therefore affirm Gaskill's Class IV felony conviction under § 29-4011(1) based on his failure to comply with § 29-4004(9) of SORA.

AFFIRMED.

STEPHAN, J., participating on briefs.

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BRADLEY E. GREEN, APPELLEE AND CROSS-APPELLANT,
v. BOX BUTTE GENERAL HOSPITAL,
APPELLANT AND CROSS-APPELLEE.
818 N.W.2d 589

Filed August 3, 2012. No. S-11-576.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives the party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom and show the moving party is entitled to judgment as a matter of law.
3. ____. As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed.
4. **Malpractice: Health Care Providers: Words and Phrases.** Malpractice is defined as a health care provider's failure to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his or her profession engaged in a similar practice in his or her locality or in similar localities.
5. **Health Care Providers: Negligence.** The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities.
6. **Malpractice: Health Care Providers: Proof: Proximate Cause.** The plaintiff patient in a medical malpractice action must provide proof of the generally recognized medical standard involved, that there was a deviation from that standard by the physician or medical care provider, and that such deviation was the proximate cause of the plaintiff's injury.
7. **Summary Judgment: Proof.** A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming the evidence went uncontested at trial, would entitle the party to a favorable verdict.

8. ____: ____. After the moving party makes a prima facie case for summary judgment, the burden to produce contrary evidence showing the existence of a material issue of fact shifts to the party opposing the motion.
9. ____: ____. In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial.
10. **Health Care Providers: Negligence.** Hospital policies and rules do not conclusively determine the standard of care owed.
11. **Summary Judgment: Affidavits.** Affidavits filed on behalf of the parties moving for summary judgment are to be strictly construed.
12. ____: ____. The absence of counter-affidavits does not relieve a moving party plaintiff from the burden of establishing the evidentiary facts of every element necessary to entitle the plaintiff to summary judgment.
13. ____: ____. Supporting affidavits in summary judgment proceedings shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.
14. **Negligence.** While the identification of the applicable standard of care is a question of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact.
15. **Negligence: Evidence: Tort-feasors.** It is for the finder of fact to resolve what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with that standard.
16. **Trial: Expert Witnesses.** The trier of fact is not bound to accept expert opinion testimony.
17. **Summary Judgment: Trial.** Summary judgment should not be used to deprive a litigant of a formal trial if there is a genuine issue of fact.
18. **Summary Judgment: Jury Trials.** The purpose of summary judgment is not to cut litigants off from their right of trial by jury if they really have issues to try.
19. **Summary Judgment: Directed Verdict: Trial.** A motion for summary judgment is not a substitute for a motion for a directed verdict or for error proceedings taken after a full trial.

Appeal from the District Court for Box Butte County: BRIAN C. SILVERMAN and LEO DOBROVOLNY, Judges. Reversed and remanded.

David A. Blagg and Brien M. Welch, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Robert O. Hippe and Robert G. Pahlke, of Robert Pahlke Law Group, P.C., L.L.O., for appellee.

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

McCormack, J.

## I. NATURE OF CASE

Bradley E. Green sued Box Butte General Hospital (Hospital) after he fell and injured his left shoulder while admitted as a patient. Green is a paraplegic. The Hospital allowed Green to have his shower chair brought from home and attempt an unassisted transfer from his wheelchair to the shower chair. The district court granted partial summary judgment in favor of Green on liability and proximate cause and ultimately found damages of $3,733,022, which it capped at $1 million. The issue is whether there was a genuine issue of material fact precluding summary judgment.

## II. BACKGROUND

Green has been a paraplegic since 1985. He was admitted to the Hospital on March 6, 2005, with pneumonia. On March 7, Green wanted to take a shower. The staff allowed Green to have someone bring his personal shower chair from home. A nurse's aide placed the shower chair in the shower of the patient bathroom. She then allowed Green to attempt to transfer himself from his wheelchair to the shower chair unassisted. During the transfer, the shower chair slipped and Green fell, sustaining injuries to his left shoulder.

Green filed a complaint against the Hospital, alleging that the Hospital was negligent and that it had failed to exercise a degree of skill and care ordinarily exercised by a hospital in Alliance, Box Butte County, Nebraska, or a similarly situated area. Green alleged that such negligence and breach of the standard of care were the proximate cause of Green's injuries. The Hospital generally denied that it had breached the standard of care or that its employees' actions had caused any injury or damage to Green.

### 1. Summary Judgment on Liability

After discovery, Green moved for partial summary judgment on the issues of negligence and causation. In support of the motion, Green offered his deposition testimony, the affidavit of a professor of nursing, and the Hospital's responses to Green's request for admissions. Green also introduced the deposition testimony of his treating physician, the deposition testimony of

a registered practical nurse at the Hospital, and the deposition testimony of a registered nurse at the Hospital. In opposition to the motion for summary judgment, the Hospital presented the affidavits of two of its employees who were present at the time of Green's fall.

The district court granted Green's motion for partial summary judgment. The district court did not specifically state that there was no material issue of fact, but instead stated that it was "find[ing]" that the Hospital was "guilty of negligence" and that the Hospital's "negligence was a proximate cause of injuries to [Green] the nature and extent of which will have to be determined at trial."

(a) Melissa Lucas and Carol Glass

Melissa Lucas, a nurse's aide, testified that when Green attempted to transfer from his wheelchair to his shower chair, she was standing in the doorway of the bathroom. She testified that she stood monitoring the situation with the intent of helping Green if he needed help. She explained that the bathroom was not large enough to allow her to be inside with the wheelchair, the shower chair, and Green. Lucas stated that before the transfer, she had asked Green whether he wanted assistance and he had indicated that he did not.

Carol Glass, a licensed practical nurse, testified that she was in Green's room changing the linens on his bed when Green fell. She generally confirmed that the bathroom size was too small to accommodate both a shower chair and a wheelchair. She also confirmed that Green had fallen attempting to transfer himself into his shower chair. Glass testified that after the fall, Green was checked by a nurse for injuries before he was assisted back into the shower chair. Glass testified that when she asked Green whether he was injured, he indicated that he was not.

(b) Green

Green testified in his deposition that when he requested to take a shower, the "nurse," presumably Lucas, asked "if I had any means of taking a shower." Green testified that the staff did not seem to know what a shower chair was. Nevertheless,

the staff tried to find one in the Hospital. When they were unable to, they allowed Green to have someone bring his shower chair from home.

Green testified that in order to use the shower chair, nothing more was required than to set it on the shower floor. Green stated that after Lucas placed the shower chair in the bathroom, she went back into his room. Because the bathroom was not big enough to accommodate both the shower chair and his wheelchair, Green parked his wheelchair halfway inside the bathroom. Green then attempted to transfer himself from the wheelchair to the shower chair.

According to Green, the shower chair suction cups did not hold and the chair slipped out from underneath him, causing him to fall. Green testified that he was alone in the bathroom when he fell and that he had to push a call button to receive assistance. Green stated that when two staff members came to his aid, he instructed them how to get him back into his shower chair. This was accomplished, and Green proceeded with his shower without further incident. Green testified that after the shower, there was no one around to assist him and he could not reach the call button. But he was able to transfer himself back into his wheelchair and get himself back into bed.

Green stated that when he fell, he hit his head and right arm on the toilet, while his left arm was caught up in the air on the shower chair. Green described the injuries resulting from the fall, which included a tear of his left rotator cuff. Green testified that in his 20 years of being paraplegic, he had never fallen before while transferring himself from his wheelchair to a shower chair.

(c) Susan Hoff and Hospital Policies

Susan Hoff, a registered nurse at the Hospital, testified that a nurse assistant was qualified to move patients and help with bathing. Hoff was apparently confronted with a copy of the Hospital's policies and procedures. Those policies and procedures were not themselves placed in evidence at the summary judgment hearing. Hoff noted that the policies regarding patient transfers were for the safety of both the patient and the employee doing the transfer.

In light of the policies and procedures presented to her, Hoff admitted it was the Hospital's policy to get additional assistance when in doubt about the ability to transfer a patient safely. And, if the patient is unable to bear his or her own weight, it was the Hospital's policy to use a mechanical lift. Hoff explained that lifting usually required at least two people.

Hoff testified that it was the Hospital's policy that all patients upon admission to the Hospital have a fall risk assessment conducted. Hoff could not see, from the documents presented to her, evidence that such a fall risk assessment was conducted for Green when he was admitted on March 6, 2005. Based on his paraplegia alone, Hoff admitted that Green should have been assessed at a high risk for a fall.

Hoff testified that mechanical lifts were commonly used for transfers of paraplegic patients, although "[i]t kind of depends on the situation." Hoff stated that when a paraplegic patient wishes to shower, it was her practice to place a wheeled shower chair in the patient's room, where a mechanical lift would assist in the transfer of the patient to the shower chair. Once the patient is in the shower chair, the patient is wheeled into the bathroom and into the shower. This type of transfer with a mechanical lift could not be done within the bathroom because of the limited space.

Hoff explained that a gaited belt would also be appropriate for transferring a paraplegic patient, "[d]epend[ing] on [the patient's] upper body strength . . . ." When asked whether just one person assisting a transfer was not in keeping with Hospital policy, she said: "I don't know for sure how to answer that one because every situation is slightly different. But I guess based on that I'd have to say yes."

(d) Tina Pryor

Tina Pryor, a registered practical nurse at the Hospital, described the different kinds of mechanical lifts available at the Hospital, but was unfamiliar with the Hospital's lift policy. She had never used a mechanical lift to transfer a patient into the bathroom to the shower, but noted that she worked the night

shift, when few people shower. Pryor was apparently deposed because she had signed Green's admission sheet.

(e) Dr. Joyce Black

The affidavit of Dr. Joyce Black was admitted over the Hospital's objections on the basis of hearsay and foundation. Black received an associate degree in nursing and a bachelor of science degree in nursing from colleges in Minnesota, and she worked in Minnesota in various nursing positions from 1972 to 1979. Black later graduated from the University of Nebraska Medical Center College of Nursing in Omaha, Nebraska, first with a master of science degree in nursing and later with a doctor of philosophy degree in nursing. Since 1982 to the present, Black has worked in various teaching positions at the University of Nebraska Medical Center College of Nursing. Black did not aver that she is familiar with the standard of care in Box Butte County or in similar communities.

Black stated that she had reviewed Green's medical records and the witness affidavits. Black stated that the medical records revealed Green was a fall risk when admitted on March 6, 2005. Black opined "to a reasonable degree of probability in my field of nursing expertise" that the Hospital violated "the standard of care" in its treatment of Green by (1) failing to have a reasonably safe environment for its patients, (2) failing to be in compliance with the Americans with Disabilities Act, (3) failing to have the equipment necessary to care for patients such as Green, (4) failing to monitor and properly assess Green before the fall, (5) failing to adequately assess and determine that it was unsafe to allow Green to transfer himself into the shower chair, (6) failing to either support Green's transfer to a shower chair in a safe and secure manner or prohibit the unassisted transfer, (7) failing to properly secure the shower chair, (8) failing to continue to monitor the transfer, and (9) failing to conduct an adequate injury assessment of Green after his fall. Black did not opine as to whether any of the listed breaches of "the standard of care" proximately caused injury to Green.

(f) Dr. Michele Arnold

Dr. Michele Arnold is a specialist in rehabilitation medicine. She has been treating Green since before the fall for conditions common to paraplegics relating to overuse of the arms and hands, as well as for continued care for his spinal cord injury. Arnold opined within a reasonable degree of medical certainty that Green's fall in the Hospital was the likely cause of a full tear of Green's left rotator cuff. She described the medical, logistical, and psychological impact such an injury has on paraplegics who rely primarily on upper body strength for their mobility.

(g) Request for Admissions

The Hospital's responses to Green's request for admissions admitted that Green injured his left shoulder while a patient at the Hospital and that at the time Green was injured, he was transferring himself, without assistance, from his wheelchair to a shower chair. The Hospital admitted that there were no shower chairs with accommodations for paraplegics available at the Hospital at the time of Green's fall and that Green had his personal shower chair brought from home. But the Hospital denied that the transfer was in contravention of its policies and procedures, and the Hospital denied it had breached the recognized standard of care. The Hospital also denied that any breach of the standard of care was the proximate cause of Green's injuries.

2. Trial and Verdict on Damages

After granting partial summary judgment in favor of Green, the action proceeded to a bench trial on damages. The court rendered a verdict in the amount of $31,687.18 for past medical expenses, $701,334.95 for future medical expenses, $450,000 in past pain and suffering, and $2,550,000 in future pain and suffering.

The parties agreed that Green's action involved a political subdivision governed by the Political Subdivisions Tort Claims Act (PSTCA),[1] as well as medical malpractice, governed by

[1] Neb. Rev. Stat. §§ 13-901 to 13-927 (Reissue 2007).

the Nebraska Hospital-Medical Liability Act (NHMLA).[2] The PSTCA has a $1 million cap on damages, while the NHMLA has a cap of $1,750,000.[3] Hospitals under the NHMLA are responsible for only $500,000 of the recovery, however, and the balance is paid by the Excess Liability Fund.[4] Green's attorney repeatedly conceded to the district court that the lesser of the two caps, the PSTCA, would apply, and the Hospital did not disagree. Therefore, the court capped damages under the PSTCA at $1 million.

The court found that 19.6 percent of the capped award, $196,000, was for medical needs and 80.4 percent, $804,000, was for noneconomic losses. The court denied the Hospital's motions for new trial and to alter or amend the judgment, and granted Green costs of $1,377.74, above and beyond the cap.

The Hospital appeals the district court's grant of partial summary judgment, the amount of damages, and the fact that the costs of $1,377.74 were not included in the capped damages. Green cross-appeals the district court's order of damages insofar as it employed the PSTCA cap instead of the NHMLA cap and it failed to tax additional costs requested by Green.

## III. ASSIGNMENTS OF ERROR

The Hospital assigns that the district court erred in (1) granting summary judgment on negligence, (2) admitting the Black affidavit in support of Green's motion for summary judgment, (3) its determination of the amount of damages, (4) taxing costs above the cap provided by the PSTCA, and (5) denying its motion for new trial.

Green assigns in his cross-appeal that the district court erred in (1) applying the recovery cap from the PSTCA rather than the cap from the NHMLA and (2) finding that the Hospital had a reasonable chance of a successful defense and, accordingly, denying costs and attorney fees under § 44-2834.

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[2] Neb. Rev. Stat. §§ 44-2801 to 44-2855 (Reissue 2010).

[3] See §§ 13-926 and 44-2825.

[4] See §§ 44-2829 and 44-2832.

## IV. STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[5]

## V. ANALYSIS

[2,3] Summary judgment is proper when the pleadings, depositions, and admissions on file, together with affidavits, show there exists no genuine issue either as to any material fact or as to the ultimate inferences to be drawn therefrom and show the moving party is entitled to judgment as a matter of law.[6] As a procedural equivalent to a trial, a summary judgment is an extreme remedy because a summary judgment may dispose of a crucial question in litigation, or the litigation itself, and may thereby deny a trial to the party against whom the motion for summary judgment is directed.[7] In reviewing a summary judgment, an appellate 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.[8] We agree with the Hospital that the district court erred in granting summary judgment in favor of Green.

We begin with the elements of Green's cause of action. Green's petition was framed as a cause of action for hospital malpractice.[9] A court may not enter a summary judgment on an issue not presented by the pleadings.[10] Green alleged the following in his petition:

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[5] *Westin Hills v. Federal Nat. Mortgage Assn.*, 283 Neb. 960, 814 N.W.2d 378 (2012).

[6] See, *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002); *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990).

[7] *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000).

[8] *Westin Hills v. Federal Nat. Mortgage Assn., supra* note 5.

[9] See *Casey v. Levine*, 261 Neb. 1, 621 N.W.2d 482 (2001).

[10] *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, 560 N.W.2d 758 (1997).

> The treatment, care and supervision rendered by Defendant HOSPITAL and its employees [were] negligent and failed to exercise a degree of skill and care ordinarily exercised by hospitals engaged in providing medical care such that there was a breach of the standard medical care for a hospital in Alliance, Box Butte County, Nebraska or a similarly situated area, and were the proximate cause of injuries to GREEN . . . .

[4,5] Malpractice is defined as a health care provider's failure to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his or her profession engaged in a similar practice in his or her locality or in similar localities.[11] The NHMLA specifically provides for use of the locality rule.[12] The proper measure of the duty of a hospital to a patient is the exercise of that degree of care, skill, and diligence used by hospitals generally in the community where the hospital is located or in similar communities.[13]

[6] The plaintiff patient in a medical malpractice action must provide proof of the generally recognized medical standard involved, that there was a deviation from that standard by the physician or medical care provider, and that such deviation was the proximate cause of the plaintiff's injury.[14] In hospital and other medical malpractice cases, the plaintiff must usually produce expert testimony to support his or her prima facie case of negligence and causation.[15]

Under the so-called common knowledge exception, where negligence or causation may be inferred from the facts by a layman with common knowledge and experience and with

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[11] See *Murray v. UNMC Physicians*, 282 Neb. 260, 806 N.W.2d 118 (2011).

[12] Neb. Rev. Stat. § 44-2810 (Reissue 2010).

[13] *Casey v. Levine, supra* note 9; *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992).

[14] See *Anderson v. Moore*, 202 Neb. 452, 275 N.W.2d 842 (1979).

[15] See, *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008); *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008); *Fossett v. Board of Regents, supra* note 7. See, also, e.g., *Krenek v. St. Anthony Hosp.*, 217 P.3d 149 (Okla. Civ. App. 2008).

no technical knowledge, then expert medical testimony is not essential for those elements of proof.[16] In such a case, the locality rule does not apply. But Green does not argue that the common knowledge exception applies. Certainly, the conflict between the opinions of Black and the Hospital—to the extent that they could be considered for a standard of care within common knowledge—would preclude the determination that Green was entitled to judgment as a matter of law.

The parties instead debate whether Black was qualified to opine on the standard of care for Box Butte County or similar communities. Thus, we will treat the issue of the hospital's negligence in this case as subject to the requirement that the plaintiff produce expert testimony as to the standard of care in accordance with the locality rule.

[7-9] In light of the above, we must consider whether Green, as the plaintiff, established that there was no material fact as to each and every element of his cause of action against the Hospital and that he was therefore entitled to judgment as a matter of law. A party makes a prima facie case that it is entitled to summary judgment by offering sufficient evidence that, assuming the evidence went uncontested at trial, would entitle the party to a favorable verdict.[17] After the moving party makes a prima facie case for summary judgment, the burden to produce contrary evidence showing the existence of a material issue of fact shifts to the party opposing the motion.[18] In the absence of a prima facie showing by the movant that he or she is entitled to summary judgment, the opposing party is not required to reveal evidence which he or she expects to produce at trial.[19]

[10] The Hospital asserts that Green failed to make a prima facie case for summary judgment because Green failed to

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[16] See, *Thone v. Regional West Med. Ctr., supra* note 15; *Keys v. Guthmann*, 267 Neb. 649, 676 N.W.2d 354 (2004); *Walls v. Shreck*, 265 Neb. 683, 658 N.W.2d 686 (2003). See, also, *Krenek v. St. Anthony Hosp., supra* note 15.

[17] *Thone v. Regional West Med. Ctr., supra* note 15.

[18] See, *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012); *Schafersman v. Agland Coop*, 268 Neb. 138, 681 N.W.2d 47 (2004).

[19] See *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002).

present proof that the Hospital had breached the standard of care of hospitals generally in the community where the hospital is located or in similar communities. We agree. Hospital policies and rules do not conclusively determine the standard of care owed.[20] And those policies and procedures were not, in any event, entered into evidence at the summary judgment hearing. Hoff's testimony was insufficient to establish that Green was entitled to judgment as a matter of law. Pryor's testimony that she knows nothing about this case, the Hospital's policies, or the use of mechanical lifts is of no consequence. And while the testimonies of Green and Arnold and the Hospital's answers to Green's request for admissions arguably make a prima facie case that the fall caused some injury, the only evidence purporting to show that the Hospital breached the standard of care in connection with the fall is the affidavit of Black.

[11,12] Affidavits filed on behalf of the parties moving for summary judgment are to be strictly construed.[21] The absence of counter-affidavits does not relieve a moving party plaintiff from the burden of establishing the evidentiary facts of every element necessary to entitle the plaintiff to summary judgment.[22]

[13] Under Neb. Rev. Stat. § 25-1334 (Reissue 2008), supporting affidavits in summary judgment proceedings shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.[23] Black failed to affirmatively demonstrate that she was competent to testify as to the standard of care of hospitals in Box Butte County or similar communities. While Black attached her curriculum vitae to her affidavit, the degrees, experiences, and other accomplishments listed therein do not necessarily demonstrate knowledge of the relevant community standard for

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[20] See, *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972); *Darling v. Charleston Hospital*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

[21] See *House v. Lala*, 180 Cal. App. 2d 412, 4 Cal. Rptr. 366 (1960).

[22] *Id.*

[23] See, also, e.g., *Chism v. Campbell*, 250 Neb. 921, 553 N.W.2d 741 (1996).

Box Butte County.[24] And Black at no point averred in her affidavit that she was familiar with the standard of care for hospitals in Box Butte County or in similar communities.

If Black was not familiar with the standard of care of Box Butte County or similar communities, then she was unqualified to conclude that the Hospital had breached "the standard of care" and that conclusion—insofar as we can construe it as the standard of care of the same community or similar communities—must be disregarded. Without expert testimony of the standard of care of hospitals in the same community or similar communities, Green would not be entitled to a favorable verdict at trial. Thus, Green failed to make a prima facie case that he was entitled to summary judgment.

We need not determine the weight to be given the Hospital's averments in its answers to Green's request for admissions that it did not violate the standard of care—for which the Hospital, as the nonmoving party, is granted all reasonable inferences. But we note that there is evidence preserved in the bill of exceptions in connection with the motion for summary judgment which controverts whether the Hospital breached the applicable standard of care.

[14-16] Moreover, while the identification of the applicable standard of care is a question of law, the ultimate determination of whether a party deviated from the standard of care and was therefore negligent is a question of fact.[25] It is for the finder of fact to resolve what conduct the standard of care would require under the particular circumstances presented by the evidence and whether the conduct of the alleged tort-feasor conformed with that standard.[26] And the trier of fact is not bound to accept expert opinion testimony.[27]

[17-19] Summary judgment should not be used to deprive a litigant of a formal trial if there is a genuine issue of fact.[28] The

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[24] Compare *Medley v. Davis*, 247 Neb. 611, 529 N.W.2d 58 (1995).

[25] *Murray v. UNMC Physicians, supra* note 11.

[26] See *id.*

[27] See *Jones v. Meyer*, 256 Neb. 947, 594 N.W.2d 610 (1999). See, also, *Wilson v. Muhanna*, 213 Ga. App. 704, 445 S.E.2d 540 (1994).

[28] *Medley v. Davis, supra* note 24.

purpose of summary judgment is not to cut litigants off from their right of trial by jury if they really have issues to try.[29] A motion for summary judgment is not a substitute for a motion for a directed verdict or for error proceedings taken after a full trial.[30] When viewing the evidence presented at the summary judgment hearing in a light most favorable to the nonmoving party, in this case the defendant, the plaintiff-movant failed to establish each element of his cause of action as a matter of law. Therefore, the district court erred in granting partial judgment. Because we reverse the partial summary judgment in favor of Green and remand the cause for a new trial which will include the issues of negligence and liability, we need not address the parties' remaining assignments of error concerning damages and costs.

## VI. CONCLUSION

For the foregoing reasons, we reverse the judgment below and remand the cause for a new trial.

REVERSED AND REMANDED.

WRIGHT, J., not participating in the decision.

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[29] *Ingersoll v. Montgomery Ward & Co., Inc.*, 171 Neb. 297, 106 N.W.2d 197 (1960).

[30] *Illian v. McManaman*, 156 Neb. 12, 54 N.W.2d 244 (1952).

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# STATE OF NEBRASKA EX REL. JON BRUNING, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. JOHN A. GALE, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT.

817 N.W.2d 768

Filed August 3, 2012. No. S-11-933.

1. **Constitutional Law: Statutes.** Whether a statute is constitutional is a question of law.
2. ____: ____. The general rule is that when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions.
3. **Constitutional Law: Statutes: Proof.** Laws that burden political speech are subject to strict scrutiny, which requires the government to prove that the