

26-5398

No. ____

FILED

MAY 16 2026

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATE

DETRON L. PERRY,

Petitioner,

v.

JASON B. BOTTLINGER AND

BOTTLINGER LAW L.L.C., ET AL.,

Respondents.

ORIGINAL

ON PETITION FOR A WRIT OF CERTIORARI

FROM THE NEBRASKA SUPREME COURT

Prepared and Submitted:

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QUESTIONS PRESENTED

1. Whether courts violate due process by affirming summary judgment where disputed material facts are resolved against the nonmovant, contrary to this Court's precedents.
2. Whether courts exceed the limits of judicial notice by relying on prior proceedings to resolve contested issues central to liability.
3. Whether due process is violated when courts exclude or disregard critical evidence and witnesses, then grant summary judgment based on an incomplete record.
4. Whether appellate courts deny meaningful review by:
 - a. Refusing oral argument, and
 - b. Issuing summary affirmances and rehearing denials without addressing substantial federal questions.

II

PARTIES TO THE PROCEEDING

The parties are DeTron L. Perry, Cody Haddock and Allstate Insurance Company, Jason B. Bottlinger and Bottlinger Law L.L.C; Stephen Kalhorn and Buchanan Energy; and Kathlin McLaughlin and Federated Insurance Company.

III

RELATED PROCEEDINGS

1. District Court of Douglas County, Nebraska, Summary Judgement No. CI 22-9564 (March 01, 2024)
2. Nebraska Court of Appeals, No. A-24-506 (Oct. 14, 2025)
3. Nebraska Supreme Court (Petition for Further Review denied) (Feb. 17, 2026).

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OPINIONS BELOW**(Rule 14.1(i))**

The decision of the Nebraska Court of Appeals is an unpublished memorandum opinion:

Perry v. Bottlinger, No. A-24-506 (Neb. Ct. App. Oct. 14, 2025), reproduced in the Appendix.

The order denying rehearing (Dec. 19, 2025) and the Nebraska Supreme Court's denial of further review and related relief are unpublished and reproduced in the Appendix.

JURISDICTION

(Rule 14.1(a))

The Nebraska Supreme Court denied discretionary review on February 17th, 2026. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(Rule 14.1(b))

U.S Const. amend. V

U.S. Const. amend. XIV

Federal Rule of Evidence 201

STATEMENT OF THE CASE

(Rule 14.1(g))

The decision below, though unpublished, illustrates a recurring pattern: summary judgment used as a substitute for trial despite disputed facts and evidentiary conflict.

1. The Court of Appeals' Framing of the Case

The Nebraska Court of Appeals characterized this case as a straightforward malpractice action in which Respondent:

1. Secured policy limits (\$75,000 total), and
2. Submitted an affidavit asserting compliance with the standard of care.

Based on that affidavit, the court held that Respondent established a prima facie case, shifting the burden to Petitioner to produce evidence.

But that framing is precisely where the constitutional error begins.

2. The Court's Treatment of Disputed Facts

The court acknowledged Petitioner's allegations of:

1. Fraud, concealment, and misrepresentation,
2. Failure to investigate additional claims (including premises liability), and
3. Improper handling of settlement proceeds.

Yet the court dismissed those claims because Petitioner did not produce:

1. Expert testimony, or
2. Evidence sufficient to overcome Respondent's affidavit.

In doing so, the court:

1. Accepted Respondent's version of events as dispositive,
2. Discounted conflicting inferences, and
3. Effectively resolved factual disputes at the summary judgment stage.

3. Judicial Notice and Prior Proceedings

The court further upheld the trial court's reliance on judicial notice of Petitioner's prior lawsuit to support dismissal and limit claims.

Although framed as a routine application of res judicata principles, the court's approach:

1. Relied on prior proceedings to foreclose factual development, and
2. Prevented Petitioner from presenting additional or clarifying evidence.

4. Treatment of Evidence and Witnesses

The court declined to consider Petitioner's claims regarding:

1. Exclusion of subpoenaed witnesses, and

2. Exclusion of evidence,

not because those claims lacked merit, but because they were deemed insufficiently assigned or argued.

This procedural disposition had a substantive effect:

critical evidence was never evaluated on the merits.

5. Procedural Posture on Appeal

The Court of Appeals:

1. Denied oral argument,
2. Issued a memorandum affirmance, and
3. Denied rehearing without opinion.

The Nebraska Supreme Court:

1. Denied further review.

At no stage were Petitioner's constitutional claims meaningfully addressed.

REASONS FOR GRANTING THE WRIT

VI. THIS CASE PRESENTS AN ACKNOWLEDGED AND OUTCOME-DETERMINATIVE SPLIT OF AUTHORITY

Lower courts are openly divided on a recurring and dispositive question of federal procedure:

Whether a defendant's affidavit—particularly in professional negligence cases—may, standing alone, justify summary judgment by shifting the burden to the plaintiff to produce expert testimony, or whether such affidavits merely create competing factual inferences that must be resolved by a jury.

Compare decisions of the Eleventh Circuit and other courts, which hold that even self-serving testimony can create a triable issue of fact, with decisions of the Nebraska courts and similar jurisdictions, which permit a defendant's affidavit to eliminate triable issues altogether absent expert rebuttal.

This division directly controls the outcome of cases nationwide and warrants this Court's intervention under Supreme Court Rule 10(a).

A. Federal Circuits Recognize That Self-Serving Testimony Can Create Triable Issues

Several federal courts of appeals have made clear that credibility determinations and competing testimony cannot be resolved at summary judgment, even where evidence is self-serving.

The Eleventh Circuit has squarely held:

“Even if a statement in an affidavit is self-serving, it may be sufficient to create a genuine issue of material fact.”

— United States v. Stein, 881 F.3d 853, 857 (11th Cir. 2018).

Similarly, the Second Circuit has emphasized that:

“The nonmoving party is entitled to rely on his own testimony to establish disputed issues of fact.”

— *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 57 (2d Cir. 1998).

And the Ninth Circuit likewise holds:

“A self-serving affidavit is sufficient to create a genuine issue of material fact if it is based on personal knowledge and sets forth specific facts.”

— *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497–98 (9th Cir. 2015).

These courts uniformly recognize that summary judgment cannot be used to weigh credibility or resolve competing factual narratives.

B. Nebraska and Similar Jurisdictions Permit Defendant Affidavits to Eliminate Claims

In direct tension with those decisions, the Nebraska Court of Appeals held here that:

1. A defendant attorney’s affidavit asserting compliance with the standard of care
2. Establishes a prima facie case, and
3. Requires the plaintiff to produce expert testimony or equivalent evidence to avoid summary judgment

See *Perry v. Bottlinger*, No. A-24-506, slip op. at 8–10 (Neb. Ct. App. Oct. 14, 2025).

That approach mirrors decisions in other jurisdictions requiring expert rebuttal to defeat summary judgment in malpractice cases, even where factual disputes exist. See, e.g.:

Rice v. Poppe, 293 Neb. 467, 881 N.W.2d 162, 170 (2016) (defendant affidavit may establish prima facie case)

Boyle v. Welsh, 256 Neb. 118, 589 N.W.2d 118, 123 (1999)

Under this rule, the absence of expert testimony—rather than the absence of factual dispute—becomes dispositive, effectively allowing summary judgment to substitute for trial.

C. The Conflict Is Direct and Outcome-Determinative

These approaches cannot be reconciled:

The Eleventh, Second, and Ninth Circuits hold that even minimal testimony can create a triable issue;

Nebraska courts hold that absent expert rebuttal, a defendant's affidavit can eliminate triable issues entirely.

The divergence is not academic—it determines whether cases proceed to trial or are dismissed at the threshold.

Had this case arisen in a jurisdiction following Nigro, Danzer, or Stein, Petitioner's claims—supported by his own testimony and documentary evidence—would have been submitted to a jury.

Instead, under the rule applied below, those claims were terminated without trial.

D. The Split Extends to the Use of Judicial Notice as a Dispositive Tool

A parallel conflict exists regarding the scope of judicial notice.

Federal courts strictly limit judicial notice to undisputed facts, cautioning that it cannot be used to resolve contested issues:

Courts may not take judicial notice of facts “subject to reasonable dispute.”
— Fed. R. Evid. 201(b); see also *Lee v. City of Los Angeles*, 250 F.3d 668, 689–90 (9th Cir. 2001).

Yet the decision below approved reliance on prior proceedings not merely as background—but as a basis to foreclose claims, effectively resolving contested issues without evidentiary testing.

This reflects a broader divide over whether judicial notice is:

1. A limited evidentiary doctrine, or
2. A mechanism for resolving claims at the pleading or summary judgment stage.

E. The Split Also Encompasses Procedural Defaults Versus Constitutional Review

The court below declined to consider claims involving:

1. Excluded witnesses, and
2. Excluded evidence

based on briefing technicalities.

But this Court has cautioned that procedural rules must not be applied in a manner that defeats substantial rights. See:

Hormel v. Helvering, 312 U.S. 552, 557 (1941)

Singleton v. Wulff, 428 U.S. 106, 121 (1976)

Lower courts are divided on how strictly to apply such rules when constitutional issues are implicated—further underscoring the need for clarification.

F. This Case Is an Ideal Vehicle to Resolve the Conflict

This case squarely presents the split:

1. The court below relied on a defendant affidavit to terminate claims
2. It required expert rebuttal as a prerequisite to trial
3. It approved judicial notice as a dispositive mechanism
4. It declined to review evidentiary exclusions on procedural grounds

The issues are:

1. Cleanly presented;
2. Fully developed;
3. Outcome-determinative

CONCLUSION

This Court's intervention is necessary to restore uniformity and reaffirm a foundational principle:

Summary judgment cannot replace trials where genuine disputes of fact exist.

Respectfully submitted,

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