Case No. A-04-000642

In the Court of Appeals of the State of Nebraska

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ROBERT SALTS,

Petitioner-Appellant,

v.

LANCASTER COUNTY, NEBRASKA and BERNIE HEIER, LARRY HUDKINS, DEB SCHORR, RAY STEVENS, and BOB WORKMAN, as the LANCASTER COUNTY BOARD OF COMMISSIONERS for LANCASTER COUNTY, NEBRASKA,

Respondents-Appellees.

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APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

Honorable Bernard J. McGinn, District Judge

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REPLY BRIEF OF APPELLANT

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Prepared and submitted by:

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STATEMENT OF FACTS

When Mr. Salts applied for General Assistance and requested Medical Assistance he was suffering from a number of medical conditions, including large lumps on his left arm and left rib cage, an ear infection, an ingrown toenail, and dental problems. (T16). The lumps on Mr. Salt's arm and ribs were examined by Dr. Harlan Shriner, Medical Director at Cornhusker Place. (E1,1:2,Exhibit B). Dr. Shriner, suspecting the lumps were tumors, ordered Mr. Salts to be sent to the emergency room for an evaluation. *Id.* At the emergency room, theses lumps were diagnosed as multiple lipomas. *Id.* Following the emergency room visit, Mr. Salts continued to have significant pain associated with these lumps. *Id.* Despite these facts, the Appellees continue to refer to these lumps as an "ongoing skin condition." (Appellees' Brief pg. 1).

ARGUMENT

This case is about Lancaster County trying to avoid its statutory duty to provide medical care to all indigent individuals living within the county. Mr. Salts, who has lived in Lancaster County since March 17, 2003, is being penalized for moving to Lancaster County to seek substance abuse treatment at Cornhusker Place. (T16). There is no question that Mr. Salts is otherwise eligible for General Assistance benefits. The only requirement he has failed to meet is that he has not lived in Lancaster County for one year to establish legal settlement. (E2,20:2,1). This durational residency requirement is not consistent with the statutes governing the General Assistance program or with the purpose and intent of the program. The construction of the statutes provided by Lancaster County to support GA 2:101 and 3:101 creates an unconstitutional result and therefore cannot be adopted by this Court.

I. LANCASTER COUNTY HAS A DUTY TO PROVIDE NON-EMERGENCY MEDICAL ASSISTANCE TO MR. SALTS.

It is clear from the plain language of § 68-144 that Lancaster County, as the county where Mr. Salts was living at the time of his application, has a duty to care for him. However, Lancaster County argues that this duty is limited to what the County Board deems necessary. (Appellees' Brief pg. 4-5). In this case, the County has decided that while non-emergency medical care is a necessity for those who have established legal settlement, it is not a necessity for those who are in the process of achieving that status. This policy is not only contrary to the plain language of the statutes governing the General Assistance program, it places individuals, like Mr. Salts, in an impossible situation. To receive any assistance for non-emergency care, Mr. Salts must either leave Lancaster County, where he is working to get his life back on track by receiving substance abuse treatment, and find a way back to Dawson County and obtain

assistance or forego care and wait a full year until he has established legal settlement in Lancaster County.

Lancaster County argues that their position is justified by § 68-114. Specifically that § 68-114 provides the County Board with complete discretion to decide what kind of relief is necessary for those who have not yet achieved legal settlement. (Appellees' Brief pg. 4). While the phrase "as they shall deem necessary" is found within that section of the statute, it must be looked at in context. There is no question that a county does not have to provide any and all assistance that may be requested. However, the phrases leading up to the phrase "as they shall deem necessary" in § 68-114 provide a framework for determining the parameters of a county board's duty and discretion. According to the language of the statute, counties must provide assistance necessary to alleviate sickness, distress, and suffering. Lancaster County ignores the implications of these preceding phrases in its interpretation of the statute.

More evidence of the scope of Lancaster County's duty to provide non-emergency medical care to those who have not yet achieved legal settlement is found in § 68-133. Section 68-133 establishes the framework to be used by counties in drafting their General Assistance guidelines and provides in relevant part:

> Each county shall...[p]rovide a schedule of goods and services *necessary for the maintenance of minimum decency and health* for families of various sizes, including single persons. Such schedule shall include, but not be limited to, food, housing, utilities, clothing, *medical expenses*, burial expenses, laundry, transportation, housing supplies, personal care and such other goods and services as the county board shall deem *necessary to insure the maintenance of minimum health and decency.*

(emphasis added). Section 68-133 applies to the entire operation of the General Assistance program, not just those who have achieved legal settlement, and places a duty on counties to provide services necessary for individuals to maintain a minimum standard of health and decency. This section echoes § 68-114 description of the duty to do what is necessary to address the sickness, suffering, and distress of those who have not yet established legal settlement.

In establishing guidelines for its General Assistance program, Lancaster County has determined that providing non-emergency medical care is necessary for the maintenance of minimum decency and health for families who have achieved legal settlement. *See* GA 3:300-3:506. Yet, for some reason, Lancaster County has determined non-emergency care is unnecessary for those who are in the process of achieving legal settlement. It is a long-standing principle of statutory construction that a statute should not be construed in such a way that it leads to an absurd result. *Ottaco, Inc., v. McHugh*, 263 Neb. 489 (2002). To say that non-emergency care is necessary for someone who has lived here for a year to maintain a minimum standard of health, but not for a similarly situated person who has lived here for three months, is certainly an absurd result.

Mr. Salts was not requesting extraordinary care. He was simply requesting the same level of care Lancaster County acknowledges it has a duty to provide to those who have established legal settlement in Lancaster County. And in fact, he was requesting the same level of care provided to those whose legal settlement cannot be determined. *See* Neb. Rev. Stat. § 68-114. These two groups must only meet a requirement that the treatment they are seeking is "medically necessary." GA 3:300-3:506. Lancaster County defines "medically necessary" as follows: "Treatment for a condition is medically necessary if the condition will worsen without medical intervention and interfere with the client's self-sufficiency or ability to work." GA

1:116. Mr. Salts was clearly dealing with conditions that while non-emergent, were causing him significant pain, and if left untreated, could become more serious and potentially life threatening. (E1,1-2:2,Exhibit B). Mr. Salt's conditions, an ear infection, ingrown toenail, dental problems, and large lumps on his left arm and rib cage, were not frivolous and would certainly satisfy the tenants of § 68-114, sickness, suffering, and distress, and the definition of medical necessity. (T16).

Lancaster County points out that it has not proposed a strict application of § 68-144 by not seeking the removal of Mr. Salts to Dawson County. (Appellees' Brief pg. 5) While this issue has no relevance to the issues presented by this appeal, it should be noted that Lancaster County would not be required to seek removal of Mr. Salts to Dawson County. Section 68-145 provides:

> If a poor person, by reason of sickness or disease, or by neglect of the authorities of the county in which he or she has a legal settlement, or for any other sufficient cause, cannot be removed, then the county taking charge of such individual may sue for, and recover from the county to which such individual belongs, the amount expended for and in behalf of such poor person and in taking care of such person.

Mr. Salts, needing to stay and complete his treatment program, and lacking sufficient resources to return to Dawson County, certainly has sufficient cause to remain in Lancaster County. More importantly, this section allows Lancaster County to recover from Dawson County all of the costs expended for Mr. Salts care until Mr. Salts establishes legal settlement in Lancaster County. *Id.* This statute should take care of any fiscal concerns Lancaster County has about providing non-emergency care to Mr. Salts and others like him who have not yet established legal settlement.

The General Assistance statutes considered together in their plain and ordinary sense, clearly require Lancaster County to provide care for Mr. Salts, including non-emergency medical assistance to alleviate his sickness, distress and suffering and to provide him with a minimum standard of health and decency. General Assistance guidelines 2:101 and 3:101 stand in direct violation of this statutory mandate and therefore, must be invalidated.

II. LANCASTER COUNTY'S INTERPRETATION OF THE GENERAL ASSISTANCE STATUTES IS UNCONSITUTIONAL.

In this case, the Appellant has provided a construction of the statute that does not raise any constitutional concerns. However, the interpretation offered by Lancaster County in this case does create a constitutional problem. If this Court agrees with the Appellant's construction, there is no need to reach the constitutional issue. If, however, this Court believes both constructions are plausible, the Court must adopt "...the construction that will achieve the purposes of the statute and preserve the statutes' validity." *Mason v. State*, 267 Neb. 44 (2003).

The constitutional right implicated in this case is the right to intrastate travel. While the United States Supreme Court has yet to affirmatively recognize a right to intrastate travel, it has indicated that such a right likely exists. For example, in *Memorial Hospital et al., v. Maricopa County et al.*, 415 U.S. 250, 256 (1974), the Court noted: "It would seem inconsistent to argue that the residence requirement should be construed to bar long-time [state] residents, even if unconstitutional as applied to persons migrating into [a county] from outside the State." Furthermore, five United States Circuit Courts have recognized that such a right exists under the United States Constitution. *See Johnsen v. City of Cincinnati*, 310 F. 3d 484 (6th Cir. 2002); *Lutz v. City of York, Pa.*, 899 F.2d 255 (3rd Cir. 1990); *Gomez v. Turner*, 672 F.2d 134 (DC Cir. 1982); *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2nd Cir. 1971); *Cole v. Housing Authority of Newport*, 435 F.2d 807 (1st Cir. 1970).

Additionally, Article I, Section 26 of the Nebraska Constitution provides a basis for a right to intrastate travel. That section provides: "This enumeration of rights shall not be construed to impair or deny others, retained by the people, and all powers not herein delegated remain with the people." Constitution of the State of Nebraska, Art. I, Sec. 26. Similar language was found to give rise to a right to intrastate travel in Wyoming. *See Watt v. Watt*, 971 P.2d 608 (Sup. Ct. Wyo. 1999).

As set out in detail in Appellant's brief, the construction of the General Assistance statutes provided by Lancaster County violates the equal protection clause. (Appellant's Brief pg. 19-22). Lancaster County argues that there is no constitutional problem because Mr. Salts is not being penalized for his intrastate travel and that Mr. Salts is not being denied General Assistance statewide. (Appellees' Brief pg. 8).

First, Mr. Salts is clearly being penalized for his intrastate migration. Mr. Salts moved to Lancaster County to seek substance abuse treatment. (T16). The only place Mr. Salts has lived long enough to establish legal settlement is Dawson County. (T20). Based on Lancaster County's interpretation of the statutes, Dawson County is the only place that Mr. Salts can receive non-emergency medical assistance. The United States Supreme Court has expressly found that denial of non-emergency medical care based on a durational residency requirement does in fact penalize the exercise of a person's right to travel. *Memorial Hospital v. Maricopa County et al.*, 415 U.S. 250, 259-260 (1974).

Second, the fact that Mr. Salts could receive care somewhere within the state does not alleviate the constitutional problem. The issue is not whether there is somewhere Mr. Salts can go to get non-emergency care within the state, but rather, is Mr. Salts being penalized for choosing to move to Lancaster County. As noted above, the Supreme Court has determined

withholding non-emergency medical care based solely on the length of time a person has lived in a particular county is in fact a penalty on migration. *Id.*

Lancaster County argues that Mr. Salts is not being forced to return to Dawson County, but what are Mr. Salts' options? His only options are to stay in Lancaster County and go without care until he establishes legal settlement or return to Dawson County so he can receive medical assistance. Just as someone who moved to Lancaster County from Iowa cannot be forced to either forego care or return to Iowa to seek non-emergency medical care, Mr. Salts cannot be forced to either forego treatment or return to Dawson County to receive care. As the United States Supreme Court has noted it makes no sense to allow a state to do to its own citizens what it is prohibited from doing to citizens of other states. *Id.* at 256.

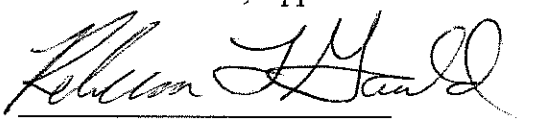
If this Court feels that both parties' constructions of the statutes are plausible, for the reasons provided above, it must adopt the position of the Appellant and invalidate GA 2:101 and GA 3:101 on the grounds that they are in direct violation with Nebraska law.

CONCLUSION

For all of the foregoing reasons, GA 2:101 and GA 3:101 should be invalidated and Mr. Salt's application for medical assistance should be approved dating back to the date of his application.

DATE: October 25, 2004

ROBERT SALTS, Appellant

By: 

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PROOF OF SERVICE

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

I, Rebecca L. Gould, being first duly sworn, depose and state that two copies of the brief in the above-entitled case were served upon the Appellee by depositing said copies in the United States Mail, first class postage prepaid, addressed to counsel for the Appellee, Kristy Mundt, Deputy County Attorney, Justice and Law Enforcement Center, 575 South 10th Street, Lincoln, NE 68509.

DATED: October 25, 2004

Affiant

Subscribed and sworn to before me, a notary public, on this 25th day of October, 2004.

Notary Public

GENERAL NOTARY-State of Nebraska
SUE ELLEN WALL
My Comm. Exp. March 29, 2007