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necessary for the record to establish, by clear and convincing evidence, that termination is in a child's best interests. In this case, the record establishes both Victoria's failure as a parent, along with the foster parents' willingness to provide Elizabeth with stability and permanency.

In fact, in arguing for relinquishment, Victoria seems to agree that adoption by the foster parents is in Elizabeth's best interests. And while Gibreal did not specifically opine that termination was in Elizabeth's best interests, she did opine that Elizabeth's needs were being met by her foster parents, that placement with the foster parents was in Elizabeth's best interests, that Elizabeth needed permanency as soon as possible, and that reunification with Victoria was not a realistic goal. In short, the record contains clear and convincing evidence that terminating Victoria's parental rights was in Elizabeth's best interests.

V. CONCLUSION

While we agree with Victoria that the juvenile court should have ordered the Department to accept relinquishment of her parental rights, we also agree with the Department that the relinquishment is moot. And we find no merit to Victoria's claim that the court erred in terminating her parental rights. The juvenile court's judgment is affirmed.

AFFIRMED.

WRIGHT, J., not participating in the decision.

JAN GINAPP, APPELLEE, V. CITY OF BELLEVUE, NEBRASKA, APPELLANT, AND ALEGENT HEALTH MIDLANDS HOSPITAL, APPELLEE.

809 N.W.2d 487

Filed January 6, 2012. No. S-11-193.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought pursuant to the Political Subdivisions Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong. When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every

controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.

2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Negligence: Proof.** In order to recover in a negligence case, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
4. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
5. ____. An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
6. ____. The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.
7. ____. An actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless an affirmative duty created by another circumstance is applicable.
8. ____. An actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship.
9. ____. To the extent that a custodian has some custody and control of a person posing dangers to others, the custodian has an affirmative duty to exercise reasonable care, consistent with the extent of custody and control.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded with directions.

Robert S. Lannin, of Shively & Lannin, P.C., L.L.O., and, on brief, Richard C. Grabow for appellant.

Patrick R. Guinan, of Erickson & Sederstrom, P.C., L.L.O., for appellee Alegent Health Midlands Hospital.

Steven M. Lathrop and Terry M. Anderson, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellee Jan Ginapp.

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

GERRARD, J.

Jan Ginapp, a registered nurse, was injured on the job in a violent assault committed by a patient who had been admitted to the hospital after he was taken into emergency protective custody by the City of Bellevue, Nebraska, police department.

The questions presented in this appeal are whether Bellevue's duty to control the assailant's behavior ended when he was admitted to the hospital and whether Bellevue breached that duty by taking him to the hospital in the first place.

BACKGROUND

On July 4, 2007, at 4:14 p.m., Bellevue police were dispatched to an apartment in Bellevue based on a report that 18-year-old Ray Gilpin was "out of control." When they arrived, they learned that Gilpin had used a hammer to destroy walls, a door, and a window in his mother's apartment. Gilpin had also possessed a notebook containing statements indicating a desire to kill people and a drawing of a cube with the word "help" in the center. The notebook had been torn and stabbed with a pen. Gilpin's mother explained that while Gilpin was destroying the apartment, he had been laughing and mumbling. She hid in the bathroom and got dressed, but Gilpin pounded on the bathroom door and told her to get out. She took her car keys and left, but Gilpin followed her and got into the car. Gilpin's mother drove him to his aunt's house in Omaha, Nebraska.

One of the officers contacted Omaha police and had them pick up Gilpin and return him to his mother's apartment. Gilpin was cooperative until he saw his mother, but then he became agitated, spit on her and police, and yelled obscenities. Bellevue police then took Gilpin to Midlands Hospital (Midlands), where he remained cooperative. Gilpin arrived at Midlands' emergency room at 5:33 p.m. The "Emergency Admittance" form completed by Bellevue police at 5:45 p.m. provided a description of Gilpin's behavior that day and indicated that Gilpin was mentally ill and dangerous toward others.

When a person is taken into emergency protective custody by Bellevue police, the protectee is handcuffed and is not free to leave police custody. But emergency protective custody is a medical issue, and the protectee is neither under arrest nor charged with a crime. Any final determination as to whether the protectee is a threat is made by a mental health board. It was the Bellevue Police Department's policy, when leaving a protectee in an emergency room, not to leave until the officers believed the protectee was under control. But if the protectee

later became disruptive and law enforcement support was required, Midlands was to call police in Papillion, Nebraska, not Bellevue, because Midlands is in Papillion.

The Bellevue Police Department's written policy concerning emergency protective custody also provided that protectees were to be placed in appropriate psychiatric care through the Spring Center, at that time, a local mental health treatment center. Midlands does not provide psychiatric care, so Midlands was the preferred destination only if medical care was needed before transportation to a psychiatric facility. But other evidence in the record suggests that despite that written policy, Bellevue police routinely transported protectees to Midlands. The record in this case does not indicate whether Gilpin was transported to Midlands because of any medical issue, although he later tested positive for use of illegal drugs. The detaining officer testified in his deposition that he did not remember contacting the Spring Center and did not remember why Gilpin was transported to Midlands as opposed to some other destination.

Gilpin was triaged at 6:06 p.m. by a triage nurse, and Midlands admitted him for medical screening. He continued to cooperate with hospital personnel. A Midlands' emergency room admission record describes him as a patient in emergency protective custody who was "being medically screened prior to transfer to psych hospital." Bellevue police remained with Gilpin throughout this process, at times displaying a stun gun to ensure that they kept physical control of him, and removing his handcuffs only when necessary. The Bellevue officers did not depart until 7:10 p.m., and Midlands security was present when the police left. According to the Midlands security officer, Gilpin "got a little restless a couple of times but not so out of control" and complied with voice direction.

Although the record does not reflect whether Bellevue police contacted the Spring Center, Midlands' medical records indicate that Midlands was in contact with the Spring Center that evening, a few minutes after the police left, and was eventually informed that no psychiatric placement would be available that evening. Gilpin tested positive for marijuana and barbiturates. He was examined by a Midlands doctor who again

recommended admission, pending bed availability. Gilpin was placed in one of Midlands' intensive care units.

At the time of the incident, Ginapp was a registered nurse employed at Midlands. She worked in the intensive care unit (ICU) and intensive immediate care unit (IMCU), which is a post-intensive-care unit. The ICU and IMCU are on different sides of the same floor: 9 beds are in the ICU and 16 beds are in the IMCU. Because Midlands does not provide psychiatric services, emergency protective custody patients at Midlands, such as Gilpin, are usually in the ICU, unless no beds are available.

On the next day—July 5, 2007—Ginapp was the charge nurse, responsible for managing both the ICU and IMCU. Gilpin was in the IMCU because it had the only available bed. Ginapp had Gilpin moved closer to the nurses' station so that she would have a better view of him and to get him away from an exit door. Later that day, Gilpin became agitated about having to use the commode and was cursing and making a commotion. Ginapp went to his room and successfully calmed him. Hospital security was not present in the ICU or IMCU, nor was Gilpin restrained. Ginapp explained that she did not have the authority to order that a patient be restrained and did not believe that Gilpin's behavior warranted calling for a doctor's order to restrain him.

But later in the evening of July 5, 2007, Gilpin had another outburst. Ginapp had security called and then went to Gilpin's room to try to calm him again. She convinced Gilpin to return to bed, but after about a minute, he lunged at her. He hit her on the left side of her face and she fell to the floor, where he continued beating her as she lay on the floor. Ginapp was seriously injured, incurred substantial medical expenses and lost wages, and still suffers from headaches and debilitating double vision. After the assault, Gilpin was restrained, and later that day, he was transferred by ambulance to an available psychiatric care placement.

Ginapp sued Bellevue in district court pursuant to the Political Subdivisions Tort Claims Act,[1] alleging that her

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

injuries resulted from the Bellevue Police Department's negligence. Midlands is part of the Alegent Health System (Alegent), and Bellevue moved to join Alegent as a necessary party, for purposes of both apportionment of negligence and workers' compensation subrogation. The court denied Bellevue's motion as it related to apportionment, but added Alegent as a party to protect its workers' compensation subrogation interest.

After a bench trial, the court found that Gilpin was still in Bellevue police custody while at Midlands, so Bellevue had a duty to prevent Gilpin from injuring third persons. The court also found that Bellevue knew or should have known that Gilpin was a substantial risk to cause serious harm. The court found that the Bellevue Police Department was negligent in transporting Gilpin to Midlands, which had no psychiatric ward. The court refused to allocate negligence to Alegent, and entered judgment for Ginapp against Bellevue in the amount of $350,000. Bellevue appeals.

ASSIGNMENTS OF ERROR

Bellevue assigns, as consolidated and restated, that the court erred in (1) finding that Bellevue police had custody of Gilpin; (2) not finding that Bellevue's officers exercised due care; (3) finding that Bellevue police owed a duty to Ginapp; (4) failing to allocate the negligence of Midlands and proportionally reducing Bellevue's liability; (5) failing to allocate negligence between Bellevue, Midlands, and Ginapp; and (6) awarding excessive damages.

STANDARD OF REVIEW

[1,2] In actions brought pursuant to the Political Subdivisions Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong.[2] When determining the sufficiency of the evidence to sustain the trial court's judgment, it must be considered in the light most favorable to the successful party; every controverted fact must be

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[2] *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

resolved in favor of such party, and it is entitled to the benefit of every inference that can be deduced from the evidence.[3] But when reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[4]

ANALYSIS

[3-6] In order to recover in a negligence case, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.[5] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[6] An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.[7] And the conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party.[8]

[7,8] When discussing a defendant's duty to control the behavior of a third party, we have previously relied on the Restatement (Second) of Torts,[9] which provides that there is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct," and explains that "[o]ne who takes charge of a third person whom he knows or should know [is] likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such

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[3] *Id.*

[4] *Id.*

[5] *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011).

[6] *Id.*

[7] *Id.*

[8] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 19 (2010).

[9] Restatement (Second) of Torts § 315(a) at 122 (1965).

harm."[10] The Restatement (Third) of Torts[11] similarly explains that an actor whose conduct has not created a risk of physical harm to another has no duty of care to the other unless an affirmative duty created by another circumstance is applicable, but that "[a]n actor in a special relationship with another owes a duty of reasonable care to third persons with regard to risks posed by the other that arise within the scope of the relationship."[12]

There is little question in this case that when Bellevue police took Gilpin into emergency protective custody, they assumed a duty to exercise reasonable care to prevent him from causing harm to others.[13] The questions presented in this appeal are when that duty ended and whether it was discharged sufficiently before it did.

[9] Specifically, Bellevue argues that the district court erred in finding that its legal custody of Gilpin continued even after he was admitted to Midlands. We agree. As we have explained, the duty of a custodian to prevent a person in custody from causing harm to others is premised on the degree of control afforded to one who "'takes charge'" of another.[14] The Restatement (Third) of Torts explains that the custodial relationship need not be "24/7 physical custody giving the custodian complete control over the other person," but that to the extent that "there is some custody and control of a person posing dangers to others, the custodian has an affirmative duty to exercise reasonable care, consistent with the extent of custody and control."[15] The extent of Bellevue's control here is not at issue, because the record is clear that by the time the assault occurred (and well before it), Bellevue police had no custody or control of Gilpin.

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[10] *Id.*, § 319 at 129.

[11] See Restatement (Third), *supra* note 8, § 37 (Proposed Final Draft No. 1, 2005).

[12] *Id.*, § 41(a) at 778.

[13] See *id.*, comment *f*.

[14] See *Bartunek v. State*, 266 Neb. 454, 462, 666 N.W.2d 435, 441 (2003).

[15] Restatement (Third), *supra* note 8, § 41, comment *f.* at 783.

Under the Nebraska Mental Health Commitment Act,[16] a law enforcement officer who has probable cause to believe that a person is mentally ill and dangerous may take such person into emergency protective custody.[17] The person taken into emergency protective custody "shall be admitted to an appropriate and available medical facility,"[18] and the officer executes a written certificate alleging the officer's belief that the person in custody is mentally ill and dangerous and summarizing the behavior supporting such allegations.[19] A copy of that certificate is immediately forwarded to the county attorney.[20] The administrator of the medical facility then has the person evaluated by a mental health professional as soon as reasonably possible but not later than 36 hours after admission, and the person is released from emergency protective custody after the evaluation unless the mental health professional determines, in his or her clinical opinion, that the person is mentally ill and dangerous.[21] A mental health professional reaching that conclusion also completes a written certificate that is immediately forwarded to the county attorney.[22] And if the county attorney elects to petition for involuntary commitment, the subject of the petition is held in the "nearest appropriate and available medical facility."[23]

That procedure was properly initiated by law enforcement here. The district court seems to have reasoned that because a person taken into "emergency protective custody" remains in custody, and is not free to leave, Bellevue police still had a custodial relationship with Gilpin at the time of the assault. But as explained above, that is not how the Nebraska Mental Health Commitment Act works. Just because Gilpin remained

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[16] Neb. Rev. Stat. §§ 71-901 to 71-963 (Cum. Supp. 2006).

[17] § 71-919(1).

[18] § 71-919(2)(a).

[19] § 71-919(3).

[20] *Id.*

[21] § 71-919(4).

[22] § 71-920.

[23] § 71-922(2).

in "emergency protective custody," pending decisions by a mental health professional and the county attorney, did not mean that he remained in the custody of Bellevue police. And even if Bellevue police had retained some lingering legal connection to Gilpin, it is equally clear that for purposes of evaluating Bellevue's tort liability, it is *actual custody and control* that gives rise to a duty to prevent harm to third persons. Bellevue had no such control here.

But that is not dispositive of Bellevue's liability, because it is not disputed that Gilpin was in Bellevue's custody for at least some time, and a failure to exercise reasonable care during that time could support liability. For instance, had Bellevue police simply released Gilpin or negligently permitted him to escape, which then would have given him the opportunity to assault someone, Bellevue might have been liable. But that liability would not arise out of custody of Gilpin at the time of the assault—indeed, the loss of custody would be the basis for the tort claim. Instead, that liability would arise out of Bellevue's failure to exercise reasonable care *while Gilpin was in custody*.

So, the issue here is whether Bellevue, while Gilpin was actually in its custody, exercised reasonable care. The district court found that Bellevue failed to transport Gilpin to an "appropriate" medical facility for emergency protective care purposes. The court concluded that because Midlands does not have a psychiatric ward, it was not an "appropriate" facility to hold individuals in emergency protective custody.

The record, however, establishes that Midlands was a common destination for persons being held in emergency protective custody, from Bellevue and other law enforcement agencies. It was Midlands' practice to transfer such patients to other facilities, when they were medically stable, but that does not mean that law enforcement had a duty, in tort or under the Nebraska Mental Health Commitment Act, to transport detainees to another facility initially.

The record also establishes, beyond reasonable dispute, that when Gilpin was contacted by Omaha police, he was cooperative. Only in the presence of his mother was he disruptive, and once transported from her apartment, he was again cooperative

with police and hospital personnel during admission. Hospital personnel were notified of Gilpin's behavior leading to his detention. Bellevue police remained with Gilpin at Midlands for nearly 2 hours, and the detaining officer explained that Bellevue police only left the hospital under such circumstances "with the understanding that we left with the person being calm and it was safe — we felt it was safe at the time and that the medical staff were aware of the situation and that they were comfortable with us leaving." And in this case, when the officers left, they did so after Midlands agreed to admit Gilpin and with Midlands security personnel in control of him.

Taken as a whole, the record establishes no basis upon which to conclude that Bellevue police did not exercise reasonable care in detaining Gilpin and transporting him to Midlands. The question whether Midlands was the best medical facility to detain Gilpin for mental health evaluation is not one on which a law enforcement officer should be expected to act as the final authority, and there is no evidence in this record to prove that the Bellevue officers in this case acted unreasonably in transporting Gilpin to Midlands or relying upon Midlands' willingness to accept Gilpin and admit him.

It is true that Bellevue's official law enforcement policy on emergency protective custody provided that placement was to be conducted by contacting the Spring Center and that transportation to Midlands was only preferred if medical care was required. The record does not establish, one way or the other, whether the Spring Center was contacted regarding Gilpin before he was taken to Midlands. Nor does the record establish whether police suspected the medical issue presented by Gilpin's drug use. The question, however, is not solely whether Bellevue's written procedure was followed, but whether the measures that were taken in this case were reasonable. We conclude, as a matter of law, that they were. The district court was clearly wrong in concluding otherwise.

Given that conclusion, there is no basis in the record for finding that Bellevue was liable for Ginapp's injuries. While Ginapp's injuries are clearly substantial, her remedy is from her employer for workers' compensation or from Gilpin himself. Bellevue was not responsible for Gilpin's actions on

July 5, 2007, and the district court erred in concluding otherwise. Having reached that conclusion, we need not consider Bellevue's remaining arguments.

CONCLUSION

The district court erred in concluding that Gilpin was in Bellevue's custody at the time of the assault and that Bellevue law enforcement acted unreasonably in transporting Gilpin to Midlands and permitting him to be admitted. The judgment of the district court is reversed, and the cause is remanded with directions to enter judgment in favor of Bellevue.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.