The Tribe's motion to dismiss is not based in § 6-1112(b)(6), but instead on § 6-1112(b)(1) for lack of jurisdiction over the subject matter. Thus, this language in § 6-1112(b) and this court's opinion in *Crane Sales & Serv. Co.* are inapplicable.[33]

We additionally note that when the Tribe filed its motion, that motion indicated it would be supported by affidavit, and in fact, such affidavits were presented by the Tribe. We therefore question whether the Tribe was truly without notice as to whether the motion to dismiss would be converted to a motion for summary judgment.

The Tribe's final assignment of error is also without merit.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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[33] Cf. *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007).

KENNETH RIGGS AND LEANN RIGGS, HUSBAND AND WIFE, APPELLANTS, V. GARY NICKEL, APPELLEE.

796 N.W.2d 181

Filed March 25, 2011. No. S-10-459.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.
3. **Trial: Witnesses: Evidence.** Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded. In applying this rule, the important considerations are that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony.

4. **Negligence.** Not every negligence action involving an injury suffered on someone's land is properly considered a premises liability case.
5. ____. Under a premises liability theory, a court is generally concerned with either a condition on the land or the use of the land by a possessor.
6. **Negligence: Proof.** In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
7. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
8. ____. An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

John C. Fowles, of Fowles Law Office, P.C., L.L.O., and John M. Lefler for appellants.

Andrea D. Snowden and Stephanie F. Stacy, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

STEPHAN, J.

Kenneth Riggs (Riggs) and his wife, LeAnn Riggs, brought this action against Gary Nickel seeking damages for injuries Riggs suffered while repairing a motor grader, and for LeAnn's related loss of consortium. The district court for Lancaster County sustained Nickel's motion for summary judgment, and the Riggses appealed. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

The accident occurred on August 2, 2007, in rural Lancaster County on an acreage owned by Nickel. Nickel's neighbor had stored an older-model motor grader on Nickel's property for approximately 4 years prior to the accident, and Nickel had used the grader on the property a few times.

At the time of the accident, Riggs was 41 years old and had approximately 20 years' experience as a mechanic. In January 2007, he opened a business specializing in the repair of cars, trucks, and heavy machinery. Approximately 3 months before the accident, Riggs installed a new engine and clutch in

the grader. He considered himself to be "very familiar" with the machine.

The grader has an enclosed cab in which the operator's seat and controls are located. There is a door on the right side of the cab. The keyed ignition switch is located on the backwall of the cab to the right and adjacent to the rear portion of the operator's seat. The separate starter button is located on a panel to the right and near the front portion of the operator's seat. The grader is started by first turning the ignition switch to the "on" position and then pressing the starter button.

On the day of the accident, Riggs came to Nickel's acreage to repair a tractor owned by Nickel. As Riggs was completing work on the tractor, Nickel asked him to look at the grader, which had developed a hydraulic leak. Although the parties agree that the grader was parked near a shed on Nickel's property when Riggs began working on it, they disagree as to when it was parked there. According to Nickel, he parked the grader near the shed on the preceding weekend when it began to leak hydraulic fluid while he was using it. But Riggs testified that Nickel was using the grader when he asked him to look at it and that he parked it next to the shed just before Riggs began the repair.

Nickel testified that in order to bring the grader to a stop after operating it, he depressed the clutch and then turned the ignition switch to the "off" position, leaving the grader in gear as he did so. Nickel testified that turning the ignition switch to the "off" position was the only way he knew to stop the engine. Riggs stated in an affidavit that a grader engine is typically shut down by pulling up on the choke and flooding the engine.

The parties agree that when Riggs approached the grader to make the repair, its engine was not running. After examining the area of the leak, Riggs retrieved a wrench and, standing outside the right side of the cab with both feet on the ground, reached through the open doorway to the interior of the cab to tighten a bolt in the area of the leak. Riggs testified that after he finished the repair, which took about 30 seconds, he started to turn around to back away from the cab. But as he did so, his left elbow accidently struck the starter button, causing the grader to lurch forward. The lurch startled Riggs and caused

him to turn. When that occurred, he struck the starter button again, this time with his right wrist. The engine started and the grader began moving forward. Riggs fell to the ground and the grader passed over him, causing significant injuries.

In the complaint, the Riggses alleged that Nickel was negligent in "failing to turn the motor grader off before requesting that [Riggs] do the repair" and in "failing to warn [Riggs] that the motor grader was on before requesting that [Riggs] engage in the minor repair." Nickel answered by denying any negligence on his part and alleging that the accident and resulting injuries were caused by Riggs' own negligence.

Nickel then moved for summary judgment. The record includes the depositions of both Riggs and Nickel, Riggs' answers to Nickel's interrogatories, and Riggs' affidavit. In sustaining the motion for summary judgment, the district court reasoned that the Riggses could not recover under a premises liability theory because Nickel was not conducting an activity on his land and that the Riggses could not recover under a theory of direct negligence because Nickel owed Riggs no legal duty to protect him from harm. The Riggses perfected this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

II. ASSIGNMENTS OF ERROR

The Riggses assign, summarized and restated, that the district court erred in granting summary judgment in favor of Nickel because the evidence does not show that Nickel was entitled to judgment as a matter of law.

III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing

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[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

[2] *Schlatz v. Bahensky*, 280 Neb. 180, 785 N.W.2d 825 (2010); *In re Estate of Fries*, 279 Neb. 887, 782 N.W.2d 596 (2010).

a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all favorable inferences deducible from the evidence.[3]

IV. ANALYSIS

1. Facts and Inferences

The only witnesses to the accident are Riggs and Nickel. Their accounts differ in two respects. First, as noted above, Nickel testified that he parked the grader near the shed on his property approximately 1 week before the accident, while Riggs testified that Nickel was operating the grader on the day of the accident and parked it just before asking Riggs to repair the hydraulic leak. Under our standard of review, we assume the truth of Riggs' version of these events for purposes of determining whether Nickel was entitled to summary judgment.

Second, the parties disagree as to whether the grader's ignition switch was in the "on" or "off" position just prior to the accident. Nickel testified that he turned the ignition switch off when he parked the grader, and he argues that there is no evidence to refute his testimony. Riggs testified in his deposition that Nickel did not leave the grader running when he parked it, and agreed that Nickel "turned it off." But in a subsequent affidavit, Riggs explained that in giving this testimony, he was referring only to the status of the engine because he "could not see what . . . Nickel had done with the key."

[3] Where a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded.[4] In applying this rule, the important considerations are that the testimony pertains to a vital point, that it is clearly

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[3] *Id.*

[4] *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981). See, also, *Insurance Co. of North America v. Omaha Paper Stock, Inc.*, 189 Neb. 232, 202 N.W.2d 188 (1972); *Clark v. Smith*, 181 Neb. 461, 149 N.W.2d 425 (1967).

apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony.[5] Although Nickel argues otherwise, we conclude that the rule is not applicable here because the record does not show that Riggs changed his testimony to meet the exigencies of litigation. By agreeing in his deposition that Nickel "turned [the grader] off," Riggs could have meant either that Nickel turned the ignition switch to the "off" position or that Nickel shut down the motor in another manner. In his affidavit, Riggs simply explained that he meant the latter.

We also note that it is uncontroverted that the grader would start only if the ignition switch was "on" and the starter button was depressed. It is also uncontroverted that the grader lurched forward and then started when Riggs unintentionally depressed the starter button. From these facts, a finder of fact could reasonably infer that the ignition switch was in the "on" position when Riggs began working on the grader. The Riggses are entitled to the benefit of that inference under our standard of review.

2. Premises Liability

[4,5] The Riggses first argue that the district court erred in failing to recognize the existence of a duty on the part of Nickel under a theory of premises liability. But not every negligence action involving an injury suffered on someone's land is properly considered a premises liability case.[6] Under a premises liability theory, a court is generally concerned with either a condition on the land or the use of the land by a possessor.[7] The Riggses argue that this case falls in the second category and is governed by the principle of premises liability stated in Restatement (Second) of Torts § 341A, which provides:

> A possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if,

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[5] *Momsen v. Nebraska Methodist Hospital, supra* note 4.

[6] *Semler v. Sears, Roebuck & Co.*, 268 Neb. 857, 689 N.W.2d 327 (2004).

[7] *Id.*

> but only if, he should expect that they will not discover or realize the danger, or will fail to protect themselves against it.[8]

We found this principle to be applicable to the facts in *Haag v. Bongers*,[9] a case in which a person was injured while attending an estate auction. The auction was conducted on property owned by the estate by auctioneers hired by the estate. Antique vehicles offered for sale were towed into a building where the bidding and sale occurred. The plaintiff was struck and injured when a hitch ball came loose from the drawbar of a tractor which was towing one of the vehicles. In affirming the verdict against the estate, we reasoned that the estate was in possession of the premises on the day of the auction and that the injury arose out of an activity conducted on the premises.

The Riggses argue that the "activity" in this case was Nickel's act of driving the grader to the spot on his property where the repair was undertaken. Assuming without deciding that this could constitute the type of activity contemplated by § 341A of the Restatement (Second), it had clearly ended before the injury occurred. The only "activity" being conducted at the time of the injury was the repair of the grader by Riggs himself. The circumstance is no different than if Nickel had driven the grader to Riggs' property and left it there to be repaired. Here, the property was simply the place where the injury occurred. No defective condition of the property or negligently conducted activity on the property caused the injury. We conclude that *Haag* is factually distinguishable and that the Riggses' premises liability theory fails as a matter of law.

3. Negligence: Duty to Exercise Reasonable Care

The Riggses alleged in their complaint that Nickel was negligent in "failing to turn the motor grader off before requesting that [Riggs] do the repair" and in "failing to warn [Riggs] that the motor grader was on" before requesting that Riggs repair the hydraulic leak. As noted above, the words "on" and "off" as used here necessarily refer to the ignition switch, as Riggs

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[8] Restatement (Second) of Torts § 341A at 209 (1965).

[9] *Haag v. Bongers*, 256 Neb. 170, 589 N.W.2d 318 (1999).

admits that the grader's engine was not actually running when he began his work. The district court concluded that under the specific facts of this case, considered in a light most favorable to Riggs, there was no duty on the part of Nickel.

[6,7] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.[10] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[11] In the past, we used the risk-utility test to determine the existence of a tort duty.[12] That approach required consideration of multiple factors, including "the foreseeability of the harm," in resolving the legal issue of whether a plaintiff owed a legal duty to a defendant under the particular circumstances of the case.[13] The district court utilized this test in determining that Nickel owed no duty to Riggs as a matter of law, noting that the "chance that someone working on a hydraulic leak would inadvertently hit the starter button twice causing the grader motor to start and move forward is extremely remote."

[8] In *A.W. v. Lancaster Cty. Sch. Dist. 0001*,[14] decided during the pendency of this appeal, we abandoned the risk-utility test and adopted the duty analysis set forth in the Restatement (Third) of Torts.[15] Under this approach, an actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.[16] This approach examines the defendant's conduct, not in terms of whether he had a "duty" to take particular actions, but, rather, in terms of whether his

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[10] *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[11] *Id.*

[12] See, e.g., *Hughes v. Omaha Pub. Power Dist.*, 274 Neb. 13, 735 N.W.2d 793 (2007).

[13] *Id.* at 28, 735 N.W.2d at 805.

[14] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 10.

[15] See Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010).

[16] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 10; Restatement (Third), *supra* note 15, § 7(a).

conduct breached the duty to exercise the care that would be exercised by a reasonable person under the circumstances.[17]

Based on the analytical framework we adopted in *A.W.*, we conclude that Nickel had a duty to exercise reasonable care in operating the grader on his property. We examine the record to determine if there is a genuine issue of material fact as to whether he breached that duty in either of the ways alleged in the complaint.

(a) Failure to Turn Off Ignition Switch

Nickel could breach his duty to use reasonable care in operating the grader by failing to turn the ignition switch off only if it was reasonably foreseeable that harm to Riggs would result from the ignition switch's being left on.[18] The record shows that even with the ignition switch in the "on" position, the grader was not running and posed no immediate risk of harm to Riggs. The record further shows that Nickel had limited experience with the grader, while Riggs was an experienced mechanic who was very familiar with the grader and had the opportunity to use appropriate care while working on the machine. In light of these facts, we agree with the district court that the "chance that someone working on a hydraulic leak would inadvertently hit the starter button twice causing the grader motor to start and move forward is extremely remote." Although foreseeability of the risk is a question of fact,[19] on this record no reasonable fact finder could conclude that Nickel breached his duty to exercise reasonable care with respect to Riggs simply by leaving the ignition switch in the "on" position. Nickel was entitled to summary judgment on this theory of liability.

(b) Failure to Warn

The Riggses also alleged that Nickel failed to exercise reasonable care by "failing to warn [Riggs] that the motor grader was on" before requesting him to undertake its repair. Again,

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[17] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 10; *Behrendt v. Gulf Underwriters Ins. Co.*, 318 Wis. 2d 622, 768 N.W.2d 568 (2009).

[18] See *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 10.

[19] *Id.*

we understand the word "on" to refer to the position of the ignition switch.

In *Erickson v. U-Haul Internat.*,[20] we held that § 388 of the Restatement (Second) defined the common-law duty of a lessor to warn those expected to use a leased vehicle of dangers attendant to its use. Section 388 provided that one who supplied a chattel for use by another could be liable for physical harm caused by its use if the supplier

> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.[21]

Other courts applied § 388 in defining the duty owed by the owner of personal property to one who performs repairs on the property at the owner's request.[22]

Section 18 of the Restatement (Third) broadens the scope of potential liability for negligent failure to warn beyond suppliers of chattels, providing:

> (a) A defendant whose conduct creates a risk of physical or emotional harm can fail to exercise reasonable care by failing to warn of the danger if:
>
> (1) the defendant knows or has reason to know: (a) of that risk; and (b) that those encountering the risk will be unaware of it; and
>
> (2) a warning might be effective in reducing the risk of harm.[23]

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[20] *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[21] Restatement (Second), *supra* note 8, § 388 at 300-01.

[22] See, *Alvarez v. E & A Produce Corp.*, 708 So. 2d 997 (Fla. App. 1998); *Overbeck v. Cates*, 700 A.2d 970 (Pa. Super. 1997); *Quinton v. Kuffer*, 221 Ill. App. 3d 466, 582 N.E.2d 296, 164 Ill. Dec. 88 (1991).

[23] Restatement (Third), *supra* note 15, § 18(a) at 205.

The official comment to § 18 notes that an obligation to warn can arise in a wide range of circumstances, including that of the owner of a product who turns it over to another for repair.[24] We adopt § 18(a) as the standard for determining liability based upon alleged negligent failure to warn.

As noted, there is evidence in this record from which a finder of fact could reasonably conclude that Nickel left the ignition switch in the "on" position when he parked the grader. But nothing in the record supports an inference that he was aware that he had done so. There is no evidence upon which a finder of fact could reasonably infer that Nickel knew that the ignition switch was on when he asked Riggs to repair the grader.

Nor does the evidence support a reasonable inference that Nickel could have expected Riggs to be unaware of any risk created by the ignition switch's being left on. Failure to warn can be a breach of the standard of care articulated in § 18(a) of the Restatement (Third) "only if the defendant knows or can foresee that potential victims will be unaware of the hazard. Accordingly, there generally is no obligation to warn of a hazard that should be appreciated by persons whose intelligence and experience are within the normal range."[25] In this case, Nickel knew that Riggs was an experienced mechanic and that he had recently worked on the grader. The ignition switch did not constitute a "latent defect," as the Riggses allege, because there is no evidence that it was mechanically defective and it was within Riggs' view and reach when he worked on the grader. There is no evidence to support a reasonable inference that Nickel had reason to know that Riggs would not understand and appreciate the risk posed by accidentally depressing the starter while the ignition switch was in the "on" position. Indeed, Riggs admitted that he understood this risk.

We conclude as a matter of law that Nickel was not negligent in failing to warn, under the principles stated in § 18(a) of the Restatement (Third).

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[24] *Id.*, § 18, comment *a.*

[25] *Id.*, comment *f.* at 208.

V. CONCLUSION

Although for different reasons, we agree with the district court's determination that as a matter of law, Nickel had no liability to Riggs under theories of premises liability or common-law negligence. We affirm the judgment of the district court.

AFFIRMED.

WRIGHT, J., not participating.