Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/04/2026 10:06 PM CST

action taken without subject matter jurisdiction is void.[18] A void order is a nullity which cannot constitute a judgment or final order that confers appellate jurisdiction on this court.[19] But an appellate court has the power to determine whether it lacks jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions.[20]

Because the juvenile court's order was void, the Department has not appealed from a final order or judgment. We therefore vacate the juvenile court's order and dismiss the appeal for lack of jurisdiction.

VACATED AND DISMISSED.

WRIGHT, J., not participating.

---

[18] See, *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001); *State v. Bracey*, 261 Neb. 14, 621 N.W.2d 106 (2001).

[19] See, *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002); *Bracey, supra* note 18; *State v. Rieger*, 257 Neb. 826, 600 N.W.2d 831 (1999).

[20] See, *Bracey, supra* note 18; *Rieger, supra* note 19.

DAVID A. MAYCOCK, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF MARTY A. MAYCOCK, DECEASED, APPELLANT, V. STEVE HOODY, M.D., ET AL., APPELLEES.

799 N.W.2d 322

Filed June 24, 2011. No. S-09-944.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.
2. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
4. **Limitations of Actions: Mental Competency: Words and Phrases.** A person with a mental disorder under Neb. Rev. Stat. § 25-213 (Reissue 2008) is one

who suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action. A mental disorder within the meaning of § 25-213 is an incapacity which disqualifies one from acting for the protection of one's rights.

5. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and CARLSON, Judges, on appeal thereto from the District Court for Douglas County, W. RUSSELL BOWIE III, Judge. Judgment of Court of Appeals affirmed.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

Michael F. Kinney and Kathryn J. Cheatle, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee Nichole Liebentritt.

David L. Welch and Ashley E. Dieckman, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee Alegent Health.

Michael J. Mooney, of Gross & Welch, P.C., L.L.O., for appellee Steve Hoody.

Mark E. Novotny and William R. Settles, of Lamson, Dugan & Murray, L.L.P., for appellees James Frock et al.

HEAVICAN, C.J., GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

INTRODUCTION

This case involves a complaint alleging medical malpractice and wrongful death filed under the Nebraska Hospital-Medical Liability Act (NHMLA) by the appellant, David A. Maycock (Maycock), in his capacity as special administrator of the estate of Marty A. Maycock, against various doctors and against Alegent Health, doing business as Bergan Mercy Medical Center, based on their treatment of Marty prior to and until his death on November 22, 2005. One doctor named in the complaint was not served, and any reference to "doctors" in this opinion does not pertain to him.

The district court dismissed the case against certain doctors based on their unrebutted affidavit evidence showing that they had met the standard of care. Alegent Health was also dismissed. These rulings were affirmed by the Court of Appeals, and those doctors and Alegent Health are not involved in the proceeding now before this court.

At the district court, doctors James Frock, Louis Violi, Sylvia Rael, and James Bowers (the doctors) moved for summary judgment on the sole basis that the claims against them were barred by the statute of limitations. The district court granted the motion and dismissed the claims against the doctors based on the professional negligence 2-year statute of limitations found at Neb. Rev. Stat. § 25-222 (Reissue 2008). It is this ruling involving the doctors that is the subject of this case on appeal. The Court of Appeals determined, inter alia, that there were genuine issues of material fact whether Marty was under a mental disorder as described in Neb. Rev. Stat. § 25-213 (Reissue 2008) at the time he was treated by the doctors and that therefore, pursuant to § 25-213, the statute of limitations was tolled until the removal of his mental disorder. In a memorandum opinion filed August 3, 2010, the Court of Appeals reversed the summary judgment which had been entered in favor of the doctors. See *Maycock v. Hoody*, No. A-09-944, 2010 WL 3137338 (Neb. App. Aug. 3, 2010) (selected for posting to court Web site). The doctors petitioned for further review, which we granted. Because we agree with the reasoning of the Court of Appeals, we affirm.

STATEMENT OF FACTS

Maycock brought this suit on behalf of his son, Marty, against the doctors; against doctors Nicole Liebentritt, Steve Hoody, and Thomas Connolly; and against Alegent Health, alleging that they committed medical malpractice in caring for Marty on November 17, 2005, until his death on November 22 and caused Marty's wrongful death. The district court granted summary judgment in favor of Liebentritt, Hoody, and Connolly after it concluded that these defendants had established by their affidavit evidence that they had met the requisite standard of care and Maycock had failed to rebut their prima facie case. Alegent Health was also dismissed. The Court of Appeals

affirmed these decisions. Maycock petitioned for further review of these rulings, and we denied his petition.

The district court also dismissed the claims against the doctors as time barred based on the professional negligence 2-year statute of limitations found at § 25-222. On appeal, the Court of Appeals concluded, inter alia, that the 2-year statute of limitations under the NHMLA, Neb. Rev. Stat. § 44-2828 (Reissue 2010), controlled and that there were genuine issues of material fact regarding whether this 2-year period had been tolled pursuant to § 25-213 for the period during which Marty was suffering from a "mental disorder." The Court of Appeals reversed the summary judgment in favor of the doctors, and it is this decision which is before us on further review.

The facts relevant to the issues on further review are recited below. On November 17, 2005, Frock, a board-certified nephrologist, saw Marty for a consultation at the request of Hoody, a defendant who has been dismissed from this case. In Frock's consultation report, he indicates that "[u]pon further questioning of [Marty] he did admit to drinking almost a whole bottle of antifreeze after it was noted that the [nasogastric] aspirate looked like antifreeze." Frock's diagnostic impression of Marty was "[s]uspected antifreeze overdose with oliguria [diminished urine production], acute renal failure, severe increased anion gap metabolic acidosis and hyperkalemia." Other records from November 17 indicated that at 12:35 p.m., Marty was "continu[ing] to have no verbal response to questions when asked and moving arms about in restless manner." The nurse's notes on November 18 at 12:05 a.m. reported that Marty was "able to identify his name" but "[s]till mumble[d] unintelligibly when asked his location or the year." On November 18 at 8 a.m., the nurse's notes stated, "[Marty] resting quietly in bed, eyes closed. Opens eyes to sound, does not follow commands, no response to questions of orientation." On November 18 at 3:05 p.m., Marty was intubated by Bowers, and ventilation was started at 3:19 p.m.

There is evidence in the record that when Liebentritt saw Marty on November 19 and 20, 2005, he "was, at all times . . . , unconscious [during her observations]." From the time

Liebentritt saw Marty on November 19 until his death, the basic entry in the nurse's notes at approximately hourly intervals was "assessment essentially unchanged." Doctors' notes state that on November 22, Marty was "in septic shock and comatose with some jerking movements of his head and legs." Marty died on November 22 at 5:30 p.m.

Given the Thanksgiving holiday, this case, filed on Monday, November 26, 2007, was effectively brought by Maycock on Friday, November 22. In their affidavits in support of their motions for summary judgment, the doctors stated that the last dates they provided treatment to Marty were as follows: November 17 for Frock and Violi, November 18 for Rael, and November 21 for Bowers. Given this evidence, the treatments provided by the doctors were rendered more than 2 years prior to the November 22, 2007, date on which the complaint was effectively filed and the cases against the doctors would appear to be time barred in the absence of tolling. The Court of Appeals determined that there were questions of fact whether Marty suffered from a mental disorder which permits tolling under § 25-213, and it reversed the summary judgment entered in favor of the doctors. The doctors petitioned for further review of the Court of Appeals' decision, and we granted further review.

ASSIGNMENTS OF ERROR

The doctors claim, summarized and restated, that the Court of Appeals erred when it (1) concluded that Maycock's claim was subject to the tolling provisions found in § 25-213; (2) concluded that there were genuine issues as to when Marty was suffering from a mental disorder, where Maycock failed to present expert testimony to prove that Marty was suffering from a mental disorder at any time during his hospitalization; and (3) did not affirm the summary judgment based on the doctors' interrogatory answers.

STANDARDS OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the

benefit of all favorable inferences deducible from the evidence. *Schlatz v. Bahensky*, 280 Neb. 180, 785 N.W.2d 825 (2010).

[2] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

ANALYSIS

Maycock's Claim Is Subject to the 2-Year Statute of Limitations in the NHMLA, § 44-2828, and the Tolling Provisions of § 25-213 Apply.

The district court concluded that the 2-year professional negligence statute of limitations in § 25-222 controlled this case. The district court determined that the case had been filed after the 2-year period and that the case was therefore time barred. The district court granted summary judgment in favor of the doctors and dismissed the case on this basis.

Contrary to the rulings of the district court, the Court of Appeals concluded that the 2-year statute of limitations in the NHMLA, § 44-2828, controlled this action and that § 25-213, which tolls the statute of limitations for a person with a "mental disorder," applied to this action. The Court of Appeals determined that there were issues of fact as to the duration during which Marty suffered from a mental disorder and his action against the doctors was tolled. The Court of Appeals reversed the summary judgment and remanded the cause for further factual development on matters to which § 25-213 tolling would apply.

The doctors claim on further review that the Court of Appeals erred as a matter of law when it concluded that § 25-213 tolling applied to this case. The doctors assert that the tolling provisions of § 25-213 do not apply to a case brought by the representative of an individual suffering from a mental disorder, as distinguished from a case brought by the individual himself or herself. We reject this argument.

As initial matters, we note that this action is brought under and governed by the NHMLA, Neb. Rev. Stat. §§ 44-2801

through 44-2855 (Reissue 2010), and further note that § 25-213 tolling was raised in various forms before the district court, including in an affidavit filed in response to the doctors' motion for summary judgment. We therefore consider the NHMLA and § 25-213 as we resolve this assignment of error.

In *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000), we concluded in an NHMLA case involving the death of a patient that the 2-year statute of limitations in § 44-2828 controlled the statute of limitations rather than the wrongful death statute of limitations in Neb. Rev. Stat. § 30-810 (Reissue 2008). Thus, the 2-year provision of § 44-2828 applies to the wrongful death allegations in the instant suit. We apply the same reasoning as articulated in *Alegent Health Bergan Mercy Med. Ctr.* and conclude that the NHMLA's 2-year limitations period covering "malpractice or professional negligence," set forth in § 44-2828, is the specific statute of limitations applicable to the malpractice allegations in this action, rather than the professional negligence statute of limitations in § 25-222. Section 44-2828 provides generally for a 2-year statute of limitations "[e]xcept as provided in section 25-213."

Section 25-213 provides for tolling of the statute of limitations in relevant part as follows:

> [I]f a person entitled to bring any action mentioned in Chapter 25, the Political Subdivisions Tort Claims Act, the [NHMLA], the State Contract Claims Act, the State Tort Claims Act, or the State Miscellaneous Claims Act, except for a penalty or forfeiture, for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, is, at the time the cause of action accrued, within the age of twenty years, a person with a mental disorder, or imprisoned, every such person shall be entitled to bring such action within the respective times . . . after such disability is removed.

The tolling in § 25-213, by its terms, may be invoked by "a person entitled to bring any action mentioned in . . . the [NHMLA]."

Section 44-2822 identifies who is entitled to file an action under the NHMLA. Section 44-2822 of the NHMLA provides:

> Subject to the requirements of sections 44-2840 to 44-2846, a patient or his or her representative having a claim under the [NHMLA] for bodily injury or death on account of alleged malpractice, professional negligence, failure to provide care, breach of contract, or other claim based upon failure to obtain informed consent for an operation or treatment may file a petition or complaint in any court of law having requisite jurisdiction. No dollar amount or figure shall be included in the demand in any malpractice petition or complaint, but the petition shall ask for such damages as are reasonable in the premises.

Under § 44-2822, a "representative" of a patient with a claim under the NHMLA can file an action "in any court of law having requisite jurisdiction." A "representative" for NHMLA purposes is defined in § 44-2808 as follows: "Representative shall mean the spouse, parent, guardian, adult child, executor, *administrator*, trustee, attorney, or other legal agent of the patient." (Emphasis supplied.)

[3] Section 44-2828 of the NHMLA refers to § 25-213, and § 25-213 refers to the NHMLA. Both statutes relate to the time during which an action should be filed. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision. *In re Interest of Gabriela H.*, 280 Neb. 284, 785 N.W.2d 843 (2010). Reading the foregoing statutes together, it is clear that a "representative" is entitled to bring an action under the NHMLA within 2 years, which action, pursuant to § 44-2828, is subject to tolling under § 25-213. As special "administrator" of Marty's estate, Maycock is a "representative" as described in § 44-2808 of the NHMLA and entitled to bring an action which is subject to the tolling provisions of § 25-213. Our reading of these related statutes gives them a sensible and consistent construction.

It has been observed that generally, "[w]hile the statute of limitations is suspended for as long as plaintiff's mental incompetency exists, it begins to run against the cause of action when the disabled person dies." 51 Am. Jur. 2d *Limitations of Actions* § 234 at 601 (2000). Our reading of the statutes which

were quoted above is consistent with the foregoing observation and the proposition that the representative of the deceased steps into the shoes of the deceased and assumes whatever rights he or she had, including the ability to assert tolling that occurred during the life of the deceased and prior to the representative's appointment. See, e.g., *Schwartz v. Wasserburger*, 117 Nev. 703, 30 P.3d 1114 (2001) (observing in contract action that personal representative inherits the benefits and burdens connected with running of any applicable statute of limitations applicable to decedent).

Notwithstanding the foregoing statutory authority permitting the filing of the NHMLA action by a representative subject to § 25-213 tolling, the doctors assert that under case law, a representative of a patient cannot take advantage of the mental disorder tolling in § 25-213. In this regard, the doctors rely primarily on *Sherwood v. Merchants Mut. Bonding Co.*, 193 Neb. 262, 226 N.W.2d 761 (1975). The doctors misread *Sherwood*, and we reject this argument.

Sherwood was an action to recover on the bond of a guardian under Neb. Rev. Stat. § 25-210 (Reissue 2008). The plaintiff in *Sherwood* contended that the provisions in § 25-210 which granted an out-of-state or legally disabled plaintiff an additional 5 years after discharge of the guardian to bring suit extended to executors or administrators. We rejected this argument, stating that § 25-210 "does not toll the statutes of limitations for the benefit of executors or administrators." *Sherwood v. Merchants Mut. Bonding Co.*, 193 Neb. at 264, 226 N.W.2d at 762. Our statement that certain tolling provisions did not apply to executors or administrators referred to the scope of extensions of time available in an action under § 25-210 and not to tolling under § 25-213, the latter of which was mentioned only incidentally in *Sherwood* as a source for a definition of "legal disability" as that term is used in § 25-210.

The Court of Appeals did not err when it concluded that § 25-213 tolling applied to this action brought by a representative subject to and governed by the 2-year statute of limitations in § 44-2828 of the NHMLA.

The Court of Appeals Did Not Err When It Found Genuine Issues of Material Fact With Respect to the Duration of Marty's Mental Disorder.

The Court of Appeals reviewed and quoted extensively from the medical records in evidence. The salient facts are recited earlier in this opinion. The Court of Appeals determined that Marty "undisputedly was suffering from a mental disorder, i.e., incapacitated," on November 22, 2005, but that there were genuine issues of material fact, warranting reversal and remand, regarding whether Marty suffered from a mental disorder before November 22. *Maycock v. Hoody*, No. A-09-944, 2010 WL 3137338 (Neb. App. Aug. 3, 2010) (selected for posting to court Web site). This suit was effectively filed on November 22, 2007. Determination of the dates on which Marty suffered a "mental disorder" as that term is used in § 25-213 will determine the days on which the statute of limitations will be tolled and whether claims should be dismissed as time barred against certain doctors. The doctors claim that the Court of Appeals erred when it determined that Marty suffered a mental disorder, in the absence of expert opinion to that effect. We reject this argument.

[4] The Court of Appeals has repeatedly considered the meaning of "mental disorder" under § 25-213. In *Vergera v. Lopez-Vasquez*, 1 Neb. App. 1141, 1147, 510 N.W.2d 550, 554 (1993), the Court of Appeals held that a person with a mental disorder under § 25-213 is "one who suffers from a condition of mental derangement which actually prevents the sufferer from understanding his or her legal rights or from instituting legal action" and that a mental disorder within the meaning of § 25-213 is "an incapacity which disqualifies one from acting for the protection of one's rights." See, also, *Anonymous v. St. John Lutheran Church*, 14 Neb. App. 42, 703 N.W.2d 918 (2005). This definition is comparable to that expressed in our opinion in *Sacchi v. Blodig*, 215 Neb. 817, 822, 341 N.W.2d 326, 330 (1983), decided under an earlier version of § 25-213, in which we observed in a medical malpractice case that "the purpose of § 25-213 is to lift the burden of severe time restrictions or limitations from those under legal disability, that is,

from those who do not have the ability and capacity to protect their rights existing under our laws."

The Court of Appeals properly invoked and applied the definition of "mental disorder" under § 25-213 announced in *Vergera v. Lopez-Vasquez, supra*. See *Maycock v. Hoody, supra.* Referring to an EEG study of brain activity, the Court of Appeals quoted from the doctor's notes dictated on November 22, 2005, as follows: "'[Marty] is currently in septic shock and comatose with some jerking movements of his head and legs.'" *Id.* at *10. The Court of Appeals stated that "[c]omatose is a commonly understood condition of both mental and [physical] '"incapacity which disqualifies one from acting for the protection of one's rights"'" and that thus, Marty had a mental disorder under § 25-213 on November 22 if not earlier. *Id.* In further support of its determination that Marty suffered a "mental disorder" on November 22, the Court of Appeals quoted from "'Physician Orders/Progress Notes'" of November 22 which stated, "Neurological consensus is that [Marty] has irreversible brain damage." *Id.* at *11.

The doctors assert that the Court of Appeals erred when it found that Marty suffered from a mental disorder on November 22, 2005, without Maycock's supplying an expert opinion to that effect. The doctors rely on *Anonymous v. St. John Lutheran Church, supra*, in support of their argument that an expert opinion was required. In *Anonymous*, the Court of Appeals indicated that an expert opinion was necessary because the mental disorder claimed by the plaintiff for which tolling was invoked involved "'a variety of medical and physical ailments including post-traumatic stress disorder,'" 14 Neb. App. at 52, 703 N.W.2d at 927, and such ailments could not readily be equated with an inability to institute legal action. We believe the facts in *Anonymous* are distinguishable from those in the instant case.

Whereas the disorder claimed in *Anonymous* was vague with respect to its impact on the plaintiff's ability to institute legal action, the facts in the instant case, at least on November 22, 2005, are obvious and lead readily to the Court of Appeals' determination that Marty was comatose and suffered from a

mental disorder as understood under § 25-213 on November 22 if not sooner. We have stated that "'expert testimony is not legally necessary when the conclusion to be drawn from the facts does not require specific, technical, or scientific knowledge and the circumstances surrounding the injury are within the common experience, knowledge, and observation of laymen.'" *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 785, 387 N.W.2d 486, 488 (1986).

It is common knowledge that an individual who is comatose is unable on that occasion to institute legal action, and an expert opinion is not required to so determine where evidence supports this determination.

Our resolution of this issue is consistent with authorities elsewhere. In deciding a case applying Texas law, the court in *In re Mirapex Products Liability Litigation*, 735 F. Supp. 2d 1113, 1122 (D. Minn. 2010), stated: "To survive summary judgment, plaintiff must come forward with either (1) evidence permitting the Court to conclude he lacked the mental capacity to pursue litigation, or (2) a fact-based expert opinion to the same effect." The record in this case shows that Maycock presented evidence contained in hospital records which permitted a court to determine without expert opinion that Marty suffered a mental disorder under § 25-213 on November 22, 2005, if not earlier, and, therefore, his representative can take advantage of tolling under § 25-213 in this suit brought under the NHMLA. Because there is evidence to support the determination of the Court of Appeals, an expert opinion was not required under the facts of this case. We conclude that the Court of Appeals did not err when it ordered reversal and remand based on its determination that there were genuine issues of material fact regarding whether Marty was under a mental disorder prior to November 22, as such condition related to the statute of limitations issue.

The Court of Appeals Did Not Err When It Did Not Affirm the Summary Judgment Based on the Doctors' Interrogatory Answers.

The doctors assert that the record would support a grant of, and the affirmance of a grant of, summary judgment in their

favor by the district court based on their interrogatory answers which indicated that they had met the standard of care. They claim that the Court of Appeals erred when it did not consider their interrogatory answers and thus failed to affirm the summary judgment on the basis of those answers. We find no error by the Court of Appeals in this regard.

The district court granted summary judgment to the doctors based on their claim that Maycock's action was time barred. The doctors submitted affidavits regarding treatment dates in support of this argument. Unlike Liebentritt, Hoody, and Connolly, the doctors did not submit affidavits asserting that they had met the standard of care and did not urge the district court to rule in their favor on that basis.

Maycock appealed to the Court of Appeals. The doctors did not cross-appeal and claim before the Court of Appeals that an alternative basis for affirming summary judgment in their favor might be found within each doctor's 27 pages of answers to interrogatories.

No assignment of error before the Court of Appeals sought consideration of the doctors' assertion made to this court that summary judgment in their favor could be affirmed on the basis that they had made a prima facie case in their interrogatory answers that they met the standard of care and were entitled to judgment on a basis unrefuted by Maycock. For completeness, we note that in a motion for rehearing, the doctors claimed that the Court of Appeals committed plain error by not granting the doctors relief on the basis of the standard of care issue. The motion for rehearing was denied by the Court of Appeals.

[5] When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010). We find no error by the Court of Appeals when it rejected the motion for rehearing or when it did not consider sua sponte the standard of care issue.

CONCLUSION

On further review, we conclude that the Court of Appeals correctly concluded that the 2-year statute of limitations in

§ 44-2828 of the NHMLA was applicable to this case and subject to tolling under § 25-213 for a mental disorder and that there were genuine issues of material fact regarding whether and on what dates the action was tolled. The Court of Appeals correctly reversed the summary judgment entered in favor of the doctors and remanded the cause for further proceedings.

AFFIRMED.

WRIGHT and CONNOLLY, JJ., not participating.

APRIL PALMER, APPELLANT, V. LAKESIDE WELLNESS CENTER, DOING BUSINESS AS ALEGENT HEALTH, AND PRECOR, INC., APPELLEES.

798 N.W.2d 845

Filed June 24, 2011. No. S-10-974.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Contracts: Parties: Intent.** In order for those not named as parties to recover under a contract as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interest of such unnamed parties were contemplated and that provision was being made for them.
4. **Contracts: Parties.** The right of a third party benefited by a contract to sue must affirmatively appear from the language of the instrument when properly interpreted or construed.
5. **Negligence: Words and Phrases.** Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty.
6. **Negligence.** Whether gross negligence exists must be ascertained from the facts and circumstances of each particular case and not from any fixed definition or rule.
7. **Negligence: Summary Judgment.** The issue of gross negligence is susceptible to resolution in a motion for summary judgment.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.