

**IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA**

**W.F.M. INC.,**

Plaintiff,

vs.

**CHERRY COUNTY, NEBRASKA,**

Defendant.

Case No. CI00-21

**ORDER DENYING MOTION  
FOR NEW TRIAL**

**DATE OF HEARING:** November 17, 2000.

**DATE OF RENDITION:** February 21, 2001.

**DATE OF ENTRY:** Date of filing by court clerk per § 25-1301(3).

**APPEARANCES:**

For plaintiff: Michael B. Kratville.

For defendant: Eric A. Scott, Cherry County Attorney.

**SUBJECT OF ORDER:** Plaintiff's (1) motion for new trial, and, (2) amended motion for new trial.

**PROCEEDINGS:** See journal entry filed December 1, 2000.

**MEMORANDUM:**

1. The plaintiff filed a motion for new trial concerning the order granting the defendant's motion for summary judgment. After more than 10 days from the entry of the summary judgment, the plaintiff filed an amended motion. A motion for new trial cannot be amended by assigning new grounds after the statutory time for filing such motion has expired. *State ex rel. Sorensen v. Commercial State Bank*, 126 Neb. 482, 253 N.W. 692 (1934). To the extent that the amendments merely reformulate a ground set forth in the original motion, this court has considered the amended motion. To the extent that an amendment attempts to state a new and separate ground, it must be disregarded.

2. A new trial is a statutory remedy and can be granted by a court of law only upon the grounds, or some of them, provided for by the statute. *Risse v. Gasch*, 43 Neb. 287, 61 N.W. 616 (1895). A motion for new trial must be made in the terms, substantially, in which it may be allowed within the rules of law, or it will be denied. *Real v. Hollister*, 20 Neb. 112, 29 N.W. 189 (1886). The motion

and the amended motion refer only in the most oblique manner possible to the statutory grounds for a new trial. NEB. REV. STAT. § 25-1142 (Cum. Supp. 2000). The motion contains the words “contrary to law” but otherwise fails to allege any statutory grounds. NEB. REV. STAT. § 25-1142(6) (Cum. Supp. 2000). Nevertheless, the court has endeavored to identify any proper statutory grounds for new trial.

3. This court’s summary judgment addressed a ground not expressly raised by the defendant’s motion, i.e., noncompliance with the claim provision of § 77-1735. The plaintiff argues that recent Nebraska Supreme Court decisions suggest that the noncompliance must be affirmatively pleaded. E.g., *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 507 N.W.2d 294 (1997). In this case, unlike *Crown Products* and other cases addressing similar matters, the defect appeared on the face of the plaintiff’s petition, which specifically alleged the claim for refund. The court is not persuaded by the plaintiff’s arguments concerning the merits of this matter.

4. However, the court notes that in *Svoboda v. Hahn*, 196 Neb. 21, 241 N.W.2d 499 (1976), the Nebraska Supreme Court stated that before a taxpayer can recover taxes under a statutory procedure, the taxpayer must *substantially* comply with the statutory requirement. This court concludes that service upon the county treasurer’s attorney would constitute substantial compliance.

5. In *City Nat. Bank of Lincoln v. School Dist. of City of Lincoln*, 121 Neb. 213, 236 N.W. 616 (1931), upon which this court relied in its prior order, the service was statutorily required upon the treasurer of the taxing school district. The Supreme Court held that service upon the county treasurer was not compliance. This court concludes that such service would not have been deemed substantial compliance, as the county treasurer and the school district are entirely different legal entities. Here, however, the plaintiff’s petition alleges that request was made to the attorney for the proper officer. This court is persuaded that this is a sufficient allegation to constitute substantial compliance and distinguishes this situation from that in *City Nat. Bank*.

6. Consequently, the court agrees that § 77-1735 afforded no proper basis for the granting of the defendant’s summary judgment motion at that point in the proceeding. However, the decision on the motion for new trial must consider the other matter discussed in the summary judgment ruling.

7. The motion for new trial asserts that the court granted the motion on two grounds not briefed and upon which neither party submitted evidence. To the extent that the motion addresses the § 77-1735 issue, that matter is rendered moot by the discussion above.

8. The plaintiff strenuously argues that reliance upon § 77-1742 was improper as beyond the scope of the defendant's motion. In the usual case, a motion for summary judgment states no more than the statutory grounds, i.e., that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. NEB. REV. STAT. § 25-1332 (Reissue 1995). Had the summary judgment motion been so stated, the plaintiff's claim would deserve little discussion. However, the motion did state rather specific grounds.

9. The defendant's motion expressly stated, *inter alia*, that "the *return of the County Treasurer* of Cherry County submitted to the Cherry County Board of Commissioners *does not contain any of the information required* by Neb. Rev. Stat. § 77-1738 (Reissued [sic] 1996) as a condition precedent to the striking of personal property taxes, . . ." (Emphasis supplied.) Thus, the motion expressly addressed the content of the return of the treasurer. Section 77-1742 sets forth the requirements for that content. If the plaintiff's position is that no reference may be had to any other statute than one expressly stated in the defendant's motion, it is downright silly and utterly unsupported by any authority.

10. If, as this court believes, the plaintiff's argument is that he was surprised by the reference to § 77-1742, the answer is that he should not have been surprised as the words of the motion give fair notice that the *content* of the treasurer's *return* was being attacked as insufficient. The defendant's motion afforded fair and proper notice of the ground asserted, specifically challenging the sufficiency of the return.

11. The plaintiff claims that he would have adduced additional evidence. The issue is not, however, whether grounds existed for the treasurer to make a sufficient return as contemplated by § 77-1738 and as prescribed by § 77-1742. The issue is whether the treasurer's return, as it was actually made, satisfied the statutory requirements and triggered any corresponding duty of the county board. Extrinsic evidence cannot not address that issue. The return is properly before the court; indeed, it is attached to and incorporated in the plaintiff's petition. It is the content of the return as made that controls, and not some evidence of what the treasurer might have known at the time. Additional evidence is not going to change the result on this legal issue.

12. The plaintiff argues that the court lacked any evidence to determine the sufficiency of the return. As noted above, the return itself must be examined to make that determination. The return is

attached to and incorporated in the plaintiff's petition as Exhibit "A." The plaintiff's petition was certainly a pleading on file at the time of filing and hearing on the summary judgment motion. NEB. REV. STAT. § 25-1332 (Reissue 1995). Indeed, the petition with the attachment was marked as Exhibit 3 and received in evidence on the summary judgment motion. Exhibit 3. An admission made in an un-superseded pleading is more than an ordinary admission; it is a judicial admission and constitutes a waiver of all controversies so far as an adverse party desires to take advantage of it, and therefore, it is a limitation of the issues. *Sack Bros. v. Tri-Valley Coop., Inc.*, 260 Neb. 312, 616 N.W.2d 312 (2000). The return also appears as an attachment to Exhibit 1, the affidavit of Dorthea Cook, and as an attachment to Exhibit 2, the affidavit of James Van Winkle. Exhibits 1 and 2.

13. This court simply cannot comprehend an argument that the content of the treasurer's return is not in the evidence. Evidence of *apparent* compliance with the statutory requirement must be determined from the face of the return itself. Extrinsic evidence would not be admissible to determine whether the face of the return apparently complied with the statutory requirements. A return obviously insufficient on its face, as this one was, cannot be rehabilitated by resort to extrinsic evidence.

14. The motion for new trial also claims that the plaintiff's "second cause of action" was not addressed by the court's order. The petition does not set forth two causes of action. NEB. REV. STAT. § 25-805 (Reissue 1995). The plaintiff's motion does not identify this "second cause of action." Only by reference to the plaintiff's brief on the motion for new trial does it appear that plaintiff is referring to allegations of paragraph 11 of the petition concerning § 20-148. However, the plaintiff's reliance on § 20-148 is misplaced.

15. Section 20-148 is a procedural statute which does not create any new substantive rights. *Adkins v. Burlington Northern Santa Fe RR. Co.*, 260 Neb. 156, \_\_\_ N.W.2d \_\_\_ (2000); *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996). Section 20-148 was enacted so that plaintiffs seeking to vindicate rights already existing under constitutional or statutory law could avoid the review procedures of agencies like NEOC. *Id.* In § 20-148, the Legislature created an alternative method for pursuing civil rights claims that are defined elsewhere in constitutional or statutory law. *Id.*

16. NEB. REV. STAT. § 20-148 (Reissue 1997) (emphasis supplied) provides in relevant part:

Any person or company, as defined in section 49-801, *except any political subdivision*, who subjects or causes to be subjected any citizen of this state or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the United States Constitution or the Constitution and laws of the State of Nebraska, shall be liable to such injured person in a civil action or other proper proceeding for redress brought by such injured person.

17. As the Nebraska Court of Appeals observed in *Sinn v. City of Seward*, 3 Neb. App. 59, 523 N.W.2d 39 (1994), the plain language of the statute excludes political subdivisions from its operation. In *Sinn*, the court also recalled:

The Nebraska Supreme Court has discussed this statute and narrowed the scope of the statute from what might appear from the statutory language. *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984), involved a certified question from the federal court as to whether the state had waived its sovereign immunity for actions brought in federal court under 42 U.S.C. § 1983 to protect rights under the contract clause (article I, § 10, of the U.S. Constitution) and property interests protected under the 14th Amendment. The court held that § 20-148 did not waive the sovereign immunity of the State of Nebraska as to actions brought in federal court under 42 U.S.C. § 1983 to protect rights under the contract clause and property interests protected under the 14th Amendment.

In *Wiseman*, the Supreme Court discussed the legislative history of § 20-148, stating:

The legislative history of § 20-148 indicates that the major focus of the statute was to wipe out private acts of discrimination by private employers, thus excluding the state. Judiciary Committee Hearing, L.B. 66, 85th Leg., 1st Sess. (Jan. 18, 1977).

Further support for this conclusion is found in other statutes passed by the Nebraska Legislature which specifically provide the state is subject to suit only under certain circumstances. See, e.g., Neb. Rev. Stat. §§ 24-319 (Reissue 1979), 25-1012.01 (Cum. Supp. 1984), 81-8,209 (Reissue 1981), 48-1126 (Supp. 1983), and 48-1227.01 (Supp. 1983).

218 Neb. at 721, 358 N.W.2d at 771.

Although we read *Wiseman* to suggest that the sweep of § 20-148 is limited to private acts of discrimination, presumably of a constitutional dimension, by private employers, the Eighth Circuit Court of Appeals has gone further in *Ritchie v. Walker Mfg. Co.*, 963 F.2d 1119 (8th Cir. 1992), a case involving a suit by employees alleging that their termination for failing drug tests violated their employment contracts, as well as state and federal constitutional and statutory provisions. The plaintiffs in *Ritchie* alleged a cause of action against their private employer using § 20-148. The circuit court agreed with the district court's conclusion that § 20-148 did not apply to drug testing by private employers for several reasons:

[P]erhaps most importantly, the statute's legislative history indicates that its purpose was limited. Summarizing Section 20-148, its sponsor explained that "[t]he bill is designed to allow people who have complaints of discrimination to go into court rather than being compelled to go only through the Equal Opportunity Commission." Floor Debate, L.B. 66, Judiciary Committee, 86th Leg. 1st Sess. 434-35 (Feb. 11, 1977). Thus, the intent of section 20-148 is to allow plaintiffs to bypass the time-consuming administrative procedures of the Equal Employment Opportunity Commission. This legislative history demonstrates that the statute does not sweep as far as it first appears. Indeed, section 20-148 merely usurps the jurisdiction of the EEOC, which by statute already entertains claims charging private discrimination. Conversely, no analogous state or federal statute reaches the private search and seizure involved here.

963 F.2d at 1122-23.

*Sinn v. City of Seward, supra* at 75-77, 523 N.W.2d at \_\_\_\_.

18. In Nebraska, a county is a political subdivision of the state having subordinate powers of sovereignty conferred by the legislature for purposes of local administration. *Franek v. Butler County*, 127 Neb. 852, 257 N.W. 235 (1934). The County of Cherry is such a county. NEB. REV. STAT. §§ 22-116 and 23-101 (Reissue 1997). Consequently, the County of Cherry is a political subdivision excluded from the operation of § 20-148.

19. In *King v. State*, 260 Neb. 14, 614 N.W.2d 341 (2000), the Nebraska Supreme Court again stated that statutes that purport to waive the State's sovereign immunity must be clear in their intent. Statutes that purport to waive the State's sovereign immunity are strictly construed in favor of the sovereign and against the waiver. A waiver of sovereign immunity will only be found where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction. *Id.* The required statutory consent cannot be conferred by acquiescence or consent of the parties or counsel to litigation, and the conduct of the case by the county attorney cannot waive the issue. *Henderson v. Department of Corr. Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999); *McNeel v. State*, 120 Neb. 674, 234 N.W. 786 (1931); *Eidenmiller v. State*, 120 Neb. 430, 233 N.W. 447 (1930).

20. Where sovereign immunity has not been waived, the district court lacks subject matter jurisdiction. *King v. State, supra*. When lack of jurisdiction is apparent on the face of the record, yet the parties fail to raise that issue, it is the duty of a court to raise and determine the issue of jurisdiction sua

sponte. *Vopalka v. Abraham*, 260 Neb. 737, \_\_\_ N.W.2d \_\_\_ (2000). It is the power and duty of a court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *Id.*

21. For purposes of applying the rule regarding pleadings, a summary judgment motion based on a jurisdictional defect is treated the same as a demurrer based on a jurisdictional defect. *Rice v. Adam*, 254 Neb. 219, 575 N.W.2d 399 (1998). After a summary judgment motion on jurisdictional grounds has been granted, but where there is a reasonable possibility that the jurisdictional defect may be cured by amendment, denying the plaintiff the opportunity to replead is an abuse of discretion. *Id.* After a demurrer is sustained, leave to amend is to be given, unless it is clear that no reasonable possibility exists that the plaintiff will be able to correct the deficiency. *Id.* No amendment to the plaintiff's petition would change the statutory exclusion of § 20-148.

22. For the reasons stated above, the motion for new trial should be denied.

**JUDGMENT:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The plaintiff's motion for new trial is denied.

Signed in chambers at Ainsworth, Nebraska, on February 21, 2001.  
DEEMED ENTERED upon filing by 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 \_\_\_\_.
- 9 Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days stating "Petition dismissed with prejudice."  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- Note the decision on the trial docket as: [date of filing] Signed "Order Denying Motion for New Trial" entered.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge