TO CREATE A DUTY OR NOT TO CREATE A DUTY: NEBRASKA LAW SHOULD ADOPT SECTION 37 OF THE RESTATEMENT (THIRD) OF TORTS

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."1

I. INTRODUCTION

In A.W. v. Lancaster County School District 0001,2 the Supreme Court of Nebraska adopted the state’s new duty analysis for negligence cases.3 Since its adoption, no Nebraska court has distinctively conducted an analysis to determine whether a defendant owes a duty to a plaintiff if the defendant took no actions that affected the plaintiff and did not have an affirmative duty to act in regard to the situation.4 The Restatement (Third) of Torts (“Restatement”) clarifies that there is a difference between simply failing to prevent harm and affirma-

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2. 280 Neb. 205, 784 N.W.2d 907 (2010).
4. See Durre v. Wilkinson Dev., Inc., 285 Neb. 880, 889, 830 N.W.2d 72, 80 (2013) (inferring that a company owed a duty of reasonable care towards a person in a vehicle when it serviced a sign); Olson v. Wrenchall, 284 Neb. 445, 452-54, 822 N.W.2d 336, 342-43 (2012) (explaining that the physician did not owe a duty of care towards a third party through a physician-patient relationship; however, the court discusses the possibility of creating a duty through public policy before using section 37 of the Restatement (Third) of Torts (“Restatement”) to establish that the physician did not owe a duty towards the third party because he did not subject the third party to “any risk of physical harm”); Martensen v. Rejda Bros., 283 Neb. 279, 288, 808 N.W.2d 855, 863 (2012) (correlating the Restatement’s explanation of an employment special relationship with the facts of the case, and thereafter, establishing that a duty existed between the employer and the employee); Ginapp v. City of Bellevue, 282 Neb. 1027, 1034, 1036, 809 N.W.2d 487, 493-94 (2012) (determining that the police owed no duty because the police did not have custody or control over the patient at the time of the attack); A.W., 280 Neb. at 211, 784 N.W.2d at 914 (citing Sharkey v. Bd. of Regents of Univ. of Neb., 260 Neb. 166, 182, 615 N.W.2d 889, 902 (2000) abrogated by A.W., 280 Neb. 205, 784 N.W.2d 907 (explaining that the school consented to the fact that it owed a landowner-invitee duty to the student); Peterson v. Kings Gate Partners-Omaha I, L.P., 290 Neb. 658, 661, 664, 861 N.W.2d 444, 447-449 (2015) (identifying that the landlord owed the tenant a duty under section 40 of the Restatement); Kimminau v. City of Hastings, 291 Neb. 133, 148, 864 N.W.2d 399, 412 (2015) (determining that creating a duty for the motorist, who caused a spill on the road, to further clean up the spill after public authorities took clean up action would be against public policy); Henderson v. City of Columbus, 19 Neb. App. 668, 670, 683, 311 N.W.2d 699, 703, 711, 712 (2012) (acknowledging that the city owed a duty to homeowners under the Political Subdivisions Tort Claims Act).
tively creating risk. Section 37 clearly states that an actor must actually do something to affirmatively create a risk of harm, and thus, a duty towards another person, unless sections 37 through 44 of the Restatement create an affirmative duty, such as a special relationship. Nebraska law should adopt section 37 of the Restatement as a guide to ensure that Nebraska courts correctly conduct the new duty analysis in these particular situations.

First, this Article will show that Nebraska courts have not thoroughly explained that an actor does not have a duty to act without actually doing something, unless the actor has an affirmative duty, such as a special relationship. Second, this Article will demonstrate how the Restatement explains that an actor must actually do something in order for a court to find that the actor has a duty to act towards another, unless an affirmative duty is present. Third, this Article will explain why the Supreme Court of Nebraska should adopt and follow section 37 of the Restatement in order to clarify the duty analysis in situations where an actor has taken no action. Fourth, this Article will discuss the potential argument that the Supreme Court of Nebraska should follow policy when creating duties, rather than adopt section 37. Fifth, this Article will establish that the Supreme Court of Nebraska should not create a policy standard because it would potentially create duties for people in everyday situations.

II. BACKGROUND

In A.W. v. Lancaster County School District 0001, the Supreme Court of Nebraska redefined the duty analysis for negligence cases by adopting section 7 of the Restatement (Third) of Torts ("Restatement"). The court's adoption altered the duty analysis in many ways. One of the court's major changes was removing foreseeability

6. See id. at illus. 1 (describing a situation where chapter 7 of the Restatement governed whether an actor, who took no action, owed a duty); Restatement (Third) of Torts: Liability for Physical & Emotional Harm, ch. 7, case notes (Am. Law Inst. 2012) (explaining that chapter 7 of the Restatement is sections 37 through 44).
7. See infra notes 103-147 and accompanying text.
8. See infra notes 103-109 and accompanying text.
9. See infra notes 110-127 and accompanying text.
10. See infra notes 128-133 and accompanying text.
11. See infra notes 134-141 and accompanying text.
12. See infra notes 142-147 and accompanying text.
15. A.W., 280 Neb. at 218, 784 N.W.2d at 917-18.
as a factor courts consider when determining if a duty exists. Later, in 2012, the Supreme Court of Nebraska, in *Martensen v. Rejda Bros.*, adopted sections 40(a) and 40(b)(4) of the Restatement, which demonstrates finding a duty through special relationships. After these adoptions, courts have struggled to correctly apply the new duty analysis.

**A. NEBRASKA’S VIEW ON NEGLIGENCE AND DUTY**

Despite the difficulty that courts have had interpreting the new duty analysis, Nebraska law still follows well-established general rules to determine whether negligence exists. In Nebraska, to succeed in a negligence action, a plaintiff is required to first establish that the defendant owed the plaintiff a duty to protect him or her from injury. The plaintiff must then prove that the defendant failed to discharge that duty and, subsequently, establish that the defendant’s failure to discharge his or her duty towards the plaintiff proximately caused the plaintiff’s damages.

Nebraska case law states that a duty is a legal determination where an actor is required to exercise the same degree of care a reasonable person would exercise under the same circumstances. If the defendant does not owe a duty, then the plaintiff cannot succeed in a negligence action against the defendant. Nebraska case law states that the existence of a duty is a policy decision. In addition, Ne-

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16. *Id.* at 218, 784 N.W.2d at 918 (citing Gipson v. Kasey, 214 Ariz. 141, 144, 150 P.3d 228, 231 (2007)).
17. 283 Neb. 279, 808 N.W.2d 855 (2012).
19. *See Blaser v. Cnty. of Madison*, 285 Neb. 290, 308, 826 N.W.2d 554, 567 (2013) (reasoning that the district court’s duty analysis was flawed); *Ginapp v. City of Bellevue*, 282 Neb. 1027, 1029, 1038, 809 N.W.2d 487, 495 (2012) (reversing the district court’s conclusion that a duty existed at the time of the attack).
20. *See Blaser v. Cnty. of Madison*, 285 Neb. 290, 308, 826 N.W.2d 855, 567 (2013) (opining that the lower court’s duty analysis was flawed because it concluded that the defendant had a duty based solely on the way he completed the duty, when instead, how well he completed the duty should have been the question the court considered when it determined whether the defendant breached his duty); *Ginapp v. City of Bellevue*, 282 Neb. 1027, 1029, 1038, 809 N.W.2d 487, 489, 495 (2012) (determining that the lower court erred in concluding that the defendant owed the plaintiff a duty at the time of the attack); *Durre v. Wilkinson Dev., Inc.*, 285 Neb. 880, 889, 830 N.W.2d 72, 80 (2013) (explaining the elements a plaintiff must prove in order to successfully bring a negligence claim in Nebraska).
22. *Id.*
braska courts intend for duty rules to provide broad guidelines for public behavior and to serve as the applicable rules of law for specific categories of cases.26

B. SECTION 7 OF THE RESTATEMENT (THIRD) OF TORTS

The Restatement (Third) of Torts ("Restatement") provides courts with direction as to whether a duty exists.27 Chapter 3 of the Restatement contains section 7, which defines circumstances where an actor has a duty of reasonable care towards another person.28 Section 7 clarifies that a duty arises when a person's actions create a risk of harm towards another.29 Section 7 then explains that a person's actions create a risk of harm when the actions produce a harm greater than what the other person would have experienced if the action had not occurred.30 Section 7 further clarifies that these actions can be ones that create a risk of harm to another by simply exposing a third party to the improper conduct of another.31

C. SECTION 37 OF THE RESTATEMENT (THIRD) OF TORTS

Chapter 7 of the Restatement (Third) of Torts ("Restatement") contains section 37, which sets forth the circumstances in which a person owes a duty of care to someone without ever creating any risk of harm towards that person.32 This section further explains that there is a difference between simply failing to prevent harm towards another and affirmatively creating a risk of harm towards another.33 Section 37 gives an example to explain this difference: when X Company's employee inspects Y Company's heating system, but fails to

26. Id. When a Nebraska court hears a case of first impression, it will look to other cases to answer the issue at hand. Steele v. Encore Mfg. Co., 7 Neb. App. 1, 7-8, 579 N.W.2d 563, 568 (1998).


28. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 7 (Am. Law Inst. 2012). Section 7(a) of the Restatement (Third) of Torts presents that, "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Id. Section 7(b) of the Restatement (Third) of Torts reveals that, "[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification." Id.

29. Id.

30. Id. at cmt. o.

31. Id.


33. Id. at cmt. c.
discover a faulty valve emitting poisonous gas and Y Company’s employee is later harmed by the poisonous gas, X Company’s employee did not create a risk of harm. Therefore, sections 38 through 44 of the Restatement would govern whether X Company had a duty of care towards Y Company’s employee. Section 37 provides another example of the opposite occurrence: if instead, X Company’s employee removed and inspected the heating system, but failed to release the valve and subsequently caused a poisonous gas leak that eventually harmed Y Company’s employee, then X Company’s employee created a risk of harm. In the latter case, section 7 of the Restatement governs the duty analysis. Section 37 goes on to give further guidance on how a court should determine whether the entirety of the defendant’s conduct created harm. It states that the court making the determination should imagine hypothetical situations and then decide if the same risk of harm towards the plaintiff would have been present if the defendant had not taken his or her actions. Nebraska courts have never adopted section 37, nor has any Nebraska court made the distinction between merely failing to prevent harm towards another and affirmatively creating a risk of harm to another.

34. Id. at illus. 1.
35. Id.
36. Id. at illus. 2.
37. Id. To further distinguish the two situations the comment states that “the factfinder would have to determine whether an actor’s conduct created a risk of harm as a predicate for determining whether a duty exists under § 7 or whether a duty, if any, must be found” in chapter 7. Id. at cmt. c.
38. See id. (giving further examples because of the difficulty in determining whether conduct gives rise to a risk of harm).
39. Id.
40. See Durre v. Wilkinson Dev., Inc., 285 Neb. 880, 889, 830 N.W.2d 72, 80 (2013) (indicating that a company owed a duty of reasonable care towards someone sitting in a vehicle when it serviced a sign); Olson v. Wrenshall, 284 Neb. 445, 452-54, 822 N.W.2d 336, 342-43 (2012) (explaining that a physician-patient relationship did not include third parties); Martensen v. Rejda Bros., 283 Neb. 279, 288, 808 N.W.2d 855, 863 (2012) (establishing an employment special relationship between an employer and employee, which thereby involved a duty); Ginapp v. City of Bellevue, 282 Neb. 1027, 1034, 1038, 809 N.W.2d 487, 493-94 (2012) (deciding that a police officer did not owe a duty through a special relationship because he lacked custody and control over the patient during the time of the attack); A.W., 280 Neb. at 211, 784 N.W.2d at 914 (citing Sharkey v. Bd. of Regents of Univ. of Neb., 260 Neb. 166, 182, 615 N.W.2d 889, 902 (2000) abrogated by A.W., 280 Neb. 205, 784 N.W.2d 907) (explaining that the school consented to the fact that it owed a landowner-invitee duty to the student); Peterson v. Kings Gate Partners- Omaha I, L.P., 290 Neb. 658, 661, 664, 816 N.W.2d 444, 447-449 (2015) (opining that a special relationship existed under section 40 of the Restatement (Third) of Torts between a landlord and tenant, thereby creating a duty); Kimminau v. City of Hastings, 291 Neb. 133, 148, 864 N.W.2d 399, 412 (2015) (reasoning that a motorist who created a risk of harm no longer owed a duty when public authorities attempted to eliminate that risk); Henderson v. City of Columbus, 19 Neb. App. 668, 670, 683, 811 N.W.2d 699, 703, 711, 712 (2012) (determining that the city, under the Political Subdivisions Torts Claims Act, owed a duty to homeowners).
D. **Section 19 of the Restatement (Third) of Torts**

Chapter 3 of the Restatement (Third) of Torts ("Restatement") contains Section 19, which explains that a defendant's conduct can be negligent if the conduct permits or combines with the improper conduct of a third party or even a plaintiff. Section 19 clarifies the difference between taking no action and creating or increasing the possibility of harm. Section 19 explains that increasing the possibility of harm occurs when the defendant enables or encourages a third party to harm another person. However, taking no action to protect a person against the possible conduct of another is different. As a rule, the law does not charge a duty to protect or rescue, even if defendants are in a position to help. In such cases, defendants are not liable, unless they have an affirmative duty under the exception to the general rule provided in sections 37 through 44 of the Restatement. Nebraska courts have not adopted section 19, and Nebraska courts have not recognized the distinction between failing to prevent harm towards another and affirmatively creating a risk of harm towards another.

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41. Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 19 (Am. Law Inst. 2012). Section 19 states that "[t]he 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." Id.

42. Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 19 cmt. e.

43. Id. Section 19 specifically states that:

the defendant's conduct may make available to the third party the instrument eventually used by the third party in inflicting harm; or that conduct may bring the plaintiff to a location where the plaintiff is exposed to third-party misconduct; or that conduct may bring the third party to a location that enables the third party to inflict harm on the plaintiff; or the defendant's business operations may create a physical environment where instances of misconduct are likely to take place; or the defendant's conduct may inadvertently give the third party a motive to act improperly.

Id.

44. Id.

45. See id. (explaining that, "as a general rule, the law does not impose an obligation to protect or rescue, defendants are liable in such cases only if they are subject to some affirmative duty providing an exception to the general rule.").

46. See id. (noting that sections 37 through 44 cover instances when a person's conduct did not create a risk of harm to another, but the other person is at a risk of harm because of other forces).

47. See Durre v. Wilkinson Dev., Inc., 285 Neb. 880, 889, 830 N.W.2d 72, 80 (2013) (inferring that a company owed a duty, while servicing a sign, to someone sitting in a vehicle); Olson v. Wrenshall, 284 Neb. 445, 452-54, 822 N.W.2d 356, 342-43 (2012) (explaining a physician did not owe a duty to a third party when he was in a physician-patient relationship with another); Martensen v. Rejda Bros., 283 Neb. 279, 288, 808 N.W.2d 855, 863 (2012) (establishing that a duty existed through an employment special relationship between an employer and employee); Ginapp v. City of Bellevue, 282 Neb. 1027, 1034, 1036, 809 N.W.2d 487, 493-94 (2012) (opining that a special relationship had existed between a police officer and an assailant, but that the police officer was no longer in the special relationship when he did not have custody or control over the
E. A.W. v. Lancaster: The Supreme Court of Nebraska Adopts the State's New Duty Analysis for Negligence Cases

In A.W. v. Lancaster County School District 0001, an intruder sexually assaulted a kindergarten student during the school day in a school bathroom. The student's mother sued the school, on behalf of the student, for negligently allowing the incident to occur. In determining whether the school owed a duty towards the student, the Supreme Court of Nebraska adopted the duty analysis from Section 7 of the Restatement (Third) of Torts because it found the Restatement's clarification compelling. Accordingly, the court expressly held that foreseeability was no longer a factor when determining whether a duty exists.

The court explained that in determining whether a duty exists, a court should ask whether the school owed the student a duty of reasonable care. In determining if the school breached its duty, the court posed the question, under the circumstances and facts of the case, as whether the school conducted itself reasonably or if the student assault was so reasonably foreseeable that the school was required to act to reduce or eliminate that risk. In this particular case, the court completed the duty analysis in order to illustrate guidance for lower courts. The court then explained that the school owed the student a duty of reasonable care because of the risks that were present within the scope of the relationship. The court then

assillant); A.W., 280 Neb. at 211, 784 N.W.2d at 914 (citing Sharkey v. Bd. of Regents of Univ. of Neb., 260 Neb. 166, 182, 615 N.W.2d 889, 902 (2000) abrogated by A.W., 280 Neb. 205, 784 N.W.2d 907) (showing that a school was in a landlord-invitee relationship with a student, and thus, a duty existed); Peterson v. Kings Gate Partners-Omaha I, L.P., 290 Neb. 658, 661, 664, 861 N.W.2d 444, 447-449 (2015) (opining that a landlord and tenant had a special relationship under section 40 of the Restatement (Third) of Torts); Kimminau v. City of Hastings, 291 Neb. 133, 148, 864 N.W.2d 399, 412 (2015) (providing that a motorist owed a duty up until the time public authorities took action); Henderson v. City of Columbus, 19 Neb. App. 668, 670, 683, 811 N.W.2d 699, 703, 711, 712 (2012) (reasoning that, under the Political Subdivisions Torts Claims Act, the city owed a duty to homeowners).

50. A.W., 280 Neb. at 206, 784 N.W.2d at 911.
51. Id. at 218, 784 N.W.2d at 918 (citing Thompson v. Kaczinski, 774 N.W.2d 829, 835 (Iowa 2009)).
52. Id. (citing Gipson v. Kasey, 214 Ariz. 141, 144, 150 P.3d 228, 231 (2007)).
53. Id. at 217, 784 N.W.2d at 917.
54. Id.
55. Id. at 218-19, 784 N.W.2d at 918.
56. Id. at 219, 784 N.W.2d at 919.
stated that there was no countervailing policy or principle which warranted a modification to that duty in that class of cases.57

F. MARTENSEN v. REJDA BROS.: THE SUPREME COURT OF NEBRASKAadopts Section 40(a) and 40(b) of the Restatement(Third) of Torts

In Martensen v. Rejda Bros.,58 a farmhand, Martensen, suffered an injury while working in a ranch pasture.59 An all-terrain vehicle ("ATV") Martensen was driving overturned and pinned his right leg.60 Unfortunately, it was not until the next day that two people, driving by the scene of the accident, discovered Martensen and, as a result, his right leg was amputated above the knee.61 Martensen filed suit against the ranch alleging that the ranch owner, Rejda, failed to timely search for, find, and rescue him.62

When the Supreme Court of Nebraska determined whether Rejda owed a duty to Martensen it concluded that section 40(a) and 40(b) of the Restatement (Third) of Torts ("Restatement") controlled the legal duty determination in the case.63 Thereafter the court adopted sections 40(a) and 40(b)(4) of the Restatement because the court believed that the Restatement's reasoning was sound and consistent with its jurisprudence.64 It also declared that a special relationship could constitute the basis for a duty.65 An employer is in a special relationship with an employee if the employee is injured or is in imminent danger and rendered helpless.66 Under these circumstances, an employer owes a duty of reasonable care to its employee for risks that occur within the relationship.67 The court determined that Rejda owed

57. Id.
58. 283 Neb. 279, 808 N.W.2d 855 (2012).
60. Martensen, 283 Neb. at 281, 808 N.W.2d at 859.
61. Id. at 281-82, 808 N.W.2d at 859.
62. Id. at 281, 808 N.W.2d at 859.
63. Id. at 286, 808 N.W.2d at 862 (citing Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 40 (AM. LAW INST. 2012)). Section 40(a) of the Restatement (Third) of Torts reads that, "[a]n actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship." Id. (quoting Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 40). Section 40(b) of the Restatement (Third) of Torts states that, "[s]pecial relationships giving rise to the duty provided in Subsection (a) include: . . . (4) an employer with its employees who are: (a) in imminent danger; or (b) injured and thereby helpless . . . ." Id. at 286-87, 808 N.W.2d at 862 (quoting Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 40).
64. Id. at 288, 808 N.W.2d at 863.
65. Id. at 287, 808 N.W.2d at 863 (citing Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 40).
66. Id. at 288, 808 N.W.2d at 863.
67. Id.
Martensen a duty of reasonable care through a special employment relationship and this duty remained even if Rejda had no knowledge of what had happened to Martensen. 68

G. GINAPP V. CITY OF BELLEVUE: THE SUPREME COURT OF NEBRASKA EXPLAINS THE EXTENT OF A SPECIAL CUSTODIAL RELATIONSHIP

In Ginapp v. City of Bellevue, 69 a police officer brought a patient under emergency protective custody to a hospital. 70 Thereafter, the patient violently attacked and injured a registered nurse while she was working. 71 The Supreme Court of Nebraska determined whether the police officer owed a duty to the nurse; the court explained that the question of whether a duty exists is a question of law that depends on the circumstances of a particular situation. 72 The court further opined that in situations in which a defendant’s actions created a risk of harm to the plaintiff the defendant owes the plaintiff a duty of reasonable care. 73 The court later explained that a defendant’s conduct could fail to exercise reasonable care by foreseeably permitting or combining with the improper conduct towards a plaintiff or a third party. 74

The court noted that the Restatement (Third) of Torts expressly states that when a defendant’s actions did not create a risk of harm towards the plaintiff, the defendant does not owe a duty of reasonable care to that plaintiff unless the defendant has an affirmative duty towards that plaintiff. 75 Additionally, the court clarified that a defendant who has a special relationship with a plaintiff owes third parties a duty of reasonable care to reduce or eliminate the risks that arise

68. See id. at 288, 280, 808 N.W.2d at 863, 858 (showing that the court determined there was a special relationship under the circumstances of the case and this case was about an employment relationship between Rejda and Martensen).

69. 282 Neb. 1027, 809 N.W.2d 487 (2012).


71. Ginapp, 282 Neb. at 1028, 809 N.W.2d at 489.

72. Id. at 1033, 809 N.W.2d at 492 (citing Riggs v. Nickel, 281 Neb. 249, 256, 786 N.W.2d 181, 187 (2011)).

73. Id. (citing Riggs, 281 Neb. at 256, 786 N.W.2d at 187). The court stated that, “an actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm.” Id. (citing Riggs, 281 Neb. at 256, 786 N.W.2d at 187).

74. Id. (citing Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 19 (Am. Law Inst. 2012)).

75. Id. at 1034, 809 N.W.2d at 492-93 (citing Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41 (Am. Law Inst. 2012)). The court explained 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...” Id. at 1034, 809 N.W.2d at 492-93 (citing Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41 (Am. Law Inst. 2012)).
from the scope of the special relationship.76 The court took into consideration that a custodial relationship does not have to be one in which one person has physical custody over another twenty-four hours a day.77 It further explained that if one person has even some control and custody over another person who poses danger to others, the custodial person has an affirmative duty to exercise reasonable care that is consistent with the amount of custody and control that he or she has over the dangerous person.78

The court determined that the police assumed a duty of reasonable care when they took the patient into emergency protective custody.79 This duty was to prevent the patient from causing any kind of harm to others.80 The court reasoned that the police had a custodial relationship with the patient at the time the assault took place because mental health professionals and the county attorney had not discharged the patient from emergency protective custody.81 However, the court determined that the police did not have actual control and custody over the patient at the time of the assault that required them to prevent any harm to third parties; thus, the police were not liable towards the nurse.82 The court explained that if the police had either released the patient or negligently allowed him to escape and the patient then assaulted someone, the police might have then been liable to the person that the patient assaulted because of their loss of custody over the patient.83

76. Id. at 1034, 809 N.W.2d at 493 (quoting Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41). The court remarked that, "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." Id. at 1034, 809 N.W.2d at 493 (quoting Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41).

77. Id. (quoting Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41 cmt. f). The extent of the special relationship was not at issue in Ginapp because the police had no control or custody over the patient at the time the assault took place. Id.

78. Id. (quoting Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41 cmt. f).

79. Id. (citing Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41 cmt. f).

80. Id. (citing Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 41 cmt. f). In Ginapp, the question was when did the duty the police had to third parties end and whether the police had sufficiently discharged their duty before the assault occurred. Id.

81. Id. at 1035, 809 N.W.2d at 494.

82. Id. at 1036, 1037, 809 N.W.2d at 494-95.

83. Id. at 1036, 809 N.W.2d at 494.
H. Durre v. Wilkinson Development, Inc.: The Supreme Court of Nebraska Implies That a Person May Owe a Duty of Reasonable Care in an Everyday Situation

In *Durre v. Wilkinson Development, Inc.*, a sign, maintained by a company named Love Signs, fell onto Durre’s truck and, consequently, injured him and killed his wife. Durre then filed suit against Love Signs, whom the owners of the sign hired to perform service work on the sign, for negligently failing to inspect and maintain the sign. The owners of the sign hired Love Signs to replace the ballasts and lamps within the lighted part of the sign. The owners of the sign did not engage Love Signs to maintain, inspect, repair, or care for the pole that mounted the sign. In addition, there was no open and obvious defect within the pole or the actual sign that Love Signs should have discovered when it replaced the ballasts and bulbs.

The court determined that Love Signs did not have a duty to discover latent defects within the sign that might cause the sign to collapse when it serviced the sign by replacing the ballasts and bulbs. The sign collapsed because part of the steel pole that was holding it split in half. The court agreed with the lower court that the owners of the sign had only hired Love Signs to replace the ballasts and bulbs. Therefore, Love Signs’ obligations did not include a duty to inspect, care for, or maintain the pole or sign.

Although the court did not explicitly state that Love Signs owed a duty toward Durre, it did take the duty analysis a step further and stated that Love Signs did not breach a duty of reasonable care when it performed its service work on the sign. Thus, the court suggested that Love Signs did in fact owe a duty of reasonable care towards everyone, including Durre, when it serviced the sign.

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84. 285 Neb. 880, 830 N.W.2d 72 (2013).
86. *Durre*, 285 Neb. at 882-83, 830 N.W.2d at 76.
87. *Id.* at 889, 830 N.W.2d at 80.
88. *Id.*
89. *Id.*
90. *Id.* at 889-90, 830 N.W.2d at 80.
91. *Id.* at 889, 830 N.W.2d at 80.
92. *Id.* at 890, 830 N.W.2d at 80.
93. *Id.*
94. See *id.* at 889, 830 N.W.2d at 80 (inferring that Love Signs owed a duty of reasonable care toward Durre when it serviced the sign).
95. See *id.* (suggesting that Love Signs owed a duty of reasonable care toward Durre by stating that, “[t]here was no evidence that Love Sign’s breached a duty of reasonable care when it performed its work.”).
III. ARGUMENT

The applicability of Nebraska's duty analysis, concerning whether an actor owes a duty toward another without taking any actions is unclear.96 Murky applicability makes predicting the outcome of a lawsuit difficult.97 First, Nebraska courts have not precisely discussed that a duty to act cannot be found without an actor actually doing something, unless the actor has an affirmative duty, such as a special relationship.98 Second, the Restatement (Third) of Torts ("Restatement") explains that an actor must actually do something in order for a court to state that an actor owes a duty towards another, unless the actor has an affirmative duty towards that person.99 Third, the Supreme Court of Nebraska should adopt and follow section 37 of the Restatement in order to illustrate the negligence duty analysis in situations where the actor has taken no action.100 Fourth, one may rebut that the Supreme Court of Nebraska should follow a policy decision, rather than adopt section 37.101 Fifth, creating a policy decision standard would possibly create duties for people in everyday situations.102

A. NEBRASKA COURTS HAVE NOT PRECISELY INDICATED THAT A DUTY TO ACT CANNOT BE FOUND WITHOUT AN ACTOR ACTUALLY DOING SOMETHING, UNLESS THE ACTOR HAS AN AFFIRMATIVE DUTY, SUCH AS A SPECIAL RELATIONSHIP TOWARDS ANOTHER

In A.W. v. Lancaster County School District 0001,103 the Supreme Court of Nebraska first adopted the state's new duty analysis.104 Since this adoption, no Nebraska court has conducted a duty analysis in a situation where an actor took no action, without the court considering that the actor had an affirmative duty towards the plaintiff.105

96. See infra notes 103-147 and accompanying text.
97. See infra notes 103-147 and accompanying text.
98. See infra notes 103-109 and accompanying text.
99. See infra notes 110-127 and accompanying text.
100. See infra notes 128-133 and accompanying text.
101. See infra notes 134-141 and accompanying text.
102. See infra notes 142-147 and accompanying text.
103. 280 Neb. 205, 784 N.W.2d 907 (2010).
105. See Durre v. Wilkinson Dev., Inc., 285 Neb. 880, 889, 830 N.W.2d 72, 80 (2013) (implying that a company owed a duty of reasonable care towards another person who was in a vehicle when it serviced a sign); Olson v. Wrenshall, 284 Neb. 445, 452-54, 822 N.W.2d 336, 342-43 (2012) (explaining that the physician did not incur a duty of care towards a third party through a physician-patient relationship); Martensen v. Rejda Bros., 283 Neb. 279, 288, 808 N.W.2d 855, 863 (2012) (interpreting the Restatement (Third) of Torts ("Restatement") to determine that a special relationship existed between the employer and employee, and therefore, the employer owed the employee a duty); Ginapp v. City of Bellevue, 282 Neb. 1027, 1034, 1036, 809 N.W.2d 487, 493-94
Yet, Nebraska case law has implied that a person may owe another person a duty of reasonable care in an everyday situation. 106

Nevertheless, Nebraska law follows the Restatement (Third) of Torts ("Restatement") in other aspects of duty determinations. 107 The Supreme Court of Nebraska has even interpreted Section 37 of the Restatement in case law. 108 Conversely, Nebraska law implies that courts may create duties based on policy decisions. 109

B. THE RESTATMENT (THIRD) OF TORTS EXPLAINS THAT AN ACTOR MUST ACTUALLY DO SOMETHING IN ORDER FOR A COURT TO CREATE A DUTY FOR THE ACTOR TOWARDS ANOTHER, UNLESS THE ACTOR HAS AN AFFIRMATIVE DUTY

Section 7 of the Restatement (Third) of Torts ("Restatement") explains that a duty arises when a person's actions create a risk of harm towards another. 110 Section 7 then defines risk of harm as actions that produce greater harm than what the receiving person would have

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(2012) (determining that the police owed no duty because the police lacked custody or control over the patient at the time of the attack); A.W., 280 Neb. 205, 211, 784 N.W.2d 907, 914 (2010) (citing Sharky v. Bd. of Regents of Univ. of Neb., 260 Neb. 166, 182, 615 N.W.2d 889, 902 (2000) abrogated by A.W., 280 Neb. 205, 784 N.W.2d 907) (explaining that the school consented to the fact that it owed a landowner-invitee duty to the student); Peterson v. Kings Gate Partners-Omaha I, L.P., 290 Neb. 658, 661, 664, 861 N.W.2d 444, 447-449 (2015) (providing that the landlord owed the tenant a duty under section 40 of the Restatement); Kimminau v. City of Hastings, 291 Neb. 133, 148, 864 N.W.2d 399, 412 (2015) (providing that creation of a duty for the motorist, who caused a spill on the road, to further clean up the spill after public authorities took clean up action would be against public policy); Henderson v. City of Columbus, 19 Neb. App. 668, 670, 663, 811 N.W.2d 699, 703, 711, 712 (2012) (determining that the city owed a duty to homeowners under the Political Subdivisions Tort Claims Act).

106. See Durre, 285 Neb. at 889, 830 N.W.2d at 80 (indicating that a company owed a duty of reasonable care towards another person who was in a vehicle when it serviced a sign).

107. See Martensen, 283 Neb. at 288, 808 N.W.2d at 863 (interpreting the Restatement to opine that a special relationship existed between the employer and employee, and therefore, the employer owed the employee a duty); Ginapp, 282 Neb. at 1034, 1036, 809 N.W.2d at 493-94 (reasoning that the police owed no duty because the police lacked custody or control over the patient at the time of the attack); Peterson, 290 Neb. at 661, 664, 861 N.W.2d at 447-449 (explaining that the landlord owed the tenant a duty under section 40 of the Restatement).

108. See Olson, 284 Neb. at 452-54, 822 N.W.2d at 342-43 (providing that a physician did not owe a duty of care towards a third party through a physician-patient relationship; however, the court discussed the possibility of creating a duty through public policy before using section 37 of the Restatement to establish that the physician did not owe a duty towards the third party because he did not subject the third party to "any risk of physical harm").


experienced if the actor had not taken action.\textsuperscript{111} Section 7 additionally declares that actions can create a risk of harm towards another—even if the actions only expose a third party to the improper conduct of another.\textsuperscript{112} Here, it is clear that a person must have taken some type of action towards another in order to create a risk of harm.\textsuperscript{113}

Section 37 of the Restatement explains that a person can owe a duty of care to another without ever creating any risk of harm to the other person.\textsuperscript{114} This section acknowledges that there is a difference between simply failing to prevent harm and affirmatively creating a risk of harm towards another person.\textsuperscript{115} When something other than another person’s conduct harms a plaintiff, a court should only find a duty from this person towards the plaintiff through sections 37 through 44 of the Restatement.\textsuperscript{116} When the opposite occurs and someone’s actions have created a risk of harm towards a plaintiff, a court should only find that the person owed a duty towards another through section 7 of the Restatement.\textsuperscript{117} Additionally, to determine whether an actor’s conduct actually created a risk of harm, section 37 suggests that a court should imagine hypothetical situations and decide if the same risk of harm towards the plaintiff would have been present in the hypothetical situations if the defendant had not taken action.\textsuperscript{118}

Section 19 of the Restatement states that a person can be negligent if that person’s conduct permits or combines with the improper conduct of a third party or even the plaintiff.\textsuperscript{119} However, section 19

\textsuperscript{111} Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 7 cmt. o.
\textsuperscript{112} Id.
\textsuperscript{113} See id. (indicating that actual conduct creates a risk of harm).
\textsuperscript{114} Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 37 (Am. Law Inst. 2012).
\textsuperscript{115} Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 37 cmt. c.
\textsuperscript{116} See id. at illus. 1 (explaining that when X Company’s employee inspects Y Company’s sign, but fails to identify its defective design and Y Company’s employee is later harmed when the sign falls, X Company’s employee did not initiate a risk of harm, and therefore, sections 38 through 44 of the Restatement would govern whether X Company had a duty of care to Y Company’s employee); Restatement (Third) of Torts: Liability for Physical & Emotional Harm, ch. 7, case notes (2012) (providing that chapter 7 of the Restatement (Third) of Torts (“Restatement”) is sections 37 through 44); Restatement (Third) of Torts: Liability for Physical & Emotional Harm, ch. 7, scope note (explaining that section 37, comment g, instructs that a court could apply the same policies and principles within section 7(b) to recognize an affirmative duty through sections 38 through 44).
\textsuperscript{117} Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 37 illus. 2 (Am. Law Inst. 2012).
\textsuperscript{118} Id. at cmt c.
\textsuperscript{119} Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 19 (Am. Law Inst. 2012).
explains that merely taking no action is different from increasing or creating the possibility of harm towards another. Section 19 provides that, generally speaking, the law does not enforce an obligation or duty to protect or rescue, even if a defendant is in a position to help the other person. Section 19 then reinforces section 37, which is the fact that a defendant can only be liable for either not rescuing or protecting another if the defendant is subject to an affirmative duty that provides an exception to the general rule found in sections 37 through 44 of the Restatement.

The Restatement (Third) of Torts explains that there is a difference between simply failing to prevent harm and affirmatively creating risk. Section 37 makes clear that an actor must actually do something to affirmatively create a risk of harm; thus, a duty towards another person—unless an affirmative duty such as a special relationship—is created through sections 37 through 44 of the Restatement. In addition, section 19 strengthens this notion by distinguishing between taking no action and increasing or creating a possibility of harm. Thus, a person has no obligation to act unless he or she has an affirmative duty, such as a special relationship, towards another. Therefore, in order for a court to find a duty

120. Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 19 cmt. e.
121. Id.
122. Id.
123. Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 37 cmt. c.
124. Id. at illus. 1, illus. 2; see also Restatement (Third) of Torts: Liability for Physical & Emotional Harm, ch. 7, case notes (providing that sections 37 through 44 constitute chapter 7 of the Restatement); Restatement (Third) of Torts: Liability for Physical & Emotional Harm, ch. 7, scope note (explaining that section 37, comment g, instructs that a court could apply the same policies and principles within section 7(b) to recognize an affirmative duty through sections 38 through 44).
125. Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 19 cmt. e.
126. Compare Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 37 illus. 1, illus. 2 (illustrating that “the factfinder would have to determine whether an actor’s conduct created a risk of harm as a predicate for determining whether a duty exists under § 7 or whether a duty, if any, must be found in” sections 38 through 44 because if an actor’s “conduct did not create a risk of harm” then whether the actor owes someone a duty of care “is governed by the provisions” within sections 38 through 44), with Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 19 cmt. e (providing that “[b]ecause, as a general rule, the law does not impose an obligation to protect or rescue, defendants are liable in such cases only if they are subject to some affirmative duty providing an exception to the general rule. The doctrines of affirmative duty are addressed in Chapter 7,” which is sections 37 through 44 of the Restatement).
through section 7 of the Restatement, the actor must have actually 
done something and not merely failed to do something.127

C. THE SUPREME COURT OF NEBRASKA SHOULD ADOPT AND FOLLOW 
SECTION 37 OF THE RESTATEMENT (THIRD) OF TORTS IN ORDER TO 
CLARIFY THE DUTY ANALYSIS IN SITUATIONS WHERE 
THE ACTOR HAS TAKEN NO ACTION

Nebraska case law has not yet adopted section 37 of the Restatement 
(Third) of Torts ("Restatement") and has never clearly analyzed 
a negligence case where the defendant took no action towards the 
plaintiff without an affirmative duty.128 Yet, Nebraska case law has 
adopted other sections or parts of other sections of the Restatement, 
such as sections 7 and 40.129 After adopting these sections of the Re-
statement, courts have had difficulty applying the new duty analysis

127. Compare Restatement (Third) of Torts: Liability for Physical & 
Emotional Harm § 37 illus. 2 (explaining when an actor’s conduct creates a risk of harm to 
another, the question of whether the actor owes a duty to the other person, is governed 
by section 7 of the Restatement), with Restatement (Third) of Torts: Liability for 
Physical & Emotional Harm § 19 cmt. e (revealing that “[b]ecause, as a general rule, 
the law does not impose an obligation to protect or rescue, defendants are liable in such 
cases only if they are subject to some affirmative duty providing an exception to the 
general rule. The doctrines of affirmative duty are addressed in Chapter 7,” which is 
sections 37 through 44 of the Restatement).

(indicating that a company owed a duty of reasonable care, while servicing a sign, to 
wards a person in a vehicle); Olson v. Wrenshall, 284 Neb. 445, 452-54, 822 N.W.2d 336, 
342-43 (2012) (explaining that third parties were not included in a physician-patient 
relationship); Martensen v. Rejda Bros., 283 Neb. 279, 288, 808 N.W.2d 855, 863 (2012) 
correlating the Restatement (Third) of Tort’s ("Restatement") explanation of a special 
relationship with the facts of the case and establishing that a duty existed between the 
employer and the employee); Ginapp v. City of Bellevue, 282 Neb. 1027, 1034, 1036, 809 
N.W.2d 487, 493-94 (2012) (determining that the police did not owe a duty because the 
police did not have custody or control over the patient at the time of the attack); A.W. v. 
Lancaster Cnty. Sch. Dist. 0001, 280 Neb. 205, 211, 784 N.W.2d 907, 914 (2010) (citing 
Sharkey v. Bd. of Regents of Univ. of Neb., 260 Neb. 166, 182, 615 N.W.2d 889, 902 
(2000) abrogated by A.W., 280 Neb. 205, 784 N.W.2d 907) (explaining why the school 
owed a landowner-invitee duty to the student); Peterson v. Kings Gate Partners-Omaha 
I, L.P., 290 Neb. 658, 661, 664, 861 N.W.2d 444, 447-449 (2015) (specifying that the 
landlord owed the tenant a duty under section 40 of the Restatement); Kimminau v. 
City of Hastings, 291 Neb. 133, 145, 864 N.W.2d 399, 412 (2015) (determining that a 
motorist who created a risk of harm by causing a spill on the road, no longer owed a 
duty to clean up the spill, after public authorities began cleaning the spill); Henderson 
(acknowledging that under the Political Subdivisions Torts Claims Act the city owed a 
duty to homeowners).

129. A.W., 280 Neb. at 218, 784 N.W.2d at 918 (citing Thompson v. Kaczinski, 774 
N.W.2d 829, 835 (Iowa, 2009)); Martensen, 283 Neb. at 288, 808 N.W.2d at 863. In 
Martensen, the court adopted section 40, subsection (a) and (b)(4) of the Restatement. 
Id. at 288, 808 N.W.2d at 863.
in negligence cases. A court faced with deciding an issue involving a defendant who had taken no action towards the plaintiff and did not owe an affirmative duty to the plaintiff—without precedent on this issue—could misinterpret existing case law and mistakenly create a duty for the defendant to the plaintiff. Section 37 of the Restatement offers guidance on how to complete such as duty analysis. In order to ensure that Nebraska courts correctly complete the new duty analysis, Nebraska law should adopt section 37 of the Restatement as a guide.

D. **One May Argue That the Supreme Court of Nebraska Should Follow a Policy Decision Rather Than Adopt Section 37**

In *A.W. v. Lancaster County School District 0001,* the Supreme Court of Nebraska adopted the duty analysis found within section 7 of the Restatement (Third) of Torts ("Restatement"). Section 7(b) of the Restatement explains that in rare cases an articulated countervailing policy could warrant modification to a defendant's duty towards another. As part of its duty rules, Nebraska case law follows

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130. See Blaser v. Cnty. of Madison, 285 Neb. 290, 308, 826 N.W.2d 554, 567 (2013) (showing that the Supreme Court of Nebraska reasoned that the district court’s duty analysis was flawed); Ginapp v. City of Bellevue, 282 Neb. 1027, 1029, 1038, 809 N.W.2d 487, 489, 495 (2012) (showing that the Supreme Court of Nebraska reversed the district court’s finding that a duty existed at the time of the attack).

131. Compare Steele v. Encore Mfg. Co., 7 Neb. App. 1, 7-8, 579 N.W.2d 563, 568 (1998) (showing that the court took on a matter of first impression and looked to other courts for an answer to the issue), with Blaser, 285 Neb. at 308, 826 N.W.2d at 567 (reasoning that the district court’s duty analysis was flawed), and Ginapp, 282 Neb. at 1029, 1038, 809 N.W.2d at 495 (reversing the district court’s conclusion that a duty existed at the time of the attack).

132. See Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 37 illus. 1 (Am. Law Inst. 2012) (explaining that when X Company’s employee inspects Y Company’s heating system, but fails to find a faulty valve that leaks carbon monoxide and Y Company’s employee is harmed by carbon monoxide later, X Company’s employee did not initiate a risk of harm, and therefore, sections 38 through 44 of the Restatement would govern whether X Company had a duty of care to Y Company’s employee).

133. See A.W., 280 Neb. at 218-19, 784 N.W.2d at 918 (creating guidance for other courts by applying the Restatement’s principal to the case); Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 37 illus. 1 (articulating that when X Company’s employee inspects Y Company’s heating system, but fails to find a faulty valve that leaks carbon monoxide and Y Company’s employee is harmed by carbon monoxide later, X Company’s employee did not initiate a risk of harm, and therefore, sections 38 through 44 of the Restatement would govern whether X Company had a duty of care to Y Company’s employee).

134. 280 Neb. 205, 784 N.W.2d 907 (2010).


that the existence of a duty is a policy decision. Therefore, it is possible to interpret section 7(b) of the Restatement as allowing a policy decision to determine whether an actor, who took no action towards another, owes a duty towards that other person.

In addition, Nebraska courts intend for duty rules to serve as the broad guidelines for public behavior and the applicable rules of law for specific categories of cases. Currently, Nebraska case law implies the possibility of using a policy decision to create a duty for a person who took no action. Without clarification that an actor who takes no action cannot owe a duty towards another without an affirmative duty, a Nebraska court could determine that policy creates an actor’s duty towards another.

E. CREATING A POLICY DECISION STANDARD WOULD POTENTIALLY CREATE DUTIES FOR PEOPLE IN EVERYDAY SITUATIONS

Without clear precedent on the negligence duty analysis, for a court to determine whether a defendant who took no action owed a

138. Compare Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 7 (providing that “[i]n unusual cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”), with Martensen, 283 Neb. at 287, 808 N.W.2d at 863 (quoting A.W., 280 Neb. at 215, 784 N.W.2d at 916) (explaining that Nebraska case law recognizes “that whether a duty exists is a policy decision.”).
139. Martensen, 283 Neb. at 287, 808 N.W.2d at 863 (quoting A.W., 280 Neb. at 212-13, 784 N.W.2d at 914-15).
140. See Durre v. Wilkinson Dev., Inc., 285 Neb. 880, 889, 830 N.W.2d 72, 80 (2013) (implying that a company owed a duty of reasonable care towards a person in a vehicle when it only serviced a sign); Olson v. Wrenshall, 284 Neb. 445, 452-54, 822 N.W.2d 356, 342-43 (2012) (discussing that the physician did not owe a duty of care towards a third party through a physician-patient relationship; however, the court discussed the possibility of creating a duty through public policy before using section 37 of the Restatement (Third) of Torts (“Restatement”) to establish that the physician did not owe a duty towards the third party because he did not subject the third party to “any risk of physical harm”).
141. Compare Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 19 cmt. e (Am. Law Inst. 2012) (showing that “[b]ecause, as a general rule, the law does not impose an obligation to protect or rescue, defendants are liable in such cases only if they are subject to some affirmative duty providing an exception to the general rule. The doctrines of affirmative duty are addressed in Chapter 7,” which is sections 37 through 44 of the Restatement (Third) of Torts), with Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 7 (explaining that “[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”), and Martensen, 283 Neb. at 287, 808 N.W.2d at 863 (quoting A.W., 280 Neb. at 215, 784 N.W.2d at 916) (discussing that Nebraska case law recognizes “that whether a duty exists is a policy decision.”).
duty towards another, Nebraska courts could create a duty for a defendant towards another through a policy decision.\textsuperscript{142} If a Nebraska court determined that an actor owed a duty to someone without taking any actions that would create a risk of harm towards that person—and the actor did not owe an affirmative duty to that person—this finding would be inconsistent with the Restatement (Third) of Torts ("Restatement").\textsuperscript{143} Nebraska case law has already adopted sections of the Restatement, and thus, following a policy decision could create inconsistencies.\textsuperscript{144}

Moreover, the sections of the Restatement that Nebraska case law has adopted are associated with section 37 of the Restatement.\textsuperscript{145} Adopting only some sections of the Restatement and not others may

\textsuperscript{142} Compare Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 19 cmt. e (Am. Law Inst. 2012) (explaining that "[b]ecause, as a general rule, the law does not impose an obligation to protect or rescue, defendants are liable in such cases only if they are subject to some affirmative duty providing an exception to the general rule. The doctrines of affirmative duty are addressed in Chapter 7," which is sections 37 through 44 of the Restatement (Third) of Torts ("Restatement")), with Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 7 (Am. Law Inst. 2012) (providing that "[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification."). and Martensen v. Rejda Bros., 283 Neb. 279, 287, 808 N.W.2d 855, 863 (2012) (quoting A.W. v. Lancaster Cnty. Sch. Dist. 0001, 280 Neb. 205, 215, 784 N.W.2d 907, 916 (2010)) (asserting that Nebraska law follows "that whether a duty exists is a policy decision.").

\textsuperscript{143} Compare Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 37 illus. 1 (Am. Law Inst. 2012) (illustrating that when X Company's employee inspects Y Company's heating system, but fails to find a faulty valve that leaks carbon monoxide and Y Company's employee is harmed by carbon monoxide later, X Company's employee did not initiate a risk of harm, and therefore, sections 38 through 44 of the Restatement would govern whether X Company had a duty of care to Y Company's employee), with Durre v. Wilkinson Dev., v. Inc., 285 Neb. 880, 882, 889, 830 N.W.2d 72, 75, 76, 80 (2013) (inferring that Love Signs, a company who simply serviced a sign, owed a duty toward a stranger who the sign fell on, even though Love Signs had no obligation to identify the faults within the sign's pole).

\textsuperscript{144} Compare Martensen, 283 Neb. at 288, 808 N.W.2d at 863 (adopting section 40(a) and 40(b) of the Restatement), with Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 19 cmt. e (noting that sections 37 through 44 cover instances when a person's conduct did not create a risk of harm to another, but the other person is at a risk of harm because of other forces), and Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 37 at illus. 1, illus. 2 (instructing that when an individual did not do anything to create a risk of harm towards another person, whether the individual owes a duty to that person is governed by sections 38 through 44, not by section 7).

\textsuperscript{145} Compare Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 19 cmt. e (providing that sections 37 through 44 cover instances when a person's conduct did not create a risk of harm to another, but the other person is at a risk of harm because of other forces), with Martensen, 283 Neb. at 286, 288, 808 N.W.2d at 862, 863 (citing Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 40 (Am. Law Inst. 2012)) (interpreting the Restatement to opine that a special relationship, under section 40 of the Restatement, existed between the employer and employee, and therefore, the employer owed the employee a duty), and Peterson,
cause a court to incorrectly interpret a section of the Restatement it has already adopted.\textsuperscript{146} Additionally, if Nebraska courts create this duty, the duty could be extended to people without a mere obligation or connection to the plaintiff and this plaintiff could simply be someone walking down the street.\textsuperscript{147}

IV. CONCLUSION

In A.W. v. Lancaster County School District 0001,\textsuperscript{148} the Supreme Court of Nebraska first adopted Nebraska's new duty analysis.\textsuperscript{149} Since this adoption, no Nebraska court has precisely conducted a negligence duty analysis regarding an actor who did nothing, without the court considering that the person had an affirmative duty towards the plaintiff.\textsuperscript{150} The Restatement (Third) of Torts ("Restatement") demon-

\textsuperscript{146} Compare A.W., 280 Neb. at 218, 784 N.W.2d at 918 (citing Thompson v. Kaczinski, 774 N.W.2d 829, 835 (Iowa 2009)) (adopting section 7 if the Restatement), \textit{with Restatement (Third) of Torts: Liability for Physical & Emotional Harm} § 37 at illus. 1, illus. 2 (providing that when an individual did not do anything to create a risk of harm towards another person, whether the individual owes a duty to that person is governed by sections 38 through 44, not by section 7).

\textsuperscript{147} Compare \textit{Restatement (Third) of Torts: Liability for Physical & Emotional Harm} § 37 illus. 1 (\textit{Am. Law Inst.} 2012) (explaining that when X Company's employee inspects Y Company's sign, but fails to identify its defective design and Y Company's employee is later harmed when the sign fails, X Company's employee did not initiate a risk of harm, and therefore, sections 38 through 44 of the Restatement would govern whether X Company had a duty of care to Y Company's employee), \textit{with Durre}, 285 Neb. at 882, 889, 830 N.W.2d at 75, 76, 80 (implying that Love Signs, a company who simply serviced a sign, owed a duty toward a stranger who the sign fell on, even though Love Signs was not responsible for maintaining the defective pole).

\textsuperscript{148} 280 Neb. 205, 784 N.W.2d 907 (2010).

\textsuperscript{149} A.W. v. Lancaster Cnty. Sch. Dist. 0001, 280 Neb. 205, 218, 784 N.W.2d 907, 918 (2010) (citing Thompson v. Kaczinski, 774 N.W.2d 829, 835 (Iowa 2009)).

\textsuperscript{150} See Durre v. Wilkinson Dev., Inc., 285 Neb. 880, 889, 830 N.W.2d 72, 80 (2013) (implying that a company owed a duty of reasonable care towards someone in a vehicle when it serviced a sign); Olson v. Wrenshall, 284 Neb. 445, 452-54, 822 N.W.2d 336, 342-43 (2012) (explaining that a physician does not owe a duty of care towards third parties through a physician-patient relationship); Martensen v. Rejda Bros., 283 Neb. 279, 288, 808 N.W.2d 855, 863 (2012) (establishing that the employer owed a duty to the employee through a special relationship); Ginapp v. City of Bellevue, 282 Neb. 1027, 1034, 1036, 809 N.W.2d 487, 493-94 (2012) (opining that a special relationship existed between a police officer and an assailant, but that it had ended because the police officer no longer had custody or control over the assailant); A.W., 280 Neb. 205, 211, 784 N.W.2d 907, 914 (2010) (citing Sharkey v. Bd. of Regents of Univ. of Nebraska, 260 Neb. 166, 182, 615 N.W.2d 889, 902 (2000), \textit{abrogated by A.W.}, 280 Neb. 205, 784 N.W.2d 907) (explaining that the school consented to the fact that it owed a landowner-invitee duty to the student); Peterson v. Kings Gate Partners- Omaha I, I.L.P., 290 Neb. 658, 661, 664, 861 N.W.2d 444, 447-449 (2015) (identifying that section 40 of the Restatement (Third) of Torts illustrated that the landlord owed the tenant a duty); Kimminau v. City of Hastings, 291 Neb. 133, 148, 864 N.W.2d 399, 412 (2015) (reasoning that a motorist owed a duty up until the time public authorities took action); Henderson v. City of Columbus, 19 Neb. App. 668, 670, 683, 811 N.W.2d 699, 703, 711, 712 (2012) (reasoning
strates that there is a difference between simply failing to prevent harm and affirmatively creating risk.\textsuperscript{151} Section 37 makes clear that an actor must actually do something to affirmatively create a risk of harm, and thus, a duty towards another person—unless the actor owes an affirmative duty to that person, as found in sections 37 through 44 of the Restatement.\textsuperscript{152}

Without clear precedent on how to determine whether a defendant, who took no action, owed a duty towards another, Nebraska courts could create a duty for a defendant towards another through a policy decision.\textsuperscript{153} If Nebraska courts do create this duty, the duty would be extended to an individual with no obligation or connection to the plaintiff and this plaintiff could simply be someone walking down the street.\textsuperscript{154} In order to ensure that Nebraska courts correctly perform the new duty analysis, Nebraska law should adopt section 37 of the Restatement as its guide.

\textit{Carla Stenzel—'16}

\footnotesize{that the city, under the Political Subdivisions Torts Claims Act, owed a duty to homeowners).

\textsuperscript{151} Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 37 cmt. c (Am. Law Inst. 2012).

\textsuperscript{152} Id.

\textsuperscript{153} Compare Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 19 cmt. e (Am. Law Inst. 2012) (deducing that “[b]ecause, as a general rule, the law does not impose an obligation to protect or rescue, defendants are liable in such cases only if they are subject to some affirmative duty providing an exception to the general rule. The doctrines of affirmative duty are addressed in Chapter 7,” which is sections 37 through 44 of the Restatement (Third) of Torts), with Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 7 (Am. Law Inst. 2012) (clarifying that “[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”), and Martensen, 283 Neb. at 287, 808 N.W.2d at 863 (quoting A.W., 280 Neb. at 215, 784 N.W.2d at 916) (discussing that Nebraska law allows policy to determine the existence of a duty).

\textsuperscript{154} Compare Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 37 at illus. 1, illus. 2 (explaining that when an individual did not do anything to create a risk of harm towards another person, whether the individual owes a duty to that person is governed by sections 38 through 44, not by section 7), with Durre, 285 Neb. at 882, 889, 830 N.W.2d at 75, 76, 80 (inferring that Love Signs owed a duty toward a stranger that a sign fell on, when Love Signs never serviced the faulty part of the sign).}