Defining "Professionals" within 25-222: An Approach Intended by Nebraska's Legislature?

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I. INTRODUCTION

“[W]ords are chameleons, which reflect the color of their environment . . . .”

In Nebraska, physicians, lawyers, accountants, architects, engineers, medical technicians, and certain investment advisors render “professional” services,¹ but real estate brokers do not²—that is, for purposes of Nebraska’s professional negligence statute of limitations, section 25-222 of the Revised Statutes of Nebraska (“25-222”).³ As evidenced by this summary of Nebraska law, the Nebraska Supreme Court has repeatedly used a definitional, classificatory approach in determining to whom the statute’s protection may be extended. That is, the court has focused on who ranks as a “professional” before allowing certain parties to use 25-222 as a defense. To determine which occupa-

* Special thanks go to Professor Craig M. Lawson at the University of Nebraska College of Law for his substantive suggestions on this Note.
1. See infra notes 60-64 and accompanying text.
2. See infra note 81 and accompanying text.
tions are "professions," the court has long adhered to one definition of "professional," which was recently modified in Tylle v. Zoucha, a case holding that real estate brokers were not professionals for purposes of 25-222. The court's continued attempt to apply a definition that will necessarily change and grow as our society continues to expand its perception of "professionals" only will provoke constant litigation, challenging the modern meaning of the definition.

Focusing on the line of cases in which the court has utilized this definitional approach to 25-222, this Note analyzes the development of the statute and the logic behind the court's classificatory interpretation of the statute. This Note concludes that by enacting 25-222, the Nebraska Legislature did not intend to separate particular professions from others for statute of limitations purposes. Instead, the intention was to separate professional negligence claims, based on the breach of a professional standard of care, from ordinary negligence claims, based on the breach of the reasonable person standard of care. This conclusion is supported by an examination of the statutory language selected for 25-222, the principles of professional negligence, and the legislative history leading to the passage of the statute.

II. DEVELOPMENT OF 25-222

A. History

Before the Nebraska Legislature enacted 25-222, malpractice actions were governed by section 25-208, which provided a two-year limi-
itation period in allowing claims to be brought by injured plaintiffs. This two-year time frame led to harsh results when the act or omission that created the damage was part of a long series of medical treatments for the same condition, or when the negligence was not discovered within the two-year period. In response to these situations, the Nebraska Supreme Court created the "end of treatment rule"; that is, the statute of limitations began to run when the medical treatment ended.9 This rule was later abandoned in favor of the "discovery rule." The advent of the discovery rule occurred in a case where the plaintiff alleged that a physician negligently left a foreign object in her body.10 The court stated that a cause of action did not accrue, thereby commencing the period of limitation, until the plaintiff discovered, or reasonably should have discovered, the foreign object in her body.11 The discovery rule subsequently was extended from foreign object cases to any type of malpractice case against a physician.12

Also leading to the passage of 25-222 was the increasing amount of malpractice and products liability litigation,13 causing insurance companies to either cease coverage for these types of actions or raise rates to prohibitive levels.14 The exorbitant insurance rates were being passed to the public in fees for the services rendered.15 These factors evidenced a need for a statute of limitations which put a constraint on the time period in which various malpractice and products liability suits could be commenced. Such a time limit would reduce the insurers’ risk of extending coverage to potential defendants, thereby lowering insurance rates.

The development of the discovery rule in Nebraska and the perceived nationwide malpractice crises16 created dual concerns: the in-
justice of a statute of limitations that could bar a plaintiff’s action before he or she has suffered injury\textsuperscript{17} and the additional inequity of leaving the defendant indefinitely vulnerable to suit.\textsuperscript{18} These concerns prompted the Nebraska Legislature to amend 25-208\textsuperscript{19} and enact 25-222 in 1972.\textsuperscript{20} The statute currently reads:

25-222. Actions on professional negligence. Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within

\begin{enumerate}
\item Logic therefore would seem to tell us that if one knowing of the existence of a cause of action must be given a reasonable period of time to file suit, one cannot have that right legislatively extinguished before the individual either knows of the right or, with the exercise of reasonable diligence, could know of such right. Sacchi v. Blodig, 215 Neb. 817, 824-25, 341 N.W.2d 326, 331 (1983)(Krivosha, C.J., concurring).
\item W.P. Keeton, supra note 13, § 30, at 167.
\item Neb. Rev. Stat. § 25-208 (1984) was amended as indicated in italics below:
\begin{enumerate}
\item 25-208. Actions for libel, slander, assault and battery, false imprisonment, malicious prosecution, malpractice, penalty, forfeiture, recovery of tax. The following actions can only be brought within the periods herein stated: Within one year, an action for libel, slander, assault and battery, false imprisonment, malicious prosecution, or an action upon a statute for a penalty or forfeiture, but where the statute giving such action prescribes a different limitation, the action may be brought within the period so limited; within two years, an action for malpractice which is not otherwise specifically limited by statute. In the absence of any other shorter applicable statute of limitations, any action for the recovery of an excise or other tax, which has been collected under any statute of the State of Nebraska, which has been finally adjudged to be unconstitutional, shall be brought within one year after the final decision of the court declaring it to be unconstitutional.
\end{enumerate}
\item L.B. 1132, 82d Leg., 2d Sess. (1972); 1972 Neb. Laws 637. This statute reads as amended at the time of this writing. The current relationship between 25-208 and 25-222 regarding malpractice and professional negligence has not been expressly declared by Nebraska's Legislature or Supreme Court. However, since Nebraska has adhered to such a broad definition of malpractice ("any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties," see supra note 7), it is conceivable that 25-222 concerns professional negligence only, whereas 25-208 covers any professional misconduct, not solely negligence.
\item After the enactment of 25-222, section 25-208 was applied in tandem with 25-222 in Sanitary & Improvement Dist. No. 145 v. Nye, 216 Neb. 354, 343 N.W.2d 753 (1984)(legal malpractice) and Taylor v. Karrer, 186 Neb. 381, 244 N.W.2d 201 (1976)(medical malpractice; only section 25-208 applied since acts at issue occurred in 1968, before 25-222 was adopted).
\end{enumerate}

As Oliver Wendell Holmes, Jr. said: The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.

\item L.B. 1132, 82d Leg., 2d Sess. (1972); 1972 Neb. Laws 637.
two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; Provided, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; and provided further, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

The statute sets forth a two-year limitation in the first clause, with the second clause modifying the first "by codifying the discovery rule." The last clause "limits the impact of the discovery rule," thereby satisfying the competing concerns in favor of both the plaintiff with an undiscovered injury and the defendant with an indefinite vulnerability to a lawsuit.

**B. Nebraska Supreme Court Interpretation**

The Nebraska Supreme Court has interpreted 25-222 by articulating the character and purpose of the statute, as well as by upholding its constitutionality in several cases. The court's constitutional analysis has focused on the determination of who is a "professional" within the meaning of 25-222.

Based on the language of 25-222, the court has characterized the statute as the occurrence rule, tempered by discovery. The occurrence rule states that the act or omission which invades one's legal right, as opposed to actual damage, triggers the statute of limitations. More specifically, the statute of limitations would begin to run for a tort as soon as the act or omission occurred, instead of when the plaintiff sustained loss, detriment, or harm caused by the tortious behavior.

The Nebraska Supreme Court has articulated the purpose of 25-222 as insuring that professional negligence actions will be commenced soon after the negligent act or omission occurs or is discovered, thereby granting the defendant an opportunity to defend the claim and not find applicable defenses eroded by the passage of time.

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23. Id.
26. Id. at 505, 357 N.W.2d at 189-90.
ther, statutes of limitation generally promote stability and finality in human affairs by stimulating action and punishing for delay in filing claims.\(^{28}\)

Section 25-222 has been attacked unsuccessfully on constitutional grounds seven times\(^{29}\); each time the court has focused on who ranks as a "professional" in its constitutional analysis. In *Horn v. Burns and Roe*,\(^{30}\) the Eighth Circuit Court of Appeals decided 25-222 was not unconstitutional and not void on its face because of vagueness and indefiniteness.\(^{31}\) *Horn* involved a steamfitter who allegedly was injured as a result of negligence on the part of an architectural and engineering firm and an organization of engineers which was responsible for quality control during the construction of the power plant on which the plaintiff was working.\(^{32}\) The defendants claimed that 25-222 barred the action and the district court held that architecture and engineering were "professional" occupations within the meaning of 25-222.\(^{33}\) On appeal, the plaintiff argued that the statute was unconstitutionally vague since the terms "professional negligence" and "professional services" did not convey a sufficiently definite warning as to the proscribed conduct.\(^{34}\) The Eighth Circuit Court of Appeals affirmed, citing authority that noncriminal statutes are not unconstitutionally vague if an "ordinary person exercising common sense can sufficiently understand and fulfill its prescriptions."\(^{35}\) The court stated that the more specific language found in 25-222, such as a listing of those professions protected, was not necessary because the lack of criminal sanctions required "less literal exactitude in order to comport with

\(^{28}\) Rosnick v. Marks, 218 Neb. 499, 501, 357 N.W.2d 186, 188 (1984). See also United States v. Kubrick, 444 U.S. 111, 117 (1979)("[T]hey [statutes of limitation] protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."); Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944)("Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."); Note, *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1185 (1950)("Another factor [underlying statutes of limitation] may be an estimate of the effectiveness of the courts, and a desire to relieve them of the burden of adjudicating inconsequential or tenuous claims." (footnotes omitted)).

\(^{29}\) See infra notes 30-57 and accompanying text.

\(^{30}\) 536 F.2d 251 (8th Cir. 1976).

\(^{31}\) Id. at 254-56.

\(^{32}\) Id. at 253.

\(^{33}\) Id. at 253-54.

\(^{34}\) Id. at 254.

\(^{35}\) Id.
due process." The court concluded that the ordinary meaning of the terms "professional negligence" and "professional services" was not so vague as to fail to create a standard; therefore, the statute was deemed constitutional.

The Nebraska Supreme Court also found 25-222 constitutional in Taylor v. Karrer, a medical malpractice action. The court stated that 25-222 was not void for vagueness or unconstitutional as special legislation because it was not sufficiently vague or deficient in its terms to render enforcement impossible. Again focusing on the term "professional," the court stated that, "although questions may arise as to who are professionals and what are professional services, we do not find the statute to be so imperfect or deficient as to render its enforcement impossible." Stressing that 25-222 was not unconstitutional as special legislation, the court also focused on professional people and pointed to several reasons for discrimination in the professional negligence field. One such reason was the increase in malpractice litigation and high insurance rates, which were unduly burdening the public in the form of fees. Equally important, malpractice victims were often unaware of the malpractice for indefinite lengths of time. Therefore, "[t]he situation of professional people and of those to whom they render services is substantially different from the normal situation encountered in the rendering of ordinary services and injuries sustained thereby. Public policy dictates diverse legislation in regard to professional services."

This distinction between professionals and those rendering "ordinary services" was affirmed as valid in Colton v. Dewey, another medical malpractice case. Addressing the appellant's argument that the ten-year period of repose in 25-222 was unconstitutional, the Nebraska Supreme Court stated that under the Nebraska Constitution, legislative classifications of people may be made if the classification rests "upon real differences of situation and circumstances surrounding the members of the class." Since there are valid differences between professional and ordinary services, the period of repose was not

36. Id. at 255.
37. Id. at 256.
38. 196 Neb. 581, 244 N.W.2d 201 (1976).
39. Id. at 586, 244 N.W.2d at 204.
40. Id.
41. Id. at 586, 244 N.W.2d at 204-05.
42. Id.
43. Id. at 585-86, 244 N.W.2d at 204.
44. Id. at 586, 244 N.W.2d at 204.
45. Id.
46. Id.
47. 212 Neb. 126, 321 N.W.2d 913 (1982).
special legislation, nor did it violate Nebraska’s due process clause\(^{50}\) or the equal protection clause\(^{51}\) of the United States Constitution.\(^{52}\) Finally, the court stated that the open courts provision of the Nebraska Constitution\(^{53}\) did not prohibit the placement of time limits, as in the 25-222 period of repose, on potential plaintiffs.\(^{54}\) The ruling regarding the open courts provision was upheld again in *Smith v. Dewey*,\(^{55}\) a medical malpractice case, and in *Rosnick v. Marks*,\(^{56}\) a legal malpractice action, in which the court stated that *Colton* was dispositive of the argument that the period of repose in 25-222 denied the plaintiff right of access to the courts.\(^{57}\)

It is apparent from the Nebraska Supreme Court’s constitutional analyses, which have focused on the adequacy of the terms “professional negligence” and “professional services,”\(^{58}\) and the difference between professional and ordinary services,\(^{59}\) that the approach to interpreting 25-222 has become a definitional game. As the Nebraska Supreme Court began to apply 25-222 not only to physicians, but to lawyers,\(^{60}\) accountants,\(^{61}\) architects and engineers,\(^{62}\) medical technicians,\(^{63}\) and to those who offer investment advice by planning em-

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50. NEB. CONST. art. I, § 3.
56. 214 Neb. 605, 335 N.W.2d 590 (1983).
59. See supra notes 30-42 and accompanying text.
ployee benefit programs, a definition of "professional" as used in 25-222 has emerged:

A "professional" act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. In determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself.

C. Tylle v. Zoucha

Most recently, real estate brokers have claimed that they too fall within the meaning of "professional" in 25-222. The case setting the precedent that real estate brokers do not fit into the classification created by the Nebraska Supreme Court's definitional approach to 25-222 was Tylle v. Zoucha. Tylle was the plaintiff-appellant who alleged a real estate broker's negligent failure to sell land by auction, as originally contracted by the parties. The contract required a minimum auction sale price of $3,000 per acre; if that amount was not offered, the broker, Zoucha, would have exclusive listing of the property for a specified time period. When the property was not sold at two different auctions, Tylle sold the property himself for $2,500 per acre. Tylle alleged damages of $20,908.

The district court granted Zoucha's motion for summary judgment because the action was not brought within the professional negligence statute of limitations, 25-222. After denial of his motion for a new trial, Tylle appealed, assigning as error the trial court's finding that Zoucha was a professional, therefore falling under the protection of 25-222. The Nebraska Supreme Court reversed and remanded.

67. Id.
68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
73. Id.
The Supreme Court focused on whether a real estate broker may be considered a professional for purposes of 25-222. Looking to other states for authority, the court cited with favor several cases (many of which concerned the unrelated topic of zoning law) which answered the proposition negatively.74 The court then referred to the definition of professional most often used in Nebraska,75 and stated that whether an occupation is primarily intellectual or mental rather than manual or physical should not be the only distinguishing factor.76 In its search for a definition that would not turn on the intellectual-manual distinction, the court dismissed a definition from the Nebraska Professional Corporation Act,77 which required a professional service to be one rendered after obtaining a license. The court then turned to Webster’s Dictionary78 for a definition of “professional” which properly stressed intensive preparation, but did not focus on a intellectual-manual distinction or the possession of a license:79

4a. a calling requiring specialized knowledge and often long and intensive preparation including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service . . . . 80

On the basis of this definition and case law from other states, the court held that real estate brokers were not professionals for purposes of 25-222.81 In answer to the appellant’s constitutional concerns, the court also upheld the statute as not unconstitutionally vague based on the prior Nebraska cases which established its constitutionality.82

The three-judge concurrence83 delivered by Judge Caporale agreed with the majority’s result, but not with its reasoning. Although part of the concurrence was based on a real estate broker’s professional status, the majority’s analytical approach, Judge Caporale focused on the idea that “professional” was a nebulous term, therefore not creating a classificatory scheme or meaning of “professional negligence” within the statute.84 The concurrence mentioned the growth of the

74. Id. at 478-79, 412 N.W.2d at 439-40.
75. See supra note 65 and accompanying text.
78. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1811 (1981). See also Jordan v. DeGeorge, 341 U.S. 223, 234 (1951) (“If we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant.”).
80. Id.
81. Id. at 480-81, 412 N.W.2d at 441.
82. See supra notes 30-57 and accompanying text.
84. Id.
term "professional" since the days when only law, medicine, and theology were recognized as such.\textsuperscript{85} Caporale reasoned that Nebraska likewise has expanded the definition, as evidenced by the cases permitting architects, engineers, accountants, medical technicians, and investment advisors to be included in the professional negligence statute of limitations.\textsuperscript{86}

The concurrence also noted that authorities were actually split on the question of real estate brokers being professionals, with the most recent authority classifying them as such, contrary to the majority opinion.\textsuperscript{87} Despite Caporale's conclusion that "professional" is too nebulous to create a meaning of "professional negligence" within 25-222,\textsuperscript{88} the concurrence found that real estate brokers were indeed professionals.\textsuperscript{89} Describing "professional" as "nothing more than an activity by which one earns his or her livelihood,"\textsuperscript{90} the concurrence dismissed the majority's definition of professional,\textsuperscript{91} as well as the previous definition favored by the Nebraska Supreme Court.\textsuperscript{92} From legislative history, Caporale attempted to glean an explanation for 25-222 in the presence of section 25-207,\textsuperscript{93} providing a four-year limitations period for tort actions, and section 25-208,\textsuperscript{94} the two-year statute of limitation for malpractice actions. Citing only those parts of the history specifying who would be protected by 25-222,\textsuperscript{95} Caporale concluded that 25-222 must not have been meant to apply to professions such as bowling, driving, and wrestling.\textsuperscript{96} If such professions were included in the statute, "we would have a 2-year period of limitations for all negligence claims resulting from one's occupation and a 4-year period of limitations for other causes of action based on negligence."\textsuperscript{97}

The concurrence concluded that the Nebraska Legislature failed to properly classify those who may benefit by 25-222, thereby requiring the courts to determine "what there is about various occupational ac-

\textsuperscript{85} Id.
\textsuperscript{86} Id. at 483, 412 N.W.2d at 442. See supra notes 61-64 and accompanying text.
\textsuperscript{88} See supra note 84 and accompanying text.
\textsuperscript{90} Id. at 486, 412 N.W.2d at 44 (Caporale, J., concurring).
\textsuperscript{91} See supra note 85 and accompanying text.
\textsuperscript{92} See supra note 85 and accompanying text.
\textsuperscript{93} NEB. REV. STAT. \textsuperscript{85} § 25-207 (1985).
\textsuperscript{94} NEB. REV. STAT. \textsuperscript{85} § 25-208 (1985).
\textsuperscript{95} Statement of Purpose, L.B. 1132, Judiciary Committee, 83d Leg., 2d Sess. (Jan. 17, 1972)(physicians, surgeons, and medical personnel need protection); Judiciary Committee Hearing, L.B. 1132, 82d Leg., 2d Sess. (Jan. 17, 1972)(Sen. Luedtke stated that the statute "would also cover the lawyers, the architects, and everybody." \textit{Id.} at 19).
\textsuperscript{97} Id.
tivities, if anything, which justifies such preferential treatment.\footnote{98} Caporale noted that the court’s effort in preserving 25-222 by analyzing which occupations fit into the statute on a case-by-case basis was overly ambitious.\footnote{99} Further, because the Legislature failed to create a classification, the court must do more than apply a legislative classification to a given set of facts.\footnote{100}

\section*{III. ANALYSIS}

\textit{Tylle} is the most recent example of the Nebraska Supreme Court’s definitional approach to interpreting 25-222, as developed by the Nebraska cases establishing the constitutionality of 25-222.\footnote{101} The court in each of these cases simply decided in the abstract what “professional” meant by creating or adhering to a particular definition, applied the definition to the defendant’s occupation, and then decided whether 25-222 was intended to protect that occupation. All of this was done with little reference to the complete language contained in the statute, negligence law in general, and the legislative history behind 25-222. By failing to consider these aspects, the Nebraska Supreme Court created random definitions\footnote{102} which typically brought to mind the traditional learned professions. The court could expand or contract these definitions, depending upon whom the court thought should be protected by 25-222 on any given day.

A closer look at the language of 25-222, the principles of tort law, and relevant legislative history reveals that the Nebraska Legislature intended 25-222 to cover professional negligence claims. This does not mean negligence of “professionals” in the literal, definitional sense, but negligence claims based on breach of the professional standard of care,\footnote{103} as opposed to the ordinary standard of care,\footnote{104} which causes actual damage.\footnote{105}

\subsection*{A. Statutory Language}

Section 25-222 speaks in terms of professional negligence in “rendering or failure to render professional services.”\footnote{106} The Legislature did not restrict these services to those of physicians, attorneys, architects, or any particular occupation. If more specificity was intended, the Legislature would have opted for more concise, exact terminology.

\footnotesize

98. \textit{Id.} at 491-92, 412 N.W.2d at 447.
99. \textit{Id.} at 492, 412 N.W.2d at 447.
100. \textit{Id.}
101. \textit{See supra} notes 30-66 and accompanying text.
102. \textit{See supra} notes 65 and 80 and accompanying text.
104. \textit{Id.} at 173-83.
105. \textit{Id.} § 30, at 165.
In addition, because this broad language does not define what types of "professional services" are included in the statute, it is illogical to approach statutory interpretation definitionally. This is especially true because it is the court's duty "to discover, if possible, legislative intent from the statute itself."\textsuperscript{107} Why attempt to create definitions describing "professionals" when there is no evidence from the statutory language itself that such a definition is required? The Legislature had a broader purpose for 25-222—the separation of negligence claims based on breach of the professional standard of care from ordinary negligence claims.

Various rules of statutory construction further guide how 25-222 should be interpreted. The Nebraska Supreme Court has committed itself to giving effect to "every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning."\textsuperscript{108} In addition, "[i]t is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language."\textsuperscript{109} It is clear from the line of decisions establishing the statute's constitutionality ending with \textit{Tylle} the Nebraska Supreme Court has focused solely on the word "professional" without reference to the phrase "professional negligence" as a whole.\textsuperscript{110} According to 25-222, the limitation period applies to actions based on "alleged professional negligence,"\textsuperscript{111} not simply actions against professionals. The court has violated the above rules of construction by considering only whether the action involves a "professional," instead of recognizing the key phrase "professional negligence." Professional negligence is a term of art used to describe negligence actions based on breach of the professional standard of care, thereby causing actual damage.\textsuperscript{112} If effect had been given to every word of this phrase, starting with the 25-222 constitutionality cases,\textsuperscript{113} the court's definitional approach would have been unnecessary.

Other guidelines which determine how the Nebraska Supreme Court should interpret 25-222 include sensible, as opposed to literal, interpretation,\textsuperscript{114} and avoidance of absurd results.\textsuperscript{115} An absurd result

\begin{itemize}
\item \textsuperscript{107} NC+ Hybrids v. Growers Seed Ass'n, 219 Neb. 296, 299, 363 N.W.2d 362, 365 (1985).
\item \textsuperscript{109} County of Douglas v. Board of Regents, 210 Neb. 573, 577, 316 N.W.2d 62, 65 (1982)(quoting Bachus v. Swanson, 179 Neb. 1, 3-4, 136 N.W.2d 189, 192 (1965)).
\item \textsuperscript{110} NEB. REV. STAT. § 25-222 (1985).
\item \textsuperscript{111} Id.
\item \textsuperscript{112} See supra notes 103-05 and accompanying text.
\item \textsuperscript{113} See supra notes 30-100 and accompanying text.
\item \textsuperscript{114} Tom & Jerry, Inc. v. Nebraska Liquor Control Comm'n, 183 Neb. 410, 419, 160 N.W.2d 233, 238 (1968)(quoting Grand Union Co. v. Sills, 43 N.J. 390, 408, 204 A.2d 853, 862 (1964)).
\item \textsuperscript{115} Adkisson v. City of Columbus, 214 Neb. 129, 134, 333 N.W.2d 661, 665 (1983).
\end{itemize}
will indeed be created if the court continues to attempt to classify every occupational category which comes before the court arguing a 25-222 defense as "professional." In such a situation, the litigation would be endless. As the public's perception and definition of "professional" changes over time, the court's definition will undoubtedly change, as it did in *Tylle*. Each time the definition changes, the court extends an invitation to litigate. Because the definition cannot remain static, new occupations will attempt to fit into the new definition if they had been rejected previously from the former definition.

Looking to other states' approaches to this problem is of little help. North Carolina is the only state which has a statute similar in language to Nebraska's 25-222. However, the North Carolina statute focuses on "malpractice arising out of the performance of or failure to perform professional services,"¹¹⁶ as opposed to "alleged professional negligence . . . in rendering or failure to render professional services,"¹¹⁷ the language used in 25-222. Like Nebraska, the North Carolina courts have taken a classificatory approach to the statute by defining which professionals fall within the statute.¹¹⁸ However, unlike Nebraska, the North Carolina courts have a basis on which to resort to a definitional approach, as their statute speaks of "professional services" instead of "professional negligence." Only the latter term has a settled meaning in the law of torts.¹¹⁹ Because Nebraska's 25-222 refers to "professional negligence,"¹²⁰ the statute should be interpreted based upon the tort meaning, instead of a definition of "professional."

### B. Principles of Professional Negligence

Many statutes not dealing with torts attempt classification of "pro-

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¹¹⁸. See Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., 313 N.C. 230, 338, 338 S.E.2d 274, 279 (1985)("Section 15(c) is broad enough to encompass professionals other than those in health care. We do not, however, read the statute to mean that all persons who arguably may be labeled 'professionals' necessarily fall within its ambit. . . . The legislature, we believe, intended the statute to apply to malpractice claims against all professionals who are not dealt with more specifically by some other statute."); Blue Cross & Blue Shield v. Odell Assocs., Inc., 61 N.C. App. 350, 361, 301 S.E.2d 459, 465 (1983)("We do not quarrel with applying G.S. 1-15(c) to architects. The statute does not limit the professions to which it applies, but covers 'malpractice arising out of the performance or failure to perform professional services.' Architecture is undoubtedly a profession."); petition denied, 309 N.C. 319, 306 S.E.2d 791 (1983); Roberts v. Durham County Hosp. Corp., 56 N.C. App. 533, 537, 289 S.E.2d 875, 878 (1982)("Even if the statute may be vague as to certain classes of occupations, it is not vague as to these defendants, a doctor and a hospital."); aff'd, 307 N.C. 465, 298 S.E.2d 384 (1983).
¹¹⁹. See supra notes 112 and 103-05 and accompanying text.
fessionals” using criteria such as level of training or continuous use of intellectual skills, or simply listing various occupations. However valuable such listings may be in the areas of corporation, immigration, or labor law, the demands of tort law require a rather different approach. This approach has been articulated in the Restatement as a duty of care which distinguishes the “reasonable man of ordinary prudence” from one undertaking a profession or a skilled trade:

§ 299A. Undertaking in Profession or Trade
Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.

In relation to the elements of a negligence claim (breach of a duty to conform to a standard of care which proximately causes actual damage), this provision represents the standard of conduct required of a person of superior knowledge, skill, learning, experience, training, or intelligence who undertakes rendering services to others. This standard of care applies to the practice of a profession or skilled trade. The Nebraska courts have applied this standard to dentists, architects, a wheat and millet thresher, an auto wrecker operator, and a termite inspection service. Therefore, it appears that the Nebraska Supreme Court recognizes the existence of the professional standard of care, but has simply failed to link it to the professional negligence language in 25-222.


122. Id.


125. Id. § 32, at 185-93; RESTATEMENT (SECOND) OF TORTS § 299A (1965).

126. Id. § 32, at 164-65.

127. Id. § 32, at 185-93; RESTATEMENT (SECOND) OF TORTS § 299A (1965).


134. But see Nebraska Supreme Court Committee on Pattern Jury Instructions, Nebraska Jury Instructions, Duty of One Rendering Professional and Skilled-Trade Services—In General, Instruc. 12.04 & comment, at 699 (1989) (links professional...
The closest the Nebraska Supreme Court has come to recognizing this professional standard of care in the context of 25-222 was in Rosnick v. Marks, a case involving interpretation of 25-222. The court referred to a "degree of professional skill" and "breach of professional duty" and said that "[i]n conjunction with § 25-222 every professional has a duty to render services in a reasonable and prudent manner. A negligent breach of that professional duty invades a legal right of one entitled to receive negligence-free services." However, the court failed to mention or recognize a professional standard of care as related to professional negligence and instead focused on reasonable and prudent behavior, the standard of care for ordinary negligence claims.

Because 25-222 is based on negligence, and negligence is based upon breach of standard of care, it is clear that determining who is a "professional" should have no bearing upon whom 25-222 protects. The statute should instead apply to those who have breached the professional standard of care to which they are held by virtue of their superior knowledge, skill, learning, experience, training, or intelligence in undertaking to render services to others. Unlike the Nebraska Supreme Court's random definitional approach to 25-222, the professional standard of care concept is based on the law of negligence. Negligence law is certainly more definite and widely recognized than is a vacillating definition of "professional." Under the professional standard of care approach, multitudes of cases stemming from section 299A could serve as authority for determining who should be held to a professional standard of care. This would reveal who should be extended coverage under 25-222.

C. Legislative History of 25-222

Legislative Bill 1132 was introduced "to redefine the period of limitations for actions based upon malpractice or professional negligence." The stated purpose of the bill focused upon suits against medical personnel, but the floor debate and committee records standard of care to 25-222, and provides list of professions to which the elevated standard of care applies).

136. Id. at 506, 357 N.W.2d at 191.
137. Id. at 505, 357 N.W.2d at 190.
139. RESTATEMENT (SECOND) OF TORTS § 299A (1965).
141. The purpose of this bill is to provide certain conditions when statute of limitations [sic] shall run against malpractice suits which may be brought against medical personnel. This bill would provide in any action...
indicate that the bill was not intended solely for the benefit of physicians or any other of the "learned professions." The only certain facet of this part of the legislative history is that physicians definitely were to be extended protection.

The legislative history also evidences an intent to separate professional negligence claims based on breach of the professional standard of care from ordinary negligence claims in 25-222. Mr. Flavel Wright,

to recover damages for professional negligence in the medical field by medical personnel. . . . It safeguards the patient . . . .
. . . Physicians and surgeons need some type [sic] protection to prevent actions being brought long after the incident of alleged malpractice took place, when the incident is so remote that it is difficult for the physician or surgeon to protect himself [sic], and defend himself, from the charges because the evidence has been lost, the witnesses who would know are gone, no defense is available because the defenses which existed have been erased by the passage of time.


The purpose of this bill is to change the present law, which places a statute of limitation on the bringing of certain actions. This is specifically directed to placing a limit on the time actions may be brought by the person who claims damages for injuries received for malpractice, or negligence either by commission or omission [sic] on the part of physicians.


142. SENATOR LUEDTKE [Chairman of Judiciary Committee]: "It [L.B. 1132] protects doctors in this particular case and other professional people."

. . .

SENIOR CARSTENS [Introducer of L.B. 1132]: "This bill places a limitation on the time in which an action or generally supposed mal practice [sic] may be brought against professional individuals such as doctors or any professional licensed practitioners. This primarily is a malpractice limitation bill on the medical profession." Floor Debate, L.B. 1132, 82d Leg., 2d Sess. (Feb. 25, 1972).

143. FLAVEL WRIGHT [Attorney representing the Nebraska State Medical Association, appearing in favor of L.B. 1132]: "It has been suggested that there was an earlier bill which was considered by this committee a year or so ago, and in that case, I think it related generally just to the medical malpractice cases and provided a four year [sic] period of time. This bill has been broadened to include all professional negligence, which includes malpractice cases against lawyers, architects, many professional people. I think it is necessary that it be that broad."

. . .

SENIOR LUEDTKE: "This would also cover the lawyers, the architects, and everybody."

MR. WRIGHT: "Right."


144. "Formerly, theology, law, and medicine were specifically known as the professions." United States v. Laws, 163 U.S. 258, 266 (1896) (emphasis in original).

an attorney who helped draft L.B. 1132 in his representative capacity for the Nebraska State Medical Association,146 spoke in favor of the professional negligence statute of limitations.147 He clearly separated ordinary from professional negligence in his explanation of the bill.

In an ordinary negligence case . . . you've got four years [to bring action]. You've got five years in a contract case. You've got ten years if somebody is claiming your real estate.

A malpractice case . . . a professional negligence case, is one that is based upon the failure of the person performing special service, to render the degree of care that is ordinarily rendered by accepted practitioners in his service, in his area, or in similar areas in the country. If he fails to render that quality of service, he is then guilty of malpractice, or, in effect, causes damage, then a cause of action arises. This would cover malpractice cases, generally.148

Because of Mr. Wright's paraphrasing of section 299A149 (indicated in italics above), it appears that L.B. 1132, enacted in 25-222, was conceptualized as a statute covering professional negligence actions based on breach of the professional standard of care, as opposed to one applied to a particular set of professions. Even if the legislative history appears somewhat unclear as to which interpretation of 25-222 should follow—defining professionals or using the professional standard of care—the latter is the best assumption. Logically, the best choice would be to create an approach to 25-222 based on well-recognized negligence principles, as opposed to one depending on a casual social definition of "professional" which changes as society changes.

IV. CONCLUSION

"A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918)(Holmes, J.)

The Nebraska Supreme Court's attempt to define "professional" as the answer to the issue of who 25-222 protects is, at best, a temporary solution to a problem which will continue to plague the court if this interpretative approach is continued. As more occupations develop self-regulatory standards or licensing procedures in an effort to be-

146. Telephone interview with Flavel A. Wright, attorney (Sept. 12, 1988). As attorney for the Nebraska State Medical Association, Mr. Wright helped draft L.B. 1132. The Medical Association was the main force behind the bill.

147. Senator Carstens, introducer of L.B. 1132, allowed Mr. Flavel Wright to explain the bill to the Judiciary Committee: "[M]y name is Fred Carstens, introducer of LB 1132. Since time is wasting and we have witnesses who would like to leave to catch a plane, I'm going to dispense with any explanation and turn it over to Flavel Wright to avoid repetition. I will waive closing." Judiciary Committee Records, L.B. 1132, 82d Leg., 2d Sess. (Jan. 17, 1972).


149. RESTATEMENT (SECOND) OF TORTS § 299A (1965).
come "professionals,"\textsuperscript{150} whatever definition the court devises must continually change.\textsuperscript{151}

The correct conceptual approach to interpreting the reach of 25-222 is to conclude from both the key phrase "professional negligence,"\textsuperscript{152} a term of art based on tort law, and from the legislative history that the Nebraska Legislature intended to separate claims for damage based on a breach of the professional standard of care\textsuperscript{153} from ordinary negligence claims based on the reasonable person standard of care.\textsuperscript{154} It seems logical that a legislature creating a statute based on negligence would classify the claims falling under it according to standard of care, an element of negligence,\textsuperscript{155} rather than focusing on a group of people with multiple educational degrees or licenses.

Interpreting 25-222 in this manner would assuage Judge Caporale's concerns in his \textit{Tylle} concurrence.\textsuperscript{156} Caporale was correct in his statement that the word "professional" alone is nebulous, and that 25-222 does not create a classificatory scheme based on occupation.\textsuperscript{157} If an interpretation based on breach of the professional standard of care is used, such definitions and schemes are unnecessary. Similarly, Caporale observed that the term "professional" has grown over time to mean "nothing more than an activity by which one earns his or her livelihood."\textsuperscript{158} Why try to capture the meaning in a temporary definition which will be continually challenged?

\textit{Janine E. Rempe '90}

\begin{footnotes}
\item[150] "Formerly, theology, law, and medicine were specifically known as the professions; but as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name." United States v. Laws, 163 U.S. 258, 266 (1896)(emphasis in original).
\item[151] "Words, like men, grow an individuality; their character changes with years and with use." Adler v. Deegan, 251 N.Y. 467, 472, 167 N.E. 705, 706 (1929)(Crane, J.), reh'g denied, 252 N.Y. 574, 170 N.E. 148 (1929).
\item[152] \textsc{Neb. Rev. Stat.} \textsection 25-222 (1985).
\item[153] \textit{See supra} notes 103 and 127-38 and accompanying text.
\item[154] \textit{See supra} notes 104 and 124 and accompanying text.
\item[155] \textit{See supra} note 126 and accompanying text.
\item[156] \textit{Tylle} v Zoucha, 226 Neb. 476, 482, 412 N.W.2d 438, 442 (1987).
\item[157] \textit{Id.}
\item[158] \textit{Id.} at 486, 412 N.W.2d at 444.
\end{footnotes}