**SUPREME COURT OF NEBRASKA**

# Parks v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.

268 Neb. 499 (2004) · Decided August 6, 2004

## SUMMARY

The Nebraska Supreme Court considered whether an investor's claim against a securities broker was governed by the statute of limitations for professional negligence rather than the limitations period for breach of oral contract. The court held that the broker was not a professional under Nebraska's statutory definition because his licensing and training did not require the type of extensive preparation associated with a profession. The court also held that the defendant's alternative statute-of-limitations arguments were not preserved for appellate review and affirmed.

## CASE DETAILS

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| COURT | Supreme Court of Nebraska |
| WRITING FOR THE COURT | McCormack, J. |
| JURISDICTION | Nebraska |
| DECIDED | August 6, 2004 |
| DISPOSITION | affirmed |
| PROCEDURAL POSTURE | Merrill Lynch appealed from the district court's denial of its motions for judgment notwithstanding the verdict, directed verdict, and new trial after the jury was discharged as deadlocked and the court declared a mistrial. |
| STANDARD OF REVIEW | The applicability of a statute of limitations is a question of law reviewed independently. On a motion for judgment notwithstanding the verdict, the moving party admits as true the relevant evidence favorable to the opposing party, and judgment may be granted only when reasonable minds can draw but one conclusion. |
| PRECEDENTIAL VALUE | Published Nebraska Supreme Court opinion; precedential. |
| PARTIES | Merrill, Lynch, Pierce, Fenner & Smith, Incorporated v. Susan K. Parks |

## TOPICS

breach of contract · statute of limitations · preservation of error · appellate procedure · statutory interpretation

## PRACTICE AREAS

contract law · professional negligence · civil procedure · appellate procedure · statutes of limitations

## QUESTIONS PRESENTED

1. Whether Parks' claim was one for professional negligence rather than breach of contract, such that Nebraska's professional-negligence statute of limitations applied.
2. Whether Merrill Lynch preserved its arguments that Parks' claim was barred by the statutes of limitations for ordinary negligence or breach of oral contract.
3. Whether the appeal from denial of judgment notwithstanding the verdict was properly before the court after the jury was discharged because it could not reach a verdict.

## HOLDINGS

1. Kenton was not a professional within the meaning of Neb. Rev. Stat. § 25-222; therefore, the professional-negligence statute of limitations did not apply to Parks' claim.
2. Merrill Lynch failed to preserve its arguments under the ordinary-negligence and breach-of-oral-contract statutes of limitations because it did not assert those grounds in its directed-verdict motions made at the close of Parks' evidence and renewed at the close of all evidence.
3. The appeal was properly before the court because Nebraska statutes authorize an appeal from denial of judgment notwithstanding the verdict after a jury has been discharged for inability to reach a verdict.

## KEY QUOTATIONS

> *"In determining whether a particular act or service is professional in nature, we must look to the nature of the act or service itself and the circumstances under which it was performed."* (at 506)

> *"a college degree embodies such characteristics and that licensing, although not dispositive, strongly indicates that an occupation is a profession."* (at 507)

> *"For these reasons, we conclude that Kenton was not a professional."* (at 510)

## FACTUAL BACKGROUND

Parks received approximately $800,000 from the sale of stock to an employee stock ownership plan and sought to reinvest the proceeds in highly rated, long-term, noncallable bonds. She alleged that Merrill Lynch's agent, Richard Kenton, purchased callable bonds instead, causing bonds to be called before maturity and allegedly resulting in lost earnings and premature income-tax liability. Kenton was a licensed securities representative and a Merrill Lynch trainee, but he had no college degree, no prior ESOP-rollover experience, and had acted under Parks' investment criteria.

## PROCEDURAL HISTORY

Parks sued Merrill Lynch in the Douglas County District Court for breach of an oral contract concerning the purchase of noncallable bonds. The jury could not reach a verdict, so the trial court declared a mistrial and reset the case for trial. The court denied Merrill Lynch's posttrial motions, and Merrill Lynch appealed.

## DISPOSITION

affirmed

## CASES CITED

- Black's Law Dictionary 204 (6th ed. 1990)
- Jorgensen v. State Nat. Bank & Trust, 255 Neb. 241, 583 N.W.2d 331 (1998)
- Holmes v. Crossroads Joint Venture, 262 Neb. 98, 629 N.W.2d 511 (2001)
- Snyder v. Contemporary Obstetrics & Gyn., 258 Neb. 643, 605 N.W.2d 782 (2000)
- McClure v. Forsman, 266 Neb. 90, 662 N.W.2d 566 (2003)
- Critchfield v. McNamara, 248 Neb. 39, 532 N.W.2d 287 (1995)
- Egan v. Stoler, 265 Neb. 1, 653 N.W.2d 855 (2002)
- Reinke Mfg. Co. v. Hayes, 256 Neb. 442, 590 N.W.2d 380 (1999)
- Lawyers Title Ins. Corp. v. Hoffman, 245 Neb. 507, 513 N.W.2d 521 (1994)
- Tylle v. Zoucha, 226 Neb. 476, 412 N.W.2d 438 (1987)
- Maloley v. Shearson Lehman Hutton, Inc., 246 Neb. 701, 523 N.W.2d 27 (1994)
- Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc., 192 Neb. 431, 222 N.W.2d 125 (1974)
- Georgetown Ltd. Part. v. Geotechnical Servs., 230 Neb. 22, 430 N.W.2d 34 (1988)
- Motor Club Ins. Assn. v. Fillman, 5 Neb. App. 931, 568 N.W.2d 259 (1997)
- Garden v. Frier, 602 So. 2d 1273 (Fla. 1992)
- Chase Scientific Research v. NIA Group, 96 N.Y.2d 20, 749 N.E.2d 161, 725 N.Y.S.2d 592 (2001)
- Spulak v. Tower Ins. Co., 251 Neb. 784, 559 N.W.2d 197 (1997)
- Ditloff v. Otto, 239 Neb. 377, 476 N.W.2d 675 (1991)
- In re Estate of Fehrenkamp, 154 Neb. 488, 48 N.W.2d 421 (1951)