Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/03/2026 08:24 AM CST

Visoso retained the burden to prove his permanent disability and the impairment of his earning capacity. Visoso had returned to his country of origin, and the compensation court concluded there was no credible evidence which could be used to determine his loss of earning capacity in his new community. When no credible data exists for the community to which the employee has relocated, the community where the injury occurred can serve as the hub community. Therefore, we remand the cause to the Workers' Compensation Court to allow Visoso to attempt to establish permanent impairment and loss of earning capacity using Schuyler as the hub community.

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

CASSEL, J., not participating.

LARRY BLASER ET AL., APPELLEES, V. COUNTY OF MADISON, NEBRASKA, A POLITICAL SUBDIVISION, APPELLANT.

826 N.W.2d 554

Filed February 22, 2013. No. S-12-558.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.
2. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court.
4. **Negligence: Appeal and Error.** Whether a defendant breaches a duty is a question of fact for the fact finder, which an appellate court reviews for clear error.
5. **Statutes.** Statutory interpretation presents a question of law.
6. **Judges: Recusal: Waiver.** A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.
7. **Appeal and Error: Words and Phrases.** Plain error is error uncomplained of at trial and is plainly evident from the record and of such a nature that to leave it

uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.

8. **Judges: Recusal.** A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.
9. **Negligence: Proof.** In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
10. **Negligence.** It is for the fact finder in a negligence case to determine, on the facts of each individual case, whether or not the evidence establishes a breach of duty.
11. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
12. **Statutes: Legislature: Intent: Appeal and Error.** In discerning the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
13. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
14. **Statutes.** Statutes which effect a change in the common law are to be strictly construed.
15. **Negligence.** The existence of a duty serves as a legal conclusion that an actor must exercise such degree of care as would be exercised by a reasonable person under the circumstances.
16. ____. Duty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases.
17. **Pleadings.** The issues in a case are framed by the pleadings.

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

Vincent Valentino for appellant.

Todd B. Vetter, of Fitzgerald, Vetter & Temple, for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

Larry Blaser, Terry McCaw, and Patricia McCaw, the appellees, brought this negligence action in the district court for

Madison County along with Sharon Blaser against the County of Madison, Nebraska (the County), the appellant, under the Political Subdivisions Tort Claims Act after Larry and Terry were injured in a single-vehicle accident in which Larry drove into a washout on a vacated county road. The appellees alleged that the County was negligent by failing to maintain the "Road Closed" warning sign. Following trial, the district court found the County liable for negligence and, after finding Larry 40-percent contributorily negligent, entered judgment against the County.

On appeal, the County claims that it was plain error for the first judge, who recused himself, to name a second judge as the successor judge. With respect to the merits, the County claims that although it may have had an obligation to warn travelers of the washout, the district court erred when it concluded that the County had a "duty" to maintain the vacated road and breached this duty. The County claims that it did not have "actual" or "constructive" knowledge its road closed warning sign was down on the day of the accident and that the district court erred when it failed to determine whether the County retained its sovereign immunity, which determination would resolve this issue.

We find no plain error with respect to naming the second judge. We determine that the district court erred when it concluded that the County had a duty to maintain the vacated road. We also determine that the district court erred when it determined that the issue whether the County had actual or constructive knowledge that its warning sign was down was a "non-issue" and when it failed to determine whether there was merit to the County's reliance on alleged retention of sovereign immunity under Neb. Rev. Stat. § 13-910(9) (Reissue 2007). We reverse, and remand this matter to the district court with directions, inter alia, to determine whether the County had actual or constructive knowledge that its road closed sign at the north end of the vacated road was not functioning properly on the day of the accident and whether the County had a reasonable amount of time to remedy the problem in order to determine whether or not the County retained its sovereign immunity.

STATEMENT OF FACTS

These parties were previously before us in case No. S-11-1048. In that prior case, the County brought an appeal based upon the same underlying facts and record described below. On June 6, 2012, we dismissed that previous appeal for lack of jurisdiction pursuant to Neb. Ct. R. App. P. § 2-107(A)(2) (rev. 2012) due to the absence of a final, appealable order. Although Sharon Blaser was an appellee in case No. S-11-1048, the district court's order filed September 15, 2011, had not disposed of Sharon's claims. Following our dismissal of case No. S-11-1048, the district court dismissed Sharon's claims by an order filed June 21, 2012. The County again appealed, and this is the appeal currently before us.

On November 9, 2008, Larry was driving his 1996 Ford Ranger pickup southbound on the vacated road, 545th Avenue, and Terry was riding as a passenger. While traveling on the vacated road, Larry and Terry drove into a washout, or a large hole in the middle of the road, approximately 12 feet wide and 8 feet deep. As a result of the accident, the pickup truck was damaged, Larry sustained mild injuries, and Terry sustained severe injuries. Patricia cared for Terry after the accident. This accident gives rise to this case.

According to the trial record, on October 19, 2004, the County's board of commissioners adopted resolution No. 2004-78, which vacated a 1-mile stretch of 545th Avenue, a north-south roadway, between 845th Road and 846th Road. However, the County specifically qualified the vacation and stated that the County retained a right-of-way over the vacated road subject to any easements of record. The intersection of 545th Avenue and 846th Road is the north end of the vacated portion of the road, and the intersection of 545th Avenue and 845th Road is the south end. Additionally, 846th Road is the county line between Madison County and Pierce County, with Madison County lying to the south.

In April 2005, after the County had vacated the road, road closed signs were placed at the north and south ends of the vacated road. Larry and Terry testified that on the day of their accident, they did not observe any road closed signs. The deputy who investigated Larry and Terry's accident stated that

a road closed sign at the north end of the vacated road had been unbolted and laid on the ground next to the upright post and was not visible from the road on November 9, 2008, the day of Larry and Terry's accident. Gary Drahota, a man who owned land and lived in the area, stated that he did not see a road closed sign at the north end of the vacated portion of the road at the intersection of 545th Avenue and 846th Road on October 27, 2008. Another man, who owns land surrounding the vacated road, testified that he recalled seeing a road closed sign at the north end of the vacated road a few days before Larry and Terry's accident.

A couple of weeks prior to the accident at issue in this case, another accident occurred involving the same washout on the vacated road. Between October 27 and October 30, 2008, Drahota notified law enforcement that he had been traveling on the vacated road when he found an abandoned vehicle in the washout. On October 30, a deputy sheriff for the County investigated this report and found the abandoned vehicle in the washout. He approached the abandoned vehicle from the south end of the vacated road, traveling north. On November 3, as part of his investigation, he discovered that one of the occupants of the abandoned vehicle had been injured as a result of driving into the washout and had sought treatment at a hospital. However, the deputy's subsequent attempts to contact the owners of the abandoned vehicle were unsuccessful. The abandoned vehicle was removed from the washout before the time of the accident at issue in this case, but the deputy testified that he did not know exactly when or how the abandoned vehicle was removed from the washout.

Sometime after the County was notified of the abandoned vehicle and before Larry and Terry's accident on November 9, 2008, the County's highway superintendent was instructed to investigate whether the signs on the vacated road were functioning properly. He testified that while he did inspect the south end of the vacated portion of 545th Avenue, he did not actually inspect the north end of the vacated portion of the road at the intersection of 545th Avenue and 846th Road, through which Larry and Terry traveled heading south prior to the accident. Regarding the north portion of the vacated

road, the superintendent stated he positioned himself 2 miles north of the county line and looked to the south. He testified that he could not see any signs from his vantage point of 2 miles away.

On December 14, 2009, the appellees along with Sharon filed their first amended complaint, bringing this negligence action against the County under Nebraska's Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 2007). The appellees and Sharon alleged that the County was negligent because it failed to "correct the malfunction, destruction, or any unauthorized removal of the Road Closed signed [sic] when it had actual and constructive knowledge and notice of the malfunction, destruction, and or [sic] removal of the sign." Larry alleged that he sustained damages for personal injuries, medical expenses, damage to his vehicle, loss of income, loss of earning capacity, past and future physical pain and mental suffering. Terry alleged that he sustained damages for personal injuries, past and future medical expenses, past and future physical pain and suffering, loss of income, and loss of earning capacity. Sharon and Patricia both alleged that they sustained a loss of care, comfort, companionship, assistance, and services of their spouses as a proximate result of the negligence of the County.

In its amended answer, the County denied many of the appellees' and Sharon's claims. However, the County admitted paragraph 6 of the amended complaint, which alleged that as part of the investigation by the Madison County sheriff's office, the sheriff's office located a road closed sign that had been knocked over. The record shows that the investigation occurred on November 9, 2008, the day of the accident. The County affirmatively asserted that it is immune from suit under various provisions of the Political Subdivisions Tort Claims Act and asserted the affirmative defenses of contributory negligence, assumption of the risk, and alternative safe route. The defense under the Political Subdivisions Tort Claims Act which has been asserted in this appeal is found at § 13-910(9), which generally provides that the political subdivision retains sovereign immunity from "[a]ny claim arising out of the malfunction, destruction, or unauthorized removal

of any traffic or road sign . . . unless it is not corrected by the political subdivision responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal."

The County filed a motion for summary judgment, and the appellees and Sharon filed a motion for partial summary judgment. On July 14, 2010, the first judge entered an order in which it granted the appellees' and Sharon's motion for partial summary judgment, overruled the County's motion for summary judgment, and left for trial the issues of contributory negligence, proximate causation, and damages.

The County then filed a motion for recusal which the appellees and Sharon did not oppose. On January 4, 2011, the first judge entered an order recusing himself from the matter and assigned the case to a second judge whom he identified by name for further disposition. No party challenged this order at the time it was entered, or throughout the trial-level proceedings. In response to the County's motion, the second judge vacated the prior order which had granted the appellees' and Sharon's motion for partial summary judgment, and the case proceeded to trial.

On September 15, 2011, after a bench trial before the second judge, the district court entered an order finding that the County had a duty toward the appellees, breached its duty, and was liable for damages. The court rejected the County's defenses of immunity under various provisions of the Political Subdivisions Tort Claims Act and its other defenses except contributory negligence. After finding Larry 40-percent contributorily negligent, the court entered judgment in favor of the appellees. The court awarded judgments of $6,093.71 to Larry, $365,383.66 to Terry, and $12,000 to Patricia. The court's order did not address whether or not it was awarding any damages to Sharon; Sharon's claims were later dismissed.

Considerable argument occurred in the district court regarding the duty, if any, owed to the appellees and the particular way the County could meet its duty. The appellees alleged, and the evidence was directed at whether, the County had failed to meet its obligation to warn travelers by failing to maintain

its warning sign. In its order following trial, the district court relied on the reasoning in *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999), *abrogated, A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010), and concluded that the County had a "duty" to remedy the dangerous condition of the vacated road. The court found that the condition of the road was the proximate cause of the accident and injuries. Elsewhere in the district court's order, the court stated, "The evidence is in dispute as to the existence and position of a sign posted by the [County] at the intersection of 545th Avenue and 846th Road . . . . This is a non-issue . . . ." The district court did not make any findings as to whether the County's warning sign at the northern point of the vacated road was down and whether the County had actual or constructive knowledge that the sign was down or had a reasonable time to correct it.

On November 10, 2011, the district court denied the County's motion for new trial. The County appealed the district court's September 15 order and its November 10 order denying the motion for new trial. As stated earlier, that initial appeal, case No. S-11-1048, was dismissed for lack of jurisdiction and the rulings following our remand have disposed of all claims of all parties. The County appeals.

ASSIGNMENTS OF ERROR

The County claims, consolidated and restated, that (1) plain error was committed when the first judge, who recused himself from the case, appointed the second judge; (2) the district court erred when it determined that the County had a "duty" to repair the vacated road; (3) the district court erred when it determined that the County breached the duty to repair the road; and (4) the district court erred when it concluded that the sovereign immunity defense under §13-910(9) was not applicable and failed to determine whether the County had actual or constructive knowledge that the warning sign was down and failed to correct the problem within a reasonable time. In view of our disposition, we need not reach the County's other assignments of error.

STANDARDS OF REVIEW

[1] In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong. *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012).

[2,3] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Olson v. Wrenshall*, 284 Neb. 445, 822 N.W.2d 336 (2012). When reviewing a question of law, an appellate court resolves the question independently of the conclusion reached by the trial court. *Id.*

[4] Whether a defendant breaches a duty is a question of fact for the fact finder, which an appellate court reviews for clear error. *Downey v. Western Comm. College Area, supra.*

[5] Statutory interpretation presents a question of law. *Id.*

ANALYSIS

Judge Disqualification.

The County moved for recusal of the first judge to whom the case was initially assigned. The first judge granted the motion and appointed the second judge as the successor judge. The County did not move to recuse or disqualify the second judge at the trial level. The County states in its brief on appeal that the "issue raised is whether [the first judge's] reassignment action was plain error requiring reversal of [the second judge's] subsequent trial order." Brief for appellant at 41. We do not find plain error and reject this assignment of error.

[6] The County acknowledges that it did not seek disqualification of the second judge at the trial level. We have stated that

> the rule that it is generally too late to raise the issue of disqualification after the matter is submitted for decision rests on the principle that a party may not gamble on a favorable decision. This principle does not apply when the facts constituting the disqualification are unknown, because no gamble could have been purposefully made. Instead, the issue of disqualification is timely if submitted

> at the "'earliest practicable opportunity' after the disqualifying facts are discovered."

Tierney v. Four H Land Co., 281 Neb. 658, 665, 798 N.W.2d 586, 592 (2011) (quoting *Urias v. Harris Farms, Inc.*, 234 Cal. App. 3d 415, 285 Cal. Rptr. 659 (1991)). We also stated in *Tierney* that

> [a] party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings. [Under these facts, o]nce a case has been litigated, an appellate court will not . . . disqualify a judge and give litigants "'a second bite at the apple.'"

281 Neb. at 664-65, 798 N.W.2d at 592 (quoting *McCully, Inc. v. Baccaro Ranch*, 279 Neb. 443, 778 N.W.2d 115 (2010)). The County waived this disqualification issue by not raising it at the earliest possible time at the trial level.

[7] Having waived the disqualification issue, the County nevertheless asks us to disqualify the second judge and reverse his order following trial based on plain error. We have stated that plain error is error uncomplained of at trial and is plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. See *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). We do not find plain error.

[8] The Nebraska Revised Code of Judicial Conduct requires that "[a] judge shall hear and decide matters assigned to the judge, except when disqualification is required . . . ." Neb. Rev. Code of Judicial Conduct § 5-302.7 (previously found at Neb. Code of Judicial Conduct § 5-203(B)(1)). The code goes on to state that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned . . . ." Neb. Rev. Code of Judicial Conduct § 5-302.11(A) (previously found at Neb. Code of Judicial Conduct § 5-203(E)). We have previously stated that a trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person

who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown. *Tierney, supra*.

The County suggests that the rulings in the order after trial are similar to those of the first but disqualified judge and that they thus suggest an implicit bias toward an adherence to the earlier rulings and perhaps a failure of impartial examination of the law. The record shows, however, that the second judge, as successor judge, vacated the first judge's partial summary judgment ruling and that the matter proceeded to full trial. The reversible error which is found below in this opinion, i.e., the second judge's erroneous finding that the County's knowledge of the condition of its warning signs was a "non-issue," was unique to the second judge. We find nothing in the record that indicates under an objective standard of reasonableness that the second judge's impartiality was subject to question or that his appointment as successor judge by the first judge has an appearance of impropriety.

We determine that it is not plainly evident that the first judge's appointment of the second judge is an error that if left uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. The second judge was the only remaining resident district judge in the judicial district, and his appointment did not result in an appearance of impropriety. Accordingly, the County's first assignment of error is without merit.

The County's Duty, Breach of Duty, and Sovereign Immunity.

The County claims that the district court erred when it concluded that the County had a "duty" to repair or remedy the washout in the vacated road and further erred when it determined that the County breached this duty, proximately causing damage to the appellees. The County claims that the district court erred when it failed to consider its sovereign immunity defense under § 13-910(9). In this regard, although the County concedes on appeal that its warning sign was not posted on the day of the accident, it asserts that it did not have actual or

constructive knowledge of this fact and that the district court erred when it failed to resolve the issues of whether the County had constructive knowledge of the status of the road closed sign and whether the County failed to correct this problem within a reasonable time. As explained below, we analyze the issue regarding duty and then the sovereign immunity defense and find merit to these assignments of error. We reverse the judgment entered in favor of the appellees and remand the cause with directions to the district court to make findings regarding the warning sign issue as these facts relate to the County's claim of sovereign immunity under § 13-910(9) and to consider defenses as may be appropriate and enter orders accordingly. Because the County's motion for new trial essentially encompassed its challenges to the order after trial, our analysis focuses on the reversible errors in that order. These errors also require reversal of the order denying the motion for new trial.

[9,10] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012). See, also, *Connelly v. City of Omaha*, 284 Neb. 131, 140, 816 N.W.2d 742, 753 (2012) (stating that a "negligence action brought under the [Political Subdivisions Tort Claims Act] has the same elements as a negligence action against an individual, i.e., duty, breach of duty, causation, and damages"). The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Martensen, supra*. But it is for the fact finder to determine, on the facts of each individual case, whether or not the evidence establishes a breach of that duty. *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). In *A.W.*, we abandoned the risk-utility test and adopted the duty analysis in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010). More recently, in *Martensen, supra*; *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012); and *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011), we again followed the duty analysis in the Restatement (Third), *supra*.

In its order after trial, the district court noted that the County retained a right-of-way in the vacated road and that the County was aware of the road's use and its dangerous condition. The district court reasoned that because of these facts, the County had a "duty" to remedy the condition. The district court specifically found that the unremedied condition of the road was the proximate cause of the accident. Evidently as a result of this determination, the district court further determined that the issues surrounding the warning sign on the day of the accident were "non-issue[s]." In its order, the district court indicated that evidence regarding the County's warning sign was in dispute, but it made no finding regarding whether the warning sign was up or down on the day of the accident and no finding whether the County had actual or constructive knowledge of this fact and whether the County had a reasonable time within which to remedy this problem.

The district court's legal conclusion that the County had a "duty" to repair the vacated road is inconsistent with the statutes, and thus, as the County claims, the court erred in making this conclusion. The County makes several arguments regarding duty. We reject the County's suggestion relying on Neb. Rev. Stat. § 39-1401(2) (Reissue 2008) that the road lost its public character, absolving the County of responsibility, when the road was vacated with retention of the County's right-of-way. However, we agree that the County did not have a duty to maintain the road.

[11-13] We have stated that statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Bridgeport Ethanol v. Nebraska Dept. of Rev.*, 284 Neb. 291, 818 N.W.2d 600 (2012). In discerning the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.* Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent,

harmonious, and sensible. *Pittman v. Western Engineering Co.*, 283 Neb. 913, 813 N.W.2d 487 (2012).

With these general rules of statutory construction in mind, we turn to the applicable statutes. Neb. Rev. Stat. § 39-1402 (Reissue 2008) describes the scope of the authority of a county board regarding county roads. Section 39-1402 provides:

> General supervision and control of the public roads of each county is vested in the county board. The board shall have the power and authority of establishment, improvement, maintenance and abandonment of public roads of the county and of enforcement of the laws in relation thereto as provided by the provisions of Chapter 39, articles 14 to 20, except sections 39-1520.01 and 39-1908.

Neb. Rev. Stat. § 39-1404 (Reissue 2008) provides in effect that public roadways ordinarily remain public and do not lose their public character; nor is that character diminished by occupation, estoppel, or other similar acts. Section 39-1404 provides:

> No privilege, franchise, right, title, right of user, or other interest in or to any street, avenue, road, thoroughfare, alley or public grounds in any county, city, municipality, town, or village of this state, or in the space or region under, through or above any such street, avenue, road, thoroughfare, alley, or public grounds, shall ever arise or be created, secured, acquired, extended, enlarged or amplified by user, occupation, acquiescence, implication, or estoppel.

We read §§ 39-1402 and 39-1404 together with Neb. Rev. Stat. § 39-1725 (Reissue 2008), which provides that a county board can vacate a road completely or with qualifications such as retention of a right-of-way. Section 39-1725 provides in relevant part:

> In the event that the county board decides to vacate or abandon, *its resolution shall state upon what conditions, if any, the vacation or abandonment shall be* qualified and particularly whether or not the title or right-of-way to any vacated or abandoned fragment or section of road shall be sold, revert to private ownership, or remain

> in the public. If the county board fails to specify in a resolution as to the disposition of right-of-way, and if there shall be nonuse of such right-of-way for any public purpose for a continuous period of not less than ten years, the right-of-way shall revert to the owners of the adjacent real estate, one-half on each side thereof. When the county vacates all or any portion of a road, the county shall, within thirty days after the effective date of the vacation, file a certified copy of the vacating resolution with the register of deeds for the county to be indexed against all affected lots.

(Emphasis supplied.)

A roadway is generally said to be "vacated when its existence is terminated by direct action of public authorities." 39A C.J.S. *Highways* § 112 at 613 (2003). Such direct action is authorized by § 39-1725. "Abandonment" of a road or highway by nonuse or otherwise is generally viewed as distinguishable from "vacation," the latter of which is accomplished by affirmative action of a governing body. 39 Am. Jur. 2d *Highways, Streets, and Bridges* § 173 at 756 (2008). See, also, *id.*, § 149. As it applies to state highways, "[a]bandon" means "to reject all or part of the [Department of Roads'] rights and responsibilities relating to all or part of a fragment, section, or route on the state highway system." Neb. Rev. Stat. § 39-1302(1) (Reissue 2008). The term "vacate" is not defined in § 39-1302.

A "[r]ight-of-way" is defined in § 39-1302(31) as "land, property, or interest therein, usually in a strip, acquired for or devoted to a road, street, or highway." Although this definition of the term "right-of-way" pertains to state highways, we apply it to the county road involved in this case.

Under the statutes, a county board is authorized to take varied actions with respect to its rights-of-way all of which demonstrate the public character of the rights-of-way. Under Neb. Rev. Stat. § 39-301 (Reissue 2008), the county board can grant permission to a landowner to divert water from one area to another along a county highway right-of-way. Under Neb. Rev. Stat. § 39-309 (Reissue 2008), the county board may remove trees and hedges planted by landowners bordering the county's

right-of-way. Neb. Rev. Stat. § 39-1816 (Reissue 2008) confers power on the county board to restrict parking on the county's right-of-way, and parking in the right-of-way in violation of no parking or restricted parking signs is punishable as a Class V misdemeanor. Neb. Rev. Stat. § 39-1702 (Reissue 2008) authorizes the county board to acquire land in fee simple or a lesser estate, and such acquired land may be a right-of-way. Taken together, these statutes show the powers of the county board with respect to the county's rights-of-way. Thus, notwithstanding the qualified vacation of the road, the character of the rights-of-way remains public.

In reading these statutes sensibly, we consider the general context in which they appear, which pertains to public roadways. It has been observed that generally, "[o]nce established, a public highway does not lose its character as a public road unless it is either vacated by the authorities in the manner prescribed by statute or abandoned." 39 Am. Jur. 2d *Highways, Streets, and Bridges* § 148 at 736 (2008). See, also, *Board of County Com'rs v. Kobobel*, 74 P.3d 401, 406 (Colo. App. 2002) (stating that "[o]rdinarily, public highways remain public unless and until vacated or abandoned by some appropriate action"). It has also been noted:

> The discontinuance of a public highway is not favored in the law. Once it is shown that a road is a public highway, the highway is presumed to exist until it is discontinued. The general rule is "once a highway, always a highway," though of course this maxim gives way to the rules of law concerning the abandonment or vacation of a highway.

39 Am. Jur. 2d, *supra*, § 150 at 738-39.

[14] Nebraska statutes are consistent with these statements reflecting the common law. The above-quoted Nebraska statutes show that a county road is a public road which tends to remain public, see § 39-1404, but under § 39-1725, a county can completely vacate a road or there may be a vacation with a qualification, such as the retention of a right-of-way. It has been noted that "statutes governing the vacation of a public road are in derogation of the common law [concerning a public entity's continuing ownership and responsibilities

for roadways] and must be strictly construed." 39 Am. Jur. 2d, *supra*, § 148 at 737. We have recognized that statutes which effect a change in the common law are to be strictly construed. *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012).

For completeness, as we noted above, the County briefly refers us to one additional statute, § 39-1401(2), which provides that a public road is a road which has not been vacated. The County suggests that under this statute, the vacated road in this case lost its public character, thus relieving the County of responsibility. We reject this argument. Contrary to the County's suggestion, we read § 39-1401(2) in conjunction with the other statutes considered above, and thus, we believe that for a road to lose its public character under § 39-1401(2), there must be an unqualified vacation of the road.

At issue in this case are statutes governing the public roadways in general and statutes governing the vacating of public roadways in particular. We must read the series of statutes pertaining to county roads conjunctively so that the different provisions are consistent, harmonious, and sensible. *Pittman v. Western Engineering Co.*, 283 Neb. 913, 813 N.W.2d 487 (2012). In so doing, we read the relevant statutes to mean that a county board controls and supervises the public roads in its county. § 39-1402. Under § 39-1725, the county board may take steps to vacate a road completely, in which case the roadway would lose its public character, § 39-1401(2), or to vacate a road with qualifications such as retention of the right-of-way, in which case the road with the right-of-way retains its public character but requires responsibility by the county commensurate with its status. Thus, with respect to its public roads, we conclude that the county had a duty to exercise such degree of care as would be exercised by a reasonable county in connection with its public road which has been vacated but for which the county has retained a right-of-way.

[15,16] As a general matter, the existence of a duty serves as a legal conclusion that an actor must exercise such degree of care as would be exercised by a reasonable person under the circumstances. *Martensen v. Rejda Bros.*, 283 Neb. 279,

808 N.W.2d 855 (2012). We have stated that "'[d]uty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases.'" *Id.* at 287, 808 N.W.2d at 863 (quoting *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010)). We have recognized that "'whether a duty exists is a policy decision.'" *Id.* (quoting *A.W., supra*).

In the present case, the County vacated 545th Avenue between 845th Road and 846th Road with the qualification that it retained a right-of-way pursuant to § 39-1725. In this regard, the record shows that on October 19, 2004, the County's board of commissioners vacated this portion of 545th Avenue by resolution No. 2004-78, which provided in part, "NOW THEREFORE, BE IT RESOLVED by the Board of Commissioners of Madison County, Nebraska that the county road described below is hereby vacated, and that the County shall retain the Right-of-Way subject to any easements of record, which shall remain in full force and effect."

As of November 9, 2008, the date of the accident at issue in this case, the County still retained this right-of-way, and it is undisputed that there was occasional public use. Under § 39-1725, had there been no public use of the right-of-way for a period of 10 continuous years after the resolution, the vacated road would have reverted to the adjacent landowners. The reversion provision in § 39-1725 lends support to the proposition that in the absence of reversion, the authority over the vacated road remained with the County and the road remained public in character.

Summarizing what we have noted above, because the County retained a right-of-way in the vacated road, we conclude that the County had the duty to do what a reasonable county would do having vacated a road but retained a right-of-way. The district court erred as a matter of law when it failed to reach this legal conclusion regarding duty. Perhaps using the word "duty" in a casual sense, when the district court determined that the County had a "duty" to remedy the condition of the road, it substituted a factual proposition regarding the manner in which a duty can be met or breached in place of the legal conclusion as to the existence of the duty.

In its order after trial, the district court relied on *Woollen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999), which involved, inter alia, allegations of improper maintenance of a state highway and no allegations of vacation or abandonment. Referring to *Woollen*, the district court concluded that "by retaining control of the road through retention of the right-of-way, [the County] had a duty . . . to remedy the condition [of the vacated road]." The facts in *Woollen* are distinguishable, and the reasoning in *Woollen* has been abrogated by the jurisprudence set forth in *A.W., supra*. Thus, the district court's duty analysis relying on *Woollen* was flawed. What the district court characterized as the County's legal "duty" to remedy the road was instead the factual manner by which the County could arguably meet or breach its duty. However, as explained below, the manner in which the County could meet its duty in this case was to maintain warning signs it had chosen to install rather than remedying the washout. Although there was a fleeting reference to road maintenance in closing argument, neither the controlling pleadings nor the evidence was directed at the manner in which the County might maintain the vacated road.

The statutes do not specify the responsibilities of the County for those roads which are vacated by an act of its board of commissioners but with the qualification that the County retains a right-of-way. A road that has been vacated with a qualification falls between a road that has been completely vacated and a road untouched by vacation in any degree. Based on the statutes, the logical conclusion is that a county's responsibilities regarding a road that has been vacated with a qualification are less than the obligation to fully maintain, as with a public road untouched by any degree of vacation, but more than no obligations, as with a completely vacated road. Thus, we turn to the nature of the County's responsibilities in this case and whether the County's conduct breached its duty to exercise the degree of care that would be exercised by a reasonable county under the circumstances.

In order to recover, the appellees were required to establish that the County breached its duty owed to them. See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907

(2010). The question of whether the County's conduct breached its duty regarding a vacated road in which it retained a right-of-way is a question of fact. See *id.* at 210-11, 784 N.W.2d at 913 (stating that "it is for the fact finder to determine, on the facts of each individual case, whether or not the evidence establishes a breach of . . . duty").

[17] The issues in a case are framed by the pleadings. *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004). In their first amended complaint at paragraph 10, the appellees allege that the particular manner in which the County breached its duty was by

> failing to correct the malfunction, destruction, or any unauthorized removal of the Road Closed signed [sic] when it had actual and constructive knowledge and notice of the malfunction, destruction, and or [sic] removal of the sign, which sign would have notified the traveling public that the section of road was vacated and contained dangers thereon. [The County violated] the Nebraska Political Subdivisions Tort Claims Act, §13-910(9).

See, also, paragraphs 6 and 8 of the complaint.

In paragraph 19 of its amended answer to the first amended complaint, the County affirmatively alleged that it was immune from suit under, inter alia, § 13-910(9). Section 13-910(9) of the Political Subdivisions Tort Claims Act generally provides that the political subdivision retains its sovereign immunity from "[a]ny claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign . . . unless it is not corrected by the political subdivision responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal." The second sentence of § 13-910(9) continues, "Nothing in this subdivision shall give rise to liability arising from an act or omission of any political subdivision in placing or removing any traffic or road signs, signals, or warning devices when such placement or removal is the result of a discretionary act of the political subdivision." There is no indication in this record that the County removed the warning sign, and the County does not assert an absence of liability under the second sentence of § 13-910(9).

We have previously considered § 13-910(9) and its related provisions. We have observed that the decision to install a traffic control device is ordinarily a discretionary function and that a political subdivision is immune from suit with respect to such decision. See *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002). See, also, § 13-910(2). See, additionally, Neb. Rev. Stat. § 60-6,121 (Reissue 2008) (providing that local authorities shall place traffic control devices "as they deem necessary"). In the instant case, the County exercised its discretionary function by choosing to install the road closed warning sign at the north end of the vacated road. Under § 60-6,121, once the political subdivision elects to install a device, the device must conform to the Manual on Uniform Traffic Control Devices. See *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005).

The appellees alleged that having chosen to erect a warning sign, the County was responsible to maintain it, and that the County's failure to maintain the warning sign gave rise to liability under § 13-910(9). Evidence was presented by the appellees to support these allegations, and evidence was presented by the County to disprove these allegations. The County's evidence focused on its alleged lack of notice that the sign was down on the day of the accident. Under Neb. Rev. Stat. § 81-8,219(9) (Reissue 2008), which is the statute applicable to the state equivalent to § 13-910(9), which is the statute applicable to political subdivisions, we have recognized that whether the public entity had notice of a malfunction and whether it did not correct the malfunction within a reasonable time are findings of fact. See *Fickle v. State*, 273 Neb. 990, 735 N.W.2d 754 (2007), *modified on other grounds*, 274 Neb. 267, 759 N.W.2d 113. Given the law and the record, these critical facts should have been decided by the district court as the fact finder in order to determine whether the County's defense under § 13-910(9) had merit.

The district court stated that the sign-related issue was a "non-issue" based on the district court's erroneous legal conclusion that, in any event, the County had a duty to repair the washout in the road and had breached this duty. These determinations by the district court constitute reversible error.

Therefore, we reverse the judgment in favor of the appellees and remand the cause to the district court.

Because we are remanding this matter to the district court to make determinations regarding the warning sign, we do not reach the County's remaining assignments of error.

CONCLUSION

We do not find plain error in connection with the first judge's appointment of the second judge. However, we find errors in the order after trial and the denial of the County's motion for new trial, and we reverse, and remand. We conclude that because the County retained a right-of-way in the vacated road, it had a duty to exercise such degree of care as would be exercised by a reasonable county under the circumstances. The district court erred when it concluded that the County had a "duty" to maintain the vacated road and based its negligence determination in favor of the appellees on its erroneous determination that the County breached its "duty" to maintain the road. The central issue in the case was whether the County met its obligations relative to the warning sign it had chosen to erect. The district court erred when it determined that the issue regarding the warning sign was a "non-issue." We reverse the judgment in favor of the appellees and remand the cause to the district court with directions to find whether the County had actual or constructive notice that its warning sign was down on the date of the accident and whether the County had reasonable time to correct the problem. These findings will determine whether the County retained sovereign immunity, as the County claims under § 13-910(9).

REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., not participating.