

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THOMAS R. ZAKRZEWSKI,
Plaintiff,

vs.

DEPARTMENT OF MOTOR VEHICLES,
Defendant.

Case No. CI00-126

**ORDER DENYING MOTION TO
PROCEED *IN FORMA*
*PAUPERIS***

DATE OF HEARING: No hearing held.

SUBJECT OF ORDER: Plaintiff's motion to proceed in forma pauperis.

ORDER: After examination of the files, the court finds, determines, and orders:

1. The plaintiff filed his motion and affidavit seeking leave to commence this case without payment of fees and costs on August 3, 2000.

2. In 1999, the statutes relating to proceedings in forma pauperis were substantially modified. Section 25-2301.01 provides:

Any county or state court . . . may authorize the . . . appeal therein, of a . . . criminal case in forma pauperis. Any application to proceed in forma pauperis *shall include an affidavit stating* that the affiant is unable to pay the fees and costs or give security required to proceed with the case, the nature of the action . . . , and *the affiant's belief that he or she is entitled to redress.*

NEB. REV. STAT. § 25-2301.01 (Supp. 1999) (emphasis supplied).

3. While not totally in the language of the statute, the words used in the affidavit at least arguably meet the first requirement that the affidavit state "that the affiant is unable to pay the fees and costs or give security required to proceed with the case." Even as to this requirement, previous Supreme Court decisions require that the affidavit follow the language of the statute, which the affidavit partially fails to do. The affidavit meets the second requirement to state "the nature of the action . . ." However, even the most liberal construction cannot discern any words stating "the affiant's belief that he or she is entitled to redress."

4. In *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995), the Supreme Court stated that the poverty affidavit must follow the language of the statute. The Court also stated that an inadequate affidavit does not waive the mandatory docket fee or vest jurisdiction. *Id.* In that case, the

Court recognized that a poverty affidavit serves as a substitute for the docket fee otherwise required. In *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996), the Supreme Court, citing *Schmailzl*, concluded that if the poverty affidavit in lieu of docket fee on appeal is not sufficient to meet the statutory requirements, the appeal has not been perfected. This court acknowledges that *Schmailzl* and *Noelle F.* were decided under the former statute.

5. Upon careful analysis, this court concludes that the rationale of the previous decisions is not affected by the statutory changes and is consistent with the Legislature's intention.

6. While the jurisdictional document might now be the application to proceed *in forma pauperis*, the statute requires that the application "shall include" the affidavit stating the required statements. The use of the word "shall" is presumed to constitute a mandatory requirement. *State v. Jensen*, 259 Neb. 275, ___ N.W.2d ___ (2000). In addition, the Legislature is presumed to have been familiar with the previous decisions of the Supreme Court. *Halstead v. Rozmiarek*, 167 Neb. 652, 94 N.W.2d 37 (1959). Consequently, it appears from the language of the statute, in light of the previous Supreme Court decisions, that the Legislature intended that the application, including the required affidavit, would substitute for the filing fee. Consequently, the plain language of the statute would direct the conclusion that an inadequate affidavit thereby renders inadequate the application, upon which the court proceeds the same as if no application had been filed. Because the application and affidavit do not show the date of the administrative order from which appeal is sought, this court cannot determine whether the 30-day period to perfect the appeal has expired. If the time has not expired, the court could consider a timely amended application and affidavit.

7. The only matter requiring further discussion is the effect of the other language in § 25-2301.02 that requires the application be granted unless there is an objection upon either or both of two bases, i.e., that the affidavit is untruthful (affiant has sufficient funds) or that the appeal is frivolous or malicious. That language has no application where an inadequate application, i.e., an inadequate affidavit, has been filed. Both of the grounds specified address the merits of the affidavit rather than the form. The Legislature obviously intended to provide a procedure for adjudication of an application's merits. See *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995). But there is no point to the procedure where the underlying application and affidavit are legally inadequate to invoke the statute.

8. Section 25-1301.02 commands that the application be granted unless there is an objection. But where the application is legally insufficient to constitute a proper application, the statutory mandate obviously cannot apply.

9. Because the mandatory affidavit, deemed by the statute as part of the application, is legally inadequate, the same must be denied without hearing.

10. The court therefore orders that the application *in forma pauperis* be denied without prejudice to any timely amended application and affidavit.

IT IS SO ORDERED.

Signed in chambers at Ainsworth, Nebraska, on August 5, 2000.
DEEMED ENTERED upon the date of filing by the court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed "Order Denying Motion to Proceed In Forma Pauperis" entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge