207(3) is when a plaintiff suffers a direct injury to his or her rights. Appellants' Brief, at 16-18. Kearney Towing misconstrues this argument as suggesting an "actual damage" standard governs all claims, despite Appellants explicitly stating that for tort actions like trespass the occurrence rule would *de facto* apply based on that tort's elements. *Id.* at 17-18; Appellee's Brief, at 21, 23-25, 27. Despite Kearney Towing's assertions, it is no more difficult to ascertain when the plaintiff's rights were first directly impacted by wrongful conduct than when the wrongful conduct first occurred, *see* Appellee's Brief, at 43-44; in fact, for premise liability cases, it would be nearly impossible to pin-point the day that a condition became negligently dangerous (i.e. a sidewalk became negligently unleveled).

Additionally, the Nebraska Supreme Court uniformly applied a direct injury, rather than occurrence rule, standard to § 25-207(3) before 1975, so the Legislature had no reason to amend the statute to confirm the standard it already imposed. *See* Appellants' Brief, at 21, 22-23. Conversely, adding the "act or omission" language in § 25-223 was necessary to replace the actual damage rule for negligence claims. *See Rosnick*, 218 Neb. at 505, 357 N.W.2d at 190.

Further, as Kearney Towing concedes, adding "actual damage" to § 25-224 adopted a discovery accrual standard, similar to § 25-207(4), not an actual damage standard. Appellee's Brief, at 18.

C. Neb. Rev. Stat. § 25-207(3)'s Text Does Not Impose The Occurrence Rule.

Appellants showed in their opening brief that the plain text of § 25-207(3) imposes an accrual standard based on when a plaintiff's rights are invaded, resulting in harm to the plaintiff. Appellants' Brief, at 25-29. This construction is both supported by the text as a whole and the definition the term "injury," in its legal sense. The Nebraska Supreme Court approved of a legal meaning of the term "injury" as "something done against the right of the party, producing damage." *Id.* at 26-27 (quoting *Rosnick*, 218 Neb. at 504, 357 N.W.2d at 190). That is the legal meaning of the term "injury" adopted by scholars and courts as well. *See, e.g.*, *Injury*, Black's Law Dictionary (11th ed. 2019) ("1. The violation of another's legal right, for which the law provides a remedy; a wrong or injustice. . . . *injury* involves an actionable invasion of a legally protected interest.") (citing Restatement (Second) of Torts § 7 cmt. a (1965)); *Hoever v. Marks*, 993 F.3d 1353, 1371 (11th Cir. 2021) (citing other Circuits applying the same meaning).

Conversely, Kearney Towing urges a narrow meaning of the term "injury" that is applicable only to § 25-223. *See* Appellee's Brief, at 18-20. "In a cause of action for professional negligence, legal injury is the wrongful act or omission which causes the loss." *Dondlinger v. Nelson*, 305 Neb. 894, 901, 942 N.W.2d 772, 778-779 (2020). This is because the Legislature substituted the measure of accrual in § 25-207(3), an "injury to the rights of the plaintiff," with the text "the alleged act or omission." *See* Appellant's Brief, at 24 (quoting *Rosnick*, 218 Neb. at 504, 357 N.W.2d at 190) ("[b]y using this language the Legislature envisioned situations involving a breach of duty as injury to the person."). Similarly, the legal meaning of "injury" in § 25-224 is also narrowed by that statute's text. *See Condon*, 217 Neb. at 68, 349 N.W.2d at 626

("'Injury' in the legal sense means a physical injury which the plaintiff knows or as a reasonable person should know was caused by the defendant.") For both §§ 25-223 and 25-224, the legal meaning for the term "injury" is consistent with its focus on the invasion of the plaintiff's rights, considering those statutes' modification of what constitutes an invasion of the plaintiff's rights.

Further, even if Kearney Towing was correct in asserting that "injury" in § 25-207(3) means "misconduct" (it is not), its assertion that "injury to the rights of the plaintiff" then means "misconduct of the defendant" is not a reasonable construction. *See* Appellee's Brief, at 20. It defies the principles of statutory construction, set forth in both parties' earlier briefs, to suggest the Court could replace the text "the rights of plaintiff" with "defendant," based on the meaning of "injury." Such would entirely change the statute's meaning, and render any such definition of "injury" unreasonable. Instead, even if "injury" meant "misconduct" (it does not), the text of § 25-207(3) would still prohibit accrual of a plaintiff's claim until that misconduct resulted in a direct, rather than technical, effect "to the rights of the plaintiff." The occurrence rule does not account for when the wrongful conduct impacts any specific plaintiff's rights, so applying it to § 25-207(3) would be contrary to that statute's plain text and be an unreasonable construction.

III. THE DISCOVERY RULE HAS NO RELEVANCE TO THIS MATTER.

While Kearney Towing has persistently attempted to inject the discovery rule into this case, including case law and evidence concerning its application, the discovery rule is wholly irrelevant here. *See* Appellee's Brief, at 32-41. Kearney Towing fails to even accurately identify how the doctrine is applicable--suggesting it is an evidentiary burden shifting device similar to summary judgment. *Id.* at 36-37. Instead, the discovery rule is only applicable if (1) the plaintiff's claim is time barred, but (2) the plaintiff alleges facts to avoid the bar. *See Bonness v.*

Armitage, 305 Neb. 747, 755, 942 N.W.2d 238, 245 (2020). Here, Appellants assert their claim is not time barred and admit that no exception would save that claim if the occurrence rule applies.

Kearney Towing's discusses case law applying the discovery rule ad nauseam to argue that there is no difference between claims where the wrongful conduct occurs simultaneously with the injury and years before the injury. Appellee's Brief, at 32-36. Like Appellants, however, scholars have also commented on the shortcomings of applying the occurrence rule in atypical cases. *See* 5 Neb. Prac., Civil Procedure § 5:11. Further, each and every case Kearney Towing discusses, concerns typical claims where the wrongful conduct and injury/damage occurred simultaneously. Kearney Towing suggests that the failure of the plaintiffs in those cases to identify facts allowing them to timely plead an element of their claim is somehow similar to this case where there were not facts to discover between June 10, 2014 and May 1, 2015 because **Appellants did not sustain any direct injury to their rights or actual damage until the May 1, 2015 accident occurred**. Hence, Kearney Towing's cases are wholly inapposite to this matter; as opposed to the numerous cases cited by Appellants that Kearney Towing completely ignored.

IV. KEARNEY TOWING ADVOCATES FOR CONSTRUING NEB. REV. STAT. § 25-207(3) AS A STATUTE OF REPOSE.

Appellants briefly mentioned the discovery rule to show that applying the occurrence rule to claims governed by § 25-207(3) would foreseeably be unworkable and unjust in future cases. Appellants' Brief, at 36. This argument was based on the fact that the discovery rule applies only when a plaintiff discovers an injury or damage that existed but was previously unknown. *Id.*; *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 432, 730 N.W.2d 376, 385 (2007) ("[W]here the injury is not obvious and is neither discovered nor discoverable within the limitations period running from the wrongful act or omission.") Accordingly, the discovery rule has no application

whatsoever to an atypical negligence claim where a plaintiff **does not suffer any** direct injury or damage within the initial period running from the wrongful conduct--**a plaintiff cannot subsequently discover something that never existed**.

Despite Kearney Towing's suggestions, toxic tort cases do not always present such a scenario because plaintiffs in such cases experience a direct injury to their rights immediately upon exposure to a chemical, even if their damage is not discovered for years. *See* Appellee's Brief, at 42. Instead, adopting the occurrence rule will, in some premises liability or toxic tort actions, wholly bar a plaintiff's claim before the plaintiff suffers any injury to their rights, such as from tripping and falling in four-year-old hole or being exposed to a chemical spilt eight years prior that continually emits toxins--allowing that property owner to leave the condition indefinitely with impunity from any liability. Further, it would bar suit (or provide as little as one day to file if the injury occurs within the four years) for an innocent plaintiff who first enters a vehicle or elevator more than four years after a tortfeasor fails to tighten lug nuts on a tire, causing it to fall off, or properly repair an elevator's breaks, causing it to drop.

Kearney Towing did not respond to this argument about the broader implications of adopting an occurrence rule. Instead, it argued that such impunity should be provided to tortfeasors as a matter of fairness, as it will be difficult for them to mount a defense when their wrongful conduct injuries an innocent plaintiff more than four years after they commit their bad acts. *Id.* at 42-43. Further, Kearney Towing suggests the rule is necessary to prevent a flood of claims by plaintiffs merely sitting on their rights to file suit--**rights that did not exist before they actually experienced an injury to their rights and damages**. *Id.* at 44.

Essentially, Kearney Towing asks this Court to construe § 25-207(3) as a statute of repose that "creates a finite amount" of time in which a tortfeasor may face liability from the date

of its wrongful act or omission. *Id.* at 42. "It has been observed that statutes of repose represent a legislative decision that 'as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability.'" *Farber v. Lok-N-Logs, Inc.*, 270 Neb. 356, 367, 701 N.W.2d 368, 377 (2005). However, no court has ever construed § 25-207(3) as a statute of repose, and Kearney Towing has provided no reasonable basis for doing so here.

CONCLUSION

For the reasons set forth in Appellants' opening brief and above, this Court should follow the plain meaning of §§ 25-201 and 25-207(3) and long-standing Nebraska Supreme Court precedent to hold that negligence claims governed by § 25-207(3) do not accrue until a plaintiff can institute and maintain suit, upon suffering a direct injury resulting in actual damage. Alternatively, this Court should impose the above accrual standard for negligence claims where the wrongful conduct and injury to the plaintiff's rights do not occur simultaneously as an exception to the occurrence rule to protect plaintiffs who had no claim to bring within the four years following the tortfeasor's wrongful conduct. Accordingly, Appellants respectfully request this Court overrule the District Court's Order and remand this matter for further proceedings.

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

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PROOF OF SERVICE

The undersigned certifies that the original of the foregoing Appellant's Reply Brief was served via the Nebraska electronic filing system to the Clerk of the Nebraska Supreme Court and that a true and correct copy of the Appellant's Reply Brief was served via electronic mail this 29th day of July, 2021, to counsel for all parties of record.

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

I hereby certify that on Thursday, July 29, 2021 I provided a true and correct copy of this *Reply Brief* to the following:

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