1987

It's Time to Pack Away the Crystal Ball: The Need for Remand in Pleading and Proof Cases of First Impression in Nebraska

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Recommended Citation
John P. Lenich, It's Time to Pack Away the Crystal Ball: The Need for Remand in Pleading and Proof Cases of First Impression in Nebraska, 66 Neb. L. Rev. (1987)
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I. INTRODUCTION

Making generalizations about the law is often a risky proposition but there is one generalization that can be safely made. The law is constantly changing and evolving. While a manufacturer was once liable only if he negligently designed or manufactured a product, that is no longer true.1 Likewise, while an employer could once discharge an at-will employee with complete impunity, that is no longer true.2

Although we recognize that our substantive rules are continually

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evolving, we sometimes forget that our procedural rules are also evolving. Substance and procedure are inextricably intertwined. For example, recognizing that a terminated employee may have a cause of action for wrongful discharge in turn requires the development of a clear set of requirements for pleading that cause of action. Because pleading requirements are more the product of judicial decisions than of statutory pronouncements, developing those requirements inevitably takes time. Each case adds something new to the pleading puzzle—clarifying and building on what had come before—and it may be years before the puzzle begins to take on a recognizable shape.

The process of evolution in pleading is not limited to new causes of action. We are continually refining and modifying the requirements for pleading even long-standing causes of action. For example, it was only a few months ago that the Nebraska Supreme Court put to rest a twenty year conflict in its own decisions and specifically held that intent to deceive is not an element of a cause of action for fraud. Thirteen years ago, a plaintiff who planned to file suit against a county prosecutor for false imprisonment would have searched the digests in vain for a case discussing whether malice is an essential element of the cause of action and, if so, whether a general allegation of malice would be sufficient. The court first addressed those issues in 1974. We now know that mitigation of damages is not a subject that the plaintiff need address in his petition; it is instead an affirmative defense that the defendant must specifically plead. That unqualified statement could not have been made four years ago, however. The court first addressed the issue in 1983.

The problem with change and evolution in pleading is that someone has to go first. The issue of whether a particular allegation is an essential element of a cause of action is not a question that will be decided in the abstract. It will instead be decided in a specific case involving the sufficiency of the allegations in a specific petition. Although the case will establish a precedent for future pleaders, the first pleader will have no precedent to guide him. Nevertheless, if his petition fails to comply with the new pleading requirement that the

3. Although there are a handful of statutes dealing with specialized pleading requirements, see, e.g., Neb. Rev. Stat. § 25-836 (1985) (compliance with conditions precedent may be pleaded generally), the only statute that addresses the plaintiff's basic pleading obligation is § 25-804 which provides: "The petition must contain . . . a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition . . . " Neb. Rev. Stat. § 25-804 (1985). That vague statutory pronouncement provides very little in the way of concrete guidance. See infra text accompanying notes 15-28. Judicial opinions are what define the elements of a particular cause of action and indicate how those elements should be pled. See infra text accompanying notes 29-32.
court announces, the case is over irrespective of whether the pleader could meet that newly announced requirement. In other words, he loses—not because his action is without merit but because he failed to comply with a pleading requirement that he could not have reasonably foreseen.

That should change. After discussing the practical difficulties that Nebraska pleaders face on a daily basis,\(^7\) this Article will analyze the interrelationship between the Nebraska pleading system and the expanding reach of *res judicata*.\(^8\) That interrelationship suggests that the court should modify its current approach to pleading appeals in order to ensure that cases are decided on their merits rather than on the technicalities of pleading. More specifically, the court should remand with leave to amend when the petition fails to comply with a newly announced pleading requirement\(^9\) and should also discontinue its practice of affirming pleading appeals on grounds other than those

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7. See *infra* notes 12-41 and accompanying text.
8. See *infra* notes 42-84 and accompanying text.
9. See *infra* notes 85-131 and accompanying text. The remand standard proposed in this Article is very similar to the standard federal courts follow in determining whether new rules of law should be given prospective effect. When announcing new rules of laws, courts have the power to give those rules retroactive effect, partial retroactive effect, or prospective effect. *See, e.g.*, Great No. Ry. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364-65 (1932); Myers v. Drozda, 180 Neb. 183, 187, 141 N.W.2d 852, 854 (1966). At least on the federal level, the determination of what effect a new rule should have

[[j]involves a three part analysis: (1) whether the appellate decision established a new principle of law either by overruling past precedent which had been relied upon or by deciding an issue of first impression in a manner 'not clearly foreshadowed' [by earlier decisions]; (2) whether prospective application will further or retard the [new] rule . . .; and (3) whether the rule if applied in this case would produce a "substantial inequitable result."

LePatourel v. United States, 463 F. Supp. 264, 272 (D. Neb. 1978) (decision that federal judge acting in an official but nonjudicial capacity while driving a car was a federal employee within the meaning of the Federal Tort Claims Act applied prospectively because, *inter alia*, the decision addressed an issue that had never been specifically addressed before and was, therefore, not clearly foreshadowed, and it would be inequitable to deny plaintiffs any relief when they had no reason to believe that the Act was potentially applicable, especially since the statute of limitations had run); *see, e.g.*, Chevron Oil Co. v. Huson, 404 U.S. 97, 107-08 (1971) (decision that state statute of limitations applies to actions brought under the Outer Continental Shelf Lands Act applied prospectively because it would be fundamentally unfair to deprive the plaintiff of "any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable").

Although the Nebraska Supreme Court has occasionally given its decisions prospective effect, the court has never clearly articulated the standard it follows. The court has sometimes emphasized the financial hardship that retroactive application would create for defendants, *see* Brown v. City of Omaha, 183 Neb. 430, 436, 160 N.W.2d 805, 809 (1968), at other times has emphasized that it was overruling precedent upon which the parties relied, *see* Langfeld v. Nebraska Dept. of Roads, 213 Neb. 15, 26, 328 N.W.2d 452, 455 (1983), and at still other times has
relied on by the trial court.10

Because the sufficiency of the plaintiff's petition can be indirectly challenged on appeal by arguing that the plaintiff failed to introduce sufficient evidence to prove each element of his cause of action, the suggested remand standard should also be followed when adopting new proof requirements.11

II. IF ONLY I KNEW WHAT TO PLEAD

Perhaps the greatest mystery that confronts a lawyer in a code pleading12 jurisdiction like Nebraska13 is how to draft a proper peti-

emphasized that its decision was contrary to the past practices of the trial courts. See Sosso v. Sosso, 196 Neb. 242, 244, 242 N.W.2d 621, 622 (1976).

The remand standard proposed in this Article parts company with traditional retroactivity analysis in that the standard does not contemplate giving prospective effect to new rules of pleading or proof. Those rules would apply to the parties, but the parties would be given an opportunity not currently available: the opportunity to comply with pleading or proof requirements that they could not reasonably have foreseen.

10. See infra notes 132-51 and accompanying text.
11. See infra notes 152-86 and accompanying text.
12. The term "code pleading" refers to the procedural system first adopted by New York in 1848. The New York Code, which was subsequently adopted by federal courts and most states, was primarily the work of David Dudley Field and is often referred to as the "Field Code." See C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 22 (1947). The code blended law and equity into one procedural system by abolishing the common law forms of action and substituting the civil action in their place. J. POMEROY, CIVIL REMEDIES: REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION 5-6 (5th ed. 1929); see, e.g., NEB. REV. STAT. § 25-101 (1985).

In addition to merging law and equity, the code relaxed the common law restrictions on joinder of parties and claims, see C. CLARK, supra, at 23, 435-38, and eliminated the extremely convoluted common law system of declarations, traverses, pleas by way of confession and avoidance, rejoinders, rebutters, surrebutters, and so on. In their place, the code substituted four pleadings: the petition, the defendant's answer or demurrer, the plaintiff's reply or demurrer to new matter contained in the defendant's answer, and the defendant's demurrer to new matter in the plaintiff's reply. C. CLARK, supra, at 687-88; see, e.g., NEB. REV. STAT. § 25-803 (1985). Finally, the code rejected the technical, formalistic, and conclusory nature of common law pleading in favor of a fact-based pleading system. In other words, the pleader's obligation under the code was to allege facts, not to mimic technical formulas. See J. POMEROY, supra, at 610-13; see, e.g., NEB. REV. STAT. § 25-804 (1985).

The nightmare of distinguishing law and fact soon led to proposals to replace fact pleading with notice pleading. See, e.g., Whittier, Notice Pleading, 31 HARV. L. REV. 501, 501-02 (1918). Those proposals were adopted by the federal system in 1938 with the promulgation of the Federal Rules of Civil Procedure. Rule 8(a) provides that a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Under Rule 8(a), the question is not whether the complaint alleges ultimate facts sufficient to state a cause of action but whether it gives "the defendant fair notice
tion. The requirement of alleging facts sufficient to state a cause of action seems simple enough. The pleader need only allege the “dry, naked, actual facts.” Facts are not so easily divorced from law, how-

of what the plaintiff’s claim is and the grounds upon which it rests.” Conley v. Gibson, 355 U.S. 41, 47 (1957).

There is sometimes a tendency to think that notice pleading and code pleading are as different as day and night. That is not quite accurate. Just like a petition in Nebraska state court, a complaint in federal court must include allegations covering each element of the cause of action. The difference is that federal courts are much more willing to infer that the necessary allegations have been made, to accept generalized allegations, and to brush aside arguments that the allegations are mere conclusions. See, e.g., Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

A majority of the states have now adopted notice pleading. See J. Friedenthal, M. Kane, & A. Miller, Civil Procedure 238 (1985). For further discussion of notice pleading see 5 C. Wright & A. Miller, Federal Practice and Procedure §§ 1201-1312 (1989 & 1986 Supp.). For further discussion of code pleading, see C. Clark, supra, and for further discussion of common law pleading, see B. Shipman, Handbook of Common Law Pleading (3d ed. 1923).

13. Nebraska has been a code pleading jurisdiction since 1857. See C. Clark, supra note 12, at 24.

14. The mystery surrounds more than petitions. The requirement of pleading facts, see infra notes 15-17 and accompanying text, is not limited to claims. It also applies to affirmative defenses, setoffs, counterclaims, and crossclaims. See Newman Grove Creamery Co. v. Deaver, 208 Neb. 178, 181-82, 302 N.W.2d 697, 700 (1981) (allegation that contract was the product of duress was a mere conclusion; facts constituting an affirmative defense must be specifically pleaded in the answer); Neb. Rev. Stat. § 25-811 (1985). Although this Article focuses on the petition, the remand standard it proposes would apply to all pleadings and parties.


16. J. Pomeroy, supra note 12, at 638. In his treatise, Pomeroy made what is generally considered to be the classic statement of a pleader’s obligation under the codes:

The issuable facts in a legal action, and the facts material to the relief in an equitable suit, should not only be stated to the complete exclusion of the law and the evidence, but they should be alleged as they actually existed or occurred, and not their legal effect, force, or operation. This conclusion follows as an evident corollary from the doctrine that the rules of law and the legal rights and duties of the parties are to be assumed, while the facts only which call these rules into operation, and are the occasion of the rights and duties, are to spread upon the record. Every attempt to combine fact and law, to give the facts a legal coloring and aspect, to present them in their legal bearing upon the issues rather than in their actual naked simplicity, is so far forth an averment of law instead of fact, and is a direct violation of the principle upon which the codes have constructed their system of pleading.

Id. at 639-40. In addition to being utterly unworkable, see e.g., F. James & G. Hazard, Civil Procedure 138 (3d ed. 1985), Pomeroy’s standard would sweep away a number of convenient pleading shortcuts, including, for example, the common counts.

Historically, the obligation of pleading facts did not mean pleading just any facts. Ultimate facts were to pleaded, not evidentiary facts. See, e.g., Bee Publishing Co. v. World Publishing Co., 59 Neb. 713, 718-19, 82 N.W. 28, 29 (1900); J. Pomeroy, supra note 12, at 635. The distinction between ultimate and eviden-
ever, and many a pleader has fallen into the trap of substituting legal conclusions for factual allegations.\(^{17}\)

The distinction between law and fact is generally thought of as the keystone of code pleading, but that thinking is not quite accurate. The last thing that the drafters of the code were interested in creating was a procedural trap that elevated form over substance. Code pleading was a direct response to the rigidity and formalism of common law pleading.\(^{18}\) By abolishing the forms of action and requiring a pleader to allege facts, the drafters of the code sought to simplify pleading and thereby ensure that cases would turn more on their merits than on technicalities and tactical mistakes.\(^{19}\) From the standpoint of the drafters, the pleader's primary obligation was to use "ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."\(^{20}\)

Although it was originally hoped that code pleading would simplify pleading to the point that "even a child could write a letter to the

\[17\] See, e.g., Allen v. Lancaster County, 218 Neb. 163, 164, 352 N.W.2d 883, 884 (1984) (allegation that sewer system permit did not conform with county resolution is a legal conclusion); Roadrunner Dev., Inc. v. Sims, 213 Neb. 649, 652, 330 N.W.2d 915, 917 (1983) (allegation in class action is that it was impracticable to join all interested parties is a legal conclusion); International Bd. of Elec. Workers Local 763 v. Omaha Pub. Power Dist., 209 Neb. 335, 342, 307 N.W.2d 795, 799 (1981) (allegation that defendant failed to comply with an order of the Industrial Relations Commission is a legal conclusion); Koch v. Grimminger, 192 Neb. 706, 714, 223 N.W.2d 838, 837 (1974) (allegation that the defendant acted "maliciously, intentionally, and recklessly" is a legal conclusion); Chamber of Commerce of Plattsmouth v. Kieck, 128 Neb. 13, 15, 257 N.W. 493, 494 (1934) (allegation that plaintiff had no remedy at law is a legal conclusion); U.S. Theatre Supply Co. v. Creal, 122 Neb. 743, 746, 241 N.W. 529, 530 (1932) (allegation that amounts are now due and owing is a legal conclusion).

\[18\] See First Report of the Commissioners on Practice and Pleadings (New York) 73-74, 87, 123-24, 137-38, 140-41, 144 (1848) [hereinafter First Report].


\[20\] First Report, supra note 18, at 147.
court telling of its case,"21 those hopes were soon dashed. Despite the drafters' emphasis on the use of ordinary, understandable language, the courts began to focus exclusively on the distinction between ultimate facts and legal conclusions.22 That in turn resurrected the very kind of formalistic complexity that code pleading was designed to eliminate and introduced a degree of uncertainty that has continued to plague the system.

The distinction between law and fact is so unwieldy that a pleader can never be sure whether a particular allegation is sufficient unless there is a reported decision in his jurisdiction directly on point.23 Reasoning by analogy is of limited use, not only because decisions applying the distinction have sometimes reached results that seem counterintuitive,24 but also because the courts have never been able to articulate a standard for determining whether a particular allegation falls into the permissible category of pleading facts or into the impermissible category of pleading conclusions of law.25

21. Clark, *Simplified Pleading*, 2 F.R.D. 456, 459 (1942). For a delightful account of how code pleading would have functioned if the courts had approached a petition as though it were a letter, see Costigan, *supra* note 19.


24. For example, an allegation that the defendant was negligent sounds very much like a conclusion of law. It is instead an allegation of fact. See Chicago, R.I. & P. Ry. v. O'Donnell, 72 Neb. 900, 905, 101 N.W. 1009, 1010 (1904). By contrast, an allegation that a physician was engaged in the practice of osteopathy sounds very much like a fact. It is instead a conclusion of law. See State ex rel. Johnson v. Wagner, 139 Neb. 471, 475, 297 N.W. 906, 909 (1941). Classifying a particular statement as an allegation of fact or a conclusion of law is even more difficult that the text suggests because the classification often depends on the context in which the statement is made. See C. CLARK, *supra* note 12, at 232.

25. Some courts did try to articulate a standard for distinguishing ultimate facts from conclusions of law. The most commonly articulated standard was that an ultimate fact is a conclusion reached by natural reasoning whereas a conclusion of law is a conclusion reached by artificial reasoning, i.e., by the application of a fixed rule of law. See, e.g., Mallinger v. Webster City Oil Co., 211 Iowa 847, 849, 234 N.W. 254, 256 (1931). That may well be a standard but it is by no means a workable standard. As the California Supreme Court said:

The line of demarcation between what are questions of fact and conclusions of law is not one easy to be drawn in all cases. It is quite easy to say that the ultimate facts are but the logical conclusions deduced from certain primary facts evidentiary in their character, and that conclusions of law are those presumptions or legal deductions which, the facts being given, are drawn without further evidence. This does not, however, quite meet the difficulty. We deduce the ultimate fact from certain probative facts by a process of natural reasoning. We draw the inference or conclusion of law by a process of artificial reasoning, but this last process is often in such exact accord with natural reason, that the distinction is scarcely appreciable.

...Sanity or insanity, guilt, innocence, fraud, and negligence, are all
The absence of any such standard is troublesome but understandable. When all is said and done, there is no inherent distinction between conclusions of law and allegations of fact. The only difference between the two is that the second provides more detail than the first. For example, an allegation that “Jack and Jill entered into a contract” is insufficient to plead the existence of a binding contract supported by valuable consideration.26 The pleader must instead allege that “Jack and Jill entered into a contract whereby Jack promised to sell Jill a pail of water and Jill promised to pay Jack one dollar for said pail of water.” Neither of those allegations are allegations of “dry, naked, actual facts;”27 they both plead facts according to their legal effect. The only real difference between them is that the second allegation describes the terms of the contract. In other words, it provides more information. Saying that a pleader has alleged a legal conclusion rather than facts is simply another way of saying that a pleader has failed to describe his claim in sufficient detail.28

Because the question of whether a petition is sufficiently detailed

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26. In order to state a cause of action for breach of contract, the petition must allege the existence of a contract, compliance with all conditions precedent, breach, and resulting damage. See, e.g., Department of Banking & Finance v. Wilken, 217 Neb. 796, 799, 352 N.W.2d 145, 147 (1984). Alleging the first element, the existence of a contract, involves setting forth the terms of the contract. See, e.g., Heinzman v. Hall County, 213 Neb. 268, 270, 328 N.W.2d 764, 767 (1983); Bryant v. Barton, 32 Neb. 613, 615, 49 N.W. 331, 332 (1891). It is not sufficient simply to allege that the parties entered into a contract. See, e.g., C. CLARK, supra note 12, at 277-80.

27. J. POMEROY, supra note 12, at 640.

28. See, e.g., C. CLARK, supra note 12, at 231-34; F. JAMES & G. HAZARD, supra note 16, at 140; Cook, supra note 23, at 241-44.
is so case-specific, there are no definite rules to guide a pleader.\textsuperscript{29} Unless there is a reported decision addressing the precise allegation at issue, the pleader is "left to blaze new paths through a trackless wilderness."\textsuperscript{30} The only advice anyone can give to a pleader who finds himself blazing a new trail is to add more detail whenever he is unsure about the sufficiency of a particular allegation.\textsuperscript{31} But no one—other than a court—can tell him when enough is in fact enough or whether the words he uses are in fact the words he should be using.\textsuperscript{32}

In addition to the problem of not knowing how detailed each allegation should be, a pleader may sometimes face an even more fundamental problem. He may not know what to plead. Saying that a petition must allege each element of the cause of action does not answer the question of what those elements are. The decision of what must be pled in order to state a cause of action is a function of a number of considerations, including the underlying substantive law, convenience, access to information, and the probability of unfair surprise.\textsuperscript{33} Because so many variables affect the burden of pleading, it is impossible to formulate a general standard for determining the elements of a particular cause of action.\textsuperscript{34} We know what the elements of

\begin{itemize}
\item \textsuperscript{29} See, e.g., C. CLARK, supra note 12, at 234.
\item \textsuperscript{30} Cook, "Statements of Fact in Pleading Under the Codes," 21 Colum. L. Rev. 416, 423 (1921).
\item \textsuperscript{31} As Judge Clark said:
\begin{quote}
No rule of thumb is possible, but in general it may be said that the pleader should not content himself with alleging merely the final and ultimate conclusion which the court is to make in deciding the case for him. He should go at least one step further back and allege the circumstances from which this conclusion directly followed.
\end{quote}
C. CLARK, supra note 12, at 234 (emphasis added and footnotes omitted).
\item \textsuperscript{32} Because pleading rules tend to become extremely rigid and formalized over time, see Clark, supra note 21, at 460, a petition that does in fact state a cause of action may nevertheless be found defective if the allegations are not made in the way the courts have grown accustomed to seeing them made. See Cook, supra note 30, at 417. For an example of a case in which the plaintiff pled what she was required to plead but not in the way the court expected, see Morris v. Lutheran Medical Center, 215 Neb. 677, 340 N.W.2d 388 (1983).
\item \textsuperscript{34} F. JAMES & G. HAZARD, supra note 16, at 149. Although there have been attempts to define the term, "cause of action," none of those attempts provide much in the way of concrete guidance. For example, Pomeroy defined "cause of action" as follows:
\begin{quote}
[E]very remedial right arises out of an antecedent primary right and corresponding duty and a delict or breach of such primary right and duty by the person on whom the duty rests. . . . [T]he primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several States. . . . The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen,
\end{quote}
\end{itemize}
malicious prosecution are, for example, not because they can be deduced from some overreaching principle but because the court has told us what they are. A pleader attempting to allege a cause of action in an evolving area of law, however, does not have the luxury of precedent. Realistically, all he can do is guess.

The problem of knowing what to allege, and at what level of detail, is compounded in Nebraska by the limited resources available to the pleader. There are comparatively few reported pleading decisions in Nebraska, in large part because only the supreme court issues written opinions. Furthermore, unlike their counterparts in larger states like California, Nebraska pleaders do not have a wealth of form books to guide them. The only Nebraska practice encyclopedia is of rather uneven quality and out of date.

Pleading in Nebraska is therefore more of a challenge than a rou-

35. Those elements are: (1) institution of a proceeding (2) by the defendant (3) with malice (4) and without probable cause (5) that terminated in favor of the present plaintiff (6) who was damaged as a result of the institution of the proceeding. E.g., Johnson v. First Nat'l Bank & Trust Co. of Lincoln, 207 Neb. 521, 526, 300 N.W.2d 10, 14 (1980).

36. See F. JAMES & G. HAZARD, supra note 12, at 149 (in the absence of official forms or judicial precedents, a pleader is left without useful guides for determining the elements of a cause of action).

37. Nebraska county and district judges do not issue published opinions, and, unlike so many other states, Nebraska has no intermediate court of appeals.

38. Like Nebraska, California is also a code pleading jurisdiction. See CAL. CIV. PROC. CODE § 425.10 (West 1973). Among the many resources available to a California pleader are: K. ARNOLD, CALIFORNIA CIVIL ACTIONS: PLEADING & PRACTICE (1988); OWENS, CALIFORNIA FORMS & PROCEDURE (1983); B. WITKIN, CALIFORNIA PROEDURE (1971 & 1986 Supp.).

39. That encyclopedia is W. MOORE, NEBRASKA PRACTICE (1976). The only other relatively comprehensive form book published in the last 50 years to which a Nebraska pleader can turn is AMERICAN JURISPRUDENCE PLEADING AND PRACTICE FORMS (1967). Although it can often be helpful, AMERICAN JURISPRUDENCE is not specifically tailored to Nebraska practice.

The last pocket part of NEBRASKA PRACTICE was issued in 1982. The law has not remained stagnant since 1982, however. For example, the court has recognized some limitations on the power of an employer to discharge an at-will employee, see Morris v. Lutheran Medical Center, 215 Neb. 677, 340 N.W.2d 388 (1983), and, not surprisingly, there has recently been a significant increase in the number of wrongful discharge actions filed in Nebraska. See Memorandum of Telephone Conversation with Dale E. Bock, Esq. (July 18, 1986) (on file in Rm. 213 at Univ. Neb. Law College). A pleader looking for guidance on how to allege a cause of action for wrongful discharge, however, will find nothing in NEBRASKA
tine task. No matter how careful a pleader may be, it is often extremely difficult to draft a petition that cannot be challenged for failure to state a cause of action. In the absence of a clear supreme court case on point, the trial court—like the pleader—is left without a definitive benchmark against which to evaluate the petition's sufficiency. It may decide that the petition makes all the necessary allegations in sufficient detail to state a cause of action, but, then again, it might not. Whatever the trial court decides, its disposition of the demurrer will not necessarily dispose of the case. If the trial court overrules the demurrer, the litigation will go forward. If the trial court sustains the demurrer, the litigation may still go forward—provided, of course, that the plaintiff correctly answers the $64,000 question.

A. To Appeal or to Amend—The $64,000 Question

When a demurrer to a petition is sustained for failure to state a

PRACTICE. The book does not even contain a form for pleading a simple breach of contract.

40. See Dalton, Fact Pleading in Nebraska 2-3 (May 11, 1978) (unpublished manuscript) (on file in Rm. 212 at Univ. Neb. College of Law). Because a plaintiff will generally be given an opportunity to amend after a demurrer is sustained, assuming that the defect is one that can be remedied by amendment, it seems fairly obvious that demurrers are not always filed with an eye toward disposing of the case. A good number of demurrers are instead filed to buy time and harass the plaintiff. See Memorandum of Telephone Conversation with Hon. Donald R. Grant (Sept. 3, 1986) (on file in Rm. 213 at Univ. Neb. College of Law) (while there are colorable grounds for one half of the demurrers filed, the grounds for the other half are best described as “silly”). In addition to keeping the plaintiff off balance, successive demurrers may serve another strategic purpose: forcing the plaintiff to make an allegation that he cannot prove. By filing an amended petition, the plaintiff waives any argument that the added allegation is not essential to his cause of action. See infra text accompanying notes 81-84.

Demurrers in Nebraska are classified as either special or general demurrers. If the defendant seeks to demur on the grounds of lack of subject matter jurisdiction, lack of capacity to sue, misjoinder of claims, misjoinder of parties, or a prior pending action between the same parties for the same cause of action, he must specify the ground when he demurs. See NEB. REV. STAT. §§ 25-806, 25-807 (1985). Such a demurrer is classified as a special demurrer. If the defendant fails to specify the ground, the demurrer is treated as a demurrer on the ground that the petition fails to state a cause of action. NEB. REV. STAT. § 25-807 (1985). Such a demurrer is classified as a general demurrer.

41. Theoretically, the defendant could immediately appeal the trial court's decision by failing to answer and allowing a default judgment to be entered against him. That is a rather dangerous course of action to follow. If the judgment is affirmed, the defendant will not be allowed to answer; the case is over. See Estabrook v. Hughes, 8 Neb. 496, 502, 1 N.W. 132, 134 (1879). There is no reason, however, for the defendant to expose himself to that danger. Filing an answer and litigating the case on the merits does not waive the right to challenge the sufficiency of the petition on appeal. See Stitzel v. Hitchcock County, 139 Neb. 700, 702-03, 298 N.W. 555, 557 (1941); Sallander v. Prairie Life Ins. Co., 112 Neb. 629, 632, 200 N.W. 344, 345 (1924).
cause of action, the plaintiff has a choice to make. He can either stand on his petition and appeal the trial court’s ruling or he can attempt to cure the alleged defect by filing an amended petition. Unless the trial court’s ruling is clearly wrong—in which case the option to appeal becomes rather attractive—or clearly right—in which case the option to amend becomes rather attractive—the decision of how to respond is not an easy one to make. Both courses of action entail considerable risks, some less obvious than others.

If the plaintiff elects to stand on his petition, his action will be dismissed and final judgment entered against him. The entire case will then hinge on whether there is any ground upon which the trial court could have properly sustained the demurrer, irrespective of whether the trial court actually relied on that ground as the basis for its ruling. Because the Nebraska Supreme Court has shown no hesitation in affirming decisions on grounds other than those invoked by the lower court, a plaintiff must do more than simply evaluate the sufficiency of his petition in light of whatever explanation the trial judge may have given for sustaining the demurrer. The plaintiff must instead play the devil’s advocate and sift through the petition for any conceivable defect before he can realistically make an informed decision on the wisdom of appealing rather than amending.

The price of making a wrong decision in that regard is high. Once the supreme court affirms, the case is over. The plaintiff will not be given leave to amend, regardless of whether the defect in the petition is one that could be easily remedied. Although appellate courts do have the power to remand cases with instructions that the plaintiff be given leave to amend the petition, they have traditionally refused to exercise that power unless the lower court committed reversible er-

42. See Knapp v. City of Omaha, 175 Neb. 576, 122 N.W.2d 513, (1963); Hoffman v. Geiger, 134 Neb. 643, 648, 279 N.W. 350, 353 (1938); R. Harnsberger, Pleading and Jurisdiction 80 (1964) (mimeographed course materials) (on file in Rm. 172D at the Univ. Neb. College of Law). Amendments following the sustaining of a demurrer are governed by § 25-854 which provides: “If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct.” NEB. REV. STAT. § 25-854 (1985). Although § 25-854 does not confer an unqualified right to amend, it comes very close to doing just that. The trial court cannot sustain the demurrer without giving the plaintiff leave to amend unless it is clear that the defect cannot be remedied. Cagle, Inc. v. Sammons, 198 Neb. 595, 254 N.W.2d 398, 404 (1977).

43. The risks associated with amending a petition are discussed infra notes 79-84 and accompanying text.

44. See, e.g., Parkin v. Parkin, 123 Neb. 836, 244 N.W. 638, 639 (1932).


46. That power can be exercised even though the trial court’s decision was correct in all respects. See Morearty v. City of McCook, 119 Neb. 202, 225 N.W. 367, 368 (1929); Moseley v. Chicago, B. & Q. R.R., 57 Neb. 636, 78 N.W. 293, 294
ror. In other words, most courts—and, more specifically, the Nebraska Supreme Court—will not reverse a judgment and remand the case for the sole purpose of allowing the plaintiff to amend his petition in order to state a cause of action.47

The traditional approach to pleading appeals—affirming the judg-

(1899); Humphries v. Spafford, 14 Neb. 488, 490, 16 N.W. 911, 912 (1883). One of the sources of that power is Neb. Rev. Stat. § 25-842 (1985) which provides:

The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. Whenever any proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment.

Id. This section has been most often invoked by the supreme court to amend pleadings to conform to the evidence introduced at trial. See, e.g., Lippire v. Eckel, 178 Neb. 643, 645-46, 134 N.W.2d 802, 805 (1965). There are cases holding that Neb. Rev. Stat. § 25-852 (1985) does not authorize the supreme court to entertain a motion to amend when the court is exercising normal appellate jurisdiction. See J. Thompson & Sons Mfg. Co. v. Nicholls, 52 Neb. 312, 313, 72 N.W. 217, 217 (1897). The cases in which the court has itself granted a motion to amend have generally been equity cases, which are reviewed de novo. See, e.g., In re Sanitary & Improvement Dist. No. 107, 177 Neb. 15, 26, 128 N.W.2d 121, 128 (1964); Neb. Rev. Stat. § 25-1925 (1985). When the court is exercising normal appellate jurisdiction, the proper approach is to remand the case for the purpose of allowing the trial court to amend the pleading. See J. Thompson & Sons Mfg. Co. v. Nicholls, 52 Neb. 312, 314, 72 N.W. 217, 218 (1897); Humphries v. Spafford, 14 Neb. 488, 490, 16 N.W. 911, 912 (1883).

Although the court has said that amendments after judgment should be allowed only when the effect of doing so will be to sustain rather than reverse the judgment, the court has also recognized that amendments which have the effect of reversing a judgment may nevertheless be appropriate if necessary to prevent a miscarriage of justice. See, e.g., Peterson v. Lincoln County, 92 Neb. 167, 178, 138 N.W. 122, 126 (1912).

47. See e.g., Roberge v. Cambridge Coop. Creamery, Co., 243 Minn. 230, 236, 67 N.W.2d 400, 404 (1954); A. Harris & Co. v. Cook, 62 S.W.2d 205, 207 (Tex. Ct. App. 1933). Although the Nebraska Supreme Court has not specifically said that it will not remand a case solely to allow a party to amend a petition, the court’s disposition of pleading appeals leaves no doubt that the no-remand rule is followed in Nebraska. See, e.g., Prososki v. Commercial Nat’l Bank & Trust Co., 219 Neb. 607, 335 N.W.2d 427 (1985) (affirming judgment of dismissal); Smith v. Dewey, 214 Neb. 605, 335 N.W.2d 530 (1983) (same); Almarez v. Hartmann, 211 Neb. 243, 318 N.W.2d 98 (1982) (same); State Auto. & Cas. Under. v. Kline, 204 Neb. 414, 282 N.W.2d 601 (1979) (same); Koch v. Grimminger, 192 Neb. 706, 223 N.W.2d 833 (1974) (same); R. Harnsberger, supra note 42, at 80. The only discordant note in this sea of affirmances was sounded long ago in Moseley v. Chicago, B. & Q. R.R., 57 Neb. 637, 640, 78 N.W. 293, 294 (1899) (even though trial court committed no error, remand is appropriate because plaintiff was mistaken as to his remedy; he sued in equity when he had an adequate remedy at law). The Moseley case has not been cited by the Nebraska Supreme Court for almost sixty years.
ment with no opportunity to amend if the petition is deficient—is both a harsh approach in light of the uncertainty inherent in code pleading and a questionable approach in light of the basic purpose of code pleading: to simplify pleading in order to ensure that cases will be decided on their merits rather than on technicalities. Yet, it is somewhat misleading to refer to this as the “traditional approach.” Although it has been followed for well over 100 years, the substantive context in which it operates has changed dramatically over the years.

The notion that a case should not be remanded simply to allow the plaintiff to amend his petition took hold during an age in which res judicata was an extremely narrow doctrine. Unlike the broad transactional analysis that courts utilize today, res judicata analysis historically focused primarily on whether the successive suits arise out of the same transaction, i.e., the same operative facts. If so, the two suits are based on the same cause of action. See, e.g., Isaac v. Schwartz, 706 F.2d 15, 17 (1st Cir. 1983) (applying Massachusetts law); Costantini v. TWA, 681 F.2d 1199, 1201-02 (9th Cir.), cert. denied, 459 U.S. 1087 (1982); Beegan v. Schmidt, 451 A.2d 642, 645-46 (Me. 1982); RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). Although the Nebraska Supreme Court employs the same evidence test to determine whether two suits are both based on the same cause of action, see Vantage Enter. v. Caldwell, 196 Neb. 671, 675-76, 244 N.W.2d 678, 681 (1976), there is often no meaningful difference between the same evidence test as applied by the court and the same transaction test. In Vantage, the plaintiff entered into a contract to build a home for Caldwell. The parties later had a falling out and the plaintiff sued Caldwell to recover the amount due under the contract. After the jury returned a verdict for Caldwell, the plaintiff filed a second suit for quantum meruit. The court held that the second suit was barred by res judicata because the same evidence would sustain both suits. Id. at 676, 244 N.W.2d at 681.

The explanation that the court gave for its holding in Vantage is somewhat misleading. Although there will inevitably be a substantial evidentiary overlap between a suit for breach of contract and a suit for quantum meruit, the evidence is not in fact the same. For example, quantum meruit requires proof of the reasonable value of the work done and benefit conferred while breach of contract simply requires proof of the contract price. Even though the evidence might not have been the same, the two suits at issue in Vantage did arise out of the same transaction: the construction of Caldwell's house. In other words, they were both based on the same cause of action.

This discussion should not be interpreted as suggesting that the law of res judicata is settled in Nebraska. There are relatively recent cases in which the court has reverted to the very narrow same right test for determining whether successive actions are based on the same cause of action. See Suhr v. City of Scribner, 207 Neb. 24, 295 N.W.2d 302 (1980) (suit for wrongful eviction based on allegations that defendant city entered into a contract giving plaintiff the right to operate a landfill dump but that defendant later locked out the plaintiff did not bar a second suit for breach of the dump contract, apparently because the first suit was in tort and the second suit in contract).

48. See supra notes 18-21 and accompanying text.
50. This approach focuses primarily on whether the successive suits arise out of the same transaction, i.e., the same operative facts. If so, the two suits are based on the same cause of action. See, e.g., Isaac v. Schwartz, 706 F.2d 15, 17 (1st Cir. 1983) (applying Massachusetts law); Costantini v. TWA, 681 F.2d 1199, 1201-02 (9th Cir.), cert. denied, 459 U.S. 1087 (1982); Beegan v. Schmidt, 451 A.2d 642, 645-46 (Me. 1982); RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982). Although the Nebraska Supreme Court employs the same evidence test to determine whether two suits are both based on the same cause of action, see Vantage Enter. v. Caldwell, 196 Neb. 671, 675-76, 244 N.W.2d 678, 681 (1976), there is often no meaningful difference between the same evidence test as applied by the court and the same transaction test. In Vantage, the plaintiff entered into a contract to build a home for Caldwell. The parties later had a falling out and the plaintiff sued Caldwell to recover the amount due under the contract. After the jury returned a verdict for Caldwell, the plaintiff filed a second suit for quantum meruit. The court held that the second suit was barred by res judicata because the same evidence would sustain both suits. Id. at 676, 244 N.W.2d at 681.
torically focused on the question of whether the legal right the plaintiff sought to enforce in the second action was identical to the legal right that he sought to enforce in the first action.51 An action for breach of contract, for example, would not bar a second action for quantum meruit; the first action sought to enforce a right arising out of an express contract while the second sought to enforce a right arising out of an implied contract.52

Of more significance from a pleading standpoint, dismissal for failure to state a cause of action only barred the plaintiff from maintaining a second suit when the petition contained the same allegations as those contained in the petition dismissed in the previous suit.53 By contrast, if the court dismissed an action because the plaintiff failed to include a necessary allegation in his petition, the dismissal was not deemed to be a final judgment on the merits and therefore did not bar the plaintiff from filing a subsequent action so long as his second petition included that missing allegation.54

Viewed in light of its historical underpinnings, the rule that a case should never be remanded simply to give the plaintiff an opportunity to amend his pleadings was neither harsh nor insensitive to the uncertainties of code pleading. A plaintiff who elected to stand on his petition because of a reasonable but mistaken belief that the petition was legally sufficient was not left without any means of pursuing his claim.


53. See, e.g., W.E. Hedger Transp. Corp. v. Ira S. Bushey & Sons, Inc., 186 F.2d 236, 237 (2d Cir. 1951); Citizens Mortgage Corp. v. Second Ave. Ltd. Dividend Hous. Ass'n, 72 Mich. App. 1, 4-5, 248 N.W.2d 699, 701 (Ct. App. 1976); Flynn v. Sinclair Oil Corp., 20 A.D.2d 636, 636-37, 246 N.Y.S.2d 360, 361 (1964); RESTATEMENT (FIRST) OF JUDGMENTS § 19 comments c-e (1942). When the petition in the second action is essentially identical to the petition in the first action, it is somewhat inaccurate to say that the second action is barred by res judicata. It is more accurate to say that the second action is barred by direct estoppel; the question of whether the allegations are sufficient to state a cause of action was already litigated by the same parties in the first action. See RESTATEMENT (FIRST) OF JUDGMENTS § 45, comment d (1942).

While he would not be permitted to amend his pleading to correct the defect, he could accomplish the very same purpose by filing a new suit. In fact, the no-remand rule was apparently based on the assumption that the limited scope of *res judicata* ensured that a plaintiff would not lose the right to litigate his claim because of a mere pleading technicality. In the earliest reported case specifically discussing the no-remand rule, the Minnesota Supreme Court stated:

> We have less hesitation in sustaining the trial court than we should have if the result would preclude plaintiff from bringing another action in proper form to establish his rights. ... The judgment in this action will not bar an action ... [based on a complaint containing the allegations omitted from the complaint under review]. It is probable that the complaint could have been amended and made good ... [by including those allegations]; but application to do so was not made in the court below, and we have no right to reverse the case and send it back merely for the purpose of permitting such an application to be made.\(^5\)

While the *res judicata* consequences of standing on a petition were once virtually nonexistent, that is no longer true today. In 1963, the Nebraska Supreme Court decided *Knapp v. City of Omaha*\(^5\) and held that dismissal for failure to state a cause of action is a final judgment on the merits and therefore bars the plaintiff from filing a second suit in an attempt to plead his cause of action properly. The court based its decision on the need for finality, emphasizing:

> If this court should hold a cause of action stated in a petition as to which a general demurrer was interposed and sustained and the cause dismissed could be reasserted in a subsequent action by adding one or more essential averments not previously pleaded, litigation would have no finality. Finality would then turn not on what cause had been attempted to be stated but what by amendment might have been stated. In such cases, the conclusiveness of decisions would be seriously impaired. A party should not be vexed with successive actions on the same cause of action. A judgment of dismissal after sustaining a demurrer based on the failure to state a cause of action is a judgment on the merits even though by amendments a good cause of action might be stated.\(^5\)

It is difficult to quarrel with the court’s reasoning—at least in the abstract. Because a plaintiff will inevitably be given leave to amend if a demurrer to his petition is sustained, there is no reason to allow him to file a second suit to accomplish what he could have accomplished in the first suit. The only plaintiffs who will lose the opportunity to pursue a claim simply because of a pleading technicality are those plaintiffs who are so stubborn that they are willing to ignore both their opportunity to amend and their obligation to plead their cause of action properly.

That appears to have been the case in *Knapp*. Mrs. Knapp filed a

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55. Barkey v. Johnson, 90 Minn. 33, 36, 85 N.W. 583, 584 (1903) (emphasis added); see also Chamberlin v. Hatch, 111 Vt. 317, 323, 15 A.2d 586, 589 (1940).

56. 175 Neb. 576, 122 N.W.2d 513 (1963) [hereinafter Knapp II].

57. Id. at 580-81, 122 N.W.2d at 516.
negligence suit against the City of Omaha after she slipped off a curb. Because former section 14-801 of the Nebraska Revised Statutes\textsuperscript{58} provided that a city is not liable for damages unless the party gives the city written notice within ten days after the accident, Mrs. Knapp alleged in her petition that she had given the city "proper statutory notification."\textsuperscript{59} She did not include an allegation, however, specifically stating the date on which she gave the city notice.\textsuperscript{60} After the trial court sustained the defendant's general demurrer to the petition, Mrs. Knapp did not seek leave to amend her petition to state the date on which she gave the city notice. She instead elected to stand on her petition and appeal. The supreme court affirmed, holding that the date on which the notice is given is an essential element of the plaintiff's cause of action.\textsuperscript{61} Mrs. Knapp then filed a new lawsuit against the city, this time specifically alleging the date she gave the city the notice.\textsuperscript{62}

\textsuperscript{58} Section 14-801 provided in part:

\begin{quote}
No metropolitan city shall be liable for damages arising from defective streets, alleys, sidewalks, public parks, or other public places, within such city unless actual notice in writing, describing fully the accident and the nature and extent of the injury complained of and describing the defects causing the injury and stating the time when and with particularity the place where the accident occurred, shall be proved to have been filed with the city clerk within ten days after the occurrence of such accident or injury.
\end{quote}

\textsuperscript{59} Knapp v. City of Omaha, 172 Neb. 78, 79, 108 N.W.2d 419, 420 (1961) [hereinafter \textit{Knapp I}].

\textsuperscript{60} Mrs. Knapp's petition alleged that the accident occurred on July 15, 1957, and that "after said accident and on the \underline{\textit{day of July, 1957}}" the plaintiff filed a proper statutory notification which was denied by the City of Omaha . . . ." Brief of Appellees at 9-10, \textit{Knapp I}, 172 Neb. 78, 108 N.W.2d 419 (1961). Why Mrs. Knapp left that space blank in her petition is a matter of pure conjecture. Perhaps her attorney was careless when he drafted the petition. An equally plausible explanation, however, is that Mrs. Knapp may not have kept a copy of the notice and could not remember the precise date on which she gave the city the required notice. After the court affirmed the judgment in \textit{Knapp I} on the ground that Mrs. Knapp's § 14-801 allegation was insufficient, Mrs. Knapp may have obtained a copy of the notice from the city clerk. \textsuperscript{\textit{Knapp II}, 175 Neb. 576, 578-79, 122 N.W.2d 513, 515 (1963).}

\textsuperscript{61} More specifically, the court said Mrs. Knapp's petition was defective because it failed to allege that notice was given "within ten days after the occurrence of such accident or injury." \textit{Knapp I}, 172 Neb. 78, 80, 108 N.W.2d 419, 420 (1961) (quoting \textsuperscript{NEB. REV. STAT. § 14-801 (1954) (repealed 1969).}) Although that suggests it might have been sufficient for Mrs. Knapp simply to have tracked the statutory language, the court did not explicitly say that such an allegation would have been proper. An allegation that notice was given "within ten days after the occurrence of the accident" would arguably be insufficient. It does not provide the court with the facts necessary to determine whether the notice was actually given within the required period. In light of the court's penchant for detail, the safer interpretation of \textit{Knapp I} is that the plaintiff must plead the specific date on which the notice was given in order to state a cause of action. See \textit{Knapp II}, 175 Neb. 576, 580, 122 N.W.2d 573, 516 (1963) (without the date, no cause of action was stated).
required statutory notice. The trial court ruled that Mrs. Knapp's second suit was barred by *res judicata*, a ruling with which the supreme court agreed.\(^6\)

Why Mrs. Knapp elected to stand on her first petition rather than amending to add a boilerplate allegation that she clearly could have added almost defies explanation. As the supreme court noted in its opinion in *Knapp II*, Mrs. Knapp "would doubtless have been given the right to amend her petition" had she applied for leave.\(^6\) If one simply read the court's opinions in *Knapp I* and *II*, it would be difficult to avoid the conclusion that Mrs. Knapp was suffering from a case of foolhardy stubbornness when she elected to stand on her petition. Those opinions, however, do not tell the full story.

The fact is that Mrs. Knapp had no choice but to appeal the trial court's ruling in *Knapp I*. The defendants challenged the sufficiency of Mrs. Knapp's petition on at least seven separate grounds.\(^6\) There is currently no way of knowing for certain on which of the grounds the trial court relied in sustaining the defendant's demurrer. The focus of the parties' briefs to the supreme court, however, suggests that the trial court sustained the demurrer, not on the ground that Mrs. Knapp failed to allege the date on which she gave the city the written notice required by former section 14-801, but rather on the ground that she failed to allege compliance with a different statute, former section 14-802, which required her to give the city notice of the defect in the curb at least five days before the accident.\(^6\) Because Mrs. Knapp evidently


\(^6\) Id. at 579-80, 122 N.W.2d at 516.

\(^6\) Those seven grounds were: (1) the petition did not allege compliance with § 14-802; (2) the petition did not properly allege compliance with § 14-801; (3) as a matter of law, the existence of a sloping curb as alleged in the petition does not constitute negligence; (4) the petition anticipated but did not negate contributory negligence; (5) on its face, the petition showed that the condition of the curb was not the proximate cause of Mrs. Knapp's fall; (6) as a matter of law, the existence of a slippery curb does not constitute negligence; and (7) the defendants were absolutely immune because the construction and maintenance of sidewalks is a governmental function. *See* Brief of Appellees at 7-22, *Knapp I*, 172 Neb. 78, 108 N.W.2d 419 (1961).

\(^6\) Section 14-802 provided:

> Cities of the metropolitan class shall be absolutely exempt from liability for damages or injuries suffered or sustained by reason of defective public ways or the sidewalks thereof, within such cities unless actual notice in writing describing with particularity the place and nature of the defect shall have been filed with the city clerk at least five days before the occurrence of such injury or damage.

NEB. REV. STAT. § 14-802 (1944) (repealed 1969). Both parties' briefs opened with their respective arguments on the applicability of § 14-802. Brief of Appellant at 4-9, *Knapp I*, 172 Neb. 78, 108 N.W.2d 419 (1961); Brief of Appellees at 7-9, *Knapp I*, 172 Neb. 78, 108 N.W.2d 419 (1961). Although the defendant's brief did include an argument on the insufficiency of Mrs. Knapp's § 14-801 allegation, *see* id. at 9-11, *Knapp I*, Mrs. Knapp's brief did not contain even a passing reference to § 14-
had not given the city prior notice of any defect in the curb, she could not have amended her petition to state a cause of action to the satisfaction of the trial court. Appealing under these circumstances was therefore her only option.

Mrs. Knapp's decision to stand on her original petition and appeal was not only necessary but also strategically sound. If the supreme court held that an allegation of prior notice was necessary to state a cause of action, Mrs. Knapp would have been no worse off than she would have been had she not appealed. If the supreme court held that such an allegation was unnecessary—which seemed to be the most likely result—Mrs. Knapp would have been free to pursue her claim against the city. Of course, there was always the possibility that the court would hold that an allegation of prior notice was unnecessary but find Mrs. Knapp's petition defective in another regard, for example, because it failed to allege the date on which Mrs. Knapp gave the city the subsequent notice of the accident.

That seemed to be a remote possibility, however, not only because the trial court apparently concluded that Mrs. Knapp had properly alleged compliance with section 14-801 but also because the supreme court had never explicitly or implicitly held that a plaintiff must specifically allege the date on which notice was given in order to state a cause of action. Furthermore, even if the court affirmed the dismissal on the ground that such an allegation was necessary, Mrs. Knapp would not have lost the right to pursue her claim. The unequivocal rule in Nebraska at the time Mrs. Knapp elected to stand on her petition was that a dismissal for failure to state a cause of action was not a final judgment for purposes of res judicata. As the court had said on more than one occasion:

801. It is inconceivable that Mrs. Knapp would have said nothing about the sufficiency of her § 14-801 allegation if the trial court had sustained the demurrer on the ground that her allegation was insufficient.

66. Mrs. Knapp's petition alleged that the city had been negligent in constructing the sidewalk, see Brief of Appellant at 4, Knapp I, 172 Neb. 78, 108 N.W.2d 419 (1961), and the court had previously held that prior notice was not required when the defect was created by the city's own affirmative negligence. See Stewart v. City of Lincoln, 114 Neb. 96, 98, 206 N.W. 151, 152 (1925); Updike v. City of Omaha, 87 Neb. 228, 234-39, 127 N.W. 229, 231-33 (1910); Tewksbury v. City of Lincoln, 84 Neb. 571, 576, 121 N.W. 994, 996 (1909).

67. The court's prior decisions all involved situations in which the plaintiff made no attempt whatsoever to plead that the requisite notice had been given. See Harms v. City of Beatrice, 142 Neb. 219, 221, 5 N.W.2d 287, 288 (1942); Betscheider v. City of Hebron, 137 Neb. 909, 910, 291 N.W. 684, 684 (1940); Chaney v. Village of Riverton, 104 Neb. 189, 195, 177 N.W. 845, 847 (1920); McCollum v. City of South Omaha, 84 Neb. 413, 414, 121 N.W. 438, 438 (1909); Schmidt v. City of Fremont, 70 Neb. 577, 578, 97 N.W. 830, 830 (1903); City of Hastings v. Foxworthy, 45 Neb. 676, 679, 63 N.W. 955, 956 (1895). While these cases indicate that the plaintiff must allege compliance with § 14-801, they do not shed any light on how to make that crucial allegation.
If to a petition or pleading in an action a general demurrer is interposed, and the pleading is determined defective for the want of a material allegation, and a judgment follows, and in a second suit the material averment which the pleading in the first suit lacked is supplied, constituting the pleading sufficient as a statement of a cause of action, the judgment in the first case is not a bar to the second suit, though both were instituted to obtain the enforcement of the same right.68

The rest is history. On appeal, the supreme court in Knapp I never discussed the ground that the trial court relied on to sustain the defendant's demurrer—the failure to allege prior notice pursuant to section 14-802—but instead focused exclusively on section 14-801, holding for the first time that an allegation of "proper statutory notification" is insufficient to plead that the plaintiff gave the defendant written notice of the accident within ten days. Despite the fact that its decision was the first reported opinion to provide plaintiffs with any meaningful guidance on how to plead compliance with section 14-801, the court affirmed the judgment against Mrs. Knapp and left her without an opportunity to correct this newly-found defect by amending her petition. When Mrs. Knapp filed her second suit to correct the defect in her first petition, the court held for the first time—and without any mention of its clear precedents to the contrary69—that Mrs. Knapp's

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69. The court did attempt to distinguish some of its earlier decisions that had held that a judgment based on a technical pleading defect does not have res judicata effect. The court distinguished Fuchs v. Parsons Constr. Co., 172 Neb. 719, 111 N.W.2d 721 (1961) on the ground that Fuchs involved a demurrer sustained for misjoinder rather than for failure to state a cause of action. Knapp II, 175 Neb. 576, 581, 122 N.W.2d 513, 516-17 (1963). The court also distinguished Trainor v. Maverick Loan & Trust Co., 92 Neb. 821, 139 N.W. 666 (1913) on the ground that the failure to allege the date on which notice was given is not a technical defect. [I]t is obvious that unless that date were supplied no cause of action whatever was stated. The want of an allegation as to the timely filing of the notice was fatal. That a petition could be amended without great difficulty or even with slight effort to state a cause of action does not make its failure to do so in the first instance a "technical defect." The defect is so substantial that it defeats the action entirely. Knapp II, 175 Neb. 576, 580, 122 N.W.2d 513, 516 (1963). Although this distinction has some superficial appeal, it is nevertheless a rather disingenuous distinction. If the failure to include a slightly more specific allegation of what was already alleged is not a technical pleading defect, it is difficult to understand what would be a technical pleading defect. Finally, the court distinguished Yates v. Jones Nat'l Bank, 74 Neb. 734, 105 N.W. 287 (1905) on the grounds that the second petition at issue in Yates stated an entirely different cause of action than the first petition. Knapp II, 175 Neb. 576, 581-82, 122 N.W.2d 513, 517 (1963). Despite the
suit was barred by *res judicata*.

To describe what happened to Mrs. Knapp as unfair would be an understatement. She was deprived of the opportunity to litigate her claim for no reason other than her inability to foresee developments that were not reasonably foreseeable. When she drafted her petition, Mrs. Knapp did not have the benefit of any supreme court decisions that specifically explained how a plaintiff should plead compliance with section 14-801. Arguably, Mrs. Knapp should have known that an allegation of “proper statutory notice” is not an allegation of an ultimate fact but is instead nothing more than a legal conclusion. Those three words do not provide the detail necessary to determine whether the notice was in fact given within the required ten day period. But the distinction between an ultimate fact and a conclusion of law is often elusive, and reasonable minds can differ on the question of whether a particular allegation falls into one category as opposed to the other.\(^7\)

It would be a mistake, however, to evaluate the reasonableness of Mrs. Knapp’s belief in the sufficiency of her allegation by simply fo-courts' assertion, that is not what happened in *Yates*. See *Yates* v. *Jones Nat’l Bank*, 74 Neb. 734, 743, 105 N.W. 287, 290-91 (1905).

Setting aside the question of whether the distinctions the court drew in *Knapp II* are at all persuasive, the fact remains that the court never mentioned its decisions in *Welsh* or *Cornell*, most likely because those decisions could not have been distinguished. Both of them clearly held that *res judicata* did not bar a plaintiff from filing a second suit if the petition contained a crucial allegation that had been omitted from the petition in the first action. See *supra* note 68 and accompanying text.

The court should not do what it did in *Knapp*. Parties rely on precedent in analyzing their procedural options and deciding which course of action to follow. Overturning a decision upon which a party relied is one thing. Applying the new rule to that same party is another. It smacks of arbitrary and capricious decision-making. As Justice Caporale bluntly said of the court’s recent decision adopting a new interpretation of the Workmans’ Compensation Act and overturning a four year old opinion in the process:

> The only significant thing which has changed since this court’s first interpretation of the “arising out of and in the course of” language of the compensation act is the composition of this court. I respectfully submit that if the law depends upon nothing more than the predilections of those who happen to sit on this tribunal at any given time, there is no law.

*Nippert v. Shinn Farm Constr. Co.*, 223 Neb. 236, 240, 388 N.W.2d 820, 823 (1986) (Caporale, J., dissenting). When the court reverses a prior decision and adopts a new rule of procedure, that new rule should be given prospective application. See *Langfeld v. Nebraska Dept. of Roads*, 213 Neb. 15, 26, 328 N.W.2d 452, 458 (1982). In other words, the new rule of *res judicata* that the court announced in *Knapp II* should not have been applied to bar Mrs. Knapp’s second suit.

\(^7\) As the Arizona Supreme Court once said: “The line of separation between a conclusion of law and an allegation of ultimate fact is as uncertain as the lines separating the cardinal colors in the spectrum.” *Gill v. Manhattan Life Ins. Co.*, 11 Ariz. 232, 239, 95 P. 89, 90 (1908); see *supra* notes 15-32 and accompanying text.
cusing on the abstract distinction between ultimate facts and legal conclusions. By sustaining the demurrer on the ground that Mrs. Knapp failed to allege that she gave the city prior notice of the defect as required by section 14-802, the trial court effectively led Mrs. Knapp to believe that she had properly alleged compliance with the subsequent notice requirements of section 14-801. Although in theory a plaintiff should not assume that an allegation is sufficient merely because the trial court does not explicitly identify that allegation as defective, theory does not always mirror reality. The requirements of code pleading are so unsettled and case-specific that a plaintiff often has no benchmark against which to evaluate the sufficiency of a petition other than the trial court's ruling. If the trial court either rejects or ignores a challenge to a particular allegation, the plaintiff realistically has no incentive to correct any defects in that allegation by amending. From the plaintiff's standpoint, there are no defects to correct.

In short, the Knapp decisions provide a graphic illustration of how the uncertainties of code pleading, the continuing adherence to the no-remand rule, the expanding scope of res judicata, and the practice of affirming on grounds other than those relied on by the trial court have all combined to create a world of crystal ball litigation, a world in which cases may turn on the ability of litigants to foresee how the supreme court will resolve as-of-yet unresolved issues of pleading. The only way that Mrs. Knapp could have avoided the fate that eventually befall her action was if she foresaw not only that the supreme court would find an allegation defective that the trial court had found sufficient but also that the supreme court would subsequently reverse its long-standing position on the res judicata consequences of a dismissal for failure to state a cause of action.

71. Had Mrs. Knapp been able to foresee those developments, she would have known how to proceed. Rather than immediately appealing, she would have filed an amended petition specifically alleging the date on which she gave the city notice of the accident, even though she knew that the defendants would demur to the amended petition and that the demurrer would be sustained because the trial court had already ruled that the absence of an allegation that she complied with § 14-802 rendered her petition fatally defective. Once the trial court sustained the demurrer to the amended petition, Mrs. Knapp would have appealed that ruling on the ground that she was not required to allege compliance with § 14-802 in order to state a cause of action.

The course of action suggested here is based on the assumption that the defendants would have filed a demurrer to the second petition rather than a motion to strike. A motion to strike would have been inappropriate because the amended petition would have included a material allegation not included in the original petition. In general, a motion to strike is the proper response to an amended petition that does not differ in any material respect from the original petition. If a motion to strike is granted under those circumstances, the plaintiff cannot argue on appeal that the original petition in fact stated a cause of action. The plaintiff can only argue that the amended petition includes a material allega-
Although no litigant is blessed with that degree of clairvoyance, our procedural system has developed into a system that assumes that litigants are capable of anticipating and adhering to pleading mandates that the supreme court has not yet announced. That assumption was built into the system by *Knapp II* and its holding that a dismissal for failure to state a cause of action is a final judgment on the merits for purposes of *res judicata*. A plaintiff who elects to stand on his petition and appeal now runs the risk of being forever barred from litigating his claim even though the supreme court may not have previously addressed the pleading requirements for the cause of action at issue. The inevitable result is that pleading has become an end in itself rather than a means to an end, with cases being decided solely on the basis of pleading technicalities.

It is extremely unlikely that the supreme court intended to create such a harsh and unforgiving procedural system when it decided *Knapp II*. What most likely happened is that the court fell into the common trap of viewing procedural rules as independent rather than interdependent. Standing alone, each of the court's decisions in the *Knapp* litigation is defensible and based on sound policy. The court's holding in *Knapp I*—that a plaintiff suing a city for damages caused by a defective sidewalk must specifically allege that he gave the city notice within ten days of the accident rather than merely alleging that he gave the city "proper statutory notification"—may seem rather hypertechnical. Requiring that level of detail, however, arguably furthers one of the purposes of our pleading system: to eliminate frivolous lawsuits at their inception.\(^2\)

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\(^{2}\) It is often said that pleading serves two basic purposes: first, to provide the defendant with notice sufficient to allow him to prepare his defense and, second, to identify the issues for trial. *E.g.*, Bashus v. Turner, 218 Neb. 17, 21, 352 N.W.2d 161, 165 (1984); B.C. Christopher & Co. v. Danker, 196 Neb. 518, 522, 244 N.W.2d 79, 81 (1976). Although it is not often explicitly stated, a third purpose of pleading is to eliminate frivolous suits at their inception. *See J. Friedenthal, M. Kane, & A. Miller, supra* note 12, at 239. Requiring more detail from the pleader makes it more likely that the system can identify claims upon which the plaintiff will be unable to prevail as a matter of law, thereby avoiding the expense and time involved in trying the case.

In many ways, however, these functions have been superseded over time by other procedural devices. While insisting on a factually detailed statement of the plaintiff's claim may once have been necessary in order to allow the defendant to prepare his case, that is no longer true. Nebraska's discovery procedures now parallel the liberal discovery provisions of the federal rules. *See Neb. S. Ct. Rev. Rules 26-37* (1986). Omitting the details from a petition does not leave the defendant helpless. He can fill in those details through discovery.

Likewise, the availability of the pretrial conference at the district court level reduces the significance of the petition in terms of defining the issues for trial.
Likewise, the court's holding in *Knapp II*—that dismissal for failure to state a cause of action is a final judgment—may seem rather harsh. Adopting that rule, however, furthers the basic policies underlying the doctrine of *res judicata*—to ensure finality and to protect the defendant from the harassment of multiple litigation. Although in isolation both of these decisions are defensible and vindicate important policies, the result they produce in conjunction with each other is indefensible; they elevate curable pleading technicalities to the level of incurable substantive defects.

Each aspect of our procedural system is interrelated. Whether a dismissal for failure to state a cause of action should be given *res judicata* effect is not a question that can be answered by simply focusing on the need for finality. The rules of *res judicata* do not operate in a vacuum. They instead operate within the context of a pleading system, and their effect in turn depends on the characteristics of the system in which they operate. For example, the consequences of giving *res judicata* effect to a dismissal are much different in the fast and

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See Neb. S. Ct. Rev. Rules, supra, at 10.1. Even in the absence of a pretrial conference, the first petition—and sometimes even the final petition—is unlikely to set the agenda for trial. New information uncovered through discovery may lead to the introduction of new issues through an amended petition. Furthermore, the court has significantly relaxed the rules historically governing variance and has also recognized that pleadings can be amended after trial to conform with the evidence actually introduced and issues actually tried. See, e.g., Eicher v. Eicher, 148 Neb. 173, 179, 26 N.W.2d 808, 812 (1947); Neb. Rev. Stat. § 25-842 (1985).

Obsolescence is also beginning to characterize the third function of pleading: eliminating frivolous lawsuits at their inception. While rigorous pleading requirements may once have been necessary to smoke out frivolous suits before trial, that is no longer true. In 1951, Nebraska parted company with the original Field Code and adopted the summary judgment procedure, see 1951 Neb. Laws 199-200 (codified at Neb. Rev. Stat. §§ 25-1330 to 25-1336 (1985)), a procedure that is more finely tuned to eliminating frivolous lawsuits than the demurrer procedure. Unlike a demurrer which essentially focuses on how well the plaintiff said whatever he said, a motion for summary judgment focuses on whether there is any factual basis for what the plaintiff said. In other words, it focuses on the merits of the plaintiff's claim.

Giving notice to the defendant, identifying the issues for trial, and eliminating utterly frivolous suits are not the only functions that pleading serves. The pleadings also indicate whether the court has subject matter jurisdiction and create a permanent record of what was tried, a record that may become important in determining whether a subsequent suit is barred by *res judicata*. See F. James & G. Hazard, supra note 16, at 127-28. When all is said and done, however, the basic purpose of pleading—especially when analyzed in light of the various changes in the Nebraska procedural system discussed above—is simply to serve as the opening salvo in the litigation and to give the court a basic understanding of the case. See C. Clark, supra note 12, at 57.

loose world of federal notice pleading than they are in the uncertain and intricate world of code pleading.\textsuperscript{74} Unlike a pleader in federal courts, a pleader in Nebraska state court cannot ignore the murky distinction between ultimate facts, evidentiary facts, and legal conclusions.\textsuperscript{75} Unlike a pleader in federal court, a pleader in Nebraska state court does not have the benefit of reported pleading decisions from three tiers of courts. The risk that a pleader will find himself without any meaningful guidance as to how a particular cause of action should be pled—and the corresponding risk that a case may be decided on the basis of an unforeseen pleading technicality—is therefore much greater in the Nebraska state court system than it is in the federal system.

The court in \textit{Knapp II} was not insensitive to this risk, but focused its analysis too narrowly. In holding that a dismissal for failure to state a cause of action is a final judgment on the merits, the court noted that Mrs. Knapp would have been allowed to amend her petition but instead elected to appeal.\textsuperscript{76} Apparently, the court concluded that the liberal amendment provisions of section 25-854\textsuperscript{77} offset the harshness of giving \textit{res judicata} effect to dismissals for failure to state a cause of action.\textsuperscript{78} The opportunity to amend in the first action eliminates any meaningful risk that a mistake in pleading will inevitably deprive the plaintiff of the opportunity to litigate his claim on the merits.

Although the opportunity to amend is an important protection, it is not a panacea. Because of the general demurrer and the related doctrine that a correct result based on incorrect grounds should nevertheless be affirmed, a plaintiff may be barred from litigating his claim.

\textsuperscript{74} In arguing that a dismissal for failure to state a claim should be given full \textit{res judicata} effect, Professors Wright and Miller have emphasized the liberality of federal notice pleading:

\begin{quote}
In older times . . . there was ample opportunity to misplead a valid claim; preclusion would have been a harsh penalty to impose for failure to unravel all the intricacies of pleading. . . . Pleading has moved so far from older rules that in many courts great effort would be required to plead a valid claim so ineptly as to suffer dismissal.
\end{quote}

\textsuperscript{18} C. Wright, A. Miller, & E. Cooper, \textit{Federal Practice and Procedure} § 4439 (1981). It does not take "great effort" to mislead a valid claim in Nebraska state court.


\textsuperscript{76} \textit{See supra} text accompanying note 63.

\textsuperscript{77} The text of § 25-854 is reproduced \textit{supra} note 42.

\textsuperscript{78} The relative ease of amending a petition is generally cited as the primary justification for giving full \textit{res judicata} effect to judgments dismissing an action for failure to state a cause of action. \textit{See, e.g.}, \textit{Restatement (Second) of Judgments} § 19 comment d (1982); C. Clark, \textit{supra} note 12, at 530-31; Von Moschzisker, \textit{Res Judicata}, 38 \textit{Yale L.J.} 299, 319 (1929).
because of a pleading technicality that he had no realistic opportunity to correct by way of amendment.79 The trial court may sustain the demurrer on one ground, thereby implicitly (or explicitly) leading the plaintiff to believe that his petition is otherwise sufficient to state a cause of action. Unless the plaintiff has a good faith basis for making the allegation that the trial court found lacking, the plaintiff has no choice but to appeal. On appeal, however, the supreme court may conclude that the petition is insufficient, not because of the alleged defect that the trial court identified but because of a defect that the trial court never identified. That is precisely the situation in which Mrs. Knapp found herself. As previously discussed, she could not have realistically amended her petition at the trial court level to cure a defect that, for all practical purposes, she first became aware of when the supreme court rendered its decision.80

The ameliorating effect of section 25-854 is further eroded by the fact that amending a petition is not a risk-free proposition. By filing an amended petition, a plaintiff waives any objection that the trial court erred in sustaining the demurrer to the original petition.81 While waiving that objection may not be of any practical significance

79. The doctrine that a correct result based on incorrect grounds should nevertheless be affirmed is explored in further detail in the text accompanying notes 133-50 infra.
80. See supra text accompanying notes 64-67.
81. See Raskey v. Michelin Tire Corp., 223 Neb. 520, 524-25, 391 N.W.2d 123, 126-27 (1986); Hoffman v. Geiger, 134 Neb. 643, 648, 279 N.W. 350, 353 (1938); Wheeler v. Barker, 51 Neb. 846, 849, 71 N.W. 750, 750 (1897). Although the federal courts have traditionally applied the waiver rule, see, e.g., Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967), the rule has not only come under strong attack recently but has also been rejected by a number of courts. See Wilson v. First Houston Inv. Corp., 566 F.2d 1235, 1238 (5th Cir. 1978), vacated, 444 U.S. 959 (1979); Blazer v. Black, 196 F.2d 139, 143 (10th Cir. 1952).

Requiring a plaintiff to forego the opportunity to amend a petition in order to preserve his right to challenge the sustaining of a demurrer for failure to state a cause of action, while at the same time allowing a defendant to answer without forgoing his right to challenge the overruling of a demurrer, see supra note 41, is at best logically inconsistent. See 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1476 (1971). More importantly, the waiver rule is unjust. Assume, for example, that the plaintiff asserts two counts in his petition, both of which are based on the same cause of action. The trial court erroneously sustains a demurrer to the plaintiff’s first count on a substantive ground and correctly sustains a demurrer to the plaintiff’s second count on a pleading ground. By amending, the plaintiff forgoes the right to proceed on the first count even though it is a valid claim under the law. The amended petition may correct a defect in the second count but the allegations in the first count will remain the same. Those allegations are therefore vulnerable to a motion to strike. See supra note 71. By appealing, the plaintiff forgoes the right to proceed on the second count even though the claim could be properly pleaded with the addition of one or more boilerplate allegations. The first count may be valid but the court will affirm the judgment without leave to amend in so far as the second count is concerned. This Hobson’s choice approach to litigation is intolerable and unjustifi-
in some cases, it can be of crucial significance in others. For example, assume that the plaintiff's petition properly pleads elements a, b, and c and that the trial court subsequently sustains a demurrer on the ground that the plaintiff must also allege element d in order to state a cause of action. Rather than standing on his petition and appealing, the plaintiff elects to amend his petition to add element d. Although the plaintiff introduces sufficient evidence at trial on elements a, b, and c, judgment is nevertheless entered against him because he failed to introduce sufficient evidence on element d.

The plaintiff cannot appeal that judgment on the ground that d is not an element of his cause of action—irrespective of whether the trial court's ruling in that regard was correct. By amending his petition to add element d, the plaintiff acquiesced in the trial court's ruling and consequently waived his right to argue that element d is not an essential element of his cause of action. In other words, the plaintiff voluntarily submitted his case to the trier of fact under the theory that element d was essential. So long as the trial court was correct in finding the plaintiff's evidence on element d insufficient, the judgment will be affirmed on appeal even though the supreme court may conclude that the trial court was incorrect in holding that element d was essential. Cases are reviewed in light of the theory on which they were submitted to the trier of fact—even though that theory may be incorrect as a matter of law.

By way of summary, the choice between appealing and amending is not necessarily an easy one to make or one that is always available. Setting aside the difficulty of evaluating with any degree of certainty whether a petition is sufficient to state a cause of action, the decision of whether to appeal or to amend is complicated by the rules of appellate review and waiver. To believe that amendment provisions of section 25-854 adequately ensure that our pleading requirements do not operate as a trap for the diligent would be to ignore the complex realities of our procedural system.

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82. The example assumes that the supreme court has not specifically addressed the issue of whether element d is an element of the plaintiff's cause of action.


B. The Advantages of Modifying the No-Remand Rule

All of this should not be taken to mean that the court should abandon its holding in *Knapp II* and return to the rule that a dismissal for failure to state a cause of action has no *res judicata* effect. The problem that *Knapp II* creates is sufficiently narrow to warrant a narrow solution. The requirements for pleading a number of causes of action are fairly well-settled. In those situations, it is neither unfair nor unrealistic to expect a plaintiff to plead his cause of action properly. There is always the possibility that the plaintiff may inadvertently omit an essential element or fail to allege an element in sufficient detail, but those are the kinds of mistakes that can be corrected by amendment after demurrer.

The problem is that not all pleading requirements are well settled. To expect a plaintiff to plead his cause properly without the benefit of any meaningful guidance from the supreme court or the legislature is both unfair and unrealistic. There is no justification for penalizing a plaintiff merely because his was the first case in which the supreme court addressed the requirements for pleading one or more of the elements of a particular cause of action. It accomplishes nothing—except perhaps to rid the courts of a potentially meritorious action.85

Eliminating this penalty does not require abandoning the doctrine of *res judicata*, abolishing the general demurrer, or doing away with code pleading. The competing policies served by *res judicata*—ensuring finality—and by code pleading—ensuring that cases are decided on their merits rather than on pleading technicalities—can both be vindicated within the context of our current procedural system by modifying the no-remand rule to reflect the changes that have occurred in the doctrine of *res judicata* since the inception of the no-remand rule.

When the court concludes that the demurrer under review should have been sustained, it should not automatically affirm the judgment. It should instead analyze whether the pleading requirement that the plaintiff failed to meet is one that the plaintiff could have reasonably foreseen. In other words, the court should determine whether the requirement has been meaningfully discussed in the court’s prior decisions or is, in effect, a new pleading requirement. If it is a new requirement, the court should reverse and remand with instructions

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85. Even assuming *arguendo* that disposing of both the wheat and the chaff somehow makes our procedural system more efficient, that efficiency is achieved at high cost, including perhaps an erosion of public confidence in the judiciary. It must be very difficult for a layman to understand why the failure to include some legal mumbo jumbo in a piece of paper should irrevocably deprive him of his day in court, especially when no one had any reason to believe that those magic words belonged in the petition. “Strict pleading produces a reaction, because people will not tolerate the denial of justice for formalities only.” Clark, *supra* note 21, at 458.
that the plaintiff be given leave to amend his petition. *Knapp I*, for example, would have been a prime candidate for remand rather than affirmance. Although the court’s prior decisions clearly indicated that a plaintiff must plead compliance with section 14-801, those decisions did not indicate the kind of allegation that would be sufficient. That came for the first time in *Knapp I*. The court’s opinion therefore announced what was effectively a new rule of pleading.

A more recent—and more compelling—example of a case in which remanding rather than affirming would have been appropriate is *Morris v. Lutheran Medical Center*. Prior to its decision in that case, the court had never specifically recognized the cause of action that Mrs. Morris was attempting to state: a cause of action for wrongful discharge based on the provisions of an employee handbook.

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86. See supra note 67.
88. The court had previously addressed the issue in *Mau v. Omaha Nat’l Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980). The plaintiff in *Mau* argued that the bank’s employee handbook constituted an employment contract that limited the bank’s right to discharge the plaintiff at will. The court disagreed. After emphasizing that the handbook specifically said, “THIS BOOKLET IS NOT A CONTRACT,” the court went on to add:

Even assuming *arguendo* that the publications relied upon constituted part of an employment contract, in the absence of a promise on the part of the employer that the employment should continue for a period of time that is definite or capable of determination, such employment relationship would still be terminable at the will of the employer as it constitutes an indefinite general hiring.

*Id.* at 314-15, 299 N.W.2d at 151. The court’s decision in *Mau* is susceptible to two possible interpretations: first, the terms of an employee handbook do not limit an employer’s right to discharge an employee who was hired for an indefinite period of time; and, second, the terms of an employee handbook may limit an employer’s right to discharge an employee unless the employer specifically states that the handbook creates no contractual obligations. The court in *Morris* subsequently chose the second interpretation. *Morris v. Lutheran Medical Center*, 215 Neb. 677, 680, 340 N.W.2d 388, 391 (1983).


While a number of other states have also invoked the implied covenant of good faith and fair dealing to limit an employer’s right of discharge still further, see, e.g., *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 455, 168 Cal. Rptr. 722, 729 (Ct. App. 1980), the Nebraska Supreme Court has to date resisted any attempts to invoke the implied covenant in the employment context. See *Jeffers*
ris was therefore blazing a new trail, in terms of both substance and pleading. She successfully blazed the first trail, and, despite the absence of any Nebraska decisions analyzing how to plead such a cause of action, came close to blazing the second trail successfully. But close was not good enough.

Mrs. Morris worked as a nurse at the Lutheran Medical Center in Omaha from 1978 until she was fired in 1981. Pursuant to the grievance procedures contained in the Medical Center's employee handbook, Mrs. Morris appealed her firing to the hospital's employee grievance committee. The committee subsequently recommended that Mrs. Morris be reinstated. Although that recommendation was not automatically binding on the hospital, the grievance procedure specifically provided that the hospital's president must follow the committee's recommendation unless he concluded that the recommendation conflicted “with established hospital policy or applicable laws and regulations.” The president reversed the committee's decision, however, apparently because he believed that the decision was not supported by the facts.

Mrs. Morris then filed suit against the hospital, alleging that the grievance procedures were part of her employment contract with the hospital and that the hospital's president breached that contract by failing to follow the committee's recommendation. The trial court eventually dismissed the action on the ground that an employee who, like Mrs. Morris, does not have an employment contract for a definite period of time can be discharged for any reason whatsoever. On appeal, the supreme court held that the grievance procedures in an employee handbook can become part of an oral employment contract even though the contract is indefinite as to time. The court nevertheless affirmed the dismissal because Mrs. Morris failed to allege specifically that the grievance committee's findings did “not conflict with established hospital policy or applicable laws and regulations.”

The court's decision must have come as something of a surprise to the parties. Mrs. Morris had structured her appeal on the reasonable

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90. Id. at 679, 340 N.W.2d at 391.
assumption that the only issue was whether the indefinite term of her employment contract established as a matter of law that the parties did not intend the grievance procedures to be binding. The sufficiency of Mrs. Morris' allegation that the hospital's president violated the grievance procedures was never questioned by either the defendant or the trial court. In fact, it was not even questioned by any of the Justices during oral argument.

Mrs. Morris' case was therefore one in which remanding rather than affirming would clearly have been appropriate. It was a case of first impression and one in which no one could have reasonably foreseen either the issue that the court ultimately found dispositive or the level of specificity that the court ultimately demanded. Although Mrs. Morris failed specifically to allege that the committee's findings did "not conflict with established hospital policy or applicable laws and regulations," she did allege the substantial equivalent. Her petition alleged:

That the President of Defendant hospital, contrary to the rules and procedures of the employee grievance procedure and, in particular, step 4 of the employee grievance procedure, ignored the committee's findings and recommendations and reversed the committee's findings and upheld the action previously taken of termination.

Mrs. Morris' petition also incorporated the grievance provisions by reference. Step 4 provided: "So long as the committee's recommendation does not conflict with established hospital policy or applicable laws and regulations, the President shall not substitute his judgment for that of the committee."

Taken together, these two allegations amount to an allegation, or at the very least a suggestion, that the committee's recommendation did not conflict with established policy or applicable laws and regulations. In retrospect, that was not enough. Like Mrs. Knapp twenty years earlier, Mrs. Morris lost her case simply because she failed to comply with a pleading requirement that she could not have reasonably anticipated.

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95. Bataillon Memo, supra note 93, at 1.
98. Motion for Rehearing, supra note 96, at 4 (emphasis added).
99. Id.
100. If step 4 required the president to follow a committee recommendation that does not conflict with established hospital policy or applicable laws and regulations, and if the president acted contrary to step 4 in reversing the committee's recommendation, then it would seem to follow logically that the committee's recommendation did not conflict with established hospital policy or applicable laws and regulations.
101. Although Mrs. Morris lost the battle, she did not lose the war. After the supreme court affirmed the trial court's dismissal, Mrs. Morris filed a second suit against
Modifying the no-remand rule to allow for remand in cases of first impression like *Morris* is not without precedent from other jurisdictions. In *Woodill v. Parke Davis & Co.*,102 for example, the plaintiffs filed a strict liability action against Parke Davis in Illinois state court, alleging that Parke Davis failed to warn patients and physicians of the danger of using a drug that the company manufactured. The trial court granted Parke Davis' motion to dismiss on the ground that the plaintiffs failed to allege that Parke Davis knew of the danger. On

the hospital, this time including a more specific allegation on the committee's findings. Mrs. Morris argued that her second suit was not barred by *res judicata* because the trial judge in *Morris I* did not specify whether the dismissal was with or without prejudice. Therefore, the dismissal should be deemed without prejudice. The trial judge in *Morris II* accepted that argument and allowed the action to go forward. Shortly thereafter, the parties settled the case. Bataillon Memo, supra note 93, at 1-2.

The trial judge in *Morris II* was wrong when he allowed the action to go forward. Although there are no Nebraska cases or statutes addressing the effect of dismissal that fails to specify whether it is with or without prejudice, such a dismissal should be deemed to be a dismissal with prejudice. Cf. Akins v. Chamberlain, 164 Neb. 428, 431-32, 82 N.W.2d 632, 634 (1957) (although the Court upheld the power of a trial court to dismiss without prejudice when the petition fails to state a cause of action, the judgment of dismissal under review specifically stated that the dismissal was without prejudice). Prior to *Knapp II*, a dismissal for failure to state a cause of action only barred the plaintiff from instituting a second suit based on the same allegations as the first. See supra notes 53-54, 68 and accompanying text. In other words, *res judicata* was the exception rather than the general rule.

The court shifted that presumption, however, when it decided *Knapp II* and held—without any discussion of whether the dismissal at issue in *Knapp I* was with or without prejudice—that a dismissal for failure to state a cause of action is a final judgment for purposes of *res judicata*. See supra notes 55-57 and accompanying text. To hold that a dismissal is with prejudice—and is therefore entitled to full *res judicata* effect—only if the trial court specifically states that the dismissal is prejudice would make *res judicata* the exception rather than the general rule. Cf. Rinehart v. Locke, 454 F.2d 313, 315 (7th Cir. 1971) (because the burden ought to be on the plaintiff to persuade the trial court that *res judicata* consequences ought not attach to the dismissal, a dismissal for failure to state a claim is with prejudice unless the trial court specifically states otherwise). That would in turn undermine the interests in finality that the court sought to vindicate through its holding in *Knapp II*. See supra text accompanying note 37.

Merely because Mrs. Morris was eventually able to obtain some relief does not mean that the remand proposal outlined in the text is unnecessary. Not every litigant will be lucky enough to have a trial judge in the second suit who erroneously construes the dismissal in the first suit. Furthermore, not every litigant will be lucky enough to receive a ruling from the supreme court before the statute of limitations runs. Cf. Memorandum of Telephone Conversation with Kenneth Wade, Clerk of the Nebraska Supreme Court (Sept. 2, 1986) (on file in Rm. 213 of Univ. Neb. Law College) (time from when the appeal is filed until the opinion is filed is currently running about 16 to 19 months in nonadvanced civil appeals). Irrespective of whether the dismissal is with or without prejudice, the plaintiff cannot institute a second action after the limitations period has expired.

102. 79 Ill. 2d 26, 402 N.E.2d 194 (1980).
appeal, the Illinois Supreme Court held for the first time that knowledge is an essential element that must be pled in a failure to warn case and that the plaintiffs' complaint therefore failed to state a cause of action.\textsuperscript{103} Rather than simply affirming the judgment, however, the court remanded the case with instructions that the plaintiffs be given leave to amend. As the court explained: "Since we are enunciating the requirement that knowledge must be alleged in a complaint for the first time in this opinion, substantial justice would seem to require that the plaintiffs be given an opportunity to amend their complaint to comply with this decision.\textsuperscript{104}

The Massachusetts Supreme Court took the same approach in \textit{Cheaney v. Automatic Sprinkler Corp.}\textsuperscript{105} There, the plaintiff filed suit to recover incentive bonuses that his former employer had refused to pay. In his complaint, the plaintiff alleged that he had quit his job in order to form a competing corporation. The plaintiff's contract with the defendant, however, specifically provided that he would forfeit any unpaid bonuses if he went to work for a competitor.\textsuperscript{106} The trial court granted the defendant's motion to dismiss for failure to state a cause of action.

On appeal, the supreme court agreed that the plaintiff's complaint failed to allege a cause of action but nevertheless reversed the judgment. Although the plaintiff's complaint failed to allege any facts that suggested the forfeiture provision was unreasonable, the court emphasized that its decision was the first Massachusetts Supreme Court decision to delineate the factors relevant to the determination of whether such a provision was unreasonable and therefore unenforceable.\textsuperscript{107}

That in turn made it inappropriate simply to affirm the judgment. "[P]articularly because of our indication for the first time of the relevant considerations concerning the enforcement of a forfeiture for competition clause, we believe that the plaintiff should be given an

\textsuperscript{103} In holding that knowledge was an essential element of the plaintiff's cause of action, the Illinois Supreme Court was not writing on a clean slate. There were conflicting decisions from other states as well as from the Illinois Courts of Appeal. See \textit{id.} at 31-33, 402 N.E.2d at 196-98. What made the issue one of first impression was that it had never been specifically addressed by the final arbiter of Illinois law: the Illinois Supreme Court. See \textit{id.} at 38, 402 N.E.2d at 200.

\textsuperscript{104} Woodill v. Parke Davis & Co., 79 Ill. 2d 26, 38, 402 N.E.2d 194, 200 (1980).


\textsuperscript{106} \textit{id.} at 143-44, 385 N.E.2d at 963.

\textsuperscript{107} Although there were two Massachusetts decisions that had upheld forfeiture provisions, neither of those decisions had analyzed the enforceability of such a provision in light of the reasonableness of the resulting restraint imposed on an employee's ability to seek other employment. \textit{id.} at 145, 385 N.E.2d at 964. As in \textit{Woodill}, there were conflicting decisions from other jurisdictions, but, as in \textit{Woodill}, the crucial consideration from the standpoint of the supreme court was that it had never specifically addressed the issues under review. See \textit{id.} at 145-50, 385 N.E.2d at 964-66.
opportunity to amend his complaint."\textsuperscript{108}

Other state courts, including those of Missouri,\textsuperscript{109} Washington,\textsuperscript{110} and Wisconsin,\textsuperscript{111} have also recognized the need for remand in pleading cases of first impression.\textsuperscript{112} All of these decisions implicitly recognize that parties rely on judicial precedent in drafting their pleadings and structuring their litigation strategies.\textsuperscript{113} Although there are general principles that govern pleading—for example, a plaintiff must al-

\textsuperscript{108} \textit{Id.} at 150, 385 N.E.2d at 966.

\textsuperscript{109} See Bell v. Green, 423 S.W.2d 724, 734-35 (Mo. 1968) (interests of justice require remanding with leave to amend because plaintiff's erroneous theory of the case was based on a decision that had not been previously overruled or disapproved by the Missouri Supreme Court).

\textsuperscript{110} See Klinke v. Famous Recipe Fried Chicken, Inc., 24 Wash. App. 202, 217, 600 P.2d 1034, 1034 (Ct. App. 1979) (in reversing summary judgment for the defendants and remanding the case, the court explained that "because we here adopt for the first time the rule of Restatement (Second) of Contracts § 217A, we believe all plaintiffs should be given an opportunity in the trial court to bring themselves within the rule.").

\textsuperscript{111} See Nelson v. Hansen, 10 Wis. 2d 107, 120-21, 102 N.W.2d 251, 258-59 (1960) (interests of justice require remanding with leave to amend because the case was the first Wisconsin decision to analyze the nature of a dog owner's liability in light of the Wisconsin comparative negligence statute).

\textsuperscript{112} The United States Supreme Court has also recognized that remand with leave to amend is the appropriate way to dispose of pleading cases of first impression. \textit{See} Linn v. United Plant Guard Workers of America Local 114, 383 U.S. 53 (1966). The plaintiff in \textit{Linn} was a manager at Pinkerton's who filed a libel action against Local 114, alleging that the local had circulated defamatory leaflets during its campaign to organize Pinkerton's. The trial court dismissed the action on the ground that the libel arguably constituted an unfair labor practice which in turn meant that the National Labor Relations Board had exclusive jurisdiction of the dispute. \textit{Id.} at 55; see 29 U.S.C. §§ 158(b), 160 (1983). The Supreme Court disagreed. After concluding that the National Labor Relations Act did not completely preempt state libel law, the Court went on to hold that libelous statements made during a union organizing campaign were actionable so long as the statements were made "with knowledge of their falsity or with reckless disregard of whether they were true or false." \textit{Id.} at 65.

Because \textit{Linn} represented the first case in which the Court had both addressed the issue of whether such a claim could be brought in federal court and discussed the elements that a plaintiff must plead, it was not surprising that Linn's complaint failed to include all of the allegations necessary to state a claim upon which relief could be granted. That failure did not deprive Linn of his day in court, however. Rather than simply affirming the dismissal, the Court instead reversed and remanded the case with instructions that Linn be given leave to amend his complaint to comply with the Court's newly announced pleading requirements. \textit{Id.} at 65.

\textsuperscript{113} It must be emphasized that whether a particular pleading issue may have been discussed in cases from other jurisdictions is irrelevant. Merely because another state may have adopted a particular rule does not mean that the Nebraska Supreme Court will inevitably adopt that same rule. \textit{See}, e.g., Berglund v. Sisler, 210 Neb. 258, 261, 313 N.W.2d 679, 682 (1981). The focus must therefore be on the judicial decisions of the Supreme Court of the state in which the action is pending. \textit{See supra} notes 103 and 107.
lege facts sufficient to state a cause of action—those vague principles only become meaningful in the light of judicial opinions. Those opinions are what define the elements of a cause of action, discuss how those elements should be alleged, and analyze how detailed those allegations should be.\textsuperscript{115} Without that kind of guidance, pleading—and more specifically, code pleading—essentially becomes a roll of the dice.

The Nebraska Supreme Court has also recognized the crucial role that judicial precedents play in litigation, though in a slightly different context. In *Langfeld v. Nebraska Department of Roads*,\textsuperscript{116} the court overruled its earlier decisions and held that a property owner in a condemnation case is not competent to testify as to the value of the land simply by virtue of the fact that he is the owner.\textsuperscript{117} The court was careful to add that this newly announced rule should not be applied retroactively. "Since the adoption of this rule may make necessary a different procedural method from that heretofore allowed, it shall apply only to trials held after the issuance of the mandate in this case."\textsuperscript{118} In other words, the court recognized that it would be unfair to penalize litigants for relying on clearly established precedent.

Admittedly, *Langfeld* involved the much more dramatic situation of a court overruling a prior decision rather than of a court announcing a requirement that its previous decisions had not addressed. From a practical standpoint, however, there is no difference between rowing toward a mirage and being left adrift in uncharted waters. In both situations, the parties fail to comply with the correct legal standard, not because of carelessness, incompetence, or stubbornness, but because of a lack of clairvoyance.

Like any proposal, the proposal to modify the no-remand rule in Nebraska has its share of advantages and disadvantages. The chief advantage of allowing remand in pleading cases of first impression is that it would help restore pleading to its proper role in our procedural system. Pleading is not an end in itself.\textsuperscript{119} It is instead a means of providing the court with a basic understanding of the case, and, of lesser importance, a means of giving the defendant notice of the basis of the claim so that he can begin to prepare his defense. Pleading also furthers the objectives of eliminating frivolous suits at their inception, vesting the court with subject matter jurisdiction, and creating a permanent record of the case for purposes of trial, *res judicata*, collateral

\begin{itemize}
\item \textsuperscript{114} See supra note 15 and accompanying text.
\item \textsuperscript{115} See supra notes 25-32 and accompanying text.
\item \textsuperscript{116} 213 Neb. 15, 328 N.W.2d 452 (1983).
\item \textsuperscript{117} Id. at 24-26, 328 N.W.2d at 457-58.
\item \textsuperscript{118} Id. at 26, 328 N.W.2d at 458. The court reversed the judgment on other grounds which therefore meant that the newly announced rule would apply in the second round of the *Langfeld* litigation. Id.
\item \textsuperscript{119} See, e.g., C. CLARK, supra note 12, at 54.
\end{itemize}
estoppel, and execution.\footnote{120} None of these purposes would be compromised by remanding a case to allow the plaintiff to amend his pleadings to conform with a newly articulated pleading requirement. In fact, denying the plaintiff that opportunity contributes to the very problem code pleading was designed to combat: disposing of cases on the basis of form rather than substance.\footnote{121}

The chief disadvantage of modifying the no-remand rule is that it might encourage plaintiffs to appeal rather than to amend when a demurrer is sustained. That would not only increase the supreme court’s workload but might also transform the court into the equivalent of an “educational sounding board.”\footnote{122} Because cases would be remanded even though the petition under review fails to state a cause of action, pleading disputes might well spawn a never-ending parade of risk-free interlocutory appeals.\footnote{123}

The possibility of that occurring, however, is rather remote. The proposed modification would call not for remand in every case but only in those cases in which the Court adopts a pleading standard that the plaintiff could not have reasonably foreseen. A plaintiff who fails to allege the absence of probable cause in a suit for malicious prosecution would be hard-pressed to argue that the judgment should be reversed and the case remanded in order to allow him to amend his petition. The court has unequivocally held that the absence of probable cause is an essential element of malicious prosecution and has provided clear guidance on how to plead that element.\footnote{124}

\begin{itemize}
\item \footnote{120} See supra note 73.
\item \footnote{121} See supra notes 18-21 and accompanying text.
\item \footnote{122} United States Fidelity & Guar. Co. v. Perkins, 388 F.2d 771, 772 (10th Cir. 1968) (to allow amendments as a matter of right after appeal would encourage frivolous appeals).
\item \footnote{123} At least one federal court has expressed a concern that allowing a plaintiff to amend his complaint after unsuccessfully appealing a dismissal for failure to state a claim upon which relief can be granted “would in effect allow interlocutory appeals.” Cohen v. Illinois Institute of Technology, 581 F.2d 658, 662 (7th Cir. 1978); see 3 J. MOORE, MOORE’S FEDERAL PRACTICE ¶ 15.11 (2d ed. 1985). That should not be taken to mean that a federal court will never remand a case for the sole purpose of allowing a plaintiff to amend his complaint to state a claim. See, e.g., Denny v. Barber, 576 F.2d 465, 471 (2d Cir. 1978) (court will remand with leave to amend only when “justice so requires”). The Supreme Court has remanded with leave to amend in order to give a plaintiff the opportunity to comply with newly announced pleading requirements, and the courts of appeal have often remanded cases when the trial court correctly dismissed a complaint but for the wrong reason. See, e.g., Griffin v. Locke, 286 F.2d 514 (9th Cir. 1961); Oil, Chem & Atomic Workers Int’l Union v. Delta Refining Co., 277 F.2d 694 (6th Cir. 1960); Marranzano v. Riggs Nat’l Bank, 184 F.2d 349 (D.C. Cir. 1950).
\item \footnote{124} A general allegation that the prior action was instituted without probable cause is sufficient. See Clark v. Folkers, 1 Neb. (unof.) 96, 97, 95 N.W. 328, 328 (1901); Jones v. Fruin, 26 Neb. 76, 80, 42 N.W. 283, 284 (1889); 7 W. MOORE, NEBRASKA PRACTICE § 5941 (1967).
\end{itemize}
That is not to say that the absence of a supreme court opinion directly on point would inevitably require remand with leave to amend. Again, the proposal only calls for remand when the pleader failed to comply with a requirement that he could not have reasonably foreseen. For example, in Guaranteed Foods of Nebraska, Inc. v. Rison,\(^\text{125}\) the court held for the first time that unconscionability is an affirmative defense that must be pled.\(^\text{126}\) That holding was by no means unforeseeable. Although unconscionability is not a concept susceptible to a pat definition, claims of unconscionability generally fall into one of two categories: first, that the party was the victim of unfair surprise and had no meaningful choice but to accept the clause in question, a claim closely analogous to a claim of fraud or duress; and, second, that the clause is so one-sided as to make its enforcement unfair and unreasonable, a claim closely analogous to a claim of illegality.\(^\text{127}\) In other words, a claim of unconscionability is essentially an admission that the party entered into the contract but that the contract is nevertheless unenforceable, either because of unfair surprise or because of public policy. Unconscionability is therefore nothing more than a variation on the basic themes of fraud, duress, and illegality—all of which have long been classified as affirmative defenses.\(^\text{128}\)

While some pleading requirements can be anticipated through reasoning by analogy, others cannot be. When a pleader is attempting to state a cause of action that the court has not yet specifically recognized, there will often be nothing to guide the pleader other than the vague principle that he should plead facts sufficient to state a cause of action. To remand those kind of cases will not open the floodgates to a

\(^{125}\) 207 Neb. 400, 299 N.W.2d 507 (1980).

\(^{126}\) Id. at 407, 299 N.W.2d at 512. The doctrine of unconscionability is rooted in § 2-302 of the Uniform Commercial Code which provides:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.


\(^{127}\) See, e.g., J. WHITE & R. SUMMERS, supra note 126, at 147-52.

raft of pleading appeals. Those are the kind of cases that will probably be appealed in any event.\[129\] It is therefore unlikely that the court would significantly increase its workload by recognizing that the interests of justice sometimes require remanding rather than affirming.

In the final analysis, however, whether the proposed remand standard would increase the court's workload is irrelevant. The basic question is whether continuing adherence to the no-remand rule would be consistent with the objective of our procedural system: to ensure that cases are decided on their merits.

"[R]ules of procedure... tend to become formalized and rigid and need to be checked regularly with their objectives and in the light of their present accomplishment."\[130\] The court's approach to pleading appeals is no different today than it was 30 years ago—the judgment will be affirmed if the petition fails to state a cause of action. But something has changed; thirty years ago, claims were not lost merely because the plaintiff failed to foresee the level of detail that the court

129. While giving res judicata effect to dismissals for failure to state a cause of action may promote finality, it may also retard the development of clear pleading guidelines. Because discretion is often the better part of valor, litigants will appeal an adverse pleading decision only if they have no other choice. The stakes are too high to do otherwise. See supra text accompanying notes 42-47. It is therefore not surprising that fewer pleading opinions are being handed down today than before Knapp II.

That in turn means that litigants and trial courts alike may often have very little to go on in evaluating the sufficiency of a particular petition, a state of affairs that not only encourages defendants to file demurrers as a matter of course but may also lead to inconsistent decisions at the trial court level. The system's overall efficiency inevitably suffers as a result. Recognizing the possibility of remanding with leave to amend would counteract that inefficiency. Even assuming that the prospect of remand might increase the number of pleading appeals over the short run, that increase would improve the system's efficiency over the long run. The requirements for pleading a particular cause of action—especially causes in evolving areas of the law—would be delineated more quickly. In other words, the trial courts would not be left in the dark for years on end.

Furthermore, the flexibility that the proposed remand standard offers would eliminate any need for the court to adopt pleading requirements less stringent than it would otherwise prefer in an attempt to avoid a harsh result. For example, the court's most recent pleading decision in the wrongful discharge area suggests that less specificity may be required than its earlier decision in Morris suggests. Compare Morris v. Lutheran Medical Center, 215 Neb. 677, 340 N.W.2d 388 (1983) (failure to include allegations sufficiently specific to establish that compliance with grievance procedures would result in reinstatement was fatal) with Jeffers v. Bishop Clarkson Memorial Hosp. 222 Neb. 829, 287 N.W.2d 692 (1980) (failure to include allegations that compliance with grievance procedures could result in reinstatement or like remedy apparently was not fatal; although failure was raised by the defendant, it was not discussed by the court). Perhaps the result in Jeffers was both the proper and just result, but the opinion, when read in light of Morris, does leave pleaders and trial courts somewhat in the dark as to what must be pled and at what level of detail.

130. Clark, supra note 21, at 460 (footnote omitted).
ultimately demanded in a petition.\textsuperscript{131} Unless our objective is to dispose of claims on the basis of pleading technicalities, our rules of procedure must be adjusted to take into account the effect of Knapp \textit{II} and its holding that a dismissal for failure to state a cause of action is a final judgment on the merits. At the very least, that adjustment should include remanding with leave to amend when announcing what are effectively new requirements for pleading a particular cause of action.

\textbf{C. The Unfairness of Affirming on Grounds Other Than Those Relied on by the Trial Court}

Although modifying the no-remand rule in pleading cases of first impression is a reform long overdue, there is one further step that should be taken to help ensure that pleading no longer functions as an end in and of itself. That step involves modifying the doctrine that a judgment should not be reversed if the trial court reaches the correct result for the wrong reason.\textsuperscript{132} Invoking that doctrine to sustain a judgment may be appropriate in a number of areas\textsuperscript{133} but pleading is not one of them. Use of the doctrine in the pleading context hardly serves the ends of justice. It instead operates to deprive the plaintiff of an opportunity that he would have had but for the trial court's error: the opportunity to amend his petition to state a cause of action.

A general demurrer is often based on more than one ground. Although the defendant will inevitably argue that each one of those grounds independently establishes that the petition fails to state a cause of action, the trial court may sustain the demurrer on only one of those grounds and either explicitly reject or say nothing about the remainder. In deciding how to respond, the plaintiff will necessarily focus on the ground cited by the trial court and ignore the remain-

\textsuperscript{131} See supra text accompanying notes 53-54, 68.


\textsuperscript{133} The doctrine is grounded in notions of judicial efficiency. "It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate." SEC v. Chenery Corp., 318 U.S. 80, 88 (1943). For example, if the trial court enters a judgment on the grounds that the plaintiff failed to introduce sufficient evidence on one element of his cause of action and the appellate court concludes that the plaintiff met his burden on that element but not on another, there is no reason to reverse and remand for a new trial. The plaintiff is not entitled to a judgment in his favor unless he proves each element of his cause of action. Assuming that the plaintiff knew what he was required to prove, the plaintiff cannot claim that he was misled into believing that no such evidence was necessary. Affirming the judgment under those circumstances would therefore be neither unjust nor unfair.
The reason for focusing on that ground is obvious. The litigation cannot go forward unless the trial court is satisfied that the plaintiff has stated a cause of action.

If the defect that the trial court found in the petition is not one that can be cured by amendment, there is no reason for the plaintiff to file an amended petition. From a practical standpoint, the only conceivable purpose for filing an amended petition under those circumstances would be to eliminate grounds that the defendant cited in support of his demurrer but which the trial court either ignored or rejected when it sustained the demurrer. In other words, the amended petition would add allegations that the trial court has said are unnecessary without adding the allegations that the trial court has said are necessary. That makes no sense. For all practical purposes, the plaintiff has no choice but to appeal.

The reasons that led the trial court to sustain the demurrer therefore play a central role in the plaintiff's decision of whether to amend or to appeal, a fact that the court itself recognized in Clyde v. Buckfinck. The plaintiffs in Clyde brought suit to recover property that allegedly passed to them under a will. The defendants demurred on a number of grounds. Although the trial court sustained the demurrers and dismissed the action, it never specified the grounds for its decision. That was reversible error. In holding that a trial court must specify the grounds for its decision when it sustains a demurrer, the court emphasized that a trial court's failure to do so not only makes it difficult for the court to review the case but also makes it difficult for plaintiffs to decide whether and how to amend their petitions.

In this case, plaintiffs requested that the trial court specify its reasons for sustaining the demurrers. Part of the plaintiffs' concern was that they did not know whether the trial court had in fact construed the will and found that they had no interest in the property under it, or whether the petitions were

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134. See supra text following note 70.
135. Even if the defect is one that might be cured by amendment, the rules of waiver may leave the plaintiff with no realistic alternative but to stand on his petition and appeal the trial court's ruling. See supra notes 82-85 and accompanying text.
138. Clyde actually involved two cases which had been consolidated for appeal. The plaintiffs in both cases were different and invoked different theories as to why they were entitled to the property. The defendants in one of the cases demurred to the petition on three grounds: (1) the petition failed to state facts sufficient to constitute a cause of action, (2) there was a pending action involving the same subject matter and the same parties, and (3) misjoinder. Id. at 590, 254 N.W.2d at 396. The defendants in the other case filed a general demurrer to the petition but asserted a number of theories as to why the petition failed to state a cause of action. Id. at 593-94, 254 N.W.2d at 397. In other words, the demurrer in the second case was also based on multiple grounds.
defective for other reasons. Plaintiffs' failure to tender proposed amendments to the petitions is understandable when they were uncertain of the grounds on which the demurrers were sustained. Without knowing the reasons for the sustaining of the demurrers, it is impossible for this court to determine whether the trial court erred in not granting plaintiffs leave to amend their petitions . . . .\(^{139}\)

Just as one can understand a plaintiff's failure to file an amended petition when he does not know why the trial court sustained the demurrer, one can also understand a plaintiff's failure to file an amended petition to cure a potential defect that the trial court never cited as a ground for sustaining the demurrer. How the plaintiff responds, as a practical matter, depends on the grounds for the trial court's decision. When it bases its decision on an erroneous ground, the trial court in effect misleads the plaintiff into appealing rather than amending. Under those circumstances, it cannot be said that the plaintiff knowingly and voluntarily elected to forego his opportunity to amend.

In Morris,\(^{140}\) to take just one example,\(^{141}\) the trial court erroneously sustained the defendant's demurrer on the ground that Mrs. Morris' employment contract was indefinite as to time without even alluding to the defect that the supreme court later found in the plaintiff's petition: the absence of a specific allegation that the grievance committee's decision did not conflict with established hospital policy or applicable laws and regulations.\(^{142}\) Because of the trial court's error, Mrs. Morris had no choice but to appeal and no reason to believe that her allegation regarding the committee's findings was defective. In short, the trial court's error cost Mrs. Morris her case.

If the trial court had based its decision on the correct ground, Mrs. Morris would have had no reason to appeal. She would have been given an opportunity to amend her petition to include the more specific allegation\(^{143}\) and undoubtedly would have taken advantage of

\(^{139}\) Id. at 594, 254 N.W.2d at 398 (emphasis added). The plaintiffs had specifically requested that they be given leave to amend but failed to submit a proposed amended petition. Id. at 589, 254 N.W.2d at 395-96. That failure was cited by the trial judge as a reason for dismissing the action. Id. at 591, 254 N.W.2d 396.


\(^{141}\) See, e.g., Harmon Care Centers, Inc. v. Knight, 215 Neb. 779, 340 N.W.2d 872 (1983) (although the trial court erred in sustaining the defendants' demurrer on the grounds that the action was barred by the doctrine of sovereign immunity, the court nevertheless affirmed the judgment because the plaintiff did not properly allege the elements of either a legal or equitable accounting action); Koch v. Grimminger, 192 Neb. 706, 223 N.W.2d 833 (1974) (although the trial court erred in sustaining the defendant's demurrer on the ground that the defendant county attorney was absolutely immune, the court nevertheless affirmed the judgment because the plaintiff failed to allege malice properly).

\(^{142}\) See supra text accompanying notes 93-96.

\(^{143}\) See, e.g., Cagle, Inc. v. Sammons, 198 Neb. 595, 604, 254 N.W.2d 398, 404 (1977) (it is
that opportunity. Including that allegation would have required Mrs. Morris only to make explicit what was already obvious from her petition. But she never had the chance.

In order to ensure that plaintiffs like Mrs. Morris have a fair chance, the court should no longer adhere to the doctrine that a correct pleading decision based upon incorrect grounds should nevertheless be affirmed. If the court concludes that the demurrer should have been sustained on grounds other than those relied on by the trial court and that there is a reasonable possibility that the defect could be cured by amendment, the court should remand the case to give the plaintiff the opportunity to amend his petition, an opportunity he would have had but for the trial court’s error. As the Tennessee Supreme Court recognized in Butler v. Trentham, the interests of justice require no less.

In Butler, the administrator of a decedent’s estate filed an action for contribution against two defendants. The defendants demurred on the ground that the right of contribution did not survive the decedent. The trial court accepted that argument and sustained the demurrer. The Tennessee Supreme Court subsequently rejected that argument but nevertheless affirmed the judgment because the plaintiff had failed to allege one of the elements of his cause of action. On rehearing, the plaintiff argued that he would have been given leave to amend his petition to include the necessary allegations if the defect had been raised below. According to the plaintiff, the case therefore should have been remanded to allow him to amend his petition so he could have a trial on the merits. The supreme court agreed.

We do not know from the record before us what acts of negligence by the Defendants can be alleged and proven as required in contribution between joint tortfeasors. We are of the opinion that if such facts exist we should not simply dismiss the case with the prejudice that would follow such an adjudication. Under the [Tennessee remand statute], it is proper for this Court to remand a cause with leave to amend where justice requires it.

Despite the need to remand when the trial court sustains a demurrer, an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment); Neb. Rev. Stat. § 25-854 (1985).

144. See supra notes 98-100 and accompanying text.
145. 224 Tenn. 528, 458 S.W.2d 13 (1970).
146. Id. at 538, 458 S.W.2d at 17.
147. Id. at 538-39, 458 S.W.2d at 17; see, e.g., Marranzano v. Riggs Nat’l Bank, 184 F.2d 349, 351 (D.C. Cir. 1950) (ends of justice are better served by remanding with leave to amend when the trial court correctly dismisses an action but for the wrong reason).

The Tennessee remand statute on which the court relied in Butler provided: The court shall also, in all cases, where, in its opinion, complete justice cannot be had by reason of some defect in the record, want of proper parties, or oversight without culpable negligence, remand the cause to the court below for further proceedings, with proper directions to effec-
rer for the wrong reasons, there is a practical hurdle to adopting the approach outlined above. The approach assumes that the court will know the grounds on which the trial court sustained the demurrer. That may not often be true.\textsuperscript{148} Trial judges in Nebraska are not required to state their grounds in writing and there is a significant possibility that the parties may provide the court with conflicting statements of those grounds. This hurdle is by no means insurmountable, however. Pursuant to its supervisory authority over the trial courts,\textsuperscript{149} the supreme court could promulgate a supreme court rule requiring trial court judges to specify in writing the grounds on which they base a decision to sustain a demurrer and further requiring that the trial judge's specification be included in the transcript.\textsuperscript{150}

To summarize, the admonition that the amendment provisions of

tuate the objects of the order, and upon such terms as may be deemed right.

\textbf{TENN. CODE ANN.} § 27-3-128 (1980). Nebraska does not have a comparable statutory provision. That does not mean, however, that the court cannot reverse and remand when the trial court reaches the correct result for the wrong reason. A trial court commits a legal error when it bases its decision on an erroneous ground, and the supreme court is statutorily vested with the power to reverse judgments for legal errors. See \textbf{NEB. REV. STAT.} § 25-1911 (1985) ("A judgment rendered . . . may be reversed . . . by the Supreme Court for errors appearing on the record."). Furthermore, if there is a reasonable possibility that the defect could be remedied by amendment, the harmless error rule would not preclude remanding the case. The error under those circumstances would clearly be prejudicial. See supra notes 133-39 and accompanying text. More generally, the court has the power to remand a case with leave to amend even if the trial court did not commit any legal error. See supra note 46.


\textsuperscript{149} Section 25 of Article V of the Nebraska Constitution provides: "For the effectual administration of justice and the prompt disposition of judicial proceedings, the supreme court may promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters . . . ." \textbf{NEB. CONST. art. V, § 25}. Because a rule requiring district and county court judges to state in writing the grounds on which they sustain a demurrer would not conflict with any statutes currently in effect, § 25 clearly empowers the court to promulgate such a rule.

Although promulgating a supreme court rule to govern practice in the trial courts may seem to be a somewhat unusual approach, the court has previously exercised its power under § 25 on a number of occasions. See, e.g., \textbf{NEB. S. CT. REV. RULES} 4.1 (establishing rules for practice in Nebraska state courts by certified senior law students), 9.1 (establishing case progression timetables), 11.1 (authorizing district courts to hold pretrial conferences in civil actions), 12.1 (setting forth, \textit{inter alia}, the duties and qualifications of court reporters), 13.1 (establishing rules for the release, substitution, and disposal of exhibits), 16.1 (adopting notice forms for use by county courts in probate, guardianship, conservatorship, and trust cases) (1986).

\textsuperscript{150} The rule proposed in the text could be worded in any number of ways. One way in which it could be worded is:

Pursuant to § 25 of article V of the Nebraska Constitution, it is hereby
section 25-854 should be liberally construed to prevent injustice\textsuperscript{151} takes on a rather hollow ring in light of the practice of affirming pleading appeals on grounds other than those relied on by the trial court. One of the primary purposes of section 25-854 is to give a plaintiff the opportunity to correct pleading defects, an opportunity that, at least in theory, minimizes the risk that cases will be decided on the basis of pleading technicalities rather than on their merits. Especially in a code pleading jurisdiction like Nebraska, that opportunity is essential and its availability should not depend on whether the plaintiff is blessed with a trial judge who reaches the correct result for the correct reason.

III. IF ONLY I KNEW WHAT TO PROVE

The danger that a case will turn on ability to foresee the unforeseeable does not end at the pleading stage of the litigation. A defendant can mount a challenge to the sufficiency of the plaintiff's petition at any time.\textsuperscript{152} In fact, the defendant can challenge the sufficiency of the plaintiff's petition for the first time on appeal even though he never demurred in the trial court.\textsuperscript{153} Challenging the sufficiency of a petition after the case has been tried is generally frowned on and will most likely fail if the challenge is based on a technical pleading defect.\textsuperscript{154} That is not true, however, when the challenge is based on the

ordered that the following be adopted as a rule of practice for the county and district courts of this state:

(1) Whenever a demurrer to a petition is sustained, the judge shall issue a written order stating each and every ground upon which the demurrer is sustained. Those grounds shall be concisely stated but with sufficient detail to enable the parties and the appellate court to understand the basis for the judge's decision.

(2) Whenever an appeal shall be taken from a judgment of dismissal entered after the sustaining of a demurrer, the judge's written order shall be included in the transcript.

Because the trial judge's written statement of the grounds for his decision is analogous to a memorandum opinion, it would have to be included in the transcript. \textit{See} Neb. S. Cr. Rev. Rules 4(A)(1)(b) (1986).


152. \textit{E.g.}, \textit{In re Roller Trust}, 193 Neb. 54, 55, 225 N.W.2d 397, 399 (1975).


154. If a challenge to sufficiency of the plaintiff's petition is not mounted until either trial or appeal, the petition will be liberally construed and deemed sufficient if at all possible. \textit{See}, \textit{e.g.}, Contois Motor Co. v. Saltz, 198 Neb. 455, 461-62, 253 N.W.2d 280, 294 (1977); Bader v. Hodwalker, 187 Neb. 138, 139, 187 N.W.2d 645, 646 (1971); Gibbs v. Johns, 183 Neb. 618, 619-620, 163 N.W.2d 110, 111 (1968). In addition, the court has sharply curtailed the use of a demurrer \textit{ore tenus}—at least when a pretrial conference is held. \textit{See} Newman Grove Creamery Co. v. Deaver, 208 Neb. 178, 302 N.W.2d 697 (1981).

In \textit{Newman Grove}, the plaintiff demurred \textit{ore tenus} to the defendant's answer
failure to allege and prove an essential element of the cause of action.

Because the plaintiff bears the burden of proving each element of his cause of action, the defendant may mount his challenge indirectly by arguing that the plaintiff failed to prove one or more of those elements. No one introduces all of the evidence that is potentially relevant to his case. Litigants instead decide what to introduce in light of what they are required to prove. If the supreme court has never held that a particular fact is an element of the plaintiff’s cause of action, the plaintiff may reasonably conclude that he need not marshall and introduce any evidence of that fact, especially if the defendant never demurred to the petition on the ground that plaintiff failed to allege that fact. The plaintiff may then proceed to trial and prevail on the merits of his claim only to have the supreme court later reverse the judgment and dismiss the action because he failed to introduce evidence on one of the essential elements of his cause of action. In other words, the plaintiff may lose his case simply because he failed to introduce evidence that he had no reason to believe he was required to introduce. That is precisely what happened in Nerud v. Haybuster Mfg., Inc.155

A. The Unfairness of Applying New Proof Requirements Retroactively

Mr. Nerud bought a haystacking machine for his farm in 1976. While Mr. Nerud was working in the fields, the machine was completely destroyed when it suddenly burst into flames. Three days later, Mr. Nerud bought a second haystacker that lasted a few hours before it also burst into flames.156 Mr. Nerud subsequently filed suit against the manufacturer, alleging that the haystackers were negligently designed.157 The trial court entered judgment in favor of Mr.

156. Id. at 606, 340 N.W.2d at 371.
157. Although Nerud actually involved two suits—one for each machine—that had been consolidated for trial and appeal, id. at 605, 340 N.W.2d at 371, the legal theories on which Mr. Nerud proceeded were the same in both suits: negligence
The supreme court reversed the judgment, however, and remanded the case with instructions that the action be dismissed because Mr. Nerud had failed to introduce any evidence of a feasible alternative design that the manufacturer could have employed to produce a safer haystacker.

While it might be tempting to attribute the absence of any such evidence to poor trial preparation on Mr. Nerud's part, the fact is Mr. Nerud had no reason to believe that any such evidence was necessary. The defendants never demurred to Mr. Nerud's petition on the ground that it failed to allege that the haystackers could have been designed more safely. Furthermore, they never raised the issue in either a motion to dismiss at the close of Mr. Nerud's case or a motion for a new trial after the judge rendered a decision for Mr. Nerud. They instead raised the issue for the first time on appeal—and then only in passing.

The defendant's relative silence on the issue of whether Mr. Nerud was required to prove the feasibility of an alternative design is somewhat understandable given the absence of any Nebraska precedent imposing such a requirement. As the court itself admitted in Nerud, "[W]e have not heretofore specifically adopted a rule requiring the plaintiff in a negligent design case to demonstrate how the defectively

in designing the haystacker, negligence in manufacturing the haystacker, strict liability for producing and marketing a defective product, breach of express warranty, and breach of the implied warranty of merchantability. Id. at 606, 340 N.W.2d at 371. The dealer and the manufacturer were named as defendants in both suits, and, in both suits, the dealer filed an indemnification cross claim against the manufacturer. Id. at 606, 340 N.W.2d at 372.

158. In both suits, the trial court returned a verdict against the manufacturer on negligence grounds. The trial court also returned a verdict against the dealer in the second suit on breach of warranty grounds. The trial court rejected the warranty theory in the first suit, however, because the claim was barred by the statute of limitations. Id. at 608, 340 N.W.2d at 372-73.

159. Id. at 613, 340 N.W.2d at 375. The court invoked the same requirement to hold that Mr. Nerud could not recover on a strict liability theory. Id. at 614-15, 340 N.W.2d at 375. This was the first time that the court specifically said that a plaintiff who attempts to hold a manufacturer strictly liable for a design defect must prove that there were feasible alternative designs that would have made the product safer. See id. at 614-15, 340 N.W.2d at 375-76; see also infra text accompanying notes 167-70. Although the court did uphold the warranty verdict in the second suit, Nerud v. Haybuster Mfg., Inc., 215 Neb. 604, 616, 340 N.W.2d 369, 376 (1983), the net effect of the court's decision was to bar Mr. Nerud from any recovery for the first haystacker. In light of the court's split decision, it would not be inaccurate to say that Mr. Nerud lost his case.


161. Id. at 1.

designed product could be made safer, and . . . there is a paucity of precedent on this question in Nebraska . . . .”163 In fact, as the following discussion illustrates, the little existing case law suggested that there was no such requirement.

Although the court in Nerud said that its 1979 decision in Hancock v. Paccar, Inc.164 “hinted at”165 the requirement that there be evidence of feasible alternative designs, “hinted at” may be too strong a characterization. The plaintiff in Paccar filed suit against a truck manufacturer, alleging that the truck’s bumper had been negligently and defectively designed. Judgment was entered for the plaintiff. On appeal, the court held that there was sufficient evidence to support the jury’s verdict on both a negligence theory and a strict liability theory and therefore affirmed the judgment.166 One of the many arguments that the court addressed in the course of its twenty-two page opinion was the defendant’s argument that the plaintiff’s evidence was insufficient to support the judgment on strict liability grounds because the plaintiff failed to prove that the defendant’s design did not comply with the “state of the art” in bumper designs.167 The court rejected that argument:

We believe . . . that Paccar misconstrues what constitutes the state of the art and how it applies in a strict liability case. While the jury may consider, as evidence of the state of the art, the fact that no manufacturer is doing that which it is claimed could be done, such evidence will not establish conclusively the state of the art. Obviously, the inaction of all the manufacturers in an area should not be the standard by which the state of the art should be determined. . . . . The question therefore is not whether anyone else was doing more, although that may be considered, but whether the evidence disclosed that anything more could reasonably and economically be done. . . . The jury was not required to accept any of those suggestions. Nevertheless, those were questions of fact which the jury had to resolve.168

This language is susceptible to a number of interpretations. One interpretation is that a plaintiff alleging a defective design must prove that feasible alternative designs existed, irrespective of whether the plaintiff is proceeding on a negligence or strict liability theory. That interpretation, however, ignores the fact that the language was directed exclusively to the plaintiff’s strict liability claim. Another interpretation is that, at least in strict liability cases, a plaintiff must prove that feasible alternative designs existed. That interpretation, however, can be questioned on the ground that the court seemed to be doing nothing more than responding to the defendant’s argument on a factual as opposed to a substantive level. In other words, the court was

164. 204 Neb. 468, 283 N.W.2d 25 (1979).
167. Id. at 479, 283 N.W.2d at 34-35.
168. Id. at 479-80, 283 N.W.2d at 35 (emphasis added).
merely saying that the evidence the defendant claimed should have been introduced was in fact introduced; the court never said that evidence of feasible alternative designs must be introduced in a strict liability action. 169

The most reasonable interpretation of Paccar is that a plaintiff, if proceeding on a negligence theory, must establish that the product was negligently designed, or, if proceeding on a strict liability theory, must establish that the product was defectively designed. One way—but by no means the only way—of making the required showing is to prove that there was a feasible alternative design that would have made the product safer. That broad interpretation of Paccar becomes even more reasonable in light of what the court said in rejecting the defendant’s overall argument that the plaintiff’s evidence was insufficient to sustain the judgment:

An examination of the entire record, however, would appear to create questions of fact on either cause of action. Plaintiff’s expert testified that in his opinion the bumper was negligently and defectively designed in a number of ways, any one of which, if believed by the jury, could have established the proximate cause of the injury. It was at best a “t’is and t’aint” argument and for the jury to resolve. . . . We cannot say from a reading of the record that the jury did not act as reasonable people or did not reach a reasonable conclusion. 170

When read in its entirety, the court’s opinion in Paccar rather clearly suggests that an expert’s opinion that the product was negligently or defectively designed would be sufficient. To the extent that Paccar sent a faint signal that the plaintiff must also introduce evidence of feasible alternative designs, the court sent a very different—and much stronger—signal two years later when it decided Morris v. Chrysler Corp. 171 There, the plaintiff proceeded on a negligence the-

169. When analyzing a supreme court decision, a lawyer cannot always assume that the decision in fact says what it may seem to say. For example, in Kohler v. Ford Motor Co., 187 Neb. 428, 191 N.W.2d 601 (1971), the court quoted a jury instruction providing that, in order to recover in strict liability, the plaintiff must prove that he “was unaware of the claimed defect.” Id. at 436, 191 N.W.2d at 607. Although the court did not specifically say that it disapproved of the instruction, it did not specifically say that it approved of the instruction. Therefore, a lawyer reading the Kohler opinion could have easily come to the conclusion that lack of knowledge is an essential element of strict liability. In fact, that is precisely how the court interpreted Kohler six years later. Waegli v. Caterpillar Tractor Co., 197 Neb. 824, 826, 251 N.W.2d 370, 372 (1977). In Paccar, however, the court held that lack of knowledge is not an element that the plaintiff must prove. In doing so, the court explained away Kohler on the ground that the court did not specifically rule on the instruction at issue and explained away Waegli on the ground that the court did not specifically rule on the question of whether lack of knowledge is an element of the cause of action or an affirmative defense. Hancock v. Paccar, Inc., 204 Neb. 468, 484-85, 283 N.W.2d 25, 37 (1979).


ory and alleged that the engine in his car was defective. The trial court entered judgment for the plaintiff. On appeal, the defendant argued that the plaintiff's evidence of negligence was insufficient because the plaintiff merely established that the engine was defective. The court flatly rejected that argument:

'O[f course, negligence is never presumed.' . . . However, negligence is a question of fact and it may be proved by circumstantial evidence. . . . We have not yet dealt with this specific question in Nebraska; however, the weight of authority holds that although proof of product defectiveness is not conclusive as to negligence, it is evidence of negligence on the part of the manufacturer of the product. . . .

The appellant presented competent evidence in support of all the necessary elements of his negligence action. He established . . . that the engine was defectively manufactured and placed on the market. . . . Appellant has carried his burden and is entitled to recover damages prayed for.

Two years later, the court in Nerud brushed Morris aside by saying: "Morris, however is distinguishable from the cases at hand. Morris presented a manufacturing defect. These cases do not." That distinction is certainly defensible but the fact remains that the court did not limit the broad language of Morris until it decided Nerud. In light of what the court said—and did not say—in Morris and Paccar, Mr. Nerud could not reasonably have foreseen the requirement that the court adopted for the first time in his case. The requirement—that a plaintiff must prove the existence of feasible alternative designs in order to establish that the product was negligently designed—was in effect a new requirement. Nevertheless, the court invoked that newly announced requirement, not to reverse and remand for a new trial, but to reverse and remand with instructions that the action be dismissed.

What happened to Mr. Nerud is basically no different than what happened to Mrs. Knapp and Mrs. Morris and the appropriate response should likewise be no different. By holding that Mr. Nerud was required to introduce evidence of feasible alternative designs, the court in effect held that the existence of such designs is an element of a cause of action for negligent design. Whether that kind of holding comes in the context of a pleading appeal or an evidentiary appeal is irrelevant. In either situation, the case is not being decided on its merits. It is instead being decided on a party's ability to foresee and re-

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172. Id. at 343, 303 N.W.2d at 502.
173. Id. at 345, 303 N.W.2d at 503, quoting Porter v. Black, 205 Neb. 699, 705, 289 N.W.2d 760, 764 (1980) (emphasis added). The plaintiff's evidence on the issue of whether the engine was defective consisted of the testimony of a mechanic that the engine crankshaft failed because one of the bearings had not been installed at the factory. Id. at 342, 303 N.W.2d at 502.
175. See id. at 612-15, 340 N.W.2d at 375-76.
spond to the unforeseeable. Cases, however, should not turn on whether a litigant is lucky enough to have a finely polished crystal ball. When announcing a new proof requirement—that is, one that the plaintiff could not have reasonably foreseen—the court therefore should not dispose of the case on the ground that the plaintiff failed to comply with that newly announced requirement. The court should instead remand the case for a new trial.

It should be emphasized that the proposal does not call for remanding every case in which there is a failure of proof. If the court concludes that a plaintiff failed to introduce sufficient evidence of causation in a negligence action, for example, the court should reverse the judgment with instructions that the action be dismissed even though the plaintiff might be able to muster sufficient evidence in a second trial. The plaintiff knew from the beginning what he was required to prove, and had ample opportunity to marshal the necessary evidence. The goal here is not to give the plaintiff a second chance. The goal is much more basic: to give the plaintiff a chance.

In order to ensure that the plaintiff is given a chance rather than a second chance, a finding that the newly announced proof requirement is not one that the plaintiff could have reasonably foreseen would be a necessary but not sufficient condition for a new trial. Remand would be appropriate only if there were no other ground for disposing of the case—for example, the plaintiff failed to prove one or more of the remaining elements of his cause of action. Under those circumstances, the plaintiff would not be harmed by the absence of any warning of the new proof requirement; he would have lost his case in any event.

Just like the proposal to remand pleading cases of first impression, the proposal to remand proof cases of first impression is not without precedent. In Aiken v. Clary, for example, the Missouri Supreme Court specifically held for the first time that a plaintiff must introduce expert testimony in a medical malpractice action based on inadequate disclosure. Although the plaintiff failed to introduce any such testi-

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176. If Mr. Nerud had known that he was required to prove the existence of feasible alternative designs, he would have developed and introduced the necessary evidence. Ellison Memo, supra note 162, at 1.

177. There has never been any doubt about the plaintiff’s obligation to prove causation in order to recover. See, e.g., Pullen v. Novak, 169 Neb. 211, 216, 99 N.W.2d 16, 21 (1959).

178. In other words, the absence of notice is akin to harmless error. The commission of a harmless error—that is, a nonprejudicial error that did not affect the outcome of the case—is not a ground for reversal. See, e.g., Fuel Explor., Inc. v. Novotny, 221 Neb. 17, 25, 374 N.W.2d 838, 843 (1985); Oviatt v. Archbishop Bergan Mercy Hosp., 191 Neb. 224, 227, 214 N.W.2d 490, 492-93 (1974); Van Ornum v. Moran 186 Neb. 418, 423, 183 N.W.2d 759, 763 (1971).

179. 396 S.W.2d 668 (Mo. 1965).
mony, the court did not dispose of the case on that ground. Emphasizing that one of its earlier decisions had used language that could support a reasonable inference that expert testimony was not required, the court concluded that the interests of justice instead required remanding the case for a new trial in order to allow the plaintiff to introduce that testimony.

Admittedly, remanding a case after a full trial would involve a greater expenditure of judicial resources than remanding a case after a demurrer. To the extent that our goal is to ensure that parties have a full and fair opportunity to litigate their claims on the merits, however, that is an expenditure well worth making.

B. The Strange Case of Damages

What makes cases like Nerud so baffling is that if Mr. Nerud had been lucky enough to introduce evidence of alternative designs but sloppy enough to introduce a smattering of evidence on damages, the result might well have been different. Because proof of the amount of damages is an essential element of a plaintiff's cause of action, it is not surprising to find a number of cases that have been dismissed because the plaintiff failed to introduce sufficient evidence on damages. It is somewhat surprising, however, to find a number of cases

180. Id. at 673.
181. Id. at 676; see, e.g., Culver v. Slater Boat Co., 722 F.2d 114, 123 (5th Cir. 1983) (adopting new rule regarding the adjustment of loss of future earnings awards for inflation and reversing and remanding case for new trial on damages). Prior to its decision in Aiken, the Missouri Supreme Court had held that expert testimony was unnecessary in a malpractice action in which the defendants allegedly failed to warn the plaintiff of the risks associated with shock therapy. Mitchell v. Robinson, 334 S.W.2d 11, 16-17 (Mo. 1960). The court in Aiken distinguished Mitchell on the ground that the "factual situation in the Mitchell case was different from that here, plaintiff there contending that the doctors made no disclosure of the risks and the doctors testifying that they did make full disclosure to the patient." Aiken v. Clarey, 396 S.W.2d 688, 673-74 (Mo. 1965) (emphasis in original). Although Mitchell did not specifically address the question of whether expert testimony would be required in other types of inadequate disclosure cases, the court in Aiken admitted that its decision in Mitchell did inferentially suggest that no such testimony would be required. Id. at 674. The same could be said of the Nebraska Supreme Court's decision in Morris and the issue of whether proof of alternative feasible designs was required in negligent design cases. See supra notes 173-75 and accompanying text.

The approach that the Missouri Supreme Court took in Aiken—remanding the case for a new trial—stands in sharp contrast to the approach the Nebraska Supreme Court took when it announced for the first time that expert testimony must be introduced in medical malpractice cases. See Tady v. Warta, 111 Neb. 521, 196 N.W. 901 (1924) (affirming judgment because plaintiff failed to introduce expert medical testimony on the issue of the defendant doctor's negligence).

183. Scoular-Bishop Grain Co. v. Basset Grain, Inc., 218 Neb. 280, 352 N.W.2d 904
that have been remanded for a new trial in order to give the plaintiff a second chance to prove damages.\textsuperscript{184} These two lines of cases are like ships passing in the night. They neither acknowledge each other nor explain why they reach different results.\textsuperscript{185}

Perhaps these ships continue passing each other without signaling because the court is not comfortable with either approach and therefore moves back and forth between them. On one hand, if the plaintiff establishes that he was in fact wronged, the law ought to afford him a remedy. On the other hand, the plaintiff had his chance. As Justice Caporale once said: "Almost, but not quite, proving the measure of recovery should be treated no differently than almost, but not quite, proving the right to recover."\textsuperscript{186}

Although the choice between remanding and dismissing is not an easy one to make, dismissal is the better approach in such cases. Most plaintiffs file suit with an eye toward money damages. Giving a plaintiff a second chance to prove damages might well encourage over-reaching the first time around. The plaintiff would have nothing to lose and everything to gain by making an inflated damage claim that rested more on speculative causal links than on a firm factual foundation. There is no reason to create such an incentive. The plaintiff knew from the very beginning that he would be required to introduce competent evidence to establish the amount of his damages. If he could have introduced more evidence the first time around but failed to do so, he has no one to blame but himself.

IV. CONCLUSION

In many ways, this Article has been the story of three people—Grace Knapp, Lee Ann Morris, and Frank Nerud—who were all treated less than fairly by the Nebraska Supreme Court. The purpose of recounting the story is not to criticize the court for the way it disposed of Knapp, Morris, and Nerud, but to underscore the consequences of changing some procedural rules without carefully analyzing how those changes will affect the system overall. By engrafting a twentieth century approach to \textit{res judicata} onto a nine-


\textsuperscript{185} This is not the only instance of conflicting lines of cases in Nebraska. See Fenner, \textit{Circumstantial Evidence in Nebraska}, 19 CREIGHTON L. REV. 236 (1986) (discussing the four lines of circumstantial evidence cases in Nebraska).

teenth century approach to pleading, the court has inadvertently transformed Nebraska's procedural system into one which assumes that litigants are blessed with finely polished crystal balls. While that transformation may not have been immediately apparent, it has become increasingly apparent over time, and so has the need to make some adjustments in order to bring Nebraska's procedural system back into step with reality.

The adjustments necessary to accomplish that are relatively minor. They only involve modifying the rules that have traditionally governed pleading and proof appeals in order to accommodate the procedural system's basic objective: ensuring that litigants have a meaningful opportunity to obtain a resolution of their claims on the merits. Litigants cannot comply with pleading and proof requirements that they have no reason to believe exist.