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RSUI Indemnity Company and Liberty Mutual Insurance Group, as subrogees of Kiewit Construction Company, appellees, v. Ronald "Tim" Bacon et al., appellants.

810 N.W.2d 666

Filed September 30, 2011. No. S-10-1020.

1. **Summary Judgment: Appeal and Error.** 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.
2. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.
3. **Contracts: Principal and Agent: Liability.** An agent for a disclosed principal is not liable on a contract in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended to incur personal responsibility.
4. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.
5. **Contracts: Parties.** The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
6. ____: ____. The nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties. Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party.
7. ____: ____. A violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.
8. ____: ____. The question of a party's good faith in the performance of a contract is a question of fact.
9. **Prejudgment Interest.** Prejudgment interest accrues on the unpaid balance of a liquidated claim from the date the cause of action arose until the entry of judgment.
10. ____. A claim is liquidated when there is no reasonable controversy as to the plaintiff's right to recover and the amount of such recovery; there must be no dispute as to the amount due and to the plaintiff's right to recover.

Appeal from the District Court for Douglas County: James T. Gleason, Judge. Affirmed in part, and in part reversed.

James E. Harris and Britany S. Shotkoski, of Harris Kuhn Law Firm, L.L.P., for appellants.

Matthew D. Hammes and Michelle D. Epstein, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellees.

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

STEPHAN, J.

This is an appeal from an order granting summary judgment in a breach of contract action. The primary issue is whether an attorney and/or a law firm is liable on a contract negotiated on behalf of a client when the contract provides that both the client and the attorney "agree to and will pay" a certain sum of money and the attorney signs the contract under the legend "Agreed to in Form & Substance." We conclude that neither the attorney nor the firm is liable but otherwise affirm the order granting summary judgment.

I. FACTS

Ronald "Tim" Bacon was injured on July 28, 2003, while working at a construction site. Kiewit Construction Company (Kiewit) was the general contractor on the site, and Bacon was employed by subcontractor Davis Erection. Ridgetop Holdings, Inc. (Ridgetop), is the parent company of Davis Erection.

Liberty Mutual Insurance Group (Liberty Mutual) insured Kiewit under a commercial liability policy. Liberty Mutual also insured Davis Erection under a workers' compensation policy. The two policies bore separate policy numbers and had separate named insureds. RSUI Indemnity Company (RSUI) insured Kiewit under a separate liability policy.

After his accident, Bacon filed a lawsuit in the district court for Douglas County against Kiewit, Liberty Mutual, Davis Erection, and Ridgetop. Harris Kuhn Law Firm, LLP (Harris Kuhn), and attorneys James E. Harris and Britany Shotkoski of that firm represented Bacon in the lawsuit. Prior to trial, Kiewit and Bacon entered into a settlement in which Kiewit agreed to pay Bacon a specified sum in full and final settlement of his claims in exchange for a release. The settlement agreement provided in relevant part:

> [I]n the event BACON obtains a settlement with Ridgetop . . . or judgment against RIDGETOP, BACON and his

> attorneys, . . . Harris and . . . Shotkowski [sic], agree to and will pay to KIEWIT and/or its insurer(s) a sum of money up to a total sum of Seven Hundred Fifty Thousand and 00/100 ($750,000.00) from any such settlement with RIDGETOP or final judgment against RIDGETOP, by paying to KIEWIT 50% (1/2) of the first Five Hundred Thousand and 00/100 ($500,000.00) obtained by BACON in settlement with RIDGETOP or final judgment against RIDGETOP and 25% (1/4) of any monies obtained in excess of Five Hundred Thousand and 00/100 ($500,000.00) obtained by BACON in settlement with RIDGETOP or final judgment against RIDGETOP, up to the total reimbursable amount of Seven Hundred Fifty Thousand and 00/100 ($750,000.00). BACON further agrees that any payment owed by BACON to KIEWIT pursuant to the terms of this paragraph will be made by BACON in cash or its equivalent as soon as possible, and not to exceed seven (7) days, after receipt of good funds from RIDGETOP, unless such time is extended by agreement of the parties.

In a section entitled "Worker's Compensation," the settlement agreement stated that Liberty Mutual had advised the parties that it "did not believe" it would be asserting an interest in any settlement proceeds obtained by Bacon from either Kiewit or Ridgetop. Although the agreement contemplated the receipt of written verification from Liberty Mutual to this effect, it was executed prior to this occurring and it appears from the record that no written verification ever occurred. The settlement agreement further provided that "notwithstanding" Liberty Mutual's advisement and anticipated written verification, Bacon agreed to defend and indemnify Kiewit "with respect to any claim or suit which is or may be made by Liberty Mutual . . . as the workers' compensation insurer for Davis Erection."

The settlement agreement contained the notarized signatures of Bacon and a Kiewit representative. Harris signed the agreement under the legend "Agreed to in Form & Substance," and Kiewit's attorney did likewise. The attorneys' signatures were not notarized.

On August 23, 2007, RSUI issued a draft payable to Bacon and his attorneys at Harris Kuhn. On August 29, Liberty Mutual issued a draft which was also payable to Bacon and Harris Kuhn. These payments were made by the insurers on behalf of Kiewit pursuant to the settlement agreement. The payments were deposited into Harris Kuhn's trust account.

Bacon, represented by Harris and Harris Kuhn, then began settlement negotiations with Ridgetop. The negotiations became complicated when Liberty Mutual claimed an interest in any amount Bacon received from Ridgetop. Liberty Mutual eventually conceded that it had no subrogation right to any amount obtained by Bacon from Ridgetop, but insisted that it was entitled to a statutory credit against its future workers' compensation benefit payments to Bacon based on any amount Bacon obtained from Ridgetop.[1] Bacon ultimately settled with Ridgetop and received $1.25 million. At the time Bacon obtained the money from Ridgetop, the validity of Liberty Mutual's claim for a future statutory credit had not been resolved.

RSUI and Liberty Mutual filed this breach of contract action after Bacon received the proceeds of the Ridgetop settlement but refused to make payment to them under the terms of the Kiewit settlement agreement. The district court granted summary judgment in favor of RSUI and Liberty Mutual and found Bacon, Harris, and Harris Kuhn liable in the amount of $437,500 plus prejudgment interest. Bacon, Harris, and Harris Kuhn filed this timely appeal.

II. ASSIGNMENTS OF ERROR

Bacon, Harris, and Harris Kuhn assign, restated and consolidated, that the district court erred in (1) finding that Harris and Harris Kuhn were personally liable on the settlement agreement, (2) granting summary judgment in favor of RSUI and Liberty Mutual, (3) requiring Bacon to indemnify Liberty Mutual against its own intentional acts, (4) calculating the amount owed under the settlement agreement, and (5) finding

[1] See Neb. Rev. Stat. § 48-118 (Reissue 2010).

that the amount owed under the settlement agreement was a liquidated amount and awarding prejudgment interest.

III. STANDARD OF REVIEW

[1] 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.[2]

[2] Whether prejudgment interest should be awarded is reviewed de novo on appeal.[3]

IV. ANALYSIS

1. Harris and Harris Kuhn Have No Personal Liability

The district court found that RSUI and Liberty Mutual were entitled to summary judgment and that they could recover from Bacon, Harris, or Harris Kuhn. Harris and Harris Kuhn argue that even if the Kiewit settlement agreement was breached as a matter of law, they cannot be personally liable for the amounts due, because they acted solely as Bacon's agent. They rely on the general rule that an agent, acting for a disclosed principal, is not liable for the principal's contract.[4]

[3] While that is the general rule, an agent can become personally liable if "the agent purports to bind himself or herself, or has otherwise bound himself or herself, to performance of the contract."[5] Stated another way, an agent for a disclosed principal is not liable on the contract "'in the absence of some other agreement to the contrary or other circumstances showing that the agent has expressly or impliedly incurred or intended

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[2] *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010); *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010).

[3] *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010); *Archbold v. Reifenrath*, 274 Neb. 894, 744 N.W.2d 701 (2008).

[4] See, *Broad v. Randy Bauer Ins. Agency*, 275 Neb. 788, 749 N.W.2d 478 (2008); *McGowan Grain v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987); *Cargill Leasing Corp. v. Mueller*, 214 Neb. 569, 335 N.W.2d 277 (1983).

[5] *Broad, supra* note 4, 275 Neb. at 795, 749 N.W.2d at 483.

to incur personal responsibility.'"[6] The question before us is whether the terms of the contract and/or the circumstances of the deal showed that Harris and/or Harris Kuhn impliedly incurred or intended to incur personal liability.

The Kiewit settlement agreement provides: "[I]n the event BACON obtains a settlement with Ridgetop . . . BACON and his attorneys, . . . Harris and . . . Shotkowski [sic], agree to and will pay to KIEWIT and/or its insurer(s) a sum of money" according to the contractual formula. The agreement also specifies that settlement drafts were to be payable to both Bacon and "His Attorneys At Harris Kuhn." RSUI and Liberty Mutual argue that these contractual provisions, combined with Harris' signature on the settlement agreement, demonstrate that Harris and the firm intended to incur personal liability on the contract.

Although the contractual language refers to both Harris and Shotkoski, RSUI and Liberty Mutual do not argue that Shotkoski has any personal liability on the contract. We assume this is because Shotkoski did not sign the agreement. The rule in Nebraska is that signatures of the parties are not essential to establish a binding contract if manifestation of mutual assent is otherwise shown, unless there is a statute requiring a signature or an agreement by the parties that a contract shall not be binding until it is signed.[7] Here, the settlement agreement, at section 21, expressly states that it "shall not be effective . . . unless and until each party executes the original or a counterpart."

In light of this, Shotkoski cannot under any interpretation of the contract be personally liable, and Harris and Harris Kuhn cannot be personally liable unless Harris' signature on the "form and substance" block can be construed to bind him and his firm personally. We conclude that under the circumstances of this case, particularly the nature of the signature

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[6] *Cargill Leasing Corp., supra* note 4, 214 Neb. at 572, 335 N.W.2d at 279, quoting *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981).

[7] *In re Estate of Mathews*, 134 Neb. 607, 279 N.W. 301 (1938); *Coffey v. Mann*, 7 Neb. App. 805, 585 N.W.2d 518 (1998).

and the ambiguous contractual language, it cannot. Harris' signature under the legend "Agreed to in Form & Substance" demonstrates only that he was Bacon's attorney and that "the document [was] in the proper form and embodie[d] the deal that was made between the parties."[8] Nothing about the signature indicates or implies an intent to incur personal liability on the contract. Indeed, Kiewit's attorney signed an identical signature block even though no contractual language could be construed to impose a personal obligation on Kiewit's attorney. In addition, the contractual language relied upon by RSUI and Liberty Mutual is ambiguous, but at most governs the manner by which payment under the contract was to be made, not the parties which were to be liable for such payment.

RSUI and Liberty Mutual rely on *Kalberg v. Gilpin Company*.[9] In that case, buyers executed a written offer to purchase a home for the total price of $18,000. The contract required the buyers to pay $1,500 in earnest money and provided that the remaining $16,500 would be financed by first and second deeds of trust through the real estate agency. The contract further provided that if the financing could not be obtained, the earnest money would be returned. The contract was signed by the buyers, the seller, and an agent of the real estate company. Prior to closing, the buyers were informed by the agency that there was a fee for obtaining the deeds of trust and that the final amount due was $18,800. The buyers refused to pay the additional $800 because it was not agreed to in the purchase contract. When the seller and the agency refused to return the earnest money, the buyers sued them both.

In resolving the dispute in favor of the buyers, the court noted that the buyers had "proceeded properly in joining as defendants both the seller-principal and his agent."[10] It reasoned:

> Although it is generally true that an agent who discloses the name of his principal to the persons with whom he is dealing incurs no personal responsibility to such persons

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[8] *Freedman v. Brutzkus*, 182 Cal. App. 4th 1065, 1070, 106 Cal. Rptr. 3d 371, 374 (2010).

[9] *Kalberg v. Gilpin Company*, 279 S.W.2d 177 (Mo. App. 1955).

[10] *Id.* at 181.

> on account of the transaction, there is an exception where the contract or circumstances of the transaction discloses a mutual intention to impose a personal responsibility on the agent. Such intention appears in the written contract here involved wherein the agent acknowledged receipt of the $1,500 earnest money subject to a stipulation contained on the reverse side of the contract that it would be retained by the agent subject to certain conditions or until the sale was consummated. Thus the agent was to hold this payment as a stakeholder subject to being accountable to both the seller and the buyers.[11]

We find *Kalberg* distinguishable from the instant case, because in *Kalberg*, the real estate agent signed the contract as a party and the contract contained express terms about the agent's duty to hold the money in escrow for the parties. Here, both the contractual language and the import of Harris' signature are much less clear, and we decline to find that general agency principles can be displaced in such a situation. The district court erred in finding that Harris and Harris Kuhn were personally liable on the contract.

2. Contract Breached as Matter of Law

(a) Plain Language of Contract

Bacon contends the district court also erred in finding the settlement agreement was breached as a matter of law. He argues that because Liberty Mutual continues to assert it is entitled to a statutory credit against future workers' compensation payments based on the amount of the Ridgetop settlement, the amount he will actually receive from Ridgetop is unknown, and that thus, the amount owed to Kiewit under the settlement agreement is also unknown. In essence, Bacon interprets the Kiewit agreement to apply to only the "'net'" of any amounts he receives from a settlement with Ridgetop.

[4] The plain language of the settlement agreement refutes Bacon's argument. The agreement provides that if Bacon "obtain[ed]" a settlement or judgment against Ridgetop, a sum of money calculated pursuant to the contractual formula

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[11] *Id.*

was to be paid to Kiewit "and/or its insurer(s)." The agreement on its face does not require payment to Kiewit from the "net" received by Bacon from Ridgetop; it requires payment from any settlement or judgment "obtain[ed]" from Ridgetop. When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.[12]

According to the clear, plain, and ordinary meaning of the contractual language, once Bacon settled with Ridgetop and obtained money from that settlement, the contractual formula was triggered. The record shows that Bacon received $1.25 million from Ridgetop, and application of the contractual formula establishes as a matter of law that Bacon owes Kiewit and/or its insurers $437,500.

(b) Implied Covenant of Good Faith and Fair Dealing

Bacon also argues that summary judgment is improper because genuine issues of material fact exist as to whether Liberty Mutual violated the implied covenant of good faith and fair dealing in the Kiewit settlement agreement. We note that Bacon does not assert that RSUI violated this covenant.

[5-8] The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.[13] The nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties.[14] Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party.[15] A violation of the covenant of

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[12] *Thrower v. Anson*, 276 Neb. 102, 752 N.W.2d 555 (2008); *Peterson v. Ohio Casualty Group*, 272 Neb. 700, 724 N.W.2d 765 (2006).

[13] *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003); *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

[14] *Spanish Oaks, supra* note 13.

[15] *Id.*

good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.[16] The question of a party's good faith in the performance of a contract is a question of fact.[17]

Bacon asserts Liberty Mutual violated the implied covenant of good faith and fair dealing when it asserted its right to a statutory credit against the settlement that he reached with Ridgetop. For this argument to have merit, we would have to impute Liberty Mutual's action in its capacity as Davis Erection's workers' compensation carrier to Liberty Mutual's action in its capacity as the insurer for Kiewit. Even assuming that this would be proper, the express terms of the settlement agreement negate Bacon's argument. The settlement agreement states that at the time the parties entered into the agreement, they were aware of the possibility that Liberty Mutual could assert an interest, based on its prior workers' compensation payments, in any proceeds Bacon obtained from Ridgetop. According to the settlement agreement, although Liberty Mutual had indicated it would not seek to enforce such an interest, the parties understood that Liberty Mutual had not expressly stated that it would not do so. And Bacon expressly assumed the risk of Liberty Mutual asserting its interest. Liberty Mutual could not, as a matter of law, have violated a covenant of good faith and fair dealing in later asserting an interest in the Ridgetop settlement when all parties knew at the time the settlement agreement was entered into that there was a possibility that Liberty Mutual would act as it did, and the settlement agreement clearly placed that risk on Bacon. The district court did not err in finding no reasonable fact finder could conclude that Liberty Mutual's actions with respect to its workers' compensation setoff credit violated an implied covenant of good faith and fair dealing in the Kiewit settlement agreement.

We note that after this appeal was submitted, both parties filed motions requesting that this court take judicial notice of

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[16] *Id.*

[17] *Id.*; *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000).

activity in related proceedings. A February 3, 2011, order of the district court for Douglas County granted Liberty Mutual summary judgment on its claim that it was entitled to a statutory credit against future workers' compensation claims for the amounts Bacon obtained in the Ridgetop settlement. Even though this issue has now been resolved, it still does not affect the total amount Bacon obtained as a result of the Ridgetop settlement. Instead, Liberty Mutual has a credit against future workers' compensation payments based on the amount of the Ridgetop settlement. Bacon is thus affected only to the extent that this credit affects the amount of the weekly workers' compensation he receives from Liberty Mutual in its capacity as the workers' compensation carrier for Davis Erection.

(c) Subrogation Against Own Insured

Bacon also makes a complicated argument based on the premise that an insurer cannot subrogate against its own insured.[18] Generally, he contends that the liability policy that Liberty Mutual issued to Kiewit was part of an "owner-controlled" insurance policy and included both Davis Erection and Bacon, as an employee of Davis Erection, as additional insureds. He contends that because Liberty Mutual owed Bacon as an additional insured under the same policy the same duty it owed Kiewit, Liberty Mutual cannot recover against Bacon on the settlement agreement because it has no right of subrogation against its own insured.

But the fact that Davis Erection and Bacon were additional insureds under Liberty Mutual's liability policy means only that if one or both of them had engaged in negligent acts and been found liable to another, those acts would have been covered by the liability policy. It does not mean, and cannot mean, that because Bacon was injured by the negligent acts of another entity which was also covered by the liability policy, Liberty Mutual owed no duty to him to pay for that negligence.

Even if this premise were sound, it would have no application in this case. Here, Liberty Mutual seeks only to enforce

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[18] See *Control Specialists v. State Farm Mut. Auto. Ins. Co.*, 228 Neb. 642, 423 N.W.2d 775 (1988).

the contractual rights it obtained through the settlement agreement. It is not subrogating against Bacon, in that it is not claiming that Bacon owes money to it because it paid an obligation on his behalf. The mere fact that Bacon is the other party to the contractual agreement does not make this a subrogation action.

(d) No Hindrance or Delay

Bacon also argues that Liberty Mutual's actions hindered or delayed his ability to enter into a settlement with Ridgetop, and he implies that this then released him from the obligation under the Kiewit settlement agreement. But even if Liberty Mutual's decision to seek an interest in the Ridgetop settlement delayed Bacon's receipt of that settlement money, it is undisputed that he ultimately received it. In this action, RSUI and Liberty Mutual are not arguing that they are entitled to any damages due to any delay in the finalization of the settlement between Bacon and Ridgetop. Instead, their sole contention is that once Bacon "obtain[ed]" money from Ridgetop due to settlement, the formula of the settlement agreement was triggered and he owed Kiewit, and/or RSUI and Liberty Mutual, the stipulated contractual amount. There are therefore no relevant issues of fact about any delay in obtaining the Ridgetop settlement. The settlement agreement between Kiewit and Bacon was enforceable as a matter of law, and the district court did not err in finding it to be so.

3. Prejudgment Interest Proper

[9,10] Bacon argues the district court erred in awarding prejudgment interest. Prejudgment interest accrues on the unpaid balance of a liquidated claim from the date the cause of action arose until the entry of judgment.[19] A claim is liquidated when there is no reasonable controversy as to the plaintiff's right to recover and the amount of such recovery; there must be no dispute as to the amount due and to the plaintiff's right to recover.[20]

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[19] Neb. Rev. Stat. § 45-103.02(2) (Reissue 2008).

[20] See, *Dutton-Lainson Co., supra* note 3; *Archbold, supra* note 3.

Here, the amount due to RSUI and Liberty Mutual is clear; based on the formula of the settlement agreement, when Bacon obtained the $1.25 million settlement from Ridgetop, he was obligated to pay Kiewit and/or its insurers $437,500. The evidence thus furnishes a basis for computing an exact amount determinable without opinion or discretion.[21] None of Bacon's excuses or justifications for not paying the amount when it came due are either legally persuasive or meritorious. Once Bacon obtained the funds from the Ridgetop settlement, there was no reasonable controversy as to RSUI and Liberty Mutual's right to recover the amount owed on the Kiewit settlement. We conclude on de novo review that the district court did not err in awarding prejudgment interest.

V. CONCLUSION

The settlement agreement is clear and unambiguous and required payment to Kiewit based on the contractual formula once proceeds were obtained by Bacon from Ridgetop. The record is clear that $1.25 million was obtained from Ridgetop, and application of the contractual formula shows that $437,500 is due on the contract. This is not a subrogation action, and nothing about Liberty Mutual's subsequent assertion of an interest in the proceeds of the Ridgetop settlement affects the terms of the Kiewit settlement.

The amount due on the settlement agreement is liquidated because it can be readily determined, and there is no reasonable controversy as to RSUI and Liberty Mutual's right to enforce the contract. However, the district court erred in finding Harris and Harris Kuhn personally liable on the contract. We reverse that portion of the judgment but affirm in all other respects.

AFFIRMED IN PART, AND IN PART REVERSED.

WRIGHT, J., not participating.

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[21] See *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993).