

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

JENNIFER DAVIO, INDIVIDUALLY)
AND ON BEHALF OF ALL OTHERS)
SIMILARLY SITUATED,)

CASE NO. S09-00985

APPELLE)

V.)

NEBRASKA DEPARTMENT OF)
HEALTH AND HUMAN SERVICES,)
KERRY T. WINTERER, CHIEF)
EXECUTIVE OFFICER, TODD)
RECKLING, DIRECTOR OF DIVISION)
OF CHILDREN AND FAMILY)
SERVICES, AND VIVIANNE)
CHAUMONT, DIRECTOR OF)
MEDICAID AND LONG TERM CARE,)

APPELLANT'S BRIEF IN OPPOSITION TO
APPELLEE'S CROSS-APPEAL

On appeal from District Court of
Lancaster County, Nebraska

The Honorable Karen B. Flowers, Lancaster County
District Court Judge, presiding.

Submitted by:

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STATEMENT OF THE BASIS OF JURISDICTION

Cross-Appellee adopts the Basis for the Jurisdiction of the Court contained in the Appellant's brief .

STATEMENT OF THE CASE

Cross-Appellee adopts the Statement of the Case contained in the Appellant's brief.

PROPOSITIONS OF LAW

- I. The district court did not err in limiting the relief available to the members of the class it certified.

Neb. Rev. Stat. § 84-901 et seq.

Roubal ex rel. Holm vs. State, Department of Health and Human Services, 14 Neb. 554, 710 N.W. 2nd 359 (2006).

STATEMENT OF FACTS

Cross-Appellee adopts the Statement of Facts contained in the Appellant's brief.

Summary of Argument

As discussed in detail in Appellants' Brief and Appellants' Reply Brief, Cross-Appellee does not believe that the lower court properly certified any class in this case, or that it had jurisdiction to do so. The nature of the remedy, if any was to be granted, was properly limited to injunctive relief only.

Argument

The lower court properly limited the relief to the class members. No class was properly certified, and the court lacked jurisdiction over the claims of both the class representative and the class itself. Cross-Appellant attempts to bootstrap the claims of an entire class on the abandoned case of the class representative. Cross-Appellant's arguments point out the flaw in granting class

action status in this case. As outlined in the earlier briefing, Cross-Appellant's claim in this case was abandoned as part of her petition. (T11) The lower court had no jurisdiction over her individual claim under Neb.Rev.Stat. §84-917, nor did it have jurisdiction over her claim under Neb.Rev.Stat. §84-911. The Cross-Appellant's claim is moot.

A. THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER CROSS APPELLANT'S CLAIMS PURSUANT TO NEB.REV.STAT. §84-917.

Cross-Appellee respectfully refers this court to its earlier briefing in Appellant's Reply Brief at pages 5 to 8.

B. THE CLASS MEMBERS HAVE NOT BEEN AGGRIEVED BY A FINAL DECISION UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The members of the class as certified by the lower court have not been aggrieved by a final decision in a contested case under the Administrative Procedure Act. With the exception of Jenifer Davio herself, and possibly one other person, there were no persons at the time of the hearing on class certification who had pursued and been aggrieved by a contested case under the Administrative Procedure Act. (19:3-12) No other person had exhausted their administrative remedies as required by *Roubal ex rel. Holm vs. State, Department of Health and Human Services*, 14 Neb. 554, 710 N.W. 2nd 359 (2006). The alleged members of the class have no standing under the Administrative Procedure Act, because they have no rights or privileges under that Act.

The persons who have not exhausted their administrative remedies have had a final determination of the issues facing them. This is, however, because the issues were determined at the agency level, not because of any proceeding under the Administrative Procedure Act. The Act itself has specific requirements that must be met in order for

judicial review to occur, and for the courts to take jurisdiction. Except as noted above, these requirements were simply not met by the members of the class.

C. THE CONTESTED CASE ELEMENT IS NOT FULFILLED FOR THE MEMBERS OF THE CLASS.

Cross-Appellant's argument in this regard is a repackaging of its earlier argument that the class members have been aggrieved by a final decision under the Administrative Procedure Act. Although Jennifer Davio herself has (but has abandoned that claim), the class members have not.

In order to obtain relief under the Administrative Procedure Act, there must be an exhaustion of administrative remedies. If not, there is no jurisdiction. The only permissible way for a person to have rights or privileges under the Administrative Procedure Act is if its requirements are met. The members of the class have not met the applicable requirements, and the lower court properly limited its relief accordingly. The class action statute cannot operate to eliminate and ignore the requirements of the Administrative Procedure Act. The lower court did not grant class certification under the Administrative Procedure Act.

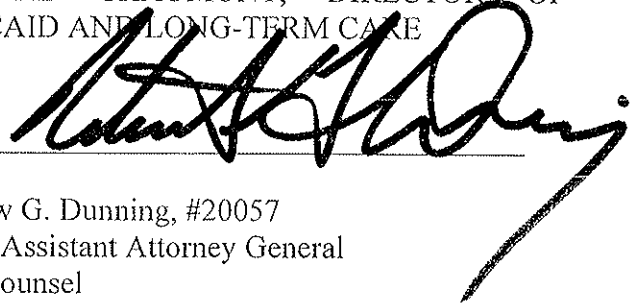
As indicated in its December 12, 2008 Order, the lower court granted the motion for class certification "as to the injunctive relief pled and prayed for under Neb.Rev.Stat. §25-1062 et seq., but denied with respect to plaintiff's appeal pursuant to the APA." (T94) Therefore, the lower court limited its jurisdiction over the case to the injunctive relief statutes, and did not grant any class status under the Administrative Procedure Act. As a result, the court's relief was limited accordingly. The court did not grant class certification as to injunctive relief under the Administrative Procedure Act itself.

CONCLUSION

Based on the foregoing, Cross-Appellee respectfully requests that this court reject the claim on appeal by Cross-Appellant, that the court grant the relief requested in Appellant's appeal, and remand this case for dismissal by the lower court.

Cross-Appellants

STATE OF NEBRASKA, DEPARTMENT OF
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TODD RECKLING, DIRECTOR OF DIVISION
OF CHILDREN AND FAMILY SERVICES,
VIVIANNE CHAUMONT, DIRECTOR OF
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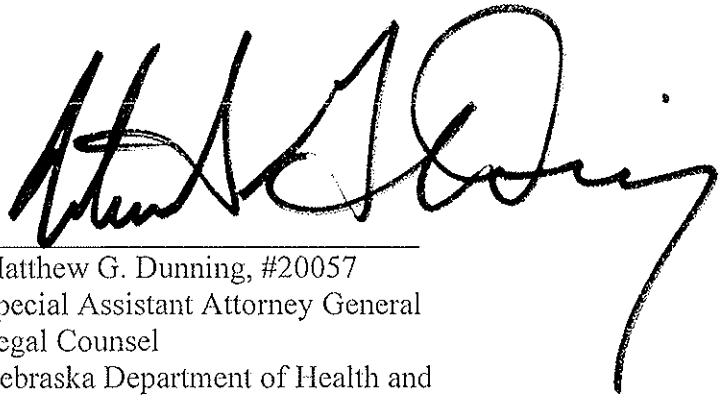
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5 day of April, 2010, a copy of the foregoing Appellants' Brief has been served on the Appellee by mailing two copies to her attorneys of record by regular United States mail, first class postage prepaid as follows:

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