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finding either that there was insufficient evidence to support the assault conviction or that an otherwise unjustified lesser-included offense instruction should have been given. We find no merit to McBride's assertions to the contrary.

V. CONCLUSION

We find no merit to McBride's assertions. The State adduced overwhelming and uncontroverted evidence that McBride assaulted Beckwith with a knife and inflicted bodily injuries. No lesser-included offense instruction was justified, counsel was not ineffective for failing to request an instruction, and the inconsistent jury verdicts do not demonstrate otherwise. The district court committed no abuse of discretion in denying McBride's motion for mistrial based on a statement volunteered by a witness, stricken from the record, and the subject of an admonishment to the jury. We affirm.

AFFIRMED.

STEVE SICKLER ET AL., APPELLANTS, V. ROBERT KIRBY, INDIVIDUALLY, AND CROKER, HUCK, KASHER, DEWITT, ANDERSON & GONDERINGER, L.L.C., A NEBRASKA LIMITED PARTNERSHIP, APPELLEES.

805 N.W.2d 675

Filed November 8, 2011. No. A-10-965.

1. **Courts: Judgments: Judicial Notice.** Where cases are interwoven and interdependent, and the controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
2. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Malpractice: Attorney and Client: Negligence: Proof: Proximate Cause: Damages.** In a legal malpractice case, there are three basic components that compose the plaintiff's burden of proof: (1) the attorney's employment, (2) the

attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client; these elements are the same general elements required in any other case based on negligence, i.e., duty, breach, proximate cause, and damages.

5. **Attorney and Client.** A lawyer's duty is to his or her client and does not extend to third parties absent some facts which establish a duty.
6. **Corporations.** The more closely held the corporation, the less separable the directors, officers, and owners are from the corporation.
7. **Attorney and Client: Corporations: Conflict of Interest.** A conflict of interest can be avoided if there is a clear understanding with the corporate owners that the attorney represents solely the corporation and not their individual interests.
8. **Malpractice: Attorney and Client.** Privity is not an absolute requirement for a legal malpractice claim.
9. **Attorney and Client.** A lawyer's duty to use reasonable care and skill in the discharge of his or her duties ordinarily does not extend to third parties, absent facts establishing a duty to them.
10. **Attorney and Client: Parties: Negligence: Liability.** Evaluation of an attorney's duty of care to a third party is founded upon balancing the following factors: (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession.
11. **Attorney and Client: Parties: Intent.** The starting point for analyzing an attorney's duty to a third party is determining whether the third party was a direct and intended beneficiary of the attorney's services.
12. **Negligence.** The determination of the existence of a duty and the identification of the applicable standard of care are questions of law, but whether there was a deviation from the standard of care, meaning that a party was negligent, is a question of fact.
13. **Negligence: Evidence.** In a negligence case, the fact finder must determine what conduct the standard of care requires under the circumstances as presented by the evidence, or as the fact finder determines the factual circumstances to be.
14. **Attorney and Client: Juries: Expert Witnesses.** To determine how an attorney should have acted in a given case, the jury will often need expert testimony describing what law was applicable to the client's situation.
15. ____: ____: ____. Expert testimony about the relevant law is often essential to assist the jury in determining what knowledge is commonly possessed by lawyers acting in similar circumstances and whether an attorney exercised common skill and diligence in ascertaining the legal options available to his or her client.
16. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not necessary to adjudicate the case and controversy before it.

Appeal from the District Court for Buffalo County: ALAN G. GLESS, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard J. Rensch and Sean P. Rensch, of Rensch & Rensch Law, for appellants.

William R. Johnson, of Lamson, Dugan & Murray, L.L.P., and Raymond E. Walden, of Walden Law Office, for appellees.

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

SIEVERS, Judge.

INTRODUCTION

This is a legal malpractice action in which the district court for Buffalo County granted summary judgment to the defendant law firm of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, L.L.C. (Croker Huck), and its member attorney Robert Kirby (collectively the defendants). In addition to claims that there were genuine issues of material fact for trial, we address issues generated by the fact that the defendants were engaged to represent only a closely held corporation, Baristas & Friends, Inc. (B&F), while the Kearney, Nebraska, law firm of Jacobsen, Orr, Nelson, Wright and Lindstrom, P.C. (Jacobsen Orr), represented the individuals owning and operating B&F, Steve Sickler (Steve) and Cathy Mettenbrink (Cathy). The litigation has its origins in the fact that attorney Jeffrey Orr of Jacobsen Orr drafted franchise disclosure statements that did not comply with applicable franchising law for use in selling franchises. We find that the summary judgment entered against B&F was error. We further conclude that Steve and Cathy were "third parties" to whom the defendants owed a duty of reasonable care. Finally, we conclude that what the standard of care was, whether it was breached, and what damages, if any, resulted are all genuine issues of material fact for trial with respect to B&F as well as Steve and Cathy.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, Steve and Cathy began operating a "European style" coffeehouse in Kearney named "Barista's Daily Grind." The success of the coffeehouse caused them in 2002 to explore the franchising of their specialty retail coffee

business, and they asked Orr to advise them on franchising laws and to prepare the necessary documents to sell franchises. Orr agreed to do so, although he had no expertise in, nor experience with, franchising that would qualify him to do this type of work.

B&F was formed to be the franchisor. Franchisees would do business under the name "Barista's Daily Grind Espresso to Go." Steve and Cathy formed W.E. Corporation to own the real estate and buildings used in Steve and Cathy's own retail coffee business and in their franchising business. They formed another corporation, Cup-O-Coa, Inc., to be the distribution arm for products used by the franchisees of B&F. All of the corporations formed by Steve and Cathy paid rent to W.E. Corporation for their buildings. In October 2002, Orr completed a draft of the franchise agreement, and in December, he drafted the disclosure statement—a crucial document, as will be explained below. From 2003 to 2006, B&F sold 22 franchises and collected over $800,000 from the sales.

The beginning of the events that ultimately led to the underlying lawsuit, in which the defendants are accused of legal malpractice, began unfolding in July 2004. At that time, a banker in Colorado requested from Steve B&F's "Uniform Franchise Offering Circular" (UFOC) on behalf of a prospective franchisee. Steve did not know what a UFOC was, and he referred the banker to Orr. Orr determined that the disclosure statement being used—the statement in its first version—was "'compliant and valid.'" *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 104, 759 N.W.2d 702, 705 (2009). Steve testified that Orr told him the UFOC was a requirement of federal law which B&F was "'probably going to have to get'" if it was "'going to be selling franchises out of state.'" *Id.*

[1] At this juncture, we note that a disciplinary proceeding was later instituted against Orr in which it was found that he had violated his oath of office and the attorney disciplinary rules requiring an attorney to competently represent a client. See *Orr, supra*. The Nebraska Supreme Court agreed with the referee's conclusion that Orr had negligently determined that he was competent to undertake this specialized franchising work for B&F and Steve and Cathy, and the court

imposed a public reprimand as a sanction. See *id*. Where cases are interwoven and interdependent, and the controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. *State ex rel. Pederson v. Howell*, 239 Neb. 51, 474 N.W.2d 22 (1991). Thus, some of our background derives from the Supreme Court's opinion in Orr's disciplinary proceeding.

In August 2004, Orr revised the franchise agreement and disclosure statement at Steve's request due to problems that B&F was having with a Des Moines, Iowa, franchisee whose attorney had sent a letter to Steve in February 2004 suggesting that B&F's disclosure statement delivered to the proposed Iowa franchisee did not comply with federal law. This resulted in Orr's production of the second disclosure statement—or "second edition," as it is referenced at times in the record. Dennis Turnbull in Colorado and Jeffrey Nesler in Iowa purchased franchises after receiving the second disclosure statement, as did others.

In October 2004, B&F filed suit with Jacobsen Orr as counsel in the district court for Buffalo County against its Colorado franchisee, Turnbull, seeking to rescind the franchise. Turnbull filed a counterclaim seeking damages and rescission due to the violations of the Federal Trade Commission (FTC) rules found at 16 C.F.R. § 436.3 et seq. (2001) dealing with the contents of franchise disclosure statements. Turnbull also claimed violations of Nebraska's Seller-Assisted Marketing Plan Act, Neb. Rev. Stat. §§ 59-1701 to 59-1762 (Reissue 2010). Although Orr remained primary counsel for B&F, he had the firm's associate, Bradley Holbrook, take over the handling of the Turnbull litigation. The ultimate outcome of that litigation was the entry of a judgment dated February 2, 2007, against B&F in the amount of $132,422.95, which included slightly over $49,000 in attorney fees awarded after the court found that the violations alleged in the counterclaim had occurred as a matter of law.

Returning to the Iowa problem, on April 25, 2005, franchisee Nesler's attorney sent a letter to Steve claiming Nesler's

entitlement to rescission, attorney fees, and other damages because of violations of the FTC rules and Iowa statutes relating to franchises, and warning that the owners of B&F, Steve and Cathy, could be personally liable for return of the franchise fee as well as other damages.

At this juncture, Steve, according to his affidavit, "demanded that Orr seek a second opinion regarding the legality of the franchising documents [he and Cathy] were using." Orr subsequently advised Steve and Cathy that his law firm, Jacobsen Orr, had contacted an Omaha, Nebraska, attorney for a second opinion about the documents in question—the second disclosure statement and the franchise agreement. The attorney that Orr contacted was Kirby of Croker Huck. Holbrook and Orr talked with Kirby, and then Holbrook wrote a confirming letter to Kirby about what he was to do—critique Orr's second-edition disclosure statement and the franchise agreement for compliance with Iowa and federal law. Holbrook provided copies of the documents to Kirby, along with a copy of the April 25, 2005, letter from Nesler's counsel setting forth the basis of his assertion that B&F's disclosure statement was insufficient and in violation of Iowa and federal law. Because of its importance to the instant lawsuit, we quote the following portions of the letter from Holbrook to Kirby:

> As mentioned, we would like your [sic] and your firm to do two things. First, we would like a legal opinion as to the compliance of the disclosure statement provided to . . . Nesler with the Iowa code as cited in [Nesler's attorney's] letter. Please also feel free to broaden the scope to any other area of the Iowa code you feel would be pertinent to the sale of this franchise and the procurement of the disclosure statement to . . . Nesler.
>
> Secondly, we would ask that you also review the disclosure statement for its compliance with the [FTC] rule 16 C.F.R. §436. In addition to that opinion, please feel free to include any failures to comply with the [FTC] rule and the level of material non-compliance. What we are interested in, in regards to the [FTC] rule, is if, in fact, the disclosure statement fails to meet the [FTC] rule, whether that would be deemed a material or non-material

> non-compliance and what the effect of the non-compliance would be on the transaction.
>
> As regards to [sic] the legal opinion on the [FTC] rule, I would ask that you keep that billing separate from the legal opinion on the disclosure statement and the Iowa code and related section[s] of the Iowa code that touch on the sale of franchises such as in the present case. Please send both billings directly to me at my office.

Moreover, Holbrook specified in his letter to Kirby that all communication regarding the review was to be via Jacobsen Orr. Although Steve had requested this review of Orr's documents, neither he nor Cathy selected Croker Huck and Kirby, and they never had any direct contact with Croker Huck or Kirby. And, while Holbrook maintains that he provided a copy of Kirby's critique of the documents to Steve, Steve's affidavit says that he did not ever see Kirby's opinion. Kirby and another lawyer at his firm completed the requested review and wrote to Holbrook on June 21, 2005, advising that B&F's franchise documents had numerous defects—and that even if not independently material, such taken together would be material violations. Kirby enclosed a 13-page memorandum from his associate detailing the defects. Moreover, Kirby pointed out that under Iowa law, a franchisor has the option of complying with the FTC rules for disclosure via a UFOC or an Iowa disclosure form provided for in the Iowa statutes, but that B&F's disclosure statement satisfied neither Iowa nor federal law. Kirby stated that under the FTC rules, there is no private right of action, as such is brought by the FTC, but there is a private right of action under the Iowa statutes. This opinion arrived about a week after Nesler filed suit against B&F, and Steve and Cathy personally, in the Polk County, Iowa, district court. Holbrook then engaged Kirby to defend only the corporation, B&F, and Holbrook assumed the responsibility for defending Steve and Cathy.

On August 10, 2005, Holbrook wrote a letter to Kirby containing the suggested strategy of delaying the litigation and working toward a settlement with Nesler whereby he would be replaced by another franchisee. Nonetheless, in the letter, Holbrook tells Kirby, "Frankly, feel free to handle it any way

you wish." While Holbrook testified that Steve told him he had someone lined up to step into the Nesler franchise, Steve says that he wanted to find someone to do that, but had not. Kirby testified that he did not ever know, discover, or make inquiry about who authored the documents that were being challenged in the lawsuit in which he was defending B&F "[b]ecause it wasn't important in connection with the defense of the Iowa litigation." Thus, Kirby did not ask Holbrook, or B&F's officers or directors, who had drafted the documents that he knew to be defective and which would subject his client, B&F, to a variety of adverse consequences. The evidence here, as well as the Supreme Court's opinion, makes it uncontroverted that Orr was the drafter of the first and second disclosure statements. See *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009). Additionally, the evidence is that Orr used Kirby's critique to attempt to draft a "third disclosure statement" that complied with applicable law—although Kirby was not told that this was being done. B&F sold seven more franchises using the third iteration of Orr's disclosure statement.

In November 2005, B&F was notified that it was under investigation by the FTC, at which point Holbrook contacted an attorney specializing in franchise law. That attorney reviewed the franchise documents, including the third disclosure statement, and found that even the third edition did not comply with FTC requirements, describing the deficiencies as "'major.'" *Orr*, 277 Neb. at 106, 759 N.W.2d at 706. It was not until after this occurrence that Orr's law firm withdrew from the representation of Steve and Cathy. By April 2006, the franchising of B&F had been shut down as the adverse consequences of the defective franchising documents continued to pile up. These consequences ultimately included an action against B&F by the U.S. Department of Justice on behalf of the FTC that resulted in injunctive relief plus a "suspended" civil penalty judgment of $242,000. An enforcement action by the Nebraska Department of Banking for failure to secure the required exemption provided for under the Seller-Assisted Marketing Plan Act, §§ 59-1701 to 59-1762, was also filed.

Returning to the Iowa lawsuit by Nesler, it was settled with the execution by Nesler of a settlement agreement and mutual release on December 21, 2005. This occurred after the execution by Steve and Cathy on December 13 of their personal confession of judgment in the amount of $45,000, which was not to be filed if paid with interest by February 24, 2006. Kirby's defense of B&F in the Nesler lawsuit turned out to be to simply follow Holbrook's instructions. Holbrook's affidavit recounts that he informed Kirby not to perform any discovery, to get an extension of time to answer the suit, and to negotiate a settlement. Holbrook further explained in his affidavit that only he communicated with Steve and Cathy about the Nesler litigation, including about Nesler's demand that any settlement include Steve and Cathy's personal confession of judgment. In fact, the evidence is that Kirby never communicated directly with Steve or Cathy about the Nesler litigation, and of course, the only way to communicate directly with the closely held corporate client, B&F, was via Steve and Cathy. The lawsuit in which Kirby was defending alleged that Steve and Cathy were "principal executive officers or directors" of B&F.

Holbrook testified via his affidavit that on June 28, 2005, he sent Steve a letter discussing a memorandum setting forth Kirby's opinions about the adequacy of the franchise disclosures that had been made to Nesler. Kirby's billings for the Croker Huck law firm reflected that the client was "Barista's and Friends, Inc.," but the bills were sent to Holbrook for the work done in reviewing the franchising documents as well as for the defense of the Nesler lawsuit, per Holbrook's instructions to Kirby.

On October 17, 2007, the U.S. Department of Justice filed suit against B&F as well as against Steve and Cathy, individually and as corporate officers, seeking "Civil Penalties, Permanent Injunction and other Equitable Relief" in the U.S. District Court for the District of Nebraska. Summarized, the suit alleged that the defendants had sold coffeeshop franchises since 2003 under the trade name "Barista's Daily Grind" in violation of the "Franchise Rule." The alleged violations were generally that such sales were made without the disclosures required prior to sale of a franchise by the UFOC,

which the FTC had authorized for franchisors to comply with the "Franchise Rule." This litigation was resolved by a "Stipulated Judgment and Order for Permanent Injunction" entered October 23, 2007, which, among many other conditions and prohibitions, included a suspended civil penalty judgment of $242,000.

The record before us contains evidence and testimony offered by the defendants from qualified experts asserting that the defendants' representation of B&F comported fully with the standard of care and, moreover, that the defendants owed no duty to Steve and Cathy. But, because the function of the trial court and, in turn, ours, on a motion for summary judgment, is not to decide the issue of fact, but, rather, to determine whether a genuine issue of material fact exists for trial, we do not detail the expert testimony that favors the defendants. Rather, we focus on the expert witness evidence offered by the plaintiffs in opposition to the defendants' motion for summary judgment and in support of the plaintiffs' own motion for summary judgment.

Gregory Garland, an Omaha trial attorney, provided expert testimony for the plaintiffs, although he conceded he was not an expert in the area of franchising. Thus, he did not offer any opinions as to the sufficiency of the franchise documents and disclosure statements. Garland set forth a virtual smorgasbord of negligence acts or omissions by Kirby with respect to Kirby's duties as the litigator for B&F. Garland's opinions are from the standpoint of an experienced litigator, and they incorporate a discussion of the relevant ethical and professional standards of conduct. Any analysis in this case must incorporate the backdrop that there obviously was negligence on the part of the drafter of the franchise documents which were given to Nesler by B&F and that Kirby, by virtue of his critique thereof, knew this core fact.

We have boiled down Garland's key opinions with respect to the ways in which Kirby was negligent to the following:

- In failing to advise the clients to seek the assistance of an experienced franchising attorney to rewrite the disclosure statement, and advise that a litigator with experience in franchising be secured to defend B&F in the Nesler litigation.

- In failing to advise the clients to immediately stop all franchising activity.
- In failing to determine who drafted the disclosure statement at issue in the Nesler litigation.
- In failing to advise the clients to seek the advice of an experienced legal malpractice attorney, given the conflict of interest the lawyers who drafted the document had in continuing to represent the clients—if Kirby had discovered, as he should have, that Orr was the drafter.
- In failing to advise the clients, if Kirby knew that Orr was the drafter of the documents, to bring Orr into the Nesler litigation as a third party; or, if he did not know that Orr was the drafter of the documents, in failing to discern who the drafter of the documents was and then advise the clients to bring that person or entity into the Nesler case as a third party.

Garland further opined that even if Kirby's only attorney-client relationship was with B&F, Kirby was nonetheless dutybound to communicate to Steve and Cathy, who were the officers and directors of his client, B&F, that their personal lawyers—if they were the drafters of the documents—had a conflict of interest that prevented them from advising Steve and Cathy about the Nesler litigation or otherwise being involved in that litigation.

DISTRICT COURT DECISION

The decision of the district court on the motion of Croker Huck and Kirby is very brief. It finds that there are "no genuine issues as to any material fact or as to the ultimate inferences that may be drawn from those facts" and that "all legal questions presented, both as to duty and as to proximate cause, must be decided in favor of [the] defendants as a matter of law." No rationale whatsoever for these conclusions is provided. The district court simply sustained the defendants' motion for summary judgment and denied the plaintiffs' motion for summary judgment. The plaintiffs appeal this decision.

ASSIGNMENTS OF ERROR

On appeal, the defendants set forth three assignments of error, which we restate: The district court erred in (1) granting

summary judgment and in deciding the issues of duty and proximate cause as a matter of law; (2) excluding from evidence exhibits 69, 70, 85 through 87, and 92; and (3) denying the defendants' motion seeking summary judgment that the defendants were negligent as a matter of law.

STANDARD OF REVIEW

[2,3] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose 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. *Lynch v. State Farm Mut. Auto. Ins. Co.*, 275 Neb. 136, 745 N.W.2d 291 (2008). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANAYLSIS

[4] In a legal malpractice case, there are three basic components that compose the plaintiff's burden of proof: (1) the attorney's employment, (2) the attorney's neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client. See *Rodriguez v. Nielsen*, 264 Neb. 558, 650 N.W.2d 237 (2002). These elements are the same general elements required in any other case based on negligence, i.e., duty, breach, proximate cause, and damages. See *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987).

Did District Court Err in Granting Summary Judgment in Favor of the Defendants on Claims of B&F?

Jacobsen Orr, the law firm that wrote the second disclosure statement that was provided to Nesler and others, engaged Kirby to perform an independent review of the disclosure statement and franchise agreement for compliance with Iowa law and with the relevant FTC rules. This occurred after Nesler's attorney wrote to Steve asserting that the disclosure statement did not comply with the applicable law. As a result, Steve

wrote an e-mail dated May 3, 2005, directing Orr to contact a lawyer to do an independent review of the documents. The defendants' critique of June 21 revealed that the disclosure statement was substantially deficient in numerous respects under both Iowa and federal law—just as Nesler, the Iowa franchisee, had claimed.

Nesler had filed suit against B&F, as well as against Steve and Cathy, approximately 1 week prior to the date of Kirby's critique of the franchise documents. Kirby's letter accompanying the critique noted the pendency of that action, as well as the fact that Iowa law allowed recovery of the franchise fee, damages, and attorney fees and costs for violation of Iowa's franchising statutes. Holbrook's affidavit in the summary judgment proceedings expressly states that he "requested that Kirby communicate with only Jacobsen Orr with respect to both the critique of the second Disclosure Statement and the representation of [B&F] in the Nesler litigation." Kirby followed that directive—a procedure that the plaintiffs' expert, Garland, opines did not meet the standard of care. The defendants concede that B&F was Kirby's client in the Nesler lawsuit and that "Croker Huck owed the full array of duties implied by the circumstances of defending a corporation against particular claims in a lawsuit." Brief for appellees at 20. Thus, the defendants were without question B&F's lawyers for the Iowa lawsuit.

Therefore, when viewing the evidence in the light most favorable to the plaintiffs, there was concededly an employment of the defendants to defend B&F. There is ample evidence in the record of the defendants' negligence in their representation of B&F, and there is evidence that such damaged B&F. What damages were proximately caused by the defendants' negligence, as distinguished from damages caused solely by the negligence of Jacobsen Orr, is a question of fact. Although we discuss damages in more detail later, suffice it to say that at this juncture, there is evidence that Kirby's negligence was part of the cascade of events that led to B&F's ceasing what had started out as a viable franchising business—at substantial personal financial damage to Steve and Cathy. Consequently, we find that there clearly are genuine

issues of material fact regarding damages caused by the defendants. Thus, summary judgment could not be granted against B&F.

For these reasons, we find that the district court's decision granting summary judgment on B&F's claim of legal malpractice against the defendants was error. As such, we reverse that portion of the district court's decision and remand B&F's cause against the defendants for further proceedings. We now turn to perhaps the more difficult aspect of the appeal: the summary judgment granted to the defendants on Steve and Cathy's claim.

Did Trial Court Properly Grant Summary Judgment to the Defendants With Respect to Steve and Cathy's Personal Claims?

After our review of the record and the parties' briefing, we believe there are two possible rationales that the district court might have used to conclude that, despite the evidence from the plaintiffs' expert detailing how the defendants breached the standard of care with respect to Steve and Cathy, the defendants were, nonetheless, entitled to summary judgment on such claims. The first is that the standard of care allowed Kirby to restrict his communication about his critique of the disclosure statements and the defense of the Nesler lawsuit to Jacobsen Orr. Put another way, the district court might have determined that the standard of care did not require Kirby to communicate with and advise Steve and Cathy about his critique and the defense of B&F in the Nesler lawsuit. Second, the court could have found that there was no evidence adduced that the defendants' negligence as outlined by Garland caused damage to any of the plaintiffs. We will analyze the merit of each of those rationales in turn.

What Duty, if Any, Did the Defendants Owe to Steve and Cathy?

Perhaps the central failure assigned to Kirby by Garland's testimony is that despite knowing that the B&F disclosure statement given to Nesler did not comply with the law and exposed B&F, as well as Steve and Cathy, to a number of adverse consequences, Kirby failed first to determine who

drafted the disclosure statement and then to advise B&F—which, as a practical matter, would mean advising Steve and Cathy, given the closely held corporation status of B&F—that the drafter was ultimately liable and should be made a third-party defendant in the Nesler lawsuit. Iowa has a third-party procedure much like Nebraska's, which allows a defendant to cross-petition into the case a nonparty who may be responsible for all or part of the plaintiff's damages. See Iowa Code Ann. § 1.246(1) (West 2002).

Also, Garland opines that because of Jacobsen Orr's production of the defective disclosure statements, that law firm had an obvious conflict of interest that prevented it from representing Steve and Cathy in the Nesler lawsuit. It also prohibited Jacobsen Orr from continuing to provide advice and counsel to Steve and Cathy with respect to the consequences of its own negligence. Kirby never advised B&F and Steve and Cathy of Jacobsen Orr's conflict of interest, which should have become obvious the minute Kirby rendered his unchallenged opinion that the franchising documents were defective and exposed the franchisor to claims for rescission, return of franchise fees, damages, and attorney fees. We note that there is no evidence that Jacobsen Orr advised Steve and Cathy that they could pursue a third-party claim against Jacobsen Orr.

In contrast to Garland's opinions, the defendants have produced evidence from experts that the failure to do these things was not any part of Kirby's duty to Steve and Cathy, as they were not his clients; only B&F was. However, because of the nature of summary judgment, we focus only on the evidence produced by the plaintiffs in resistance to the defendants' motion for summary judgment.

The plaintiffs' evidence of Kirby's negligence fundamentally involves Kirby's failure to respond to, and communicate about, the various implications of the undisputed fact that the disclosure statements were defective and exposed B&F to serious liabilities, which would negatively impact Steve and Cathy, given that B&F was their closely held corporation. The defendants' basic response arises from the fact that Jacobsen Orr, as opposed to Steve and Cathy, engaged Kirby and directed him to communicate only with Jacobsen Orr. Thus, the defendants

argue, "'[A]n attorney receiving a case from another attorney is entitled to place some reliance upon that attorney's investigation.'" Brief for appellees at 21, quoting *Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439 (5th Cir. 1992). This same proposition of law is also quoted from *Jeansonne v. Bosworth*, 601 So. 2d 739 (La. App. 1992), in the defendants' brief. The fundamental problem with this proposition is that Jacobsen Orr engaged Kirby on behalf of B&F to independently determine whether the disclosure statements complied with Iowa and federal law and to defend B&F in a lawsuit premised on the defective documents. Therefore, the express purpose of Kirby's document review was the exact opposite of "relying" on Jacobsen Orr's work.

As stated above, the defendants cite *Jeansonne, supra*, in their brief; however, they twist its proposition that "attorney B" brought into a case by "attorney A" can rely on attorney A's investigation. The Louisiana Court of Appeals made that statement in the context of an attorney's failure to assert a product liability cause of action where said attorney was brought into the case the last few days before the statute of limitations on that claim ran. Attorney A and his clients did not have the allegedly defective product—a broken piece of rope—and the court found that attorney B could rely on the fact that attorney A and his clients had searched for, but could not find, the rope. *Jeansonne*, if at all analogous to this case, is hardly helpful to the defendants, because here, there is evidence that if Kirby did not know that Jacobsen Orr was the drafter of the defective documents, he should have, and should have advised his clients about the implications of that fact, including bringing them into the Nesler suit as third parties. Kirby was bound generally to comply with the applicable standard of care, which, according to Garland, would be to identify the documents' drafter and then advise Steve and Cathy of their remedy to bring the drafter into the Nesler lawsuit as a third party.

The other case cited and relied upon by the defendants for their claim that Kirby did not have to "second guess" Jacobsen Orr is *Smith, supra*, but it is not on point. This case involved the attempted imposition of sanctions under Fed. R. Civ. P. 11,

which does not involve the attorney-client relationship or how an attorney's duty to the client is impacted by the fact attorney A procures the involvement of attorney B in the case. However, we cannot help but point out that after citing these cases, the defendants assert that such authority "supports [the defendants' expert's] opinions and repudiates . . . Garland's." Brief for appellees at 21. This is, at the very least, a tacit concession that an issue of fact regarding the standard of care exists because of differing expert opinions.

Next, the defendants cite to a series of cases, nine in number, which they assert address the applicable law regarding the duty of "secondary counsel." *Id.* at 22. Initially, we must take issue with the designation of the defendants as "secondary counsel," given that they indisputably were solely responsible for the defense of B&F in the Nesler case. Admittedly, Holbrook wanted to avoid having Kirby communicate with Steve and Cathy, the corporation's owners, officers, and directors—but that hardly makes them "secondary counsel." Rather, Holbrook's directions regarding communication that Kirby assiduously followed, when viewed in the light most favorable to the plaintiffs, lends support to Steve's claim advanced in his affidavit that Kirby acted in concert with Jacobsen Orr to "cover up" the latter's negligence.

Like the defendants' counsel, we do not dissect each of the nine cited cases, but we find it useful to discuss the first cited case, *Macawber Engineering, Inc. v. Robson & Miller*, 47 F.3d 253 (8th Cir. 1995), because it seems emblematic of what "secondary counsel" or "local counsel" really is and does. Macawber Engineering, Inc. (Macawber), appealed a district court order granting summary judgment in favor of Abdo & Abdo, P.A. (Abdo), and Steven R. Hedges, a member of that law firm. Macawber contended that Abdo and Hedges committed legal malpractice while acting as Macawber's local defense counsel because they failed to respond to certain requests for admissions which resulted in a $650,000 judgment against Macawber. The *Macawber Engineering, Inc.* court said that because there was no evidence that local counsel had a duty to respond to the requests for admissions, the summary judgment was affirmed.

The *Macawber Engineering, Inc.* court outlined the basic elements of proof in a legal malpractice claim, no different from those applicable here. Then the court turned to the matter of the attorney-client relationship and corresponding duties. The *Macawber Engineering, Inc.* court said:

> Where, as here, the alleged negligence or breach involves a failure to act, there can be no negligence or breach absent a duty to act. An attorney's duty to act arises from the attorney-client relationship. Therefore, the extent of this duty necessarily depends on the scope of the attorney-client relationship. *See* Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 8.2 (1989). In other words, an attorney's duty is defined and limited by the scope of the overall attorney-client relationship.

47 F.3d at 256. The *Macawber Engineering, Inc.* court then found that the terms of the representation agreement and the nature of the legal advice sought and received define the scope of the relationship. Using this basic rule, the Eighth Circuit reasoned:

> In this case, the undisputed evidence indicates that the scope of the attorney-client relationship between Macawber and Abdo was limited. Macawber's retention letter to Hedges provides, "[W]e confirm our appointment of your firm as our local counsel in support of litigating attorneys, Robson & Miller, in the above stated case." . . . In his deposition, Macawber's CEO testified that he relied on Robson & Miller to handle the Red Rock litigation and to direct the activities of local counsel. . . . By affidavit, Morton Robson and Kenneth Miller testified that Abdo's role was limited and that Abdo's attorneys did everything asked of them.

Id. at 256-57. The court then observed that it was undisputed that Macawber relied on the Robson & Miller law firm to direct Abdo's activities in the "Red Rock litigation." *Id.* at 256. The resulting attorney-client relationship between Macawber and Abdo was limited in scope and did not encompass a duty to monitor the discovery process and ensure responses to the requests for admissions. The unanswered requests for admissions were served on Robson & Miller, not Hedges, and the

evidence was that Hedges had no duty to either answer the requests or insure that Macawber's litigators did so in their limited capacity as local counsel. Thus, the summary judgment in favor of Abdo and Hedges was affirmed.

[5] Here, the question presented by Garland's opinions is whether Kirby was required by the standard of care to bypass the limited line of communication set forth by Jacobsen Orr's "terms of engagement" and contact Steve and Cathy directly. It is generally accepted that a lawyer who represents a business entity owes his or her allegiance to the entity, not to an individual shareholder. See, e.g., *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997), citing Canon 5, EC 5-18, of the Code of Professional Responsibility. A lawyer's duty is to his or her client and does not extend to third parties absent some facts which establish a duty. *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995); *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994).

We can find only one Nebraska case discussing what we have here, a lawyer representing a very closely held corporation. In *Detter v. Schreiber*, 259 Neb. 381, 610 N.W.2d 13 (2000), it was held that an attorney who had done legal work for a closely held corporation regarding a lease and shareholder agreement had a conflict of interest which prevented him from representing a defendant-shareholder in an action against the other shareholder. Obviously, the facts of *Detter* are distinguishable from our situation, but the case is still instructive.

[6] The *Detter* opinion cites *In Re Brownstein*, 288 Or. 83, 87, 602 P.2d 655, 656 (1979), in which the Oregon court said that for purposes of potential conflicts of interest involving small, closely held corporations, the rights of the individual stockholders who controlled the corporation and those of the corporation itself were "virtually identical and inseparable." *In Re Brownstein*, at its core, is simply practical recognition of the fact that a corporation can act only through people—its directors, officers, and shareholders. In the instance of closely held corporations, it seems clear that the financial well-being of the directors, officers, and owners of the corporation is usually inseparable from the interests and fate of the corporation.

And, we suggest that the more closely held the corporation, the less separable the directors, officers, and owners are from the corporation. Here, there is substantial evidence that the interests and fates of Steve and Cathy are indistinguishable from those of B&F. This is of course the implicit, if not explicit, premise of Garland's opinions that Kirby was required by the standard of care to communicate what he knew, or should have known, to Steve and Cathy about the fact that Jacobsen Orr was the drafter of the defective documents and about the fact that Jacobsen Orr could be brought into the Nesler lawsuit as a responsible third party.

[7] The *In Re Brownstein* court reasoned that the conflict of interest could be avoided if there was "a clear understanding with the corporate owners that the attorney represent[ed] solely the corporation and not their individual interests." 288 Or. at 87, 602 P.2d at 657. The same would be true here, except that there is no evidence showing a clear understanding on the part of Steve and Cathy that Kirby's representation was solely of B&F to the exclusion of Steve and Cathy's personal interests as the directors, officers, and owners of B&F. In fact, the evidence is to the contrary. Steve asserts in his affidavit that he and Cathy "were never told of an agreement between Kirby and Holbrook that all communication had to go through Holbrook" and that he and Cathy "would not [have] agree[d] to that arrangement." He also asserts in his affidavit that he and Cathy never received Kirby's critique and were never told of the threat to their franchise business posed by the FTC for noncompliance with the disclosure statement requirements. Consequently, we return to the question of Kirby's duty to Steve and Cathy individually. In doing so, we assume the absence of an attorney-client relationship between Kirby as counsel and Steve and Cathy as individuals.

The Nebraska Supreme Court undertook an exhaustive analysis of when an attorney has a duty to third parties with whom there is no attorney-client relationship in *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010). The factual background of *Perez* was that attorney Sandra Stern was negligent in letting the underlying wrongful death action be dismissed for failure of service, causing it to be time barred. Three years later, a

legal malpractice claim was filed against Stern on behalf of the decedent's children and their mother, but such was dismissed by the district court because it too was time barred by the statute of limitations. On appeal of that dismissal, the Supreme Court framed the issue as

> whether Stern owed an independent duty to the children, as [the decedent's] statutory beneficiaries, to exercise reasonable care in prosecuting the underlying wrongful death claim, permitting the children to bring individual malpractice claims for which the statute of limitations had been tolled because of their minority. For the reasons that follow, we conclude that Stern owed a duty to the children and reverse the court's judgment against their claims.

Id. at 188, 777 N.W.2d at 548.

[8-11] The *Perez* court set forth the children's burden of proof in a legal malpractice case, the elements of which are the same basic elements applicable in the present case: to prove (1) Stern's employment, (2) that Stern neglected a reasonable duty to the children, and (3) that such negligence was the proximate cause of damages. The court found that the first and third elements were present and thus focused on duty, even though there was no attorney-client relationship between the children and Stern. The court then said it has never been held that "privity" is an absolute requirement for a legal malpractice claim; rather, "we have said that a lawyer's duty to use reasonable care and skill in the discharge of his or her duties *ordinarily* does not extend to third parties, *absent facts establishing a duty to them*." *Id.* at 192, 777 N.W.2d at 550 (emphasis in original). The court then for the first time in Nebraska case law set forth the specific standards to guide the determination of whether such a duty to a third party exists, and we quote:

> The substantial majority of courts to have considered that question have adopted a common set of cohesive principles for evaluating an attorney's duty of care to a third party, founded upon balancing the following factors: (1) the extent to which the transaction was intended to affect the third party, (2) the foreseeability of harm, (3) the degree of certainty that the third party suffered

> injury, (4) the closeness of the connection between the attorney's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession. And courts have repeatedly emphasized that the starting point for analyzing an attorney's duty to a third party is determining whether the third party was a direct and intended beneficiary of the attorney's services.

Perez v. Stern, 279 Neb. 187, 192-93, 777 N.W.2d 545, 550-51 (2010).

The *Perez* court explicitly adopted the foregoing as the appropriate analytical framework for determining whether counsel owes a duty to a third party. We note that this approach has been referenced as the "California formulation." See 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 7:8 at 792 (2011). Mallen and Smith further state, "The modern trend in the United States is to recognize the existence of a duty beyond the confines of those in privity to the attorney-client contract. Whatever the legal theory, however, there must be a duty of care owed by the attorney to the plaintiff." *Id.* at 791.

The *Perez* court wrapped up its discussion by noting that the principles we have detailed above provide guidance to determine whether the facts establish a duty to the third party and to evaluate the scope of that duty. The court then found that "the facts establish[ed] an independent legal duty from Stern to [the decedent's] statutory beneficiaries[, the third parties]." 279 Neb. at 192, 777 N.W.2d at 550. The *Perez* court reasoned:

> Under [Nebraska's wrongful death statutes], the only possible purpose of an attorney-client agreement to pursue claims for wrongful death is to benefit those persons specifically designated as statutory beneficiaries. The very nature of a wrongful death action is such that a term is implied, in every agreement between an attorney and a personal representative, that the agreement is formed with the intent to benefit the statutory beneficiaries of the action.

279 Neb. at 197-98, 777 N.W.2d at 554.

[12-15] Furthermore, we recall that the determination of the existence of a duty and the identification of the applicable standard of care are questions of law, but whether there was a deviation from the standard of care, meaning that a party was negligent, is a question of fact. See *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009). The fact finder must determine what conduct the standard of care requires under the circumstances as presented by the evidence, or as the fact finder determines the factual circumstances to be. *Id*. How the fact finder determines whether the attorney's conduct met the standard of care was discussed in *Bellino v. McGrath North*, 274 Neb. 130, 147-48, 738 N.W.2d 434, 448 (2007) (citations omitted):

> To determine how the attorney should have acted in a given case, the jury will often need expert testimony describing what law was applicable to the client's situation. A "'"jury cannot rationally apply a general statement of the standard of care unless it is aware"' of what the common attorney would have done in similar circumstances." . . . Testimony about the relevant law is often essential to assist the jury in determining what knowledge is commonly possessed by lawyers acting in similar circumstances and whether the attorney exercised common skill and diligence in ascertaining the legal options available to his or her client. Attorneys represent their clients in legal matters; thus, in an action for professional negligence, the law is ingrained in the canvas upon which the picture of the attorney-client relationship is painted for the jury.

Applying the factors from *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010), to the present case, we begin with the extent to which the transaction, i.e., the defense of B&F, was intended to affect the third parties. Obviously, in the case of this closely held corporation, whatever affected the corporation affected Steve and Cathy in a direct and substantial way. Second, the foreseeability of harm clearly weighs in favor of finding a duty to the third parties for the same reasons just articulated. Third, the degree of certainty that the third parties suffered injury likewise favors finding a duty to Steve and

Cathy, as the Nesler suit was the beginning of events which sounded the financial death knell for B&F and resulted in the destruction of Steve and Cathy's personal financial position given that other franchisees who also received the defective disclosure statements would be able to assert the same remedies as Nesler. The fourth consideration from *Perez*, the closeness of the connection between the attorney's conduct and the injury suffered, is apparent given Kirby's failure to advise B&F, which could be done only via Steve and Cathy, that they should not continue to be represented or advised by the lawyers who drafted the defective franchising documents because of those lawyers' obvious conflict of interest. Fifth, we assess the policy of preventing future harm. In this regard, finding that a duty existed as to the third parties may prevent future harm if extremely closely held corporations are viewed, from the corporation's counsel's standpoint, as inseparable from the small number of people who actually stand behind the corporation, because they are the people who stand to lose the most from negligent representation of the corporate entity. The sixth and final consideration under *Perez* is whether an undue burden is imposed on the profession. We find that it is not, because attorneys should have no trouble appreciating that (1) doing legal work for an extremely closely held corporation more than likely will substantially impact the few people behind the corporation and (2) generally, while people form such corporations for protection from personal liability, the fact of the matter is that their personal assets will typically be pledged and at risk—as is true here; lawyers can protect themselves and their clients' interests by express agreements as to the scope of the representation agreed to by the client.

Finally, we recall what the court in *Perez v. Stern*, 279 Neb. 187, 193, 777 N.W.2d 545, 551 (2010), recognized as the overarching consideration: "[T]he starting point for analyzing an attorney's duty to a third party is determining whether the third party was a direct and intended beneficiary of the attorney's services." In *Perez*, the court recognized that the purpose of bringing the wrongful death action was to benefit the decedent's statutory beneficiaries, and thus, even though

Stern's client was the personal representative, the decedent's children were found to be third parties to whom counsel owed a duty. Here, given the closely held nature of B&F, protection via legal representation of B&F is, for all intents and purposes, protection of Steve and Cathy; therefore, they would obviously be intended beneficiaries of Kirby's representation.

Therefore, in conclusion, while Steve and Cathy may not have a direct attorney-client relationship with the defendants, they were, as a matter of law, third parties to whom the defendants owed the duty of exercising such skill, diligence, and knowledge as that commonly possessed by attorneys acting in similar circumstances. See, *Perez, supra*; *Baker v. Fabian, Thielen & Thielen*, 254 Neb. 697, 578 N.W.2d 446 (1998). Although this general standard is established by law, the questions of what an attorney's specific conduct should be in a particular case and whether an attorney's conduct falls below that specific standard are questions of fact for the jury. See, *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009); *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991). The fact finder must determine what conduct the standard of care requires under the circumstances as presented by the evidence, or as the fact finder determines the factual circumstances to be. *Id*. How the fact finder determines whether the attorney's conduct met the standard of care was discussed in *Bellino v. McGrath North*, 274 Neb. 130, 147-48, 738 N.W.2d 434, 448 (2007) (citations omitted):

> To determine how the attorney should have acted in a given case, the jury will often need expert testimony describing what law was applicable to the client's situation. A "'"jury cannot rationally apply a general statement of the standard of care unless it is aware"' of what the common attorney would have done in similar circumstances." . . . Testimony about the relevant law is often essential to assist the jury in determining what knowledge is commonly possessed by lawyers acting in similar circumstances and whether the attorney exercised common skill and diligence in ascertaining the legal options available to his or her client. Attorneys represent their clients

> in legal matters; thus, in an action for professional negligence, the law is ingrained in the canvas upon which the picture of the attorney-client relationship is painted for the jury.

Thus, given the dispute in the evidence as to whether the representation the defendants provided to B&F—which directly impacted Steve and Cathy, the third parties—met the standard of care, there is clearly a genuine issue of material fact for trial. Therefore, the district court erred in granting summary judgment to the defendants on the claims of legal malpractice asserted personally by Steve and Cathy.

Evidence of Damage From Negligence of the Defendants.

Garland opined that based on the testimony of the franchise attorney contacted by Holbrook—which attorney, we note, ultimately replaced Jacobsen Orr and began representing B&F and Steve and Cathy—fines could be levied at $11,000 by the FTC per disclosure statement violation. Garland's deposition testimony was that he had counted 42 violations for a total of $462,000 in potential fines; he said that such fines would clearly not do anything "positive [for] the business" and that he thought that if Steve and Cathy faced such fines, they "would have seen [the business,] if not implode, be crippled to the point of maybe no return." As it turned out, both the FTC and the Nebraska Department of Banking took action against B&F because of the defective disclosure statements, which effectively meant the death of B&F.

The record, when viewed most favorably to B&F and Steve and Cathy, shows that a cascading series of events, all related to the defective franchising documents, combined to ruin what had started as a successful franchising business. These events conspired to expose B&F, as well as Steve and Cathy, to a variety of adverse legal actions, including repayment of franchise fees, attorney fees, and damages, as well as their own increased legal costs. Actions were instituted by Nesler, by Turnbull via the counterclaim, by the FTC, and by the Nebraska Department of Banking. These legal proceedings, including the fact that the Colorado franchisee, Turnbull, had

obtained a judgment in excess of $130,000 against B&F for franchise disclosure statement violations, would have to be part of any future compliant disclosure statement if B&F were to try to continue its franchising business. As Garland suggested, such could hardly have a positive effect on B&F's future prospects.

And, there is evidence in the record that at least some franchisees would have been willing to "exchange" their defective documents for compliant documents so that they could continue in business. Doing so would require compliant disclosure statements, which B&F never produced, at least while represented by Jacobsen Orr. Moreover, part of B&F's projected revenue stream would have come from the goods and services the franchisees would acquire from B&F, again providing some evidence of proximately caused damages. The defective documents exposed the plaintiffs to the requirement that they offer refunds of all franchise fees paid to B&F when each franchisee had been given the defective disclosure statements prior to the purchase of a franchise. Steve's affidavit recites that seven franchises were sold using the third-edition disclosure statement Orr drafted using Kirby's critique, but the evidence is that the third edition was not compliant with applicable law either. Additionally, there is evidence that the confession of judgment in the Nesler litigation destroyed Steve and Cathy's ability to secure additional bank financing because Nesler began attachment proceedings in April 2006, and such financing was needed to keep B&F operating.

In conclusion, there is evidence of a wide variety of damages sustained by B&F, as well as by Steve and Cathy personally. While some of the damages might be solely the consequence of Jacobsen Orr's negligence, there is evidence that some of those damages could have been avoided or mitigated by Kirby's adherence to the standard of care, as articulated by Garland. Although the defendants' experts express a differing view of the standard of care, that simply means that there were genuine issues of material fact that could not be resolved by summary judgment. Consequently, we find that the trial court erred in granting summary judgment to the defendants on Steve and Cathy's claims.

Was Summary Judgment Properly Entered as to Other Named Plaintiffs?

Barista's Company, Inc., a Nebraska corporation, was also named as a plaintiff, as were W.E. Corporation and Cup-O-Coa, whose functions we described earlier. There is no evidence that these three entities had any attorney-client relationship with the defendants or that they would be third parties under the authority we have earlier discussed in detail, at least on the record before us. Thus, the district court properly entered summary judgment in favor of the defendants as to these three plaintiffs, and to this extent, we affirm the decision of the district court.

Did District Court Correctly Deny Plaintiffs' Motion for Summary Judgment?

The plaintiffs assign error to the district court's decision denying their motion for summary judgment to be entered finding the defendants negligent as a matter of law. Obviously, the trial court did not err in this respect, for all of the reasons we have discussed above as to why summary judgment in the defendants' favor as to B&F and Steve and Cathy was not correct. Thus, this assignment of error is without merit.

Did District Court Err in Ruling That Certain Exhibits Were Inadmissible at Hearing on Motions for Summary Judgment?

[16] The plaintiffs assign error to the district court's decision excluding exhibits 69, 70, 85 through 87, and 92 from evidence at the summary judgment hearing. We have studied those exhibits, but have not used any of such in reaching our decision. Therefore, it is unnecessary for us to decide this assignment of error. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (appellate court is not obligated to engage in analysis which is not necessary to adjudicate case and controversy before it).

CONCLUSION

We conclude that under *Perez v. Stern*, 279 Neb. 187, 777 N.W.2d 545 (2010), Steve and Cathy were "third parties" to whom the defendants owed a duty of reasonable care. When we

view Garland's expert testimony in the light most favorable to Steve and Cathy, whether the defendants met that standard of care is a genuine issue of material fact for trial. Accordingly, the trial court erred in granting summary judgment to the defendants on Steve and Cathy's individual claims. Thus, we reverse the decision of the district court and remand such cause to the district court for further proceedings.

With respect to the plaintiff B&F, such corporation was indisputably a client of the defendants. There is evidence, when viewed most favorable to B&F, that the defendants breached the standard of care with respect to both the critique of the disclosure statement and the defense of B&F in the Nesler lawsuit. While the defendants offer opposing testimony from experts that there was no breach of the standard of care, resolution of that question is for the jury and is not to be decided on a motion for summary judgment. Accordingly, there is a genuine issue of material fact as to B&F's legal malpractice claims against the defendants. Thus, we reverse the grant of summary judgment to the defendants as to B&F's claims and remand the cause for further proceedings.

We find that there is no evidence that Barista's Company, W.E. Corporation, and Cup-O-Coa had an attorney-client relationship with the defendants; nor does the record before us contain evidence that these corporations would be third parties that were owed a duty of reasonable care by the defendants. Therefore, we affirm the grant of summary judgment in the defendants' favor as to these three plaintiffs.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JAMES PETERSEN, APPELLANT, V.
NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., APPELLEES.
805 N.W.2d 667

Filed November 8, 2011. No. A-10-975.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative