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we do not reach the issue regarding the application of the Nebraska Trust Deeds Act.

We vacate the judgments against the defendants and remand the causes for further proceedings consistent with this opinion.

JUDGMENTS VACATED, AND CAUSES REMANDED FOR FURTHER PROCEEDINGS.

CASSEL, J., not participating.

ZIAD L. ZAWAIDEH, M.D., APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES REGULATION AND LICENSURE AND STATE OF NEBRASKA EX REL. JON BRUNING, ATTORNEY GENERAL, APPELLEES.

825 N.W.2d 204

Filed January 18, 2013. No. S-12-069.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or 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, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. ____: ____. The grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
5. **Courts: Jurisdiction: Immunity.** It is well-settled law in Nebraska that sovereign immunity deprives a trial court of subject matter jurisdiction.
6. **Constitutional Law: Legislature: Immunity: Waiver.** Neb. Const. art. V, § 22, permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.
7. ____: ____: ____: ____. Neb. Const. art. V, § 22, is not self-executing, but instead requires legislative action for waiver of the State's sovereign immunity.

8. **Statutes: Immunity: Waiver.** Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly construed in favor of the sovereign and against the waiver.
9. **Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.
10. **Actions: Immunity.** A suit against a state agency is a suit against the State and is subject to sovereign immunity.
11. **Actions: States: Statutes: Contracts.** The State Contract Claims Act authorizes suits for contract claims against the State, in derogation of the State's sovereignty.
12. **Actions: Statutes: Contracts.** The State Contract Claims Act is the exclusive remedy for resolving contract claims against the State.
13. **Fraud: Pleadings.** To state a claim for fraudulent misrepresentation, a plaintiff must allege (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that the representation was made with the intention that the plaintiff should rely on it; (5) that the plaintiff did so rely on it; and (6) that the plaintiff suffered damage as a result.
14. **Negligence: Fraud.** Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation with the exception of the defendant's mental state.
15. **Contracts: Fraud.** Fraud and deceit provide a ground for recovery that is independent of contract.
16. **Actions: Statutes: Contracts: Fraud.** A misrepresentation cause of action is not a "contract claim" under the State Contract Claims Act.
17. **Declaratory Judgments: Immunity: Waiver.** Nebraska's Uniform Declaratory Judgments Act does not waive the State's sovereign immunity, and a plaintiff who seeks declaratory relief against the State must find authorization for such remedy outside the confines of the act.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

William M. Lamson, Jr., and Denise M. Destache, of Lamson, Dugan & Murray, L.L.P., for appellant.

Jon Bruning, Attorney General, and Michael J. Rumbaugh for appellees.

HEAVICAN, C.J., WRIGHT, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

McCormack, J.

NATURE OF CASE

After our decision in *Zawaideh v. Nebraska Dept. of Health & Human Servs.* (*Zawaideh I*),[1] Ziad L. Zawaideh, M.D., filed an amended complaint against the Nebraska Department of Health and Human Services Regulation and Licensure (Department) and the Attorney General. The amended complaint alleged that the Attorney General fraudulently and negligently misrepresented the adverse effects of the assurance of compliance entered into by Zawaideh with the Attorney General. The district court granted the Department and the Attorney General's motion for summary judgment, finding the misrepresentation claims to be contract claims subject to, and barred by, the State Contract Claims Act.[2] Zawaideh appeals.

BACKGROUND

This is the second appeal in this case. In *Zawaideh I*, the following facts were established from the allegations in Zawaideh's complaint. These facts are not contested by either party in its respective briefs.

Zawaideh is a physician, licensed by and practicing in the State of Nebraska. In 2006, the Department began an investigation into a case involving obstetrical care Zawaideh provided to a patient in 2001. Terri Nutzman, an assistant attorney general, sent Zawaideh a proposed petition for disciplinary action and offered the option of an agreed settlement that would have constituted a disciplinary action against Zawaideh's license.

Zawaideh initially refused to enter into any agreement and denied any unprofessional conduct. After another proposed disciplinary settlement was refused, Nutzman offered Zawaideh an assurance of compliance. Nutzman emphasized that the assurance of compliance was not a disciplinary procedure.[3] In

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[1] *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 997, 792 N.W.2d 484 (2011).

[2] See Neb. Rev. Stat. § 81-8,302 et seq. (Reissue 2008).

[3] See Neb. Rev. Stat. § 38-1,107 (Reissue 2008).

the assurance of compliance, Zawaideh would promise to no longer provide obstetrical care. Zawaideh had already given up obstetrical care, so he agreed.

As provided by the Uniform Credentialing Act,[4] Zawaideh's assurance of compliance was made part of his public record. He alleges that it is referenced on the Department's Web site and is available to the general public upon request.

Zawaideh is also licensed to practice medicine in the State of Washington. Zawaideh alleges that the Washington Department of Health learned "via public record" of the assurance of compliance and initiated a disciplinary action based solely on the assurance of compliance. Washington entered a disciplinary order that was reported to the National Practitioner Data Bank. Zawaideh alleges that the assurance of compliance has led to the termination of his professional board certification and board eligibility which, in turn, has "created difficulties" for him in recredentialing with hospitals and insurance plans.

Zawaideh alleges that he would not have entered into the assurance of compliance had he known about the potential consequences, which he alleges were issues known to Nutzman at the time she assured Zawaideh that the assurance of compliance was not disciplinary. According to Zawaideh, the incident that formed the basis of the investigation into his conduct is no longer subject to discipline under Nebraska law, and terminating the assurance of compliance would allow him to have the Washington disciplinary order removed and restore his board eligibility with the American Board of Family Medicine. Therefore, Zawaideh asked the Department and the Attorney General to rescind the assurance of compliance and expunge the public record. Each declined.

Our Decision in *Zawaideh I*

In *Zawaideh I*, Zawaideh appealed from the district court's decision to grant a motion to dismiss the complaint for failure to state a claim, pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). In his original complaint, Zawaideh argued that the execution

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[4] See Neb. Rev. Stat. § 38-101 et seq. (Reissue 2008 & Cum. Supp. 2012).

of the assurance of compliance, and the Attorney General's refusal to vacate it, deprived Zawaideh of due process of law. His original complaint asserted four causes of action:

> (1) The [Uniform Credentialing Act] is facially unconstitutional because it permits discipline to be carried out without due process of law, as assurances of compliance are not appealable.
>
> (2) The [Uniform Credentialing Act] is unconstitutional as applied in this case because Zawaideh no longer practices obstetrics, of his own accord, and the underlying occurrence is no longer subject to discipline under Nebraska law.
>
> (3) The Attorney General carried out his statutory authority in an arbitrary and capricious manner.
>
> (4) The Attorney General committed fraudulent misrepresentation by concealing the material fact that the assurances of compliance were having the effect of a disciplinary order on other physicians.[5]

We affirmed the district court's order with respect to Zawaideh's first, second, and third due process claims for relief. However, we reversed the district court's order with respect to the fraudulent concealment claim and remanded the cause for further proceedings on that claim. In the *Zawaideh I* opinion, we noted that "[o]ther issues, such as whether the fact was within Zawaideh's reasonably diligent attention or whether Zawaideh reasonably relied on Nutzman's statement, or any potential affirmative defenses, are not before us in this proceeding, and we make no comment on them."[6]

Procedural History Since *Zawaideh I*

After remand, Zawaideh filed an amended complaint asserting fraudulent and negligent misrepresentation. The suit requested the district court to "1) declare the Assurance of Compliance void or rescinded; 2) direct the [Department and the Attorney General] to expunge any references to the

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[5] *Zawaideh I, supra* note 1, 280 Neb. at 1003, 792 N.W.2d at 491.

[6] *Id.* at 1013, 792 N.W.2d at 498.

Assurance of Compliance from [Zawaideh's] public records; 3) award [Zawaideh] costs and attorney fees; and 4) grant such other relief as the Court deems just and proper." Shortly thereafter, the Department and the Attorney General filed a motion for summary judgment alleging that sovereign immunity barred Zawaideh's claims.

The district court granted the motion for summary judgment and found that the assurance of compliance was a contract subject to the State Contract Claims Act.[7] The district court noted that Zawaideh's claims were barred because he failed to procedurally comply with the State Contract Claims Act.

ASSIGNMENTS OF ERROR

Zawaideh has assigned as error the district court's finding that it lacked subject matter jurisdiction. Further, he assigns that the district court erred in finding his misrepresentation causes of action were contract claims subject to and barred by the State Contract Claims Act.

STANDARD OF REVIEW

[1-3] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[8] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[9] The grant of a motion for summary judgment may be affirmed on any ground available to the trial court, even if it is not the same reasoning the trial court relied upon.[10]

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[7] See § 81-8,302 et seq.

[8] *Olson v. Wrenshall*, 284 Neb. 445, 822 N.W.2d 336 (2012).

[9] *Id.*

[10] *Id.*

[4] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[11]

ANALYSIS

Zawaideh's arguent is complex and at times counterintuitive. He has conceded that application of either the State Contract Claims Act or the State Tort Claims Act[12] would deprive the district court of subject matter jurisdiction over his claims. Therefore, he first argues that *Zawaideh I* precludes this court from dismissing his case for lack of subject matter jurisdiction. His second and third arguments are that neither the State Contract Claims Act nor the State Tort Claims Act apply to, and thus do not bar, his claims. For his fourth and final argument, he argues that the modified "affirmative action" test in *Doe v. Board of Regents*[13] provides the district court with subject matter jurisdiction over his claims. We will address each of these arguments in order.

[5-7] To begin, it is well-settled law in Nebraska that sovereign immunity deprives a trial court of subject matter jurisdiction.[14] Neb. Const. art. V, § 22, provides that "[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." This provision permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.[15] It is not self-executing, but instead requires legislative action for waiver of the State's sovereign immunity.[16]

[8,9] Statutes that purport to waive the protection of sovereign immunity of the State or its subdivisions are strictly

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[11] *Buckeye State Mut. Ins. Co. v. Humlicek*, 284 Neb. 463, 822 N.W.2d 351 (2012).

[12] See Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 2008 & Cum. Supp. 2012).

[13] *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[14] See *McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384 (2009).

[15] *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007).

[16] *Engler v. State*, 283 Neb. 985, 814 N.W.2d 387 (2012).

construed in favor of the sovereign and against the waiver.[17] A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.[18]

[10] Here, Zawaideh has brought suit against the Department and the Attorney General. We have held that a suit against a state agency is a suit against the State and is subject to sovereign immunity.[19] Therefore, the burden rests with Zawaideh to demonstrate how the State has waived sovereign immunity for his misrepresentation claims.

With that in mind, Zawaideh's first argument is that our failure to dismiss for a lack of subject matter jurisdiction in *Zawaideh I* somehow precludes us from dismissing his case on that ground now. We disagree. In *Martin v. Nebraska Dept. of Corr. Servs.*,[20] we held that an appellate court is required to answer all jurisdictional questions *presented* by a case. However, simply put, we were not presented in *Zawaideh I* with the issue of subject matter jurisdiction on these misrepresentation claims.[21] In fact, in the opinion, we stated that "[o]ther issues, such as . . . any potential affirmative defenses, are not before us in this proceeding, and we make no comment on them. Rather, those matters are left to further proceedings in the district court following remand."[22] Therefore, we are not precluded from now reviewing the affirmative defense of subject matter jurisdiction.

For his second argument, Zawaideh asserts that the district court erred in finding that his misrepresentation claims were subject to the State Contract Claims Act. Zawaideh argues that his misrepresentation claims are tort actions and

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[17] *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011).

[18] *Id.*

[19] See *Doe v. Board of Regents, supra* note 13.

[20] *Martin v. Nebraska Dept. of Corr. Servs.*, 267 Neb. 33, 671 N.W.2d 613 (2003).

[21] *Zawaideh I, supra* note 1.

[22] *Id.* at 1013, 792 N.W.2d at 498.

not contract claims under the State Contract Claims Act. We agree.

[11,12] The State Contract Claims Act authorizes suits for contract claims against the State, in derogation of the State's sovereignty.[23] The State Contract Claims Act is the exclusive remedy for resolving contract claims.[24] Under § 81-8,303(1), a "[c]ontract claim shall mean a claim against the state involving a dispute regarding a contract between the State of Nebraska or a state agency and the claimant . . . ."

[13,14] It is well established that both fraudulent misrepresentation and negligent misrepresentation are tort causes of action adopted from the Restatement (Second) of Torts §§ 525 and 552.[25] To state a claim for fraudulent misrepresentation, a plaintiff must allege (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that the representation was made with the intention that the plaintiff should rely on it; (5) that the plaintiff did so rely on it; and (6) that the plaintiff suffered damage as a result.[26] Negligent misrepresentation has essentially the same elements as fraudulent misrepresentation with the exception of the defendant's mental state.[27] The important thing to note is that none of the elements require an underlying contract.

[15] Although contracts are often the end result of the plaintiff's reliance on the defendant's misrepresentation, the true legal dispute for a misrepresentation cause of action is the tortious actions of the defendant.[28] We have stated that where a

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[23] See *Baldwin Carpet v. Builders, Inc.*, 3 Neb. App. 40, 523 N.W.2d 33 (1994).

[24] § 81-8,306.

[25] Restatement (Second) of Torts §§ 525 and 552 (1977). See, e.g., *Lucky 7 v. THT Realty*, 278 Neb. 997, 775 N.W.2d 671 (2009); *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009).

[26] *Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010).

[27] *Lucky 7 v. THT Realty, supra* note 25.

[28] See *L. J. Vontz Constr. Co. v. State*, 230 Neb. 377, 432 N.W.2d 7 (1988).

contractual relationship exists between persons and at the same time a duty is imposed by or arises out of the circumstances surrounding or attending the transaction, the breach of the duty is a tort.[29] In such case, the tortious act, and not a breach of the contract, is the gravamen of the action; the contract is the mere inducement creating the state of things which furnishes the occasion for the tort.[30] Thus, we have held that fraud and deceit provide a ground for recovery that is independent of contract.[31]

[16] Therefore, we hold that a misrepresentation cause of action is not a "[c]ontract claim" under the State Contract Claims Act. Our precedent requires us to strictly construe all statutes that purport to waive sovereign immunity in favor of the sovereign and against the waiver.[32] Using that as our guide, we find that a cause of action for misrepresentation is not a "dispute regarding a contract," because the gravamen of the case is in tort, independent from any underlying contract. In other words, the dispute is the tortious conduct of the defendant, not the contract itself. By excluding misrepresentation claims from the definition of contract claims, we properly narrow the applicability of the State Contract Claims Act's sovereign immunity waiver in favor of the sovereign.[33] Our interpretation is also consistent with the intent of the Nebraska Legislature, which has indicated that misrepresentation and deceit claims are torts under the State Tort Claims Act.[34] Therefore, we hold that the State Contract Claims Act does not apply to Zawaideh's misrepresentation causes of action.

For his third argument, Zawaideh argues that although his misrepresentation claims are torts, they are not subject to the

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[29] *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954).

[30] *Id.*

[31] See *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000), *overruled in part on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc., supra* note 26.

[32] *Britton v. City of Crawford, supra* note 17.

[33] See *id.*

[34] See § 81-8,219(4).

State Tort Claims Act. We again agree with Zawaideh. Section 81-8,210(4) of the State Tort Claims Act defines a "[t]ort claim" as "any claim against the State of Nebraska for money only." In *Czarnick v. Loup River P. P. Dist.*,[35] we interpreted this definition to exclude nonmonetary claims, such as actions for injunctive relief. Here, Zawaideh's amended complaint prayed for the contract to be voided or rescinded and expunged from the record and did not request monetary damages. Therefore, we find that Zawaideh's claim is not "for money only" and, thus, is not subject to the State Tort Claims Act.

[17] Finally, Zawaideh's fourth argument is that his misrepresentation claims brought pursuant to the Uniform Declaratory Judgments Act[36] are not barred by sovereign immunity under our decision in *Doe*.[37] We disagree. The problem for Zawaideh is that the State's sovereign immunity is unaffected by the declaratory judgment statutes.[38] Nebraska's Uniform Declaratory Judgments Act does not waive the State's sovereign immunity, and a plaintiff who seeks declaratory relief against the State must find authorization for such remedy outside the confines of the act.[39] Such authorization is typically found in the State Contract Claims Act, the State Tort Claims Act, and the Administrative Procedure Act.[40] Zawaideh concedes that none of these acts are applicable in this instance.

Therefore, Zawaideh argues that sovereign immunity does not apply in the first instance under the modified "affirmative action" test we set out in *Doe*.[41] In *Doe*, we stated, in dicta, that actions to compel an officer to perform an act the officer is legally required to do are not barred by state sovereign immunity unless the affirmative act would require the state official

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[35] *Czarnick v. Loup River P. P. Dist.*, 190 Neb. 521, 209 N.W.2d 595 (1973).

[36] See Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 2008).

[37] See *Doe v. Board of Regents*, *supra* note 13.

[38] *Logan v. Department of Corr. Servs.*, 254 Neb. 646, 578 N.W.2d 44 (1998).

[39] *Id.*

[40] See Neb. Rev. Stat. § 84-901 et seq. (Reissue 2008 & Cum. Supp. 2012).

[41] See *Doe v. Board of Regents*, *supra* note 13.

to expend public funds.[42] Without addressing the other elements of the modified "affirmative action" test, we will address whether the Department and the Attorney General are legally required to rescind the assurance of compliance.

Two cases cited by this court in *Doe* in support of the modified "affirmative action" test help define what it means to be "legally required" to act. In *State ex rel. Steinke v. Lautenbaugh*,[43] we did not apply sovereign immunity to an action to compel a county election commissioner to reverse the district changes he had made. We held that the commissioner had gone beyond his statutory authority in redistricting and, therefore, was legally required to restore the original districts.[44] In comparison, in *County of Lancaster v. State*,[45] we held that sovereign immunity applied to a lawsuit which sought to require the Department of Public Institutions to accept committed mental health patients. Our citation to *County of Lancaster* in the *Doe* opinion retrospectively suggests that despite the defendant's being legally required to act under the Nebraska Mental Health Commitment Act,[46] the lawsuit was barred because, unlike *State ex rel. Steinke*, the legally required action would require expenditure of public funds.[47] Therefore, to satisfy the "legally required" element, Zawaideh must prove either that state law requires the Attorney General to rescind the assurance of compliance or that the assistant attorney general went beyond her statutory authority by entering into the assurance of compliance.

Here, we find that the Attorney General is not legally required to rescind the assurance of compliance under either theory. First, Zawaideh does not argue that a Nebraska statute, rule, regulation, or mandate requires rescission of the

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[42] *Id.*

[43] *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

[44] *Id.*

[45] *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995).

[46] See Neb. Rev. Stat. § 71-901 et seq. (Reissue 2009 & Cum. Supp. 2012).

[47] *County of Lancaster v. State, supra* note 45.

assurance of compliance. The assurance of compliance was a voluntary agreement, which was negotiated and entered into by Zawaideh and the assistant attorney general.[48] Thus, we find that the rescission of this agreement of compliance is at the discretion of the parties and not compelled by law. And second, the record establishes that the assistant attorney general did not go beyond her authority in entering into the assurance of compliance. Under the Uniform Credentialing Act, the Attorney General's office has the authority to enter into an assurance of compliance with a medical professional.[49] Thus, we hold that the Attorney General is not legally required to rescind the contract.

Therefore, the district court did not err in determining that it lacked subject matter jurisdiction, because sovereign immunity bars Zawaideh's misrepresentation claims.

CONCLUSION

We hold that the district court erred in finding that Zawaideh's fraudulent and negligent misrepresentation claims were subject to, and barred by, the State Contract Claims Act. However, we find that, albeit for different reasons, the district court did not err in granting summary judgment on the issue of subject matter jurisdiction.

AFFIRMED.

CONNOLLY, J., not participating.

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[48] *Zawaideh I, supra* note 1.

[49] § 38-1,108.

KERI CLARK, APPELLANT, V. ALEGENT HEALTH NEBRASKA, APPELLEE.

825 N.W.2d 195

Filed January 18, 2013. No. S-12-271.

1. **Workers' Compensation.** Under Neb. Rev. Stat. § 48-120(2)(a) (Reissue 2010), an employee has the right to select a physician who has maintained the