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that the trust was liable for the full amount of the guaranty, $500,000, is supported by the evidence and not clearly wrong. We therefore affirm the judgment of the district court.

AFFIRMED.

WRIGHT, CONNOLLY, and MCCORMACK, JJ., not participating.

THE CHICAGO LUMBER COMPANY OF OMAHA, A NEBRASKA CORPORATION, APPELLANT, V. JOANN SELVERA, AN INDIVIDUAL, ET AL., APPELLEES.

809 N.W.2d 469

Filed August 5, 2011. No. S-10-741.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Appeal and Error.** Statutory construction is a question of law that an appellate court decides independently of the trial court.
4. **Summary Judgment: Jurisdiction: Appeal and Error.** When reviewing cross-motions for summary judgment, an appellate court acquires jurisdiction over both motions and may determine the controversy that is the subject of those motions; an appellate court may also specify the issues as to which questions of fact remain and direct further proceedings as the court deems necessary.
5. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial.
6. **Mechanics' Liens: Intent: Words and Phrases.** Under Neb. Rev. Stat. § 52-157(2) (Reissue 2010), one acts in "bad faith" if the claimant either knows its lien is invalid or overstated or acts with reckless disregard as to such facts.
7. **Mechanics' Liens: Notice.** Sending a copy of a recorded lien to a contracting owner under Neb. Rev. Stat. § 52-135(3) (Reissue 2010) is a prerequisite for foreclosing the lien.
8. **Attorney Fees: Appeal and Error.** On appeal, an appellate court will uphold a lower court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation in the absence of an abuse of discretion.
9. **Actions: Attorney Fees.** Attorney fees can be awarded when a party brings an action that is without rational argument based on law and evidence.

10. **Attorney Fees: Words and Phrases.** Regarding bad faith litigation, the term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
11. **Trial: Attorney Fees: Pleadings.** Attorney fees for a bad faith action under Neb. Rev. Stat. § 25-824 (Reissue 2008) may be awarded when the action is filed for purposes of delay or harassment.
12. **Actions.** Relitigating the same issue between the same parties may amount to bad faith.
13. ____. Any doubt whether a legal position is frivolous or taken in bad faith should be resolved for the party whose legal position is in question.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Reversed and remanded for further proceedings.

Angela L. Burmeister and Angela M. Boyer, of Berkshire & Burmeister, for appellant.

Emmett D. Childers, of Hillman, Forman, Childers & McCormack, for appellee JoAnn Selvera.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, and MILLER-LERMAN, JJ.

CONNOLLY, J.

The Chicago Lumber Company of Omaha (Chicago Lumber) recorded a construction lien on JoAnn Selvera's home and sued to foreclose the lien. Selvera brought a counterclaim under Neb. Rev. Stat. § 52-157 (Reissue 2010), which provides a remedy against claimants who, in bad faith, file liens, overstate liens, or refuse to release liens. Chicago Lumber eventually withdrew its foreclosure action and released its lien, but Selvera maintained her suit. The court later granted Selvera summary judgment on her bad faith claim and awarded her $10,000 in attorney fees.

Because Chicago Lumber had a reasonable belief that its lien was valid—at least before it received Selvera's clarifying documents—Chicago Lumber did not act in bad faith. But after it received these documents, questions of fact exist whether Chicago Lumber was acting in bad faith. We reverse, and remand for further proceedings.

I. BACKGROUND

After a fire damaged Selvera's home, she contracted with Turnbull, Jenkins & Krueger Construction, Inc. (Turnbull), to reconstruct part of her home. Turnbull, in turn, contracted with Chicago Lumber to provide material for the project.

While working on Selvera's home, Turnbull abandoned the project and breached the contract with Selvera. At the time of the breach, Turnbull had not paid Chicago Lumber for all the materials that it had provided and owed Chicago Lumber $1,034.13.

Because Chicago Lumber had not been paid, it recorded a lien on Selvera's property. Selvera claimed that she never received a copy of the lien. But a secretary who worked at the law office representing Chicago Lumber stated in an affidavit that it was the regular policy and procedure of the firm to mail copies of all recorded liens to the homeowner whose home was subject to a lien. She stated that she typically mailed these copies on the same day that the liens were recorded. And she recalled doing so with all the liens that she handled during her time with the firm.

In September 2007, Chicago Lumber sued to foreclose its lien on Selvera's property. In her answer, Selvera asserted that she was a protected party under the Nebraska Construction Lien Act (NCLA).[1] Selvera also counterclaimed under § 52-157, alleging that Chicago Lumber had refused to release its lien even though it was unenforceable. Attached to her answer, Selvera included exhibits, one of which was two pages long. We refer to this exhibit as "Exhibit B."

Exhibit B appeared to be an invoice or account statement from Turnbull to Selvera. The first page seems to track the payments that Selvera made and her outstanding balance with Turnbull. The first page indicates that Selvera still owed Turnbull $131,800. The second page, however, sets out Turnbull's profit and overhead and inconsistently states that Turnbull owed Selvera $14,912.88.

The record indicates that Chicago Lumber made several attempts to reconcile these two pages, which the company

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[1] Neb. Rev. Stat. § 52-125 et seq. (Reissue 2010).

claimed were confusing. Chicago Lumber claims that Exhibit B did not clearly show whether Selvera had paid Turnbull the full amount because one page seemed to indicate that Selvera owed Turnbull money while the next indicated the opposite. At oral argument, Selvera's counsel admitted that the joining of the two pages in Exhibit B was an inadvertent mistake and probably was confusing.

Later, in February 2009, about 17 months after she first presented Exhibit B, Selvera submitted another two-page exhibit with another affidavit. The second page was the same as the second page to Exhibit B. The first page, however, was different. This first page listed costs for labor, materials, and subcontractors. The numbers from the first page corresponded to the numbers on the second, and thus supported Selvera's claim that she had paid Turnbull in full. Along with this document, Selvera also submitted an affidavit of the vice president of Turnbull stating that Selvera owed no money to Turnbull under the contract.

In late February 2009, shortly after receiving this new document, Chicago Lumber dismissed its action to foreclose. In May, it released its lien on Selvera's property. Selvera, however, maintained her counterclaim against Chicago Lumber.

The parties eventually moved for summary judgment on Selvera's counterclaim. Chicago Lumber also moved for "Rule 11 Sanctions." It claimed that Selvera should have to pay the costs that Chicago Lumber incurred in prosecuting and defending the actions.

The court granted summary judgment to Selvera. It found that she had fully paid the contract and that she had not received a copy of the lien. The court concluded that providing a copy to the homeowner was a prerequisite to a valid lien. Because Selvera had never received a copy, the lien was invalid. Finally, the court concluded that Chicago Lumber's failure to dismiss its action until February 2009 and its failure to release the lien until the following May constituted bad faith. The court awarded Selvera $10,000 in attorney fees.

II. ASSIGNMENTS OF ERROR

Chicago Lumber assigns, restated and renumbered, that the district court erred in (1) granting Selvera, and not Chicago

Lumber, summary judgment under § 52-157; (2) granting Selvera attorney fees; and (3) failing to sanction Selvera.

III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[3]

[3] Statutory construction is a question of law that we decide independently of the trial court.[4]

IV. ANALYSIS

1. Summary Judgment Under § 52-157

In granting summary judgment to Selvera, the district court found that Selvera had not received a copy of Chicago Lumber's lien within 10 days of its recording and that thus, the lien was invalid.[5] Further, the court concluded that Chicago Lumber's refusal to release the lien until May 2009 constituted bad faith.

[4,5] When reviewing cross-motions for summary judgment, we acquire jurisdiction over both motions and may determine the controversy that is the subject of those motions; we may also specify the issues as to which questions of fact remain and direct further proceedings as we deem necessary.[6] A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant

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[2] *Freedom Fin. Group v. Woolley*, 280 Neb. 825, 792 N.W.2d 134 (2010).

[3] *Id.*

[4] See *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

[5] See § 52-135(3).

[6] See, *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008); *State Farm Mut. Auto. Ins. Co. v. Cheeper's Rent-A-Car*, 259 Neb. 1003, 614 N.W.2d 302 (2000).

is entitled to judgment if the evidence were uncontroverted at trial.[7]

Section 52-157(2) addresses bad faith claims. It provides:

> If in bad faith a claimant records a lien, overstates the amount for which he or she is entitled to a lien, or refuses to execute a release of a lien, the court may:
>
> (a) Declare his or her lien void; and
>
> (b) Award damages to the owner or any other person injured thereby.

Under this section, a court may invalidate a lien and award damages, which may include attorney fees,[8] if the claimant acts in bad faith. It is undisputed that Chicago Lumber recorded a lien on Selvera's property and initially refused Selvera's requests to release the lien. So, the only factor at issue is whether Chicago Lumber acted in bad faith.

Under § 52-157(2), bad faith will invalidate a lien and provide a basis for awarding damages. But the statute does not define "bad faith." We have previously discussed bad faith that would invalidate a lien in the context of mechanics' liens, although before the enactment of the NCLA. We have stated that a claimant could not enforce a lien "'[w]here a claimant, either by gross carelessness or by design, puts upon record a statement which he knows, or which by the exercise of reasonable and proper diligence he might have known, to be erroneous and unjust . . . .'"[9] But if the errors are the result of mistake and no element of willfulness appears, then we will not invalidate a lien.[10]

[6] In these prior cases, we were perhaps a bit loose with our language. The above-quoted language could lead some to think that mere negligence would suffice to invalidate a lien. But

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[7] *Builders Supply Co., supra* note 6.

[8] § 52-157(3).

[9] *LaPuzza v. Prom Town House Motor Inn, Inc.*, 191 Neb. 687, 692, 217 N.W.2d 472, 477 (1974), quoting *Central Construction Co. v. Highsmith*, 155 Neb. 113, 50 N.W.2d 817 (1952). See, also, *Knoell Constr. Co., Inc. v. Hanson*, 205 Neb. 305, 287 N.W.2d 435 (1980); *Rosebud Lumber and Coal Co. v. Holms*, 155 Neb. 459, 52 N.W.2d 313 (1952).

[10] See *LaPuzza, supra* note 9.

other language in these cases indicated that an element of willfulness was required. Today, we conclude that to act with bad faith, one must either know his or her lien is invalid or overstated or act with reckless disregard as to such facts. We base our conclusion on the fact that the Legislature included the term "bad faith." An act taken in bad faith, by definition, cannot be unintentional.[11] The Legislature has made clear that honest mistakes should not invalidate construction liens and subject a party to damages under § 52-157. Requiring knowledge or recklessness to invalidate the lien ensures that the claimant has the culpable mental state that the Legislature desired.

Here, the inquiry is whether Chicago Lumber knew that its lien was invalid or overstated or that it acted with reckless disregard in such belief when it refused to release it. As the district court and parties have framed the issues, there are two possible defects in Chicago Lumber's lien: whether Selvera had fully paid her contract with Turnbull, which would mean that Selvera had no lien liability; and whether she had received a copy of the lien.

The focus of the test for bad faith is on Chicago Lumber's state of mind during its refusal to release its lien. Did the company know, or was it reckless as to whether, its lien was invalid? Whether its lien is actually invalid is not the question under § 52-157(2). A lien could ultimately be found to be overstated without the claimant necessarily acting in bad faith. When a claimant is honestly mistaken about the validity of its lien and does not recklessly disregard facts showing its lien may be invalid, the person on whose property the lien was filed would not be entitled to damages. So we focus on whether the facts show Chicago Lumber knew or was reckless as to whether its lien was invalid when it refused to release its lien.

Chicago Lumber argues that it did not act in bad faith and thus, the district court erred in granting Selvera summary judgment. It argues that it did not release its lien because questions of fact existed whether Selvera received a copy of the lien and whether Selvera had paid the prime contract in full. It argues

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[11] See, e.g., *Weatherly v. Blue Cross Blue Shield*, 2 Neb. App. 669, 513 N.W.2d 347 (1994).

that it could not have been acting in bad faith when it had a reasonable basis for believing that it had a valid lien. Chicago Lumber argues that the court should have awarded it summary judgment.

(a) Did Chicago Lumber Act in Bad Faith Regarding Whether Selvera Had Paid in Full?

Selvera argues that under § 52-136(2), she had no lien liability to Chicago Lumber. Section 52-136(2) provides that the amount of the lien is the lesser of the amount unpaid under the claimant's contract or the amount unpaid under the prime contract. The former would be Chicago Lumber's contract with Turnbull, under which Chicago Lumber was owed $1,034.13. The latter "prime contract" is Selvera's contract with Turnbull. Selvera argues that she had fully paid Turnbull for the work the company did and so there was no amount unpaid under the contract. Therefore, the amount of any lien Chicago Lumber had would be $0. She argues that she provided Chicago Lumber with documentation showing that she had paid in full and that its refusal to release a lien it knew was worthless amounts to bad faith.

(i) Chicago Lumber Did Not Act in Bad Faith Before It Received Clarifying Documents Because Selvera's Exhibit Was Confusing

As noted, Selvera attached a two-page document, Exhibit B, to her answer. Chicago Lumber claimed that these two pages were confusing. We agree. The calculations from the two pages simply do not match up; one page states that Selvera owed Turnbull $131,800 while the next page states that Turnbull owes Selvera $14,912.88. As Selvera conceded during oral argument, the original Exhibit B was mistakenly joined and probably was confusing. Selvera did not explain this discrepancy until February 2009, when she provided additional documentation. This documentation included the correct documents and an affidavit from Turnbull's vice president stating that Selvera owed the company no money.

To have acted in bad faith, Chicago Lumber would have had to refuse to release its lien either knowing it was invalid or overstated or acting with reckless disregard as to such

facts. Selvera has presented no evidence of either. In fact, when faced with an internally inconsistent document, Chicago Lumber did what any commercially reasonable business would do: it sought answers through correspondence with Selvera and later through the discovery process. But the answers did not come until Selvera filed additional affidavits in February 2009. Shortly after receiving documentation showing that Selvera had paid in full, Chicago Lumber dismissed its foreclosure action. A couple of months later, Chicago Lumber released its lien.

Selvera has failed to show that Chicago Lumber had exercised bad faith in maintaining its lien before she supplied the correct documentation. The evidence submitted showed that Chicago Lumber made reasonable attempts to ascertain whether Selvera had fully paid the Turnbull contract. We conclude that the district court erred in ruling that Chicago Lumber acted in bad faith in refusing to release a lien when there were questions of fact whether Selvera owed money to Turnbull.

(ii) An Issue of Fact Exists as to Whether Chicago Lumber Acted in Bad Faith After Selvera Had Provided Clarifying Documents

Chicago Lumber, however, did not immediately release its lien upon receiving the correct documents from Selvera in February 2009. It waited until May to release its lien. This was a period of almost 3 months. During this interval, Chicago Lumber had documents seemingly indicating that Selvera had overpaid Turnbull and an affidavit from Turnbull indicating the same. We do not, however, believe that this shows as a matter of law that Chicago Lumber was acting in bad faith. Chicago Lumber, already the recipient of mismatched documents, could justifiably be hesitant to immediately release its lien. A question of fact remains as to whether this was merely innocent reluctance or bad faith.

Summing up, Selvera presented no evidence that Chicago Lumber acted in bad faith before she presented the company with the correct documents. The evidence fails to show that Chicago Lumber knew its lien was invalid or overstated. Nor does the evidence show that it was reckless as to such facts.

After Selvera presented the correct documentation, however, a question of fact exists as to whether Chicago Lumber was acting in bad faith.

(b) Chicago Lumber Had a Basis for Believing That Selvera Had Received a Copy of the Lien

The district court found that Selvera had not received a copy of the lien. It concluded that such a copy was required for an enforceable lien. Although the court did not mention whether Chicago Lumber knew that Selvera had not received a copy of the recorded lien, it then determined that Chicago Lumber's failure to release the lien was bad faith. Chicago Lumber argues that the court erred in granting summary judgment to Selvera because Chicago Lumber "had reason to believe that it had an enforceable lien against [Selvera]"[12] and, thus, was not acting in bad faith.

Section 52-135(3) provides that "[t]he claimant shall send a copy of a recorded lien to the contracting owner within ten days after recording, and the recording shall be within the time specified for the filing of liens under section 52-137." Selvera claims that she never received a copy of the lien, which rendered Chicago Lumber's lien unenforceable, and that Chicago Lumber acted in bad faith by not releasing its lien. Chicago Lumber views it differently. It claims that the secretary's affidavit—in which she stated that it was the firm's usual practice to send out copies the day that liens are recorded and that this practice was followed that day—created a presumption of receipt.[13]

As a preliminary matter, we note that there is no dispute that Selvera is a protected party under the NCLA.[14] The NCLA governs notice to an owner and applies only if the owner is a protected party.[15]

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[12] Brief for appellant at 28.

[13] See, e.g., *City of Lincoln v. MJM, Inc.*, 9 Neb. App. 715, 618 N.W.2d 710 (2000).

[14] See § 52-129.

[15] See § 52-135(6).

[7] We have previously stated that giving notice of a right to assert a lien under § 52-135(1) was permissive, and not mandatory, because that subsection uses the word "may."[16] But unlike subsection (1), subsection (3) uses the directive "shall." In drafting subsection (3), the Legislature obviously desired that property owners would receive notice and have an opportunity to respond and protect their property. To allow a claimant to foreclose a lien without providing a copy of that lien would undermine the Legislature's intent of giving owners notice and a better opportunity to defend their property. Finally, under our previous construction lien statutes, the claimant's failure to send notice of the recorded lien within the statutory time limit rendered the lien void and unenforceable.[17] We conclude that sending a copy of a recorded lien under § 52-135(3) is a prerequisite to foreclosing a lien under the NCLA.

As stated, however, under § 52-157, the question is not the lien's actual validity, but whether Chicago Lumber acted in bad faith. Selvera does not show bad faith by merely stating that she never got a copy of the lien; she must present evidence that Chicago Lumber knew Selvera had not received the copy or that it recklessly disregarded facts showing that she had not received a copy when it refused to release the lien.

We conclude that Selvera has failed to present any evidence that creates an issue of fact on Chicago Lumber's alleged bad faith. She failed to show that Chicago Lumber actually knew she had not received a copy of the lien or that it was reckless as to that fact. In contrast, Chicago Lumber presented an affidavit detailing its usual custom in sending copies of liens and stating that the practices were followed that day. It had a reasonable basis for believing that Selvera had received a copy. The court erred in granting Selvera summary judgment because Selvera had presented no evidence of Chicago Lumber's bad faith as to whether it had provided Selvera a copy of the lien.

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[16] *Midlands Rental & Mach. v. Christensen Ltd.*, 252 Neb. 806, 566 N.W.2d 115 (1997).

[17] Neb. Rev. Stat. § 52-103 (Reissue 1978). See, also, *Waite Lumber Co., Inc. v. Carpenter*, 205 Neb. 860, 290 N.W.2d 655 (1980).

2. Attorney Fees Under Neb. Rev. Stat. § 25-824 (Reissue 2008)

Because we conclude that the court erred in granting Selvera summary judgment on her bad faith claim under § 52-157, it was error to award Selvera attorney fees under that section. But Selvera also argues that she should receive attorney fees for defending the foreclosure action under § 25-824. To the extent that the award of attorney fees rested upon § 25-824, we conclude that it too was error.

[8-13] On appeal, we will uphold a lower court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation in the absence of an abuse of discretion.[18] Attorney fees can be awarded when a party brings a frivolous action that is without rational argument based on law and evidence.[19] We have also previously explained that the term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.[20] Attorney fees for a bad faith action under § 25-824 may also be awarded when the action is filed for purposes of delay or harassment.[21] We have also said that relitigating the same issue between the same parties may amount to bad faith.[22] Finally, any doubt whether a legal position is frivolous or taken in bad faith should be resolved for the party whose legal position is in question.[23]

Again, we conclude that Chicago Lumber had a reasonable basis for believing it had an enforceable lien. A suit to foreclose that lien would thus have a rational basis in law and fact.

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[18] See *Brummels v. Tomasek*, 273 Neb. 573, 731 N.W.2d 585 (2007), *overruled on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010).

[19] See *TFF, Inc. v. SID No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010).

[20] See *id.*

[21] § 25-824(4). See, also, *Malicky v. Heyen*, 251 Neb. 891, 560 N.W.2d 773 (1997).

[22] See, e.g., *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993).

[23] See *id.*

The record fails to show that Chicago Lumber had an improper motive when it sued to foreclose the lien. Nor was Chicago Lumber's legal position unreasonable. We conclude that the district court abused its discretion in awarding attorney fees to Selvera.

3. Chicago Lumber's Requests for Sanctions

Chicago Lumber argues that the court erred in not imposing sanctions on Selvera. Chicago Lumber claims that Selvera brought her counterclaim in bad faith and contends that Selvera's tactics in prosecuting her claim, namely presenting the court with Exhibit B, warranted an award of attorney fees to Chicago Lumber.

We note that Chicago Lumber filed a motion for "Rule 11 Sanctions." We assume this motion refers to Neb. Ct. R. Pldg. § 6-1111 (rev. 2008). The comment to § 6-1111 states that bad faith or frivolous litigation is subject to sanction under Neb. Rev. Stat. §§ 25-824 to 25-824.03 (Reissue 2008). We will thus treat this as a motion under § 25-824.

Applying § 25-824 and the standards previously discussed, we conclude that Selvera did not bring her counterclaim in bad faith. The difficulties that arose stem largely from the ambiguous Exhibit B attached to Selvera's counterclaim. Selvera apparently believed that she had paid in full and tried to provide Chicago Lumber with documents to that effect. Unfortunately, the exhibit was confusing. Selvera apparently did not realize the error until late in the action. We do not believe that her apparently innocent reliance on Exhibit B, which was confusing, amounts to bad faith. The court did not abuse its discretion in refusing to award attorney fees to Chicago Lumber.

V. CONCLUSION

We conclude that the court erred in granting Selvera summary judgment. Exhibit B was confusing, and so Chicago Lumber was not acting in bad faith when it refused to release its lien. The company was reasonably seeking answers. But after Chicago Lumber had received proper documentation, there is a genuine issue of fact whether the company acted in

bad faith by not releasing its lien. Finally, we conclude that neither side is entitled to attorney fees under § 25-824.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT and MCCORMACK, JJ., not participating.

JONI MUELLER, APPELLEE, V. LINCOLN PUBLIC SCHOOLS, APPELLANT.
803 N.W.2d 408

Filed August 5, 2011. No. S-10-748.

1. **Workers' Compensation: Wages.** The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law.
2. **Workers' Compensation: Appeal and Error.** Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.
3. **Employer and Employee: Wages.** In calculating an employee's average weekly wage, abnormally low workweeks resulting from circumstances such as vacation time, sick leave, or holidays should be excluded from the calculation.
4. **Workers' Compensation.** The goal of any average income test is to produce an honest approximation of a workers' compensation claimant's probable future earning capacity. The emphasis is on not distorting the employee's average weekly wage.
5. **Stipulations.** The construction of a stipulation is a question of law.

Appeal from the Workers' Compensation Court. Reversed and remanded with directions.

Riko E. Bishop, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Jon Rehm, of Rehm, Bennett & Moore, P.C., L.L.O., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Joni Mueller, an employee of the Lincoln Public Schools (LPS), was awarded workers' compensation benefits after she