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the arresting peace officer has 10 days thereafter to forward the sworn report to the director.

Although the sworn report recites that the blood test results were received on July 25, 2009, evidence was adduced at the hearing to rebut this averment and to indicate that the test results were received by the police department on July 17 and by Strode himself on July 25. Based upon the application of § 60-498.01(5)(a), the submission of the sworn report to the Department on July 30 was untimely. For this reason, we affirm the decision of the district court which reversed the revocation of Freeman's license by the director.

CONCLUSION

The sworn report was not timely submitted to the Department as required by § 60-498.01(5)(a), and therefore, the director of the Department did not have jurisdiction to administratively revoke Freeman's license. We affirm the decision of the district court, which reversed the order of revocation.

AFFIRMED.

RICHARD C. SCOTT, PERSONAL REPRESENTATIVE OF THE BRANDI J. BLOCK ESTATE, APPELLANT, V. SHAHBAZ KHAN, M.D., APPELLEE.

790 N.W.2d 9

Filed October 19, 2010. No. A-10-099.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact 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. **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.
3. **Malpractice: Physician and Patient: Proof: Proximate Cause.** To make a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm.

4. **Damages.** In awarding damages for physical discomfort and mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident.
5. **Trial: Evidence: Witnesses.** The credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the sound discretion of the fact finder.
6. **Actions: Decedents' Estates: Abatement, Survival, and Revival.** As an element of a decedent's personal injury action, conscious pre-fatal-injury fear and apprehension of impending death survives a decedent's death, under the provisions of Neb. Rev. Stat. § 25-1401 (Reissue 2008), and inures to the benefit of such decedent's estate.
7. **Negligence: Proximate Cause.** A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them.
8. **Malpractice: Physician and Patient: Proof: Proximate Cause.** Proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.
9. **Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
10. ____: ____. A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct.
11. **Malpractice: Physicians and Surgeons: Expert Witnesses: Proof.** In a medical malpractice case, expert testimony is almost always required to prove causation.
12. **Expert Witnesses: Physicians and Surgeons.** "Magic words" indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary.
13. ____: ____. Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least probable, in other words, more likely than not.
14. **Courts: Appeal and Error.** After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court.
15. **Courts: Judgments: Appeal and Error.** Ordinarily, the reversal of a judgment and remand for further proceedings, without specific directions to the trial court, is a general remand which places the parties in the same position as if a trial had not been had.
16. ____: ____: ____. If the undisputed facts are such that but one judgment could be rendered, the trial court should enter such judgment, notwithstanding the mandate did not so direct.
17. ____: ____: ____. Where, on appeal, a reversal is entered in an appellate court, if the record discloses that at the first trial the facts in issue have not been fully developed, or definitely settled, or may be said to be obscure, indefinite,

uncertain, or otherwise unsatisfactory, though indicating that the party aggrieved has sustained actual damage, the trial court, upon remand, in the absence of specific directions to the contrary, will accord to the litigants a retrial of the cause of action generally.

18. **Trial: Evidence: Appeal and Error.** Where evidence is cumulative to other evidence received by the court, its exclusion will not be considered prejudicial error.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Reversed.

David A. Domina and Brian E. Jorde, of Domina Law Group, P.C., L.L.O., for appellant.

Brien M. Welch and Amber L. Blohm, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

INTRODUCTION

Richard C. Scott, personal representative of the estate of Brandi J. Block, appeals from the order of the district court for Madison County, which granted summary judgment in favor of Shahbaz Khan, M.D. This is the second appearance of this case before this court. Scott brought a wrongful death claim on behalf of Block's next of kin, based on Khan's alleged psychiatric negligence in his treatment of Block, and a claim on behalf of Block's estate for Block's conscious pain and suffering prior to her death, also based on Khan's alleged negligence. The district court granted Khan's motion for summary judgment, finding that the claim for conscious pain and suffering was simply "a non-economic damage component" of the wrongful death action and that while Scott had provided evidence of Khan's negligence, he had failed to show that Khan's negligence was a proximate cause of Block's death. Scott appealed. This court affirmed the lower court's grant of summary judgment on the wrongful death claim, but we reversed the court's decision with respect to the conscious pain and suffering claim and remanded it for further proceedings after finding that it was a separate claim, properly joined in the same suit with the wrongful death claim. On remand, Khan

again sought summary judgment, and the district court granted summary judgment in Khan's favor. In the present appeal, Scott asserts that the court erred in failing to receive a particular exhibit and in granting summary judgment on the conscious pain and suffering claim. Because there was a material issue of fact as to whether Block experienced any conscious pain and suffering and because the district court erred in failing to receive a particular exhibit, which created a material issue of fact as to whether Khan's negligence was a proximate cause of any conscious pain and suffering by Block, we reverse the grant of summary judgment in Khan's favor.

BACKGROUND

Block, who had previously been diagnosed with schizoaffective disorder, bipolar type, began treating with Khan, a psychiatrist, on February 20, 2007, after her former psychiatrist moved his practice. Block last saw Khan on June 25, the day before her death on June 26.

Scott filed a complaint in the district court on April 18, 2008. Scott alleged that Khan was negligent in his treatment of Block in various ways and set forth a claim for wrongful death on behalf of Block's next of kin and a claim on behalf of Block's estate for Block's conscious pain and suffering prior to her death. Khan answered, admitting that he had occasion to treat Block as a patient, but denying that he was negligent in any way.

Khan's first summary judgment motion was heard on February 27, 2009. The evidence presented at the hearing showed that Khan provided medical care to Block from February 20 to June 25, 2007. As a part of the care, Khan provided diagnostic examinations and developed a psychiatric treatment plan. During that time, Khan also prescribed various psychiatric medications. Block was compliant with taking the medications prescribed by Khan. There was no indication that Block committed suicide, and the evidence was undisputed that the exact mechanism of or medical reason for Block's death was unknown. Because of the procedural posture of this case, we do not further summarize the evidence presented at the first summary judgment hearing, but we do note that the

evidence offered by Scott in opposition to Khan's motion included the deposition of Dr. Carl Greiner taken on October 29, 2008, and Greiner's reports of March 12 and September 29, 2008.

The district court entered an order on March 12, 2009, granting Khan's motion for summary judgment. The court found that Scott's claim for conscious pain and suffering was "a non-economic damage component of the wrongful death action" and did not state "a separate theory of recovery." The court found that the uncontroverted evidence showed that the cause of Block's death was unknown. The court determined that Scott had provided evidence as to Khan's negligence, in opposition to the evidence provided by Khan, but that Scott had failed to show that Khan's negligence was a proximate cause of Block's death. Accordingly, the court granted summary judgment in Khan's favor and dismissed the complaint.

Scott appealed, and in a memorandum opinion, we affirmed the grant of summary judgment in Khan's favor on the wrongful death claim, finding no genuine issue of material fact as to whether Khan's negligence caused Block's wrongful death. See *Scott v. Khan*, No. A-09-349, 2009 WL 3298160 (Neb. App. Oct. 13, 2009) (selected for posting to court Web site) (*Khan I*). We determined, however, that the claim for Block's conscious pain and suffering was a separate claim, not recoverable under the wrongful death statutes, but properly brought by Block's estate under the survival statutes and joined with the wrongful death claim in the same lawsuit. Because the district court did not separately consider the pain and suffering claim, we reversed, and remanded that portion of the court's decision for further proceedings.

On November 18, 2009, the district court entered judgment on the mandate of this court and also entered an order scheduling trial to commence February 8, 2010.

On November 23, 2009, Khan filed a motion to enforce the judgment on the mandate and to reconsider Khan's motion for summary judgment. Khan asked the court, in light of the directions from and mandate of this court, to reconsider his previously filed motion for summary judgment and to grant summary judgment specifically on the claim for conscious pain

and suffering. Khan expressed his belief that it was premature for the court to set the matter for trial until after it had ruled on his motion for summary judgment, "in light of the directions from the Court of Appeals on remand."

The district court heard Khan's motion on December 11, 2009. Khan's attorney argued, based on his reading of this court's opinion in *Khan I*, that because the district court did not consider the separate cause of action for pain and suffering in the original motion for summary judgment,

> the Court of Appeals has sent it back to you with directions that you are now to consider that separate cause of action on the evidence that was submitted on the original motion for summary judgment. So I'm not renewing a motion for summary judgment, it's the original summary judgment, it's just that I think the Court of Appeals says that you now have to reconsider that motion and issue a decision on that separate cause of action.

Scott's attorney asked the court to judicially notice "all of the bill of exceptions and its contents" and offered one additional exhibit that was not offered at the first summary judgment hearing. Specifically, Scott offered exhibit 25, the December 8, 2009, affidavit of Greiner and Greiner's attached supplemental report of the same date. In his affidavit, Greiner incorporated by reference both the supplemental report and his previous report of September 2008. Greiner stated that his supplemental report was written "for the purpose of providing clarity" and that it expressed no new opinions. In the supplemental report, Greiner stated that the report was "designed to assure there can be no mistake about my opinions reached in my original report." Greiner opined that Khan committed professional negligence in that his care did not conform to the standards of practice and care required of him in the rendition of professional services to patients like Block. Greiner stated that Khan deviated from these standards by failing to appropriately consider Block's medical history; by failing to acquaint himself with, consider, and fully evaluate her changing medical circumstances and deterioration during the time of his care of Block; and by incorrectly medicating her. Greiner further stated that the medication errors made by Khan were

material in that they introduced medications into her body that tend to cause hallucinatory thinking, patient torment, psychiatric and physical symptoms and conditions, and exacerbated illness, which things befell Block. Greiner opined that Block suffered emotionally, mentally, and physically as a direct and proximate result of Khan's negligence. Finally, Greiner referenced his "original report," which detailed more fully the specific acts and omissions of Khan proximately causing Block's exacerbated mental and physical illnesses while in Khan's care.

Khan objected to the offer of exhibit 25, stating that to accept additional evidence would be contrary to the mandate of this court. Specifically, Khan's counsel stated, "The Court of Appeals did not send this case back for new trial, the Court of Appeals did not send the case back for additional evidence." The district court heard further arguments from both parties on the issue of whether this court's mandate allowed for the receipt of additional evidence on remand and reserved ruling on the offer of exhibit 25. The court vacated the order setting the matter for trial and took Khan's motion under advisement.

The district court entered an order on January 12, 2010, granting summary judgment in Khan's favor on the claim for Block's conscious pain and suffering. The court determined that its mandate was "to complete the task that [it] was given at the time the motion for summary judgment was [originally] submitted," that is, to pass upon the issue as to Block's conscious pain and suffering. The court considered the threshold question of whether it could consider additional evidence and found that, "based on this specific remand," it should not do so. The court noted that Scott at least implied that exhibit 25 was cumulative, referencing Scott's statement that "'Exhibit 25 wraps these altogether. It was offered to simplify and, supplement, and perhaps crystallize, but not to complete, a previous incomplete case for conscious pain and suffering. The case was complete without the exhibit.'" The court stated that cumulative evidence "is not admissible."

The district court then considered whether summary judgment should be granted on the claim for conscious pain and

suffering based on the evidence submitted at the February 2009 hearing and judicially noticed at the December 2009 hearing. The court observed that Scott's claim for Block's conscious pain and suffering was based on a theory of professional negligence, specifically, that Khan was negligent in failing to provide responsive care, proximately causing Block's conscious pain and suffering. The court determined that certain evidence submitted by Khan sufficed to make a prima facie case that he did not commit malpractice and that Greiner, in his deposition, opined that Khan was negligent in his assessment and treatment of Block and thus deviated from the standard of care. However, the court determined that there must be some evidence that Block had conscious pain and suffering prior to her death, attributable to Khan's negligence. The court found no evidence in Greiner's deposition or original reports that Block experienced any conscious pain and suffering prior to her death, "certainly none attributable to [Khan]." The court concluded that the evidence as to proximate cause was notably absent as to the claim of conscious pain and suffering. The court found that while Scott had provided evidence of Khan's negligence, he had failed to show that this negligence was a proximate cause of any conscious pain and suffering of Block. Accordingly, the court granted Khan's motion for summary judgment as to the conscious pain and suffering claim and dismissed the complaint. Scott subsequently perfected the present appeal to this court.

ASSIGNMENTS OF ERROR

Scott asserts, consolidated, restated, and reordered, that the district court erred in (1) finding that there were no genuine issues of material fact in connection with the claim for Block's conscious pain and suffering and (2) refusing to admit exhibit 25 into evidence based on its erroneous interpretation of this court's mandate.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact 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. *Schlatz v. Bahensky*, 280 Neb. 180, 785 N.W.2d 825 (2010). 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. *Id.*

The construction of a mandate issued by an appellate court presents a question of law. *Anderson v. Houston*, 277 Neb. 907, 766 N.W.2d 94 (2009). An appellate court reviews questions of law independently of the lower court's conclusion. *Id.*

ANALYSIS

Evidence of Conscious Pain and Suffering.

Scott asserts that the district court erred in finding that there were no genuine issues of material fact in connection with the claim for Block's conscious pain and suffering. We first consider whether the district court was correct in granting summary judgment to Khan based on the evidence admitted at the first summary judgment hearing. If the court erred in that regard, we need not consider Scott's second assignment of error. If the court's grant of summary judgment was correct based on the evidence considered by the court, we must then consider whether exhibit 25 was properly excluded.

[3] The claim for conscious pain and suffering is based on Khan's alleged psychiatric negligence or malpractice. To make a prima facie case of medical malpractice, a plaintiff must show (1) the applicable standard of care, (2) that the defendant deviated from that standard of care, and (3) that this deviation was the proximate cause of the plaintiff's harm. *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008). In this case, the district court found evidence of Khan's negligence sufficient to overcome the motion for summary judgment, so the questions then become whether Block experienced any conscious pain and suffering and whether Khan's negligence was a proximate cause of any such pain and suffering.

In considering whether Block experienced any conscious pain and suffering, the court apparently limited its consideration to the previously admitted testimony and reports of

Greiner. The court stated that it found nothing in the evidence of Greiner indicating Block experienced any conscious pain and suffering prior to her death, certainly none attributable to Khan, and that any statement of Greiner's was at most speculative.

[4-6] In a personal injury action, the plaintiff may recover compensation for noneconomic damages, including such things as pain, suffering, mental suffering, and emotional distress. See Neb. Rev. Stat. § 25-21,185.08(3) (Reissue 2008). In a medical malpractice case, the Nebraska Supreme Court recognized that in awarding damages for physical discomfort and mental anguish, the fact finder must rely upon the totality of the circumstances surrounding the incident. *Woitalewicz v. Wyatt*, 229 Neb. 626, 428 N.W.2d 216 (1988). The credibility of the evidence and the witnesses and the weight to be given all of these factors rest in the sound discretion of the fact finder. *Id.* And, as an element of a decedent's personal injury action, conscious pre-fatal-injury fear and apprehension of impending death survives a decedent's death, under the provisions of Neb. Rev. Stat. § 25-1401 (Reissue 2008), and inures to the benefit of such decedent's estate. *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989). See, also, *Brandon v. County of Richardson*, 252 Neb. 839, 566 N.W.2d 776 (1997).

The following commentary is helpful to an understanding of just what constitutes pain and suffering:

> Pain and suffering are usually among the most significant elements of damages in medical malpractice actions. In general, courts have not attempted to draw any distinctions between the elements of "pain" and "suffering." Rather, the unitary concept of "pain and suffering" has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal.
>
> Where the distinction is attempted, "pain" is often equated with the physical or physiological body processes and has been defined as "that specific perception that results in common from a variety of different forms

> of stimulation intense enough to injure the body at least minimally or transiently."
>
> "Suffering" for medico-legal purposes is sometimes classified as mental anguish, which has been said to include worry, concern, grief, humiliation, embarrassment, depression and other unpleasant mental sequelae which are not necessarily directly related to pain sensations.

3 David W. Louisell & Harold Williams, Medical Malpractice § 18.02[1] at 18-17 and 18-18 (2007). "The most common methods of establishing damages for pain and suffering are through the plaintiff's own testimony and other lay witnesses, who relate their observations of the plaintiff's declarations and expressions of pain." 3 Louisell & Williams, *supra*, § 18.02[4] at 18-42 and 18-42.1.

One of the exhibits available for the district court's review in this case was the deposition of Jeanice Block, Block's mother. Jeanice testified that when Block saw Khan in May 2007, she was agitated and saw and heard things that were not there. On the afternoon of June 25, when Block brought food to Jeanice at Jeanice's place of employment, Jeanice observed that Block was "really tired" and "looking like she was almost ready to just drop and fall." That evening when Jeanice returned home, she found Block sleeping on the floor and "sobbing."

Police reports of the investigation into Block's death were also admitted into evidence. Police reports show that when Jeanice returned from work, she found Block lying on the floor and Block did not want to move because her back was hurting. Jeanice told police that Block was "breathing real heavy and sweating profusely and desired not to go to bed as she felt the harder surface would help her back pain." Police on the scene the morning Block's death was discovered observed that the home was very hot with no air conditioning and that the windows were closed. Jeanice told police that Block was functioning well and able to hold a job prior to her treatment with Khan, but that since that time, she had been lethargic, had exhibited signs of psychosis, and had lost her employment. Jeanice told police that when Block brought food to her, Block "'looked like a zombie'" and did not want to eat, which Jeanice thought was unusual. Jeanice also described Block's

extreme mood swings since transferring to Khan's care and her recent experience of "seeing worms in her head." Medical records reviewed by police confirmed a doctor's visit by Block on June 15, 2007, where she spoke of "worms in her hair and pubic region." Another visit to the same doctor in June showed that the doctor considered Block paranoid and that he suggested she see Khan sooner than scheduled.

In Greiner's deposition, he described the records as showing that Block was disorganized, confused, hallucinating, and less able to care for herself. In explaining on what he based his opinion that Block was unable to care for herself, Greiner referenced Block's complaint to a physician that she had worms in her head, her discharge from employment, a caseworker's indication that Block was deteriorating and having a change in behavior, Jeanice's comment that Block was "doing horribly," and Khan's review that Block had positive and negative symptoms of schizophrenia.

In his report of March 12, 2008, Greiner set forth evidence of Block's worsening condition gleaned from the medical records. Greiner observed that Block's functioning worsened around March 2007, when she described to her therapist that "she could not take it anymore and felt that her medications may not be correct." In April 2007, Block's therapist noted that Block was irrational and irritable with increased paranoia, that Jeanice did not think Block's medications were working and was concerned that Block was deteriorating, and that Block, who experienced a menstrual period after not having any for some time, wondered if she was going to die. In May, Block was described as becoming more paranoid and irritable, having problems in maintaining hygiene, and being slower at her job. She also expressed her concern to a health care provider that she was infested by worms. Near the end of May, Block refused to come to the center where she received supportive social services and was described as not doing very well, paranoid, and not finishing her sentences. Block thought that there were bugs in her home and that a man put up a fan just to annoy her. In June, Block's caseworker was concerned that Block was not acting right and had had an abrupt change in personality. At this time, Block was reported as having

significant behavioral changes, was described as being overwhelmed by getting her room clean, and thought that clumps of worms in her hair fell into the toilet. Khan's notes of the June 25 visit indicate that Block's insight and judgment were poor and that she had racing thoughts, emotional instability, and a decreased need for sleep. Khan identified Block as being disorganized and confused, but not suicidal.

When viewing the evidence in the light most favorable to Scott and giving him the benefit of all reasonable inferences deducible from the evidence, we conclude that the above evidence was sufficient to create a material issue of fact as to whether Block experienced any conscious pain and suffering prior to her death, and the district court erred in concluding otherwise. The question then becomes whether the evidence considered by the court was sufficient to create a material issue of fact on the issue of proximate causation.

Evidence of Causation.

[7-11] A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them. *Hamilton v. Bares*, 267 Neb. 816, 678 N.W.2d 74 (2004). Proximate causation requires proof necessary to establish that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff. *Id.* A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Radiology Servs. v. Hall*, 279 Neb. 553, 780 N.W.2d 17 (2010). A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). In a medical malpractice case, expert testimony is almost always required to prove causation. *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008).

[12,13] In his deposition, Greiner opined that on June 25, 2007, Block was not capable of taking care of herself. Greiner also opined that Khan was negligent in his assessment and treatment of Block and "in the negligence of assessing the

severity of her illness, in not hospitalizing her, that she was not able to care for herself and died." Greiner clearly felt that Khan's negligent assessment of the severity of Block's illness and failure to hospitalize her contributed to her inability to care for herself and led to her death. But this does not equate with an opinion to the requisite degree of medical certainty that Khan's negligence was a proximate cause of Block's conscious pain and suffering. Greiner's opinions, in the two reports attached as exhibits to his deposition, seem largely focused on whether Khan deviated from the standard of care. While it might be possible to infer from Greiner's deposition and the attached reports that he attributed Block's conscious pain and suffering to Khan's negligence, there is nothing in this evidence couching such an opinion in terms of probability, rather than in terms of possibility or speculation. "Magic words" indicating that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary. *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010). However, medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not. *Fackler v. Genetzky*, 263 Neb. 68, 638 N.W.2d 521 (2002). We conclude that the district court did not err in its conclusion that the evidence, at least as presented at the first summary judgment hearing, did not support a conclusion that Khan's negligence was a proximate cause of any conscious pain and suffering by Block. Accordingly, we must turn our attention to the question of whether exhibit 25, which undeniably contains such a conclusion, expressed in the requisite terms of medical certainty, was properly excluded.

Admission of Exhibit 25.

[14-17] Scott asserts that the district court erred in refusing to admit exhibit 25 into evidence based on its erroneous interpretation of this court's mandate. After receiving a mandate, a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330

(2010). Ordinarily, the reversal of a judgment and remand for further proceedings, without specific directions to the trial court, is a general remand which places the parties in the same position as if a trial had not been had. *Bohmont v. Moore*, 141 Neb. 91, 2 N.W.2d 599 (1942). But if the undisputed facts are such that but one judgment could be rendered, the trial court should enter such judgment, notwithstanding the mandate did not so direct. *Id.* Where, on appeal, a reversal is entered in an appellate court, if the record discloses that at the first trial the facts in issue have not been fully developed, or definitely settled, or may be said to be obscure, indefinite, uncertain, or otherwise unsatisfactory, though indicating that the party aggrieved has sustained actual damage, the trial court, upon remand, in the absence of specific directions to the contrary, will accord to the litigants a retrial of the cause of action generally. *Parish v. County Fire Ins. Co.*, 137 Neb. 385, 289 N.W. 765 (1940).

Khan directs our attention to the following:

> Where the case is remanded generally or for proceedings in accordance with the opinion of the appellate court, and neither entry of judgment nor a new trial is ordered, it may be proper to open the case for the reception of additional evidence, while, in other cases, it is proper for the lower court to decide the case without receiving additional evidence, as where on a reversal and remand the appellant does not claim any new or different evidence from that introduced at the previous trial, or where the evidence could have been made available to the court at the time of its original ruling, or when the trial court renders judgment on the findings of fact made on the first trial.

5 C.J.S. *Appeal and Error* § 1139 at 538 (2007). However, we also note:

> A decision reversing and remanding a judgment of the trial court generally permits and requires the granting of a new trial in the lower court, even where the reversal is without specific directions therefor.
>
> Whether the decision of the appellate court necessitates a new trial after remand depends on the intention of the

> appellate court, any doubt as to which is usually resolved in favor of a new trial.

5 C.J.S., *supra*, § 1163 at 563-64.

In *Khan I*, we concluded that the district court, following the original summary judgment proceedings, failed to consider the separate claim brought by Scott on behalf of Block's estate for Block's conscious pain and suffering, and we reversed, and remanded that portion of the court's decision for further proceedings. Our opinion and mandate did not specifically direct the lower court to consider only the evidence developed at the original hearing. We simply remanded for further proceedings.

In considering whether to admit exhibit 25, the district court referenced Neb. Rev. Stat. § 25-1334 (Reissue 2008), which provides in part in connection with summary judgment proceedings that "[t]he court may permit affidavits to be supplemented or opposed by depositions or by further affidavits." The court stated that the motion was previously submitted, and neither party requested that the evidence be supplemented by any additional evidence. While it may be true that neither party requested the evidence to be supplemented after the original summary judgment hearing but prior to the appeal, the effect of our reversal and remand for further proceedings was to place the parties in the same position as if a summary judgment hearing, at least on the issue of Block's conscious pain and suffering, had not been had. Scott's offer of exhibit 25 at the December 2009 hearing can be seen as a request to supplement the evidence.

[18] Another reason the district court declined to receive exhibit 25 was the view that it contained cumulative evidence. Where evidence is cumulative to other evidence received by the court, its exclusion will not be considered prejudicial error. *Campagna v. Higday*, 14 Neb. App. 749, 714 N.W.2d 770 (2006). Despite the statement in Greiner's affidavit that his supplemental report was executed for the purpose of providing clarity and that it expressed no new opinions, we are not convinced that the evidence in the report was cumulative to evidence found in Greiner's deposition and the reports attached to the deposition. In his supplemental report, Greiner states that

the medication errors made by Khan were material in that they introduced medications into Block's body that tend to cause hallucinatory thinking, patient torment, psychiatric and physical symptoms and conditions, and exacerbated illness. Greiner stated that "[t]hese things befell" Block and opined that Block suffered emotionally, mentally, and physically as a direct and proximate result of Khan's negligence. Based on the language of our mandate, we conclude that it was error for the district court to exclude exhibit 25 and that exhibit 25 creates a material issue of fact on the question of whether Khan's negligence was a proximate cause of any conscious pain and suffering on the part of Block. Accordingly, we reverse the grant of summary judgment in Khan's favor.

CONCLUSION

The district court erred in granting summary judgment in Khan's favor, and we reverse the grant of summary judgment.

REVERSED.