

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

BRENDA L. KELLER,

Plaintiff,

vs.

THOMAS N. TAVARONE, M.D.,

Defendant.

Case No. CI00-64

JUDGMENT OF DISMISSAL

DATE OF HEARING: August 27, 2001.

DATE OF RENDITION: September 4, 2001.

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

TYPE OF HEARING: In chambers at District Courtroom, Holt County Courthouse, O’Neill, Nebraska.

APPEARANCES:

For plaintiff: Robert S. Lannin without plaintiff.

For defendant: Robert W. Wagoner without defendant.

SUBJECT OF ORDER: Defendant’s demurrer to plaintiff’s amended petition.

PROCEEDINGS: See journal entry dictated at time of hearing.

FINDINGS: The court finds and concludes that:

1. The plaintiff asserts a claim for medical malpractice. She first asserted this claim in Case No. 10737. Following a bench trial on the bifurcated issues relating to the Political Subdivisions Tort Claims Act, this court determined that the defendant was an employee of a county-owned and -operated hospital. Because the plaintiff had not filed a claim with the county under the Act, the court dismissed the plaintiff’s petition. The Supreme Court affirmed. *Keller v. Tavarone*, 262 Neb. 2, ___ N.W.2d ___ (2001) (*Keller I*).

2. In *Keller I*, this court declined to determine the applicability of the “savings clause” of NEB. REV. STAT. § 13-919(2) (Reissue 1997). The Nebraska Supreme Court also refused to consider the issue.

3. After this court's decision in *Keller I*, the plaintiff submitted a tort claim to the political subdivision on or about January 27, 2000. After more than six months elapsed, the plaintiff withdrew the tort claim and commenced this action on August 14, 2000. On November 27, 2000, the plaintiff filed an amended petition. The defendant filed a written demurrer, raising (1) absence of personal jurisdiction, (2) absence of subject matter jurisdiction, (3) defect of parties, (4) pendency of another action between the same parties for the same action, and (5) failure to state a cause of action.

4. At hearing, the defendant offered Exhibits 1 and 2. Exhibit 2, the plaintiff's original petition in this case, was received without objection. The plaintiff initially objected to Exhibit 1, but withdrew her objection to pages 3, 4, and 5 of the exhibit, and the defendant withdrew the offer of the balance. Thus, pages 3, 4, and 5 of the exhibit were received without objection.

5. By the time of the hearing on the demurrer, the Supreme Court's decision had issued in *Keller I*. The "pendency of another action" argument thus fell by the wayside. The defendant did not argue any of the other grounds except failure to state a cause of action. Memorandum briefs were submitted by counsel on that issue. The court agrees that the other grounds recited in the demurrer lack merit, and consequently does not address them further.

6. The defendant principally argues the statute of limitations to support the sole remaining ground of the demurrer. A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute. *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001).

7. In *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990), the Nebraska Supreme Court stated that the notice requirement of § 13-905 of the Political Subdivisions Tort Claims Act is a procedural precedent to commencement of a negligence action, not a jurisdictional prerequisite for adjudication of a claim. See also *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997). *Millman* also suggests that the failure to submit a claim may be raised by demurrer. In *Gallion v. O'Connor*, 242 Neb. 259, 494 N.W.2d 532 (1993), the Nebraska Supreme Court affirmed a judgment sustaining a demurrer and dismissing a petition for failure to comply with § 13-920(1). See also *Knight v. Hays*, 4 Neb. App. 388, 544 N.W.2d 106 (1996). This court concludes

that, analogously to a statute of limitations defense, a demurrer should be sustained where the face of the petition shows that the plaintiff failed to comply with the condition precedent of claim submission under § 13-920(1).

8. The plaintiff now expressly relies on the “savings clause” of § 13-919(2). The defendant argues that six month extension of § 13-919(2) began to run upon the argument of the defendant’s demurrer in *Keller I*, or upon the filing and service of the defendant’s answer in *Keller I*, or upon this court’s bifurcation of the matter for separate trial, or when this court ruled on January 12, 2000, that the plaintiff had not satisfied the condition precedent of NEB. REV. STAT. § 13-920(1) (Reissue 1997).

9. None of the first three of those events appears on the face of the plaintiff’s petition. Ordinarily, as a demurrer goes only to those defects which appear on the face of the petition, in ruling on a demurrer, evidence cannot be considered. *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997). However, while a demurrer otherwise goes only to those defects in pleading which appear on the face of the petition and those documents attached to and made a part of it, in ruling on a demurrer, a court may take judicial notice of its own record in an interwoven and interdependent action it previously adjudicated. *Tilt-Up Concrete v. Star City/Federal*, *supra*.

10. This court has consistently required parties seeking this court to take judicial notice of prior proceedings to specifically copy, mark, and offer such records as exhibits. *In re Guardianship of Rebecca B.*, 260 Neb. 922, 621 N.W.2d 289 (2000); *In re Interest of C.K., L.K. and G.K.*, 240 Neb. 700, 484 N.W.2d 68 (1992); *In re Guardianship of Lavone M.*, 9 Neb. App. 245, 610 N.W.2d 29 (2000); *In re Interest of Tabitha J.*, 5 Neb. App. 609, 561 N.W.2d 252 (1997). Neither the date of argument of the demurrer in *Keller I* nor the date of the court progression order in *Keller I* appears in the record made on the present demurrer. Although the progression order is physically within Exhibit 1, it does not appear on pages 3, 4, or 5 which were the only pages ultimately offered and received in Exhibit 1. The court does not consider those potential commencement dates further.

11. The defendant’s answer in *Keller I* was offered and received in evidence without objection. The existence of court records and certain judicial action reflected in a court’s record are facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *Dairyland Power Co-op v. State Bd. Of Equal.*, 238 Neb. 696, 472

N.W.2d 363 (1991). A court may, therefore, judicially notice existence of its records. *Id.* This court may judicially notice the existence and filing of the answer. But judicial notice of *facts* reflected in a court's records is subject to the doctrine of collateral estoppel or of res judicata. *Id.* The *Keller I* answer obviously is not part of this court's judgment in that case. This court concludes that while the court may judicially notice the existence and filing of the answer, the court cannot notice the content of the answer including the certificate of service. That matter does not appear upon the face of the amended petition in this case. The court therefore has no basis to show "the date of mailing of notice to the claimant of such determination by the political subdivision . . ." NEB. REV. STAT. § 13-919(2) (Reissue 1997).

12. Even if it was proper to consider the answer for its recitation of the date of mailing, this court concludes that such answer provides no assistance to the defendant in the present analysis. Section 13-919(2) contemplates a "determination . . . by a political subdivision . . ." *Id.* The statute expressly confers authority to "determine" any tort claim upon the "governing body" of any "political subdivision." NEB. REV. STAT. § 13-904 (Reissue 1997). The statute specifically defines the terms "governing body" and "political subdivision." NEB. REV. STAT. § 13-903 (Cum. Supp. 2000). The definition of "governing body" clearly contemplates action by the "duly elected or appointed body holding the power and authority to determine the appropriations and expenditures" of the political subdivision. *Id.* An attorney at law has authority to represent a client's interests in court and bind his or her client in certain respects. NEB. REV. STAT. § 7-107 (Reissue 1997). That authority clearly does not extend beyond the court proceeding and any judgment resulting therefrom. The *Keller I* answer wholly fails to show any action by the governing body. Certainly, the action of the subdivision's attorney in filing an answer in *Keller I* cannot qualify as the action of the "governing body" to "determine" the claim.

13. This court's judgment in *Keller I* appears on the face of the amended petition. Thus, if the savings clause of § 13-919(2) has any proper application in the present case, the court may consider the effect thereof. Assuming for the moment that the savings clause may be applied, the court concludes that the savings clause does not apply because "the time to make the claim . . . under the act would [not] *otherwise* expire before the end of [the six-month] period." NEB. REV. STAT. § 13-919(2) (Reissue 1997) (emphasis supplied). The amended petition alleges a claim for medical negligence accruing on May 27, 1997. The one-year period to submit the claim to the governing board expired on May 27, 1998.

NEB. REV. STAT. § 13-920(1) (Reissue 1997). The petition in *Keller I* was not filed until December 31, 1998. Thus, the filing of a petition relying upon the Nebraska Hospital-Medical Liability Act had no effect upon the expiration of the time to make the claim. That time had already expired before the plaintiff commenced the action in *Keller I*. The plaintiff's reading of § 13-919(2) would render the word "otherwise" superfluous. Effect must be given, if possible, to all the several parts of a statute, and no sentence, clause, or word should be rejected as meaningless if it can be avoided. *NC+ Hybrids v. Growers Seed Ass'n*, 219 Neb. 296, 363 N.W.2d 362 (1985). This court concludes that, even if applicable to the present case, the savings clause does not extend the time to make the claim.

14. This court also concludes that § 13-919(2) does not apply to political subdivision-employee-negligence cases. That conclusion requires a detailed explanation of the history and development of the act insofar as it applies to claims against subdivision employees.

15. Prior to the enactment of the Political Subdivisions Tort Claims Act, the determination of liability of a political subdivision frequently revolved around the distinction between governmental and proprietary functions. E.g., *Obitz v. Airport Authority of the City of Red Cloud*, 181 Neb. 410, 149 N.W.2d 105 (1967); *Brasier v. Cribbett*, 166 Neb. 145, 88 N.W.2d 235 (1958). By adopting the act, the Legislature intended "to provide uniform procedures for the bringing of tort claims against all political subdivisions, whether engaging in governmental or proprietary functions . . ." NEB. REV. STAT. § 13-902 (Reissue 1997) (originally enacted by 1969 Neb. Laws, ch.138, § 1, p. 627).

16. In *Dieter v. Hand*, 214 Neb. 257, 333 N.W.2d 772 (1983), the defendants contended that the action against individual employees of a public power district constituted an attempt to circumvent the statutory time limitations of the tort claims act. The Nebraska Supreme Court rejected that argument. The court stated that the common-law rule of joint and several liability was not changed by the adoption of the act. It explained that the act was designed to waive the common-law governmental immunity from suit and to provide uniform procedures for the bringing of tort claims against political subdivisions. The court expressly stated that the waiver of immunity of the political subdivision did not decrease a claimant's rights against individual defendants for their own negligence. The court concluded that tort claims could still be brought against individual employees of a political subdivision for their own negligence.

17. In response, the Legislature enacted what is now codified as § 13-920. NEB. REV. STAT. § 13-920 (Reissue 1997) (added by 1987 Neb. Laws, L.B. 258, § 1). The Legislature amended the tort claims act to limit the rights of claimants against individual defendants. Section 13-920 has not been expressly amended thereafter. Subsection (1) precludes commencement of a suit against the individual employee unless a claim has been submitted to the governing body of the political subdivision within one year after accrual of the claim. Subsection (2) precludes commencement of suit against the individual employee until the claim is disposed, or if not disposed within six months, until withdrawn by the claimant. “Except as provided in section 13-919,” subsection (3) provides a two year statute of limitations from the date of accrual to commence suit. NEB. REV. STAT. § 13-920(3) (Reissue 1997).

18. In subsection (3), the Legislature expressly subordinated the two-year limitation on the time for commencement of suit to the provisions of § 13-919, including the savings clause of § 13-919(2). The Legislature omitted any such exception for the one-year claim submission requirement of subsection (1). The construction applying §13-919(2) to both the claim submission requirement of § 13-920(1) and the suit commencement limitation of § 13-920(3) would effectively nullify the first clause (“[e]xcept as provided in section 13-919”) of § 13-920(3). In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying another statute. *Keller I, supra*. The plaintiff’s construction violates that rule and must be rejected. The Legislature subjected § 13-920(3) to the exceptions in § 13-919, but declined to similarly except the requirement of § 13-920(1). That distinction displays the legislative intent, and no contrary intent appears from the other language of the statute. This court will not adopt a construction which effectively amends § 13-920(3) to remove the first clause.

19. The reasoning of the Nebraska Court of Appeals in *Gatewood v. Powell*, 1 Neb. App. 749, 511 N.W.2d 159 (1993), supports this court’s statutory construction. That case concerned a suit against an individual employee for a claim accruing prior to the effective date of L.B. 258. The Court of Appeals declined to construe the two-year limitation period of § 13-919(1) as applicable to pre-L.B. 258 claims against individual employees under § 13-921. The court noted the specific definition of a tort claim under the act as a claim “against a political subdivision . . .” NEB. REV. STAT. § 13-903(4) (Cum. Supp. 2000). The court observed that the lawsuit brought by Gatewood was not a “tort claim” against a “political subdivision.” *Gatewood v. Powell, supra*. The court determined that Gatewood’s cause of action was

controlled by § 13-921 and not by § 13-919(1). *Id.* A court cannot, under the guise of its powers of construction, rewrite a statute, supply omissions, or make other changes and this is particularly true where it appears that the matter was intentionally omitted. *Id.*

20. As noted above, this court concludes that § 13-920(1) expressly omits any reference to § 13-919, and that § 13-919(2) does not provide any exception to § 13-920(1). This court declines to rewrite § 13-920(1) to supply any such exception. In general, except as restricted by the Constitution, it is the function of the Legislature by the enactment of statutes to declare what the law is. *Nebraska P.P. Dist. v. City of York*, 212 Neb. 747, 326 N.W.2d 22 (1982). The Legislature may not delegate to the courts legislative power. *Id.* Neither should the courts, under the guise of construction, usurp the proper function and power of the Legislature. NEB. CONST. art. II.

21. For the sake of completeness, the court notes that § 13-919 was amended in 1991 by L.B. 15 to change internal references of “this act” to “the Political Subdivisions Tort Claims Act” or “the act.” 1991 Neb. Laws, L.B. 15, § 8. L.B. 15 did not purport to amend § 13-920. In 1987, L.B. 258 expressly amended § 13-901 (previously codified as § 23-2420) to include §§ 13-920 and 13-921 within the Political Subdivisions Tort Claims Act. 1987 Neb. Laws, L.B. 258, § 5. It might be suggested that L.B. 15 impliedly repealed the first clause of § 13-920(3). Repeal of a statute by implication is not favored. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. *Id.* In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying or repealing another statute. *Id.* This court concludes that there is little, if any, repugnancy between the L.B. 15 amendments to § 13-919 and the preexisting language of § 13-920, and that it cannot be described as plain and unavoidable. The court finds no legislative intent, and certainly no clear legislative intent, to amend § 13-920(3) arising from the revisor’s proposed language which was ultimately adopted in L.B. 15.

22. The face of the petition shows the failure to timely submit a claim in compliance with § 13-920(1). Because the “savings clause” of § 13-919(2) does not apply, the plaintiff’s amended petition fails to state a claim.

23. Of course, when a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that an amendment will correct the defect. *Noffsinger v. Nebraska State Bar Ass'n.*, 261 Neb. 184, 622 N.W.2d 620 (2001). The defect in this case arises because of the failure to submit the written claim required by § 13-920(1) within one year of the accrual of the plaintiff's claim. Because there is no way to comply with that requirement, and the savings clause of § 13-919(2) does not apply, it is clear that no reasonable possibility exists that an amendment will correct the defect. Consequently, leave to further amend the amended petition must be denied and the amended petition dismissed with prejudice at plaintiff's cost.

JUDGMENT:

IT IS THEREFORE ORDERED AND ADJUDGED that:

1. JUDGMENT of dismissal is hereby entered in favor of the defendant and against the plaintiff dismissing the plaintiff's amended petition at plaintiff's cost.
2. Any requests, express or implied, for attorneys' fees is denied.

Signed in chambers at Ainsworth, Nebraska, on September 4, 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 ____.
- Mail postcard/notice required by § 25-1301.01 within 3 days ("Amended Petition dismissed with prejudice at plaintiff's cost").
Done on _____, 20__ by ____.
- Note the decision on the trial docket as: [date of filing] Signed "Judgment of Dismissal" entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge