THE NEBRASKA SUPREME COURT AND THE THEORY OF "LEGISLATIVE ACQUIESCENCE," EROSION OF THE LEGISLATIVE FUNCTION OF THE NEBRASKA UNICAMERAL IN LIGHT OF THE RECENT NEBRASKA SUPREME COURT'S DECISION IN LENZ V. CENTRAL PARKING

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I. INTRODUCTION

Result oriented decisions, whatever their motivation, erode principles of separation of powers, stare decisis, and judicial credibility.1 In interpreting the Nebraska Workers’ Compensation Act2 (the “Act”), the Nebraska Supreme Court has recently demonstrated a pattern of reaching decisions based upon a desired outcome rather than upon sound judicial principles.3 Because less and less regard for the established rule of law has been shown in some of the court’s most recent decisions, stare decisis has been replaced with random uncertainty.4 At the same time, the Nebraska unicameral’s legislative authority

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1. See Bassinger v. Nebraska Heart Hosp., 806 N.W.2d 395, 403 (Neb. 2011) (citing City of Falls City v. Nebraska Mun. Power Pool, 795 N.W.2d 256 (Neb. 2011) for the proposition that “it is the Legislature’s function through the enactment of statutes to declare what is the law and public policy.”).


4. See Lenz, 848 N.W.2d at 628 (holding that the Hill decision three decades earlier was overruled because it involved “issues of public policy that were solely within the province of the Legislature”); Potter v. McCulla, 851 N.W.2d 94, 104 (Neb. 2014) (concluding that at least one prior statutory interpretation under the Nebraska Workers’ Compensation Act was not “perfect”).
has been appropriated, using a novel idea that elected State Senators can cede such constitutionally provided power through passive inactivity, or "acquiescence," as the Nebraska Supreme Court has labeled it.\(^5\)

The conditions triggering the application of "legislative acquiescence" have not been fully articulated by the Nebraska Supreme Court.\(^6\) As such, this anomaly could arguably be used by the Nebraska Supreme Court with unchecked abandon, relegating the function of the legislative branch of the Nebraska State government to little more than an advisory body with ever dwindling relevance.

Examples of shifts in legislative power from the Unicameral to the Judiciary are not new; however, the recent case of Lenz v. Central Parking System of Nebraska Inc.\(^7\) offers perhaps the most obvious and recent example of this change.\(^8\) At the same time, this particular decision has created an irreconcilable conflict with the doctrine of stare decisis and the principle of separation of powers.\(^9\)

This Note will first detail the facts and proceedings leading up to the appeal before and the decision by the Nebraska Supreme Court in the recent case of Lenz v. Central Parking.\(^10\) Then, in examining the context of how the Nebraska Supreme Court has created conflict and judicial uncertainty, this Note will examine the philosophy of the Nebraska Workers’ Compensation Act, including its purpose, intended construction, and limits of its application.\(^11\) This Note will also detail prior decisions from Nebraska courts that have analyzed and interpreted the Act, sometimes in keeping with prior decisions and the plain text of the Act and sometimes not.\(^12\) Next, this Note will summarize a history of judicial construction of statutes giving rise to the concept of "legislative acquiescence."\(^13\) Additionally, this Note will conclude that instances of judicial legislation, coupled with the use of legislative acquiescence has impermissibly redirected legislative au-

\(^5\) See Lenz, 848 N.W.2d at 628 (noting that "[w]hen judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court’s interpretation."); Potter, 851 N.W.2d at 103 (citing Dawes v. Wittrock Sandblasting & Painting, Inc., 667 N.W.2d 167, 182 (Neb. 2003)).


\(^7\) 848 N.W.2d 623 (Neb. 2014).

\(^8\) See Lenz, 848 N.W.2d at 628-29 (applying both judicial legislation and legislative acquiescence in the same case).

\(^9\) See id. at 628 (applying the concept of "legislative acquiescence"); cf. Bassinger, 806 N.W.2d at 403 (determining that the Judiciary is not a legislative body).

\(^10\) See infra notes 16-91 and accompanying text.

\(^11\) See infra notes 92-136 and accompanying text.

\(^12\) See infra notes 137-264 and accompanying text.

\(^13\) See infra notes 265-93 and accompanying text.
thority from the Nebraska Unicameral to the Nebraska Supreme Court. Finally, this Note will suggest several possible solutions to the current confusion, from the simplest remedy to the more drastic.

II. FACTS AND HOLDING

The plaintiff in *Lenz v. Central Parking System of Nebraska Inc.*

was a parking lot attendant who occasionally worked outdoors at a parking garage in Omaha, Nebraska. In December 2008, the plaintiff suffered a frostbite injury to his right foot while performing his work duties for Central Parking of Nebraska. As a result, his claim for workers’ compensation benefits was accepted by his employer and its insurance carrier, who initially paid certain medical and indemnity benefits.

Among the benefits paid to Lenz was payment for medical treatment up until mid-2009. Lenz also received indemnity payments, albeit at a rate lower than was actually owed. On the other hand, Mr. Lenz was not initially paid any permanency benefits or mileage reimbursement in connection with his injury. As such, the evidence indicated that although the claim had been accepted, Mr. Lenz had not been paid all of the benefits under the Nebraska Workers’ Compensation Act that he could have collected.

Besides being underpaid as to mileage and indemnity payments, Mr. Lenz’s medical treatment was not paid by the defendants from approximately April 2009 forward. It was during this same time period that Lenz moved from Nebraska to Colorado, where he sought additional treatment in light of the ongoing nature of his foot injury. Specifically, Mr. Lenz’s right foot had “frequent and near continuous episodes of recurrence of the ulcers.” Due to complications from

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14. *See infra* notes 385-512 and accompanying text.
15. *See infra* notes 513-31 and accompanying text.
18. *Lenz*, 848 N.W.2d at 624.
19. *Id.* at 625-26.
20. *Id.*
21. *Id.* *See also* Brief of Appellant at 10, *Lenz*, 848 N.W.2d 623 (No. A-13-000930) (benefits actually paid included temporary total disability benefits, albeit at the incorrect rate).
22. *Lenz*, 848 N.W.2d at 625-27.
25. *Id.* at 625.
26. *Id.* (noting that Mr. Lenz suffered from diabetes and had an infection, as well as ulcers in his right foot).
27. *Id.* at 626.
these ongoing problems, Mr. Lenz eventually underwent a “partial amputation of the fifth metatarsal.”

After April 2009, Mr. Lenz unilaterally submitted some of the bills for right foot care to an indigent care program in Colorado. Mr. Lenz testified that he knew the bills that were being incurred were the result of his compensable claim. He also testified that he knew he could have filed his petition for benefits earlier than he did. Still, it was not until he underwent the partial amputation of his fifth metatarsal on October 31, 2012, that he demanded payment for the remaining outstanding medical bills and additional indemnity benefits.

Among the indemnity demanded by Lenz was reimbursement for mileage expenses, temporary total disability from the date of the accident forward, and permanent partial disability benefits from May 2009 forward. This latter category of benefits was based upon a twenty percent impairment rating given by Mr. Lenz’s surgeon who performed the partial amputation. When his former employer’s insurance carrier denied Mr. Lenz’s claim on the basis of the statute of limitations found in section 48-137 of the Nebraska Revised Statutes, he filed suit in January of 2013. Before trial, the parties stipulated that more than two years had passed since the last payment of “compensation” within the meaning of the Nebraska Workers’ Compensation Act.

Issues before the trial court included whether Lenz’s claim was barred by the statute of limitations found in section 48-137 and, if not, what benefits the plaintiff might be entitled to under the Act. Lenz claimed, pursuant to an exception to the statute of limitations found in *White v. Sears*, that his petition was timely, having been filed

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28. *Id.*
29. *Id.*
30. *Id. at 626; see also Brief of Appellant at 10, Lenz, 848 N.W.2d 623 (No. A-13-000990).*
31. *Lenz, 848 N.W.2d at 625-26.*
32. *Id.*
33. *Id.*
34. *Id. at 626-27.*
35. *Neb. Rev. Stat. § 48-137 (2012 & Supp. 2014). This statutory section provides that all claims under the Act “shall be forever barred unless, within two years after the accident . . . [or] one of the parties shall have filed a petition . . . .” *Id.*
36. *Lenz, 848 N.W.2d at 626.*
37. *See id. (citing Smart v. Scrivner/Food 4 Less, 574 N.W.2d 505 (Neb. 1998) (noting that in considering whether the statute of limitations of section 48-137 is tolled by payments of "compensation," the term is a "chameleon-like expression which takes its meaning from the context in which the word is used in the statute."). *Neb. Rev. Stat. §§ 48-101, 48-137.*
38. *Lenz, 848 N.W.2d at 626.*
39. *431 N.W.2d 641 (Neb. 1988).*
within two years of the alleged worsening of his condition.\textsuperscript{40} Lenz, therefore, claimed entitlement to all benefits requested within his petition.\textsuperscript{41}

In answer to the petition filed by Lenz, the defendants asserted that pursuant to \textit{Bassinger v. Nebraska Heart Hospital},\textsuperscript{42} the statute of limitations exception in \textit{White} was unenforceable, particularly considering that the \textit{Bassinger} court had held that judicial legislation was not appropriate under the Nebraska Workers’ Compensation Act.\textsuperscript{43} Additionally, defendants alleged that even if the \textit{White} exception to section 48-137 was enforceable, Lenz had failed to meet the test specified in \textit{White}.\textsuperscript{44} Finally, the defendants suggested that Lenz never reached a point where his condition plateaued such that he could prove a “substantial material worsening.”\textsuperscript{45}

Trial on the plaintiff’s petition was held before Judge Thomas Stine of the Nebraska Workers’ Compensation Court. Judge Stein generally rejected the arguments raised by defendants that the exception to section 48-137 was unenforceable.\textsuperscript{46} In this regard, the trial court noted:

There is no doubt as to the right of an injured worker to receive compensation for an increase in disability that occurs following a compensable injury. Where there has been a proceeding before the compensation court and there has been an award, the procedure is set out in § 48-141. Where there is no dispute about the compensable nature of the injury which the worker sustained, and the employer has voluntarily paid compensation to the injured worker, the right to receive additional compensation in the event of a material increase in disability resulting from the injury is still available.\textsuperscript{47}

As to defendants’ argument regarding the application of the recent \textit{Bassinger} decision, however, the trial court stated “[w]hile the Court is flattered that defendants believe the Court can unilaterally overturn the Nebraska Supreme Court’s decision in \textit{White}, the Court respectively [sic] declines to engage in such an act of megalomania.”\textsuperscript{48} The trial court then concluded that the plaintiff had sustained a substantial worsening in his condition, thus entitling him to additional

\begin{itemize}
\item \textsuperscript{40} \textit{Lenz}, 848 N.W.2d at 627.
\item \textit{Id}. at 625-26.
\item \textit{Id}. at 395 (Neb. 2011).
\item \textit{Lenz}, 848 N.W.2d at 629.
\item \textit{Id}.
\item \textit{Id}. at 626.
\item \textit{Lenz}, 2013 WL 5494580, at *3.
\item \textit{Id}. at *4.
\end{itemize}
benefits. At the same time, the trial court found that "any claim for benefits prior to October 28, 2012, is barred by § 48-137."50

Central Parking appealed the trial court’s award in Lenz, assigning error in the trial court’s finding that the exception to the section 48-137 statute of limitations was valid, even after Bassinger.51 Central Parking also assigned as error the trial court’s finding that the test for the exception to the statute of limitations was satisfied based upon the facts of the case, particularly considering that Mr. Lenz had reason to bring suit before eventually filing his petition in January 2013.52 Additionally, Central Parking asked that the Nebraska Supreme Court give meaning to the legislative function of the Nebraska Unicameral and prior decisions supporting a separation of powers doctrine in Nebraska.53

Although this appeal was filed with the Nebraska Court of Appeals, the Nebraska Supreme Court removed the case to its docket pursuant to section 24-1106(3).54

During oral arguments before the Nebraska Supreme Court, more than one Associate Justice made references to “acquiescence of the legislature.”55 For example, Associate Justice Wright asked “[d]o you conceive that the legislature is aware of our decision in White? . . . I mean have they enacted any subsequent legislation that would change our determination in White?”56 In response, the appellant noted that “if the legislature had seen fit to carve out yet another exception to 48-137, they would have done so and they have not done so I would submit your Honor.”57

During further questioning, focus shifted to only one element of the test from White, that being whether there was a material change in the claimant’s condition. Here, Associate Justice Wright noted that

49. Id. at *3. In a somewhat contradictory reference, the trial court noted that:
If an employee suffers an injury, which appears to be slight, but which is progressive in its course, and which several physicians were unable to correctly diagnose, his failure to file claim, or bring suit within the time limited by law, will not defeat his right to recovery, if he gave notice and commenced action within the statutory period after he had knowledge that compensable disability resulted from the original accident . . . .

50. Id. at *4.
51. Lenz, 848 N.W.2d at 627, 629.
52. Id. at 627, 630.
54. Lenz, 848 N.W.2d at 627. The statutory section at issue allows the Nebraska Supreme Court to regulate the dockets of the appellate courts. Id.
56. Id.
57. Id.
"in order to obtain relief, the plaintiff has the burden to establish that there was a substantial and material change in this condition resulting from this workplace injury." The appellant's counsel repeatedly pointed out that this was but one element of the White test. Moreover, and to the extent that the trial court did not address this element of the test, appellant argued that this did not constitute a "reasoned decision," as required by the Rules of the Nebraska Workers' Compensation Court.

In examining the first element of White, requiring a showing that there was not an occasion to have brought suit earlier, Justices posed several questions as to whether Lenz could have brought suit earlier. Appellee's response to these questions were that this consideration was irrelevant to the appeal, considering that the trial court denied benefits to Lenz that were ostensibly due for more than two years by the time suit was eventually filed. In follow up, Associate Justice Miller-Lerman then observed "that Mr. Lenz was getting some money without suit and while the numbers might have been off, according to the schedules and so forth, one thing he did know is that he didn't have a permanency award and that should have alerted him to bring a suit." This again was irrelevant, according to the appellee, considering that an insurance company attempting to escape liability could simply identify some benefit that the claimant was not provided and thus argue that the statute has run.

Considering the appellant's argument that White was overturned by Bassinger, Associate Justice Wright asked the appellee to distinguish Bassinger from the case at bar. Specifically, the court noted that "[t]he defense argues that Bassinger means that we can't judicially legislate by finding exceptions to the statute of limitations to 48-137. Can you distinguish Bassinger from this case for which we held that we couldn't judicially determine that there was a misrepresentation defense?" Associate Justice Connolly joined in, observing, "the reasoning in Bassinger is that this court cannot and should not alter the provisions of the Workers' Compensation Statute by judicial inter-

58. Id. at 10:08.
59. Per the Rules of the Nebraska Workers' Compensation Court, the trial court must issue a "reasoned decision" in making any award or order on cases brought before it. Dawes v. Wittrock Sandblasting & Painting, Inc., 667 N.W.2d 167 (Neb. 2003) (citing Rule 11 of the Nebraska Workers' Compensation Court).
61. Id. at 14:24.
62. Id. at 15:04.
63. Id. at 15:20.
64. Id. at 16:03.
pretation and isn’t that what White did? . . . Didn’t it extend the two year limitation period if certain conditions were met?\textsuperscript{65}

Still other exchanges raised concerns about whether an injured worker might be left without a remedy where a substantial worsening takes place in some cases.\textsuperscript{66} In one such exchange, Associate Justice Wright asked what would happen if a worker receives some benefits for an accepted claim and then has a substantial worsening.\textsuperscript{67} The reply to this came from counsel for the appellant to the effect that under such circumstances and assuming that the claimant had reason to bring suit for any unpaid benefits before the worsening, the claim should be barred pursuant to section 48-137.\textsuperscript{68} Unsatisfied with that response, Associate Justice Wright made the point that the trial court in \textit{Lenz} barred any benefits due for more than two years before suit was filed.\textsuperscript{69} In making this observation, Associate Justice Wright did not seem to be troubled that a new statute of limitations hybrid was being created before the court’s eyes.\textsuperscript{70}

Never during the questions of either of the attorneys of record was there a reference from the court about the separation of powers, precedence regarding that subject, or even the Nebraska Constitution.\textsuperscript{71} The end result of oral arguments was a hint that the Nebraska Supreme Court would likely affirm the trial court’s decision, although the possible bases for such a conclusion were not yet fully apparent.\textsuperscript{72}

Nearly three months after oral arguments, the Nebraska Supreme Court issued its written decision on the \textit{Lenz} appeal.\textsuperscript{73} In characterizing the issues before it, the Nebraska Supreme Court stated: “[t]he question presented is whether the partial amputation was a material change in condition and substantial increase in disability that would permit Lenz to seek benefits more than 2 years after Central’s last voluntary payment.”\textsuperscript{74} In resolving the issue in favor of Lenz, the court acknowledged that Lenz had brought suit, alleging that he was entitled to benefits from two distinct time periods: one for benefits from the date of the accident up until May 2009, and a second from the date of surgery to the time of trial.\textsuperscript{75} Observing that Lenz did not cross-appeal the trial court’s denial of benefits associated with the ear-

\textsuperscript{65} \textit{Id.} at 17:00.
\textsuperscript{66} \textit{See generally} Oral Argument, supra note 55.
\textsuperscript{67} \textit{See generally} Oral Argument, supra note 55.
\textsuperscript{68} \textit{Id.} at 12:15.
\textsuperscript{69} \textit{See generally} Oral Argument, supra note 55.
\textsuperscript{70} \textit{Id.} at 3:44.
\textsuperscript{71} \textit{See id.} (recording never had questions regarding Separations of Powers).
\textsuperscript{72} \textit{See id.} (asking about the legislative acquiescence).
\textsuperscript{73} \textit{See generally} \textit{Lenz}, 848 N.W.2d at 623 (opining on the case).
\textsuperscript{74} \textit{Id.} at 624-25.
\textsuperscript{75} \textit{Id.} at 627.
lier of the two time periods, the court opted not to address whether this aspect of the trial court’s decision was in error.\textsuperscript{76}

Turning to the plain language of the statute of limitations found in section 48-137, the Nebraska Supreme Court first recited the exact language of the statute itself, followed by references to two exceptions to the statute.\textsuperscript{77} As conceded by the court, these exceptions were originally created by “case law,” the first applying to latent and progressive and the second applying to a material change in the compensable injury.\textsuperscript{78} Observing that it was the second of these two exceptions at issue in the \textit{Lenz} appeal, the court set about examining the facts in light of that test.\textsuperscript{79}

Before determining whether \textit{Lenz} satisfied the \textit{White} test, the court first addressed the defendants’ argument that \textit{White} should be repealed in light of \textit{Bassinger}.\textsuperscript{80} On this subject, the court asserted that \textit{Bassinger} overturned the common-law misrepresentation defense articulated in \textit{Hilt} because that decision was “equitable” in nature.\textsuperscript{81} Moreover, the Nebraska Supreme Court stated, “the Workers’ Compensation Court does not have equity jurisdiction and . . . [w]e do not have the ‘authority to apply equitable principles’ to the Nebraska Workers’ Compensation Act.”\textsuperscript{82} In contrast, the Nebraska Supreme Court suggested that the \textit{White} exception to section 48-137 was “clearly” distinguishable because it involved not equitable principles, but was based upon statutory interpretation.\textsuperscript{83}

Besides \textit{White} ostensibly addressing construction of a statute rather than equitable considerations, the Nebraska Supreme Court had another reason why that judicially created exception was still law after the \textit{Bassinger} decision.\textsuperscript{84} According to the Court:

[s]ince our decision in \textit{White}, the Legislature has not amended § 48-137 to preclude application of the exception to the statute of limitations in the event of a material change in

\textsuperscript{76} \textit{Id.}
\textsuperscript{78} \textit{Lenz}, 848 N.W.2d at 627.
\textsuperscript{79} \textit{Id.} at 628 (citing \textit{White}, 431 N.W.2d at 643).
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.} (citing \textit{Bassinger} v. Nebraska Heart Hosp., 806 N.W.2d 395, 403, 404 (Neb. 2011)) (emphasis added).
\textsuperscript{83} \textit{Id.} The material increase test outlined in \textit{White} was based on equity. \textit{See} Scott v. State, 289 N.W.2d 367, 369 (Neb. 1980) (stating “[e]quitably an increased disability, where compensation has been paid periodically for more than six months under a valid agreement or a formal award, must be treated as analogous to a latent injury and subject to the application of the limitation provision of the statute in the manner we have indicated above.”).
\textsuperscript{84} \textit{Lenz}, 848 N.W.2d at 628.
condition and substantial increase in disability. The appellate courts in Nebraska have recognized this exception on multiple occasions in the 26 years since White. None of these decisions have prompted an amendment by the Legislature.85

The Nebraska Supreme Court then stated:
[w]hen judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court’s interpretation. Because the Legislature has acquiesced to the exception for a material change in condition and substantial increase in disability established in White, we continue to apply it.86

Once the court concluded that the material worsening exception to the statute of limitations in section 48-137 was good law, the Lenz court then quoted at least a portion of the test in White v. Sears, Roebuck & Co.87 Significantly, the Nebraska Supreme Court observed that in order to satisfy the White test, there must be “[n]o dispute about the compensable nature of the injury which the worker sustained and the employer has voluntarily paid compensation . . . .”88 As to the appellants’ argument that there was a second prong to the White test, the Court disagreed.89 Specifically, the Court held that:

Lenz was not required to demonstrate that he could not have filed a petition earlier than he did. Part of our rationale in White was that an injured employee cannot bring a claim for additional compensation unless and until such a change has taken place. Given that fact, we explained the exception as follows: ‘Such a petition must be filed with 2 years from the time the employee knows or is chargeable with knowledge that the employee’s condition has materially changed, and there has been such a substantial increase in disability as to entitle the employee to additional compensation.’ We concluded that the employee’s petition in White met the requirement of being filed within 2 years of a qualifying change and we did not discuss whether she could have filed a petition sooner.90

The Nebraska Supreme Court then suggested that Lenz had satisfied the White test, and therefore, agreed with the trial court’s decision in awarding Lenz benefits.91

85. Id. (citing Dawes, 667 N.W.2d 167) (disapproved on other grounds); Kimminau v. Uribe Refuse Serv., 707 N.W.2d 229 (Neb. 2005); Foote v. O’Neill Packing, 632 N.W.2d 313 (Neb. 2001); Snipes, 557 N.W.2d 662; Wissinger, 823 N.W.2d 710.
86. Lenz, 848 N.W. at 628.
87. Id. at 629.
88. Id. at 627.
89. Id. at 628.
90. Id. at 629 (internal citations omitted).
91. Id. at 629-30.
III. BACKGROUND

A. THE NEBRASKA WORKERS’ COMPENSATION ACT

The Nebraska Workers’ Compensation Act\textsuperscript{92} (the “Act”), like its counterparts in the various states, was enacted to provide protection for injured workers from negative effects of on the job injuries.\textsuperscript{93} Thus, where an injury arises out of and in the course of employment, the injured employee is usually entitled to specific benefits under the Act.\textsuperscript{94} Such benefits are limited, however, as provided by the Act itself.\textsuperscript{95} This limitation of benefits is one of the trade-offs for employers that previously only had liability to employees in tort, if at all.\textsuperscript{96}

In order to qualify for benefits under the Act, an injured worker must be a “covered” employee.\textsuperscript{97} Additionally, the injury sustained by the employee must have been “sudden and unexpected.”\textsuperscript{98} Furthermore, the injury must have “[arisen] out of and in the course of his or her employment.”\textsuperscript{99} Where any one of these elements is missing, compensation may not be had.\textsuperscript{100} However, when an employee can show entitlement to benefits, he or she will be entitled to benefits including reasonable medical treatment to address the injury,\textsuperscript{101} indemnity for periods of recuperation, known as temporary total or temporary partial disability benefits,\textsuperscript{102} and indemnity for permanent disabilities, either pursuant to a schedule of benefits specified under the Act or based upon the injured worker’s “loss of earning capacity,” depending upon the location and severity of the injury.\textsuperscript{103} Of course, the benefits available under the Act may be lower than would otherwise be available to a plaintiff in a tort action.\textsuperscript{104}

\textsuperscript{93} See Troper v. Bag ‘N Save, 734 N.W.2d 704, 708-12 (Neb. 2007) (comparing other jurisdictions’ interpretation of workers’ compensation acts with the Nebraska Statutes).
\textsuperscript{94} See generally Neb. Rev. Stat. §§ 48-101 to 48-1,118.
\textsuperscript{96} See Neb. Rev. Stat. § 48-109 (providing how compensation would be dispensed); see also McIntosh v. Standard Oil Co., 236 N.W. 152 (Neb. 1931) (examining that damages in tort differ from benefits under workers’ compensation).
\textsuperscript{97} See generally Pettit v. State, 544 N.W.2d 855 (Neb. 1996) (demonstrating the analysis used when determining whether an employee is a “covered” employee).
\textsuperscript{98} Neb. Rev. Stat. § 48-151(2).
\textsuperscript{100} Seger v. Keating Implement Co., 60 N.W.2d 598, 601-02 (Neb. 1953).
\textsuperscript{101} Neb. Rev. Stat. § 48-120.
\textsuperscript{102} Neb. Rev. Stat. § 48-121.
\textsuperscript{103} Id.
\textsuperscript{104} See Neb. Rev. Stat. § 48-109 (stating that employees cannot bring a negligence action with a worker’s compensation claim); McIntosh, 236 N.W. 152.
Besides limitations on the amounts payable to injured workers under the Nebraska Workers’ Compensation Act, claims asserted by injured workers may be subject to specific affirmative defenses available to the employer. For example, where an injured worker fails to provide notice of the injury to the employer “as soon as practicable,” the claim may be barred. Additionally, where an injured employee fails to cooperate in reasonable examinations requested by the employer, the claim may be suspended or barred. Also, where a claim is not filed within two years of the date of the injury or the last payment of compensation, whichever takes place later, the claim may be barred pursuant to the statute of limitations found within the Act.

In construing particular portions of the Act that come before it, the Nebraska Supreme Court has long held that its provisions are to be construed liberally so as to accomplish the “beneficent purpose” of the Act to find compensation where possible. On the other hand, other cases have noted that this interpretation has its own limitations. In this regard, the liberal interpretation is meant to apply to the Act itself and not to the facts of any give case that might come before the Workers’ Compensation Court. Moreover, the Nebraska Workers’ Compensation Court is a court of “limited jurisdiction,” lacking equitable authority or any other powers not specifically provided by statute.

B. NEBRASKA’S LEGISLATIVE PROCESS

Of course, the Nebraska Workers’ Compensation Act and its many amendments over the years are the result of a complex and often undisciplined process employed by the Nebraska Legislature or the “Unicameral,” as it is known. The system is unique among the states, being the only single body legislative branch that exists at the

107. Id. § 48-134 (referencing examinations scheduled by employer).
108. Id. § 48-137 (providing for statute of limitations).
109. See White v. W. Commodities, Inc., 295 N.W.2d 704, 711 (Neb. 1980) (stating, “it is to accomplish this purpose the act should be liberally construed, not to find that liability exists without the required quantum of proof, but to include within the protection of the act by liberal interpretation all injuries arising out of and in the course of the employment which the act does not clearly exclude. A strict interpretation should not be resorted to in order to accomplish such exclusion.
112. See Lenz v. Cent. Parking Sys. of Nebraska, 848 N.W.2d 623, 628 (Neb. 2014) (stating the limitations of the court in workers’ compensation claims).
state level. The Unicameral is comprised of forty-nine Judicial Districts, and each sends at least one representative to the Legislature. How many more representatives each district elects is subject to the population in the county at the time of elections.

In addition to being a single, one-house branch, the Nebraska Unicameral is also "nonpartisan." In short, this means that candidates do not list party affiliation when running for office. Additionally, leadership within the Unicameral is not based upon party affiliation. That is not to say that Nebraska state senators do not themselves belong to one political party or another.

In order for a bill to become law in Nebraska, it is assigned to one of the fourteen standing committees for consideration. Once assigned, the individual committee will hold the bill, indefinitely postpone it, or advance the bill for further consideration. Because any bill must undergo multiple steps before reaching the Floor for a vote, Chairs of the fourteen standing committees wield substantial power. Should the bill clear its respective committee and receive sufficient votes on the Floor, it is then passed to the Governor to sign into law or veto. Hence, although the Nebraska Unicameral legislative system is simple in its design, the same is not necessarily true for the legislative process.

Although the Nebraska Legislature created and has amended the Nebraska Workers' Compensation Act over the course of many years, the courts are naturally charged with interpreting the Act. Indeed, the Nebraska Constitution specifically defines the roles of these two branches to pass law in the case of the Nebraska Legislature and to interpret the same law in the case of the Judiciary. Hence, all courts are bound by a constitutional prohibition against any branch of the State government from delegating its authority to any of the other

116. Id.
117. See Lawmaking in Nebraska, supra note 113.
118. Id.
119. Id.
121. Id.
122. Id.
123. See Lawmaking in Nebraska, supra note 113.
124. Id.
126. NEB. CONST. art II, § 1.
branches. This, of course, prevents the legislative branch from delegating its legislative function to the Judiciary.

According to Article II, section 1 of the Nebraska Constitution:
The powers of the government of this state are divided into three distinct departments, the legislative, the executive, and the judicial, and no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others except as expressly directed or permitted in this Constitution.

Although this three-branch system is similar in nature to the Federal Government, the separation of powers is even more rigid in Nebraska than its Federal equivalent. For example, the Nebraska State Constitution and Nebraska Supreme Court decisions addressing its provisions make it clear that setting public policy through enacting laws is a function that rests exclusively with the Legislature.

Besides constitutional limitations, there are other constraints placed upon the courts in construing law, including the Nebraska Workers’ Compensation Act. Such limitations include the prohibition against utilizing equitable considerations as a tool of construction. For example, the Nebraska Court of Appeals has previously noted that “[t]he compensation court is a court of statutory creation, and its powers are limited to those delineated in the statutes.” The Nebraska Court of Appeals has further stated that “[i]f this statutorily mandated result is inequitable, the solution lies with the Legislature and not with this court. The compensation court has no equitable powers.” Similarly, the Court of Appeals has noted that “[i]f the result appears unreasonable, that, again, is an issue for the Legislature.” Finally, the Court of Appeals has previously concluded, noting that “[w]hile we may not understand the Legislature’s motivation, we are bound to follow its statutory mandate.”

127. Id.
128. Id.
129. Id.
132. See Bryson v. Vickers, 584 N.W.2d 44, 50 (Neb. 1998) (relying on Larson’s, which had been used by the court in the past, to analyze the employee records before the court in a workers’ compensation case) (citing 5 Arthur Larson & Lex K. Larson, Larson’s Workers’ Compensation Law § 59.33(c), 10-501 through 10-509 (1998)).
133. Bryson, 584 N.W.2d at 51 (holding that “[t]he Workers’ Compensation Court has no inherent power to order that an employer be reimbursed . . . [t]he legislature set out the terms under which reimbursement should occur, and this scenario was not one of them. Again, we will not read other circumstances into the plain words of the statute.”).
134. Id.
135. Id.
136. Id. (citing In re Estate of Nelson, 571 N.W.2d 269, 273 (Neb. 1997)).
C. *Scott v. State*: A Common Sense and Workable Construction of the Act

In fulfilling its role of interpreting law, the Nebraska Supreme Court has rendered numerous decisions regarding the Nebraska Workers’ Compensation Act.\(^\text{137}\) Indeed, these decisions date back to the turn of the century and earlier.\(^\text{138}\) For example, in *Scott v. State*,\(^\text{139}\) the Nebraska Supreme Court made clear that “perpetual and unexpiring” claims would not be permitted.\(^\text{140}\)

The plaintiff in *Scott* sued her former employer, alleging an increase in disability from a compensable accident that had taken place nearly eleven years prior to bringing suit.\(^\text{141}\) From the date of the original injury, April 1926, the employer had made payments of compensation over the course of more than three years, the last of which took place in September 1929.\(^\text{142}\) These payments were made pursuant to an earlier award by the Nebraska Workers’ Compensation Court, finding the plaintiff to have suffered a seventy-five percent permanent partial loss of her left leg.\(^\text{143}\)

In July of 1926, Scott returned to her employment with the Nebraska Institution for the Feeble Minded; however, she left in December 1935, when she was physically incapable of further employment.\(^\text{144}\) Although Scott had experienced an overall increase in disability prior to her eventual separation of employment, the Nebraska Supreme Court had noted that “[t]he major portion of the increase was probably due to her age.”\(^\text{145}\) Even still, the court noted that the disability from her compensable injury had also increased.\(^\text{146}\) In any event, the Nebraska Supreme Court found that Scott was aware of her increase in disability prior to her retirement.\(^\text{147}\) This conclusion was supported by evidence that in 1929, Scott had visited with an attorney about the possibility of reopening her original claim.\(^\text{148}\)

Regardless of when any material change in Ms. Scott’s condition had actually taken place, it was clear that the latest possible date of

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\(^\text{137}\) See infra notes 137-293 and accompanying text.

\(^\text{138}\) See Beideck v. Acme Amusement Co., 166 N.W. 193, 194 (1918) (stating that the purpose of the Act was to replace “tedious delays” often associated with tort actions).

\(^\text{139}\) 289 N.W. 367 (Neb. 1939).

\(^\text{140}\) *Scott v. State*, 289 N.W. 367, 368 (Neb. 1939).

\(^\text{141}\) *Scott*, 289 N.W. at 367.

\(^\text{142}\) Id.

\(^\text{143}\) Id.

\(^\text{144}\) Id.

\(^\text{145}\) Id. Scott was seventy-three years old at the time she filed her first appeal. Id.

\(^\text{146}\) Id.

\(^\text{147}\) Id.

\(^\text{148}\) Id.
such a change that was supported by the evidence would have taken place when Ms. Scott left her employment in December of 1935.\textsuperscript{149} Because Ms. Scott did not bring suit for the alleged increase in disability until November 1937, the Nebraska Supreme Court was faced with the question of whether a new claim for disability may be brought at ANY time after an award of benefits is made or whether the then-existing one-year statute of limitations controlled, even after an award.\textsuperscript{150} As the statute of limitations read at the time:

In case of personal injury, all claims for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this Act, [or] unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 39 hereof. . . [w]here, however, payments of compensation have been made in any case, said limitation shall not take effect until the expiration of one year from the time of the making of the last payment.\textsuperscript{151}

Applying this language, the Nebraska Supreme Court affirmed the lower court’s decision, dismissing Ms. Scott’s petition as untimely.\textsuperscript{152}

In reaching its decision in \textit{Scott}, the Nebraska Supreme Court noted that this case did not present a latent injury exception to the statute of limitations.\textsuperscript{153} Indeed, the plaintiff had not argued this exception at trial.\textsuperscript{154} Instead, the plaintiff took the position on appeal that the statute of limitations cited above had no application in those cases where an award had been made.\textsuperscript{155} More specifically, the plaintiff cited authorities from other jurisdictions and the text of section 48-142, providing in a relevant part:

All amounts paid by an employer or by an insurance company carrying such risk, as the case may be, and received by the employee or his dependents, by lump-sum payments, shall be final, but the amount of any agreement or award payable periodically for more than six months may be modified as follows: (a) At any time by agreement of the parties with the approval of the Compensation Court, (b) If the parties cannot agree, then at anytime after six months from the date of the agreement or award, an application may be made by either

\textsuperscript{149}. \textit{Id.} Ms. Scott worked as an attendant at the Nebraska Institution for the Feeble Minded. \textit{Id.}
\textsuperscript{150}. \textit{Id.} at 367-68 (citation omitted).
\textsuperscript{151}. \textit{Id.} at 368 (citation omitted) (emphasis added).
\textsuperscript{152}. \textit{Id.} at 368-69.
\textsuperscript{153}. \textit{Id.}
\textsuperscript{154}. \textit{Id.}
\textsuperscript{155}. \textit{Id.}
party on the ground of increase or decrease of incapacity due solely to the injury . . . .156

The Nebraska Supreme Court in Scott rejected the plaintiff’s argument on appeal, stating:

We are unable to accept the argument that, where a court has once entered an award, section 48–142 is intended to give it a perpetual and unexpiring jurisdiction, without limitation as to time, to make additional allowances for any subsequent increase in disability . . . [i]t would still be our duty to think and reason for ourselves and to attempt to make our own construction—rational, workable, and as much in harmony as possible with our previous decisions. Mere priority of decision must not be translated into exclusiveness in judicial wisdom.157

Although the rationale employed above disposed of the Scott case in its entirety, the court nevertheless continued its analysis to increased disability claims.158 In this regard, the Scott court decided that the statute of limitations applied equally to an alleged increase in disability as it did to a latent injury claim before an award had been entered.159 Such an outcome, the court observed, was dictated by “a common sense and workable construction of our compensation law.”160 Therefore, from the Scott decision forward, claims for an increase in disability after settlement or an award could be pursued so long as they were brought within the applicable statute of limitations, running from the date “the employee knows or is chargeable with knowledge that his condition has materially changed, and that there has been a substantial increase in his disability as to entitle him to additional compensation.”161

Ultimately, it was equitable considerations that drove the Nebraska Supreme Court’s decision in Scott.162 In rejecting the plain language argument of the statute of limitations posited by the defendant, the Scott court noted that:

[s]uch a construction would result in many cases in an obvious injustice. Equitably, an increased disability, where compensation has been paid periodically for more than six months under a valid agreement or a formal award, must be treated as analogous to a latent injury and subject to the ap-

156. Id. at 368 (citing Neb. Rev. Stat. § 48-142 (2010)).
157. Id. at 368-69 (emphasis added).
158. See id. at 367-69 (explaining the new exception to the statute of limitations even though it did not apply to Ms. Scott’s case).
159. Id. at 368-69.
160. Id.
161. Id. at 369.
162. Id.
plication of the limitation provision of the statute in the manner we have indicated above.163

It was the decision in *Scott* that would provide a framework for future cases decided by the Nebraska Supreme Court, particularly in addressing exceptions to the applicable statute of limitations.164

D. *Hilt Truck Lines v. Jones*: Section 48-115 and the Misrepresentation Defense

Nearly four decades after the Nebraska Supreme Court decided the *Scott* case, the court made another landmark decision, this time interpreting when an employee is covered within the meaning of the Nebraska Workers’ Compensation Act.165 Rather than using equitable principles to construe a statute, the Nebraska Supreme Court in *Hilt Truck Lines v. Jones*166 was presented with the question as to whether misrepresentations by an applicant that would render the contract for hire voidable also would serve to bar a workers’ compensation claim.167 In the end, the court ruled in the negative.168

As noted above, one of the requirements under the Nebraska Workers’ Compensation Act is that the claimant be a “covered employee.”169 In *Hilt*, the employer sought to defeat a workers’ compensation claim by arguing that misrepresentations made by the employee, later deceased, rendered the employer-employee relationship void retroactively.170 Such representations included the employee’s prior use of an alias and several driving under the influence convictions before applying with *Hilt*.171 The trial court agreed that these misrepresentations had been made by the employee; however, it further found that there was no proximate relationship between these misrepresentations and the subsequent accident.172

The trial court in *Hilt* ultimately awarded death benefits to the decedent’s surviving dependents and the employer appealed to the Nebraska Supreme Court.173 The Nebraska Supreme Court’s decision focused on the contract for hire and whether Jones was a lawful employee at the time of the accident.174 Addressing the plaintiff’s mis-

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163. *Id.* at 369 (emphasis added).
167. *Hilt*, 281 N.W.2d at 403.
168. *Id.* at 403-04.
170. *Hilt*, 281 N.W.2d at 404.
171. *Id.* at 401-03.
172. *Id.* at 403.
173. *Id.*
174. *Id.*
representations made prior to employment, the Nebraska Supreme Court began its analysis with the general rule that:

false statements made at the time employment was secured are ordinarily insufficient to terminate the relation of master and servant existing at the time of the injury, even though they may constitute good grounds for rescinding the contract of employment, at least where there is no causal connection between the injury and the misrepresentation.\(^{175}\)

Finding this section to be unavailable to the defendant as an affirmative defense in the present matter, the Nebraska Supreme Court turned to the general rule set out in Larson’s Workers’ Compensation Law.\(^ {176}\) In this regard, the Court quoted Larson’s, noting that:

it has been held that employment which has been obtained by making false statements even criminally false statements whether by a minor or an adult, is still employment; that is, the technical illegality will not of itself destroy compensation coverage. The following factors must be present before a false statement in any employment application will bar benefits: (1) employee must have knowingly and willfully made a false representation to his physical condition. (2) The employer must have relied upon the false representation in this reliance must have been a substantial factor in the hiring. (3) There must’ve been a causal connection between the false representation and the injury.\(^ {177}\)

Although the Nebraska Supreme Court seemingly cited to Larson’s rule with favor, the court did not invoke equitable considerations in reaching its decision.\(^ {178}\) The court went on to quote the trial court as finding “insufficient evidence to raise or support an inference of a causal connection between decedent’s misrepresentations and his subsequent accident.”\(^ {179}\)

The Supreme Court noted that the contract for hire in Hilt was not void but was voidable.\(^ {180}\) Hence, even though the Nebraska Supreme Court found the affirmative misrepresentation defense to be inapplicable in Hilt, citing to it with favor left the door open for its application in subsequent decisions.\(^ {181}\) Indeed, the Hilt case remained undisturbed for nearly thirty-five years, when it was eventually reversed in the case of Bassinger v. Nebraska Heart Hospital.\(^ {182}\)

\(^{175}\) Id. (citing 56 C.J.S. Master and Servant § 180e (1948)).

\(^{176}\) Id. The Court often uses this treatise in drafting its opinions.

\(^{177}\) Id. (citing 1 B. Larson, Workmen’s Compensation Law, § 4753, 8-201 (1983)).

\(^{178}\) Id. at 399-403.

\(^{179}\) Id. at 403.

\(^{180}\) Id.

\(^{181}\) See Bassinger v. Nebraska Heart Hosp., 806 N.W.2d 395, 402 (Neb. 2011) (finding the misrepresentation defense inapplicable).

\(^{182}\) Bassinger, 806 N.W.2d at 402.
E. **White v. Sears, Roebuck & Co.: Basing Further Expansion of the Act upon Scott**

During the nearly thirty-five years that the *Hilt* case went undisturbed and more than sixty years after *Scott*, several other cases were decided by the Nebraska Supreme Court having a direct bearing on how future courts would construe the Act. In one such case, *White v. Sears, Roebuck & Co.*, the Nebraska Supreme Court reaffirmed that claims for a substantially worsened condition under section 48-141 would be allowed for additional benefits, even if they had not previously been settled or fully litigated. Before *White*, the statute of limitations found in section 48-137 provided a clear bar to cases not brought within two years of the date of injury or last payment of compensation. After *White*, however, plaintiffs had two separate exceptions to the statute of limitations to pursue, either of which could render section 48-137 inapplicable.

The plaintiff in *White* suffered a back injury on November 16, 1983, while working for Sears as a salesperson. Ms. White underwent significant surgical procedures and did not return to work for many months after the injury. While she was recuperating from her injuries, Sears did pay her medical expenses and some indemnity benefits pursuant to the Nebraska Workers' Compensation Act. It did not appear from the evidence that Sears had ever paid White permanent benefits, no impairment rating having been given by her treating surgeon.

More than two years after Sears made the last payment of any form of compensation in September 1984, White filed a petition before the Nebraska Workers' Compensation Court, alleging a material change in her condition. Specifically, White claimed that her condition worsened substantially in the spring of 1986 when she sought additional medical care and was then said to have a five to twelve percent disability by her treating physician. Sears answered

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184. 431 N.W.2d 641 (Neb. 1988).

185. *White*, 431 N.W.2d at 642.

186. *Id*.

187. *See id.* at 642-43 (referring to two exceptions: latent and progressive, as well as substantial worsening).

188. *Id.* at 642.

189. *Id*.

190. *Id*. It appears that only temporary total disability benefits were paid and that no indemnity benefits for a permanent injury were initially involved.

191. *Id.* at 642-43.

192. *Id.* at 642.

193. *Id.* at 642-43.
White’s petition, generally denying her allegations and affirmatively pleading that the statute of limitations of section 48-137 barred her claims as untimely. 194

After trial before the Workers’ Compensation Court, the trial judge dismissed White’s petition, finding it to have been filed out of time. 195 The trial court also concluded that the “plaintiff did not allege and attempt to prove that she had sustained a material increase in disability.” 196 In doing so, the trial court found it relevant that neither the facts giving rise to the claim nor the pleadings supported any suggestion that White’s condition was latent and progressive, so as to trigger at least one possible exception to section 48-137. 197 When the case was again dismissed after hearing before the Compensation Court, 198 White filed an appeal, which was eventually heard by the Nebraska Supreme Court. 199

The Nebraska Supreme Court in White determined that the plaintiff was entitled to additional benefits, notwithstanding the fact that she failed to bring a claim within two years from the date of the accident or from the last date Sears paid compensation. 200 In this regard, the Supreme Court disagreed with the trial court’s finding that White failed to plead and prove a material change. 201 Here, the court observed that the plaintiff’s petition specifically referenced “a substantial increase in disability.” 202 The Nebraska Supreme Court then compared White’s condition after surgery with her condition following the most recent treatment giving rise to the petition. 203

In considering the plaintiff’s condition at the time of the initial trial, the Nebraska Supreme Court observed that White’s treating physician found his patient to have a good neurological examination and only minor residual back discomfort. 204 Comparing this to evidence received at the second trial, the appellate court simply summarized White’s condition as having somewhere “between a 5-percent

194. Id. at 642, 643.
195. Id. at 642.
196. Id.
197. Id.
198. Id. Per the rules of the Nebraska Workers’ Compensation Court and as seen in White, procedure dictated that an initial trial be held, and if either party was dissatisfied with the outcome, a rehearing was held in the same court. Id. The result of that rehearing became final. In contrast, later decisions changed the procedure from a rehearing to a having the dissatisfied party file a direct appeal to the Nebraska Court of Appeals.
199. Id.
200. Id. at 642-43.
201. Id. at 642.
202. Id.
203. Id. at 642, 643.
204. Id. at 642-43.
and 12-percent permanent disability to the body as a whole . . ." 205
In making this reference, the court made no reference to what disability rating the plaintiff might have had prior to the "material change." 206

Just as the White court made no reference to any permanency rating the claimant might have had before the substantial worsening, the court also omitted any consideration as to whether the plaintiff had reason to bring suit for permanency benefits any time within the two years prior to her eventual lawsuit in September of 1984. 207 Instead, the court relied upon Larson's and suggested that the predominant inquiry is:

whether the claimant has any reasonable occasion to file a claim sooner than he did. If voluntary compensation was paid, the compensation cancels out the initial disability as a reason for filing a claim, and the case turns into a latent-injury situation . . . 208

Notably, the court did not parse this language with any statutory language it might have been interpreting in reaching its holding. 209

For any questions that may have remained after the White decision, the Nebraska Supreme Court would have an opportunity to later revisit its decision regarding the material increase exception to the statute of limitations. 210

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205. Id. at 643.
206. See id. at 641-46 (omitting any reference to any prior disability rating).
207. See id. at 643 (stating that the court did not consider any other assignments of error, and thus permanency benefits were not addressed).
208. Id. (emphasis added). Compare this to language embraced by the Nebraska Supreme Court in Scott. Scott v. State, 289 N.W. 367, 368 (1939) (holding that "[e]quitably, an increased disability, where compensation has been paid periodically for more than six months under a valid agreement or a formal award, must be treated as analogous to a latent injury and subject to the application of the limitation provision of the statute.").
209. White, 431 N.W.2d at 643. Where there is no dispute about the compensable nature of the injury that the worker sustained, and the employer has voluntarily paid compensation to the injured worker. Id.
210. See, e.g., Snipes, 557 N.W.2d 662; see also Hohnstein v. Frank, 468 N.W. 2d 597, 604 (Neb. 1991) (finding that a claimant alleging a material increase in disability must "prove by a preponderance of the evidence that there now exists a material and substantial change for the worse in the applicant's condition -- a change in circumstances that justifies a modification, distinct and different from that for which an adjudication has previously been made."). (citing Gomez v. Kenney Deans, Inc., 441 N.W.2d 632, 634 (Neb. 1989) (additional citations omitted)).
F. Snipes v. Vickers: Blueprint for a Substantial Worsening Claim

In Snipes v. Vickers, the Supreme Court of Nebraska was asked to determine if an injured worker was entitled to additional medical benefits, even without an alleged material increase in his disability. Snipes, an employee of Sperry Vickers, suffered an eye injury on February 2, 1984, that arose out of and in the course of his employment. His claim was accepted by the insurer and benefits were paid according to the Nebraska Workers’ Compensation Act. There was no evidence that Mr. Snipes was shorted any indemnity benefits in connection with his claim or that there were any outstanding medical expenses for which his employer and its insurance carrier otherwise would have been responsible.

Years after his injury, on March 9, 1995, Snipes sought further care from his ophthalmologist, who wrote a new prescription for glasses and suggested a replacement set. The parties stipulated that this treatment and the additional glasses were related to the original injury. The parties further stipulated that Snipes “had no claim against Sperry Vickers between August 14, 1992, and March 9, 1995.” As such, the employer and its carrier denied liability for any further benefits associated with the claim, citing the statute of limitations found in section 48-137, barring claims made more than two years after the date of the accident or, in the case of payments of compensation, two years after the last payment of such benefits. Citing section 48-137, the trial court agreed with the defense and denied Snipes’ claim. This decision was affirmed by a three judge panel of the Nebraska Workers’ Compensation Court.

211. 557 N.W.2d 662, 664 (Neb. 1997).
213. Snipes, 557 N.W.2d at 664.
214. See id. at 665 (stating Sperry Vickers paid for various medical expenses, glasses, temporary disability benefits, and permanent disability benefits).
215. See id. at 666-67 (summarizing payments made by Sperry Vickers).
216. Id. at 665.
217. Id. at 664-65.
218. Id. at 664, 665.
219. Id. at 665.
220. Id. at 664.
221. Id. At the time the Snipes case was decided, the appellate procedure of the Nebraska Workers’ Compensation Court mandated that all appeals first be heard by three judges of the Compensation Court not previously involved in the case. See Neb. Rev. Stat. § 48-1, 112 (providing that those cases pending before the Workers’ Compensation Court prior to August 27, 2011, shall be appealed to the three judge review panel of the court; whereas, cases after that date will be appealed to the Nebraska Court of Appeals pursuant to Neb. Rev. Stat. §§ 48-125, 48-145.01, 48-155, 48-156, 48-170, 48-178, 48-180, 48-182, and 48-185, as amended by Laws 2011, L.B. 151).
Appealing to the Nebraska Court of Appeals, Snipes argued that he had filed his claim prior to the bar found in section 48-137 because he filed within two years of the date he incurred the most recent medical expenses.\textsuperscript{222} The Nebraska Supreme Court removed the case to its docket for final adjudication.\textsuperscript{223} As a result, the Nebraska Supreme Court ultimately affirmed the trial court's decisions and remanded the case for dismissal.\textsuperscript{224}

Preliminarily, the Nebraska Supreme Court in \textit{Snipes} framed the issue on appeal as whether or not a claim for medical expenses incurred more than 2 years after the last payment of compensation is barred by the statute of limitations when the employee had no compensable claims to file between August 14, 1992, the date of the last payment of compensation, and March 9, 1995, the date of the examination by [the treating physician].\textsuperscript{225}

In reaching its decision, affirming the trial court, the \textit{Snipes} court noted that there are two exceptions to the statute of limitations that sometimes may apply.\textsuperscript{226} In this regard, the court referred to the latent and progressive exception, in which an injury may not reasonably be discovered within the two-year limitation.\textsuperscript{227} Because this exception was neither applicable under the present circumstances nor argued by Snipes, the court then addressed the second exception to the section 48-137 statute of limitations.\textsuperscript{228}

As the Nebraska Supreme Court observed, the second exception to the statute of limitations found in section 48-137 was most recently explained in \textit{White}, which the court found to be similar, albeit with an important distinction.\textsuperscript{229} Specifically, the court suggested that the plaintiff in \textit{White} had proven a substantial worsening in her condition at trial, while Snipes only demonstrated a change in his eyeglass prescription.\textsuperscript{230} Still, the court repeated the test set forth in \textit{White}, including the important element providing that “[t]he entire question is the simple one of whether the claimant has any reasonable occasion to file a claim sooner than he did. If voluntary compensation was paid,

\begin{itemize}
  \item \textsuperscript{222} \textit{Snipes}, 567 N.W.2d at 665.
  \item \textsuperscript{223} Id. at 664. In select cases, the Nebraska Supreme Court may remove cases from the Court of Appeals to its docket for final adjudication. See id. at 667 (stating that the Nebraska Supreme Court has the power to regulate the Court of Appeals docket and remove cases to their docket).
  \item \textsuperscript{224} Id. at 666-68.
  \item \textsuperscript{225} Id. at 666.
  \item \textsuperscript{226} Id.
  \item \textsuperscript{227} Id. (discussing the exception of when an injury is considered to be latent and progressive).
  \item \textsuperscript{228} See id. (applying the second exception to Snipes' argument).
  \item \textsuperscript{229} Id. at 666-67.
  \item \textsuperscript{230} Id.
\end{itemize}
this cancels out the initial disability as a reason for filing a claim . . . . 231

In analyzing the elements of the White test, the Snipes court noted that payments on the disability had initially been made and there was no dispute as to any compensation still due and owing.232 The Snipes court further observed that “[S]nipes had no reasonable occasion to file a claim sooner than he did.”233 Regarding the remaining element, however, the court found that there was neither stipulation nor evidence that Snipes’ original condition had materially changed or substantially increased from the original disability.234

In the end, the Snipes court rejected a problem suggested by the plaintiff that dishonest claimants would simply make up reasons to seek ongoing care so as to toll section 48-137.235 Here, the court cited the trial court, which noted in raising “this argument . . . ‘[Snipes] may very well be correct, but this problem was undoubtedly foreseen by the [L]egislature which chose to make no exceptions.’”236 On the other hand, in a concurring opinion, several Justices laid out a blueprint for Snipes to obtain further benefits in providing that “while § 48-137 barred Snipes’ claim based on the evidence before us, the courthouse door is not necessarily forever locked in the event of a material increase in disability resulting from the February 2, 1984, injury.”237 Whether Snipes took the court’s invitation and later filed a new petition to suggest a material change is unclear.

G. Bassinger v. Nebraska Heart Hospital: Overturning Judicially Created Defense of Misrepresentation

Having cited to Larson’s Workers’ Compensation Law numerous times in past cases, the Supreme Court of Nebraska, in Bassinger v. Nebraska Heart Hospital,238 again analyzed one of Larson’s provisions in 2011.239 In that case, the Nebraska Supreme Court was faced with the question of whether the persuasive treatise, together with prior precedent, should be applied in affirming a lower court decision that dismissed a plaintiff’s workers’ compensation claim.240 The basis for

231. Id. at 667 (quoting White v. Sears, Roebuck & Co., 431 N.W.2d 641,643 (Neb. 1997)) (emphasis added).
232. Id.
233. Id.
234. Id. at 667-68.
235. Id. at 668.
236. Id.
237. Id.
238. 806 N.W.2d 395 (Neb. 2011).
240. Bassinger, 806 N.W.2d at 399-401.
the dismissal at the trial court level was the affirmative misrepresentation defense originally articulated in *Hilt*.

In *Bassinger*, the plaintiff had sustained at least two prior work injuries before applying with the Nebraska Heart Hospital. In spite of these prior injuries, the plaintiff represented to the Heart Hospital that she had no prior disabilities and was capable of performing the work duties associated with her position as a certified nursing assistant. The Nebraska Heart Hospital hired Bassinger on this basis. Sometime later, Bassinger sustained a lower back injury at work near the areas that she had previously injured.

While investigating her workers' compensation claim, the insurance carrier for the Nebraska Heart Hospital discovered Ms. Bassinger's prior injuries. The insurance carrier also discovered that Ms. Bassinger had permanent restrictions before applying with the Heart Hospital, which she specifically denied in her application. In fact, the hospital was able to later confirm that Ms. Bassinger had applied for a lump-sum settlement with the Nebraska Workers' Compensation Court a matter of months before beginning her employment with the hospital. For this reason, the trial court found that it would defy logic to think that Bassinger had forgotten about these prior injuries when she applied with Nebraska Heart Hospital.

In dismissing her petition, the Nebraska Workers' Compensation Court applied the test articulated in Larson's Workers' Compensation Law and used by the court in the *Hilt Truck Lines Inc. v. Jones* case. The trial court found that Ms. Bassinger intentionally misrepresented her prior condition and that the employer relied upon the misrepresentation in extending an offer to hire. Whether the court had also contemplated a causal relationship between the misrepresentation and the subsequent injury was the subject of the plaintiff's later appeal. In fact, the three-judge panel at the Workers' Compensa-

241. *Id.* at 398-99 (citing *Hilt v. Truck Lines Inc. v. Jones*, 281 N.W.2d 399, 402-04 (Neb. 1979)).
242. *Id.* at 397.
243. *Id.*
244. *Id.*
245. *Id.*
247. *Id.*
248. See *Bassinger*, 806 N.W.2d at 398-99 (stating that the trial court had originally dismissed Bassinger's petition because of the misrepresentations made about prior physical limitations that would have affected her work at Nebraska Heart Hospital).
249. *Id.*
250. 261 N.W.2d 399 (Neb. 1979).
253. *Id.* at 399.
tion Court had initially remanded this determination to the trial court to decide whether there was such a causal relationship. Further appeal to the Nebraska Supreme Court rendered that consideration moot, considering that the court struck the affirmative defense entirely.

Initially, the plaintiff had not appealed the application of the Hilt test to the facts of this case when she appealed to the three-judge review panel of the Nebraska Workers’ Compensation Court; instead, the plaintiff suggested that the trial court’s decision should be reversed in light of a failure to prove a proximate relationship between the misrepresentation and the subsequent injury. It was not until later that the plaintiff alleged that the misrepresentation defense should be reversed. Notwithstanding this omission, the Nebraska Supreme Court concluded that Bassinger did not waive her argument and addressed the Hilt defense in rendering its decision.

Ultimately, the Nebraska Supreme Court ruled that because the Hilt defense represented a judicially created, equitable exception to the Nebraska Workers’ Compensation Act, it was overruled. Specifically, the court referred to the misrepresentation defense outlined in Larson’s as a “common-law defense” that it later found to be incompatible with Nebraska’s “workers’ compensation jurisprudence,” which is designed to accomplish the “beneficent purpose” of the Act in “provid[ing] benefits for employees who are injured on the job . . . .” The court further noted that while the Larson rule “may reflect a laudable goal . . . it is the Legislature’s function through the enactment of statutes to declare what is the law and public policy.” The court, accordingly, struck down the Hilt defense and remanded the matter to the trial court to determine whether the claimant was entitled to benefits without considering the intentional misrepresentation defense in further proceedings.

It was on the basis of the Bassinger decision that the appellant in Lenz later argued the exception to the statute of limitations should be

254. Id.
255. Id. at 395.
256. Id. at 399-400.
257. Id.
258. Id. at 400 (stating that “[r]equiring parties to ask a lower court to ignore our decision would obviously be inconsistent with the doctrine of stare decisis, which compels lower courts to follow our decisions”) (internal citations omitted).
259. Id. at 403-04.
260. Id. at 401-02.
261. Id. (internal citations omitted).
262. Id. at 404.
overturned. As noted above, this argument proved to be unsuccessful.

IV. HISTORY OF LEGISLATIVE ACQUIESCENCE AS VIEWED BY THE NEBRASKA SUPREME COURT

For many years, examining legislative response to judicial interpretation of statutes has been an accepted tool in judicial interpretation of the Nebraska Workers' Compensation Act, as well as other statutes. Some of the earliest cases in Nebraska demonstrate how the Nebraska Supreme Court has attempted to answer ambiguities left by legislative language that did not necessarily account for fact patterns that would eventually be litigated. On the other hand, the use of "legislative acquiescence" appears to have recently been used by the Nebraska Supreme Court more frequently than it has ever been seen since its inception.

In one of the earliest uses legislative activity as a method of statutory construction, the Nebraska Supreme Court in Gomez v. State ex rel. Larez addressed a paternity claim brought by a married woman against her child's father, a man that was not her husband. The child's father, Gomez, originally did not contest paternity and was ordered to pay medical bills associated with the birth and child support thereafter. After failing to pay these amounts, however, Gomez retained counsel, who argued that the child's mother could not file a paternity suit in light of the paternity statute's language, which had

264. Lenz, 848 N.W.2d 623.
266. See e.g., Howard v. Marsh, 21 N.W.2d 503, 509 (Neb. 1920) (examining an amendment to the constitution following judicial interpretation of the constitution); see also Gomez v. State ex rel. Larez, 61 N.W.2d 345, 349-50 (Neb. 1953) (reasoning that the Legislature's amendment of a statute following judicial interpretation of the same is persuasive authority); Dawes v. Wittrock Sandblasting & Painting, 667 N.W.2d 167, 182 (Neb. 2003) (using legislative acquiescence in its analysis).
267. See Gomez, 61 N.W.2d 345.
269. 61 N.W.2d 345 (Neb. 1953).
270. Gomez, 61 N.W.2d at 349-50 (citing cases in which the court analyzed legislative language to be applied in future cases). The holding in Gomez was actually an expansion on an earlier decision where the Nebraska Supreme Court held that an unfulfilled opportunity to make a constitutional change following a judicial interpretation of the constitutional section at issue created a "reasonable presumption" that if the constitutional convention was dissatisfied with the judicial interpretation, "it would have made clear its dissatisfaction by such change as was necessary to that end." See id. at 949 (citing Howard, 21 N.W.2d at 509, in which the court noted that the Legislature acquiesced to the judicial interpretation of legislative language).
271. Id.
formerly not included "married" women within the class of possible plaintiffs.\textsuperscript{272}

While marital status was not originally raised as a defense in the Gomez case, Gomez argued on appeal coverage of the paternity statutes presented a jurisdictional issue.\textsuperscript{273} The Nebraska Supreme Court agreed with Gomez to the extent that a court's jurisdiction can be raised at any point in a proceeding, even on appeal and even when the issue was not raised at the trial level.\textsuperscript{274} Gomez, therefore, asserted that the controlling statute could not confer jurisdiction, assuming it indeed applied only to unmarried women.\textsuperscript{275} Here, Gomez cited the prior legislative iterations from the first statute on point up until the version of the same law at the time of the Gomez trial court decision.\textsuperscript{276} Ultimately, the Nebraska Supreme Court reasoned that based upon the plain language, the paternity statute existing at the time of the Gomez trial did not exclude married women, thus affirming the trial court's decision.\textsuperscript{277}

In reaching its decision, the Nebraska Supreme Court noted that the first version of Nebraska's paternity statute expressly applied to "any woman."\textsuperscript{278} On the other hand, the first amendment to the statute, six years later, included a change so as to apply to "any unmarried woman."\textsuperscript{279} Later still, in 1941, the amendment to the paternity statute was repealed, leaving the question as to which version applied when Larez brought the paternity action against Gomez.\textsuperscript{280} In resolving the issue raised on appeal by Gomez, the Nebraska Supreme Court expectedly began its analysis with the plain language of the existing statute, the earlier versions of that statute, and prior interpretations of those statutes by the court.\textsuperscript{281}

The first area of examination by the Nebraska Supreme Court in Gomez was in noting that the then-existing paternity statute provided "support for children born out of wedlock."\textsuperscript{282} That being undisputed as to the child in Gomez, the court then turned to the appellant's argument that "there was no intention on the part of the Legislature to permit the mother of a child conceived and born during the time when

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{272} Id.
\item \textsuperscript{273} Id. at 346.
\item \textsuperscript{274} Id. at 347.
\item \textsuperscript{275} Id.
\item \textsuperscript{276} Id. at 348.
\item \textsuperscript{277} Id.
\item \textsuperscript{278} Id. (citing 1869 version of Paternity Act).
\item \textsuperscript{279} Id.
\item \textsuperscript{280} Id.
\item \textsuperscript{281} Id. (citing Neb. Rev. Stat. § 13-101 (R.S. Supp. 1951)).
\item \textsuperscript{282} Id. (citing Neb. Rev. Stat. § 13-101 (R.S. 1943)). The court defined a "child born out of wedlock [as] one whose parents were not married to each other at the time of birth." Id.
\end{enumerate}
\end{footnotesize}
she was married to assert and prove that the child was conceived and
born out of wedlock within the meaning of the statute. Here, the
court observed that there was no record in the legislative journals as
to what the intent of the Legislature might have been involved in
passing the most recent amendments to the statute. For this rea-
son, the court then endeavored to discern legislative intent from the
current language of the paternity statute, together with an examina-
tion of previous versions of the statute, as well as "the presumptive
regard which was given to earlier pronouncement of this court . . . ."

Examining the history of the paternity statutes, the Nebraska Su-
preme Court noted that it was last amended in 1943 and contained no
prohibition against "married women" bringing suit for support of chil-
dren born out of wedlock. While a previously enacted version of the
same statute did have language expressly applying only to unmarried
women, the court noted that that version lasted only six years and had
been repealed by the most recent amendment to the statute. The
most recent amendment, then, left in place the original statutory lan-
guage, applying to "any woman."

Coupled with the express language of the paternity statute and
its preceding amendments, the Nebraska Supreme Court looked to its
own decisions on the statutory language in order to determine the
"presumptive regard" the Legislature gave to its prior decisions. Here,
the court recounted at least two prior decisions where it con-
strued the statutory language applying to "any woman" as meaning
married or unmarried. This interpretation, according to the court,
was the reason the Legislature amended the paternity statute to spes-
cifically apply to any "unmarried woman."

The court then concluded that "unless the statement be regarded
as pure obiter dicta and therefore was not considered of any force and
effect by the Legislature it is to be reasonably thought not conclusively
presumed that the act of 1941 was enacted with reference to and with
the pronouncement in contemplation." It was this language that

283. Id.
284. Id.
285. Id.
286. Id. at 347.
287. Id.
288. Id. at 348.
289. Id.
290. Id. (referring to Parker v. Notomb, 91 N.W. 395 (Neb. 1902), reh'g 93 N.W.
851, 852 (Neb. 1903)).
291. Id.
292. Id.
served as a platform for later cases to embrace and expand upon the notion of legislative acquiescence in deciding subsequent appeals.293

V. ANALYSIS

As presently articulated by the Nebraska Supreme Court, legislative acquiescence is a controversial method for statutory construction.294 On the other hand, some of the earliest applications of this theory of statutory construction represented a reasonable framework to analyze contested litigated matters by the courts.295 Far from reasonable use, however, the Nebraska Supreme Court’s current view of legislative acquiescence enables the Judiciary to legislate from the bench and dare the Senators of the Unicameral to unite in order to undo what results may otherwise follow.296

Even without the temptation to use legislative acquiescence as cover for legislating from the bench, the Nebraska Supreme Court has previously fallen into the trap of reaching result-oriented decisions, in lieu of adherence to long established precedence.297 Often, the rationale employed in such cases renders prior holdings unrecognizable and meaningless.298 Adding legislative acquiescence as a consideration only exacerbates the problem of judicial overreaching.299 This is not to say that the current trend is beyond correction, whether by the

293. See, e.g., State v. Hocutt, 300 N.W.2d 198 (Neb. 1981) (holding that “[i]t is presumed that when a statute has been construed by the Supreme Court, and the same is substantially reenacted, the Legislature gave language the significance previously accorded to it by the Supreme Court.”) (citing Gomez, 61 N.W.2d 345). See also Erspamer Adver. Co. v. Dept. of Labor, 333 N.W.2d 646 (Neb. 1983) (providing that “where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court’s determination of its intent.”) (citing People v. Hairston, 263 N.E.2d 840 (Ill. 1970), cert. denied, 402 U.S. 972 (1971); Santeanelli v. City of Providence, 250 A.2d 849 (R.I. 1969); Hocutt, 300 N.W.2d 198 (Neb. 1981).


295. See, e.g., Gomez, 61 N.W.2d 345.

296. Cf. id. (providing that without legislative history, legislative response to judicial interpretations is an appropriate inquiry to determine legislative intent), with Potter v. McCulla, 851 N.W.2d 94, 104 (Neb. 2014) (suggesting that a passive failure to act constitutes affirmative acquiescence).

297. See, e.g., Bassinger v. Nebraska Heart Hosp., 806 N.W.2d 395, 401-03 (Neb. 2011) (justifying overturning nearly 40 years of precedence on the basis that misrepresentation defense is not consistent with “workers’ compensation jurisprudence.”).


299. See Lenz, 848 N.W.2d 623 (affirming judicial legislation based upon equitable considerations in a Nebraska Workers’ Compensation case, using the theory of legislative acquiescence resulting from legislative silence).
Judiciary itself or one of the other branches of Nebraska government. Still, without some corrective measure, little predictability remains for those seeking redress through the court system, particularly where established law may not always be upheld and where new law could be judicially created without warning.

A. Judicial Expansion of the Nebraska Workers’ Compensation Act

Some of the earliest cases construing the Nebraska Workers’ Compensation Act still stand for lasting principles that are as important today as they were when they were first expressed by the Nebraska Supreme Court. Unfortunately, such examples seem to be dwindling, having been overturned in some cases, rendered meaningless through a refusal to apply the doctrine of stare decisis in others, or, in others still, by means such as the application of the concept of legislative acquiescence. This dilution of established precedent has taken place over years but is now accelerating at an alarming pace.

One example of an early Nebraska Supreme Court case that on the surface showed some degree of restraint was the decision in Scott v. State. In that case, the plaintiff’s claim was barred under any existing or imagined construction of the Nebraska Workers’ Compensation Act. This was clear in that Scott had filed the claim at issue approximately eleven years after her injury and nearly two years after an alleged substantial worsening, upon which her suit was based.

Although it was a given that Scott’s condition had worsened, the court noted, “[t]he major portion of the increase was probably due to

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300. See notes 436-38 and accompanying text; see also Gomez, 61 N.W.2d 345 (inferring legislative intent under limited circumstances).
303. See, e.g., Good v. City of Omaha, 168 N.W. 639, 640 (Neb. 1918) (holding that “[i]f the law is uncertain or ambiguous in these respects, it may be better that it be made certain by legislative enactment, wherein the Legislature may express more clearly what its intention was.”).
306. 289 N.W. 367 (Neb. 1939).
308. Scott, 289 N.W. at 367 (the statute of limitations at the time Scott was decided was one year).
her age."\textsuperscript{309} Still, Scott's claim was undoubtedly barred according to the existing statute of limitations.\textsuperscript{310} For the foregoing reasons, the \textit{Scott} court affirmed the denial of Scott's claim, holding that there should be no such thing as "perpetual and unexpiring" workers' compensation claims, which would have no "limitation as to time . . . ."\textsuperscript{311}

The pronouncement against "perpetual and unexpiring" claims should have been enduring, applicable today as much as it was in the \textit{Scott} case. Unfortunately, other language in the \textit{Scott} decision has since been used so as to create a class of claims without any limitation.\textsuperscript{312} This was owing to the equitable perspective the \textit{Scott} court labeled "a common sense and workable construction of our compensation law."\textsuperscript{313} Here, the court in \textit{Scott} noted that denying a material worsening claim in the future would result in an "injustice."\textsuperscript{314} Further, the court stated,

\begin{quote}
\textit{[e]quitably, an increased disability, where compensation has been paid periodically for more than six months under a valid agreement or a formal award, must be treated as analogous to a latent injury and subject to the application of the limitation provision of the statute in the manner we have indicated above.}\textsuperscript{315}
\end{quote}

In \textit{Scott}, contemplation of a material worsening claim based upon equitable considerations was nothing more than "obiter dicta,"\textsuperscript{316} as it was wholly unnecessary to the ultimate holding and seemingly had no reason for being included in the court's written opinion.\textsuperscript{317} Moreover, other decisions from the Nebraska Supreme Court stood for avoiding the interjection of equitable considerations into the Act such as those contemplated by the court in \textit{Scott}.\textsuperscript{318} Nevertheless, the exception to the statute of limitations telegraphed by \textit{Scott} was finally utilized in

\begin{footnotes}
309. \textit{Id.}
310. \textit{See id.} at 367-68. Equitable considerations, ostensibly inapplicable, would not have tipped the scales in favor of Scott in any event, considering that she presumably knew about the worsening for years. \textit{Id.}
311. \textit{Id.} at 368.
312. \textit{See Lenz}, 848 N.W.2d at 628 (indicating that statute of limitations of section 48-137 does not apply to claims after more than two years have passed, even if claimant had reason to bring suit earlier than was filed).
313. \textit{Scott}, 289 N.W. at 368 (citation omitted).
314. \textit{Id.} at 369 (emphasis added).
315. \textit{Id.} (emphasis added).
317. \textit{See Carlson v. Allianz Versicherungs-Aktiengesellschaft}, 844 N.W.2d 264, 275 (Neb. 2014) (noting that "[a]n appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.").
318. \textit{Lenz}, 848 N.W.2d at 628 (citing \textit{Bassinger}, 806 N.W.2d at 403, 404).
\end{footnotes}
White v. Sears Roebuck,\textsuperscript{319} albeit without referencing the same equitable bases for the exception.\textsuperscript{320}

Whatever the motivation of the Nebraska Supreme Court in setting the stage for future claims for an increase in disability, the court did not find that Scott was entitled to additional compensation.\textsuperscript{321} The same was not so for the claimant in White.\textsuperscript{322} In White, it appears that the court was waiting for a test case with facts that would allow it to pick up where Scott left off and further expand the Nebraska Workers’ Compensation Act without legislative input.\textsuperscript{323} Still, the facts of White were less than perfect in supporting the court’s goal in this regard.\textsuperscript{324} Likely for this reason, certain facts of the White appeal were disregarded by the court in reaching its decision.\textsuperscript{325}

In White, the plaintiff filed a workers’ compensation claim, asserting substantial worsening of a previously accepted back claim involving multiple surgeries and missed time from work.\textsuperscript{326} White was paid some unspecified medical and indemnity benefits as a result; however, no initial impairment rating was referenced by the court in White, nor was the payment of any indemnity benefits for permanency.\textsuperscript{327} In spite of these missing facts, it is likely that White should have received some form of a permanency rating from the outset and attendant disability benefits as well.\textsuperscript{328} Instead of examining this likelihood, however, the court moved on to discuss White’s substantial worsening.\textsuperscript{329} First, the court briefly noted that after the initial surgery, White’s treating physician found mild remaining back discomfort and an overall good neurological examination.\textsuperscript{330}

More than two years after Sears had made compensation payments to White, White filed suit before the Nebraska Workers’ Compensation Court.\textsuperscript{331} White had not previously litigated her claim against Sears and did not include in the current suit any claim for

\textsuperscript{319} 431 N.W.2d 641 (Neb. 1988).
\textsuperscript{321} Scott, 289 N.W. at 369.
\textsuperscript{322} See White, 431 N.W.2d 643.
\textsuperscript{323} Cf. Scott, 289 N.W. at 369 (gratuitously suggesting what circumstances a substantial worsening might be allowed in the future), with White, 431 N.W.2d at 643 (applying portion of equitable substantial worsening test from Scott).
\textsuperscript{324} See White, 431 N.W.2d at 641-43 (lacking in any facts bearing upon whether White had reason to bring suit earlier).
\textsuperscript{325} Id.
\textsuperscript{326} Id.
\textsuperscript{327} Id. at 642-43. Presumably the court believed that no impairment rating was warranted after the initial surgeries. Id.
\textsuperscript{328} See id. (failing to reference likelihood of plaintiff having a prior impairment rating following surgery).
\textsuperscript{329} Id. at 641-43.
\textsuperscript{330} Id. at 642, 643.
\textsuperscript{331} Id.
prior unpaid benefits, indemnity or otherwise.\textsuperscript{332} She did offer evidence that at or near the time of filing her claim, her treating physician had provided additional care and had authored a five to twelve percent disability rating.\textsuperscript{333}

While the court paid short shrift to the status of benefits initially paid in \textit{White}, or a lack thereof, the court still cited the two-part test from Larson's as referenced by the \textit{Scott} decision. Just as articulated in \textit{Scott}, the \textit{White} court noted that this test examined "whether the claimant has any reasonable occasion to file a claim sooner than he did . . ." and that "[i]f voluntary compensation was paid, the compensation cancels out the initial disability as a reason for filing a claim . . ."\textsuperscript{334} While the court in \textit{White} quoted the \textit{Scott} test verbatim, it did not cite to the original bases of this judicially created exception, involving "equity" and "justice."\textsuperscript{335}

That the \textit{White} test was comprised of two elements was obvious, considering payment of only part of compensation otherwise due would not "cancel out" reason for filing a claim.\textsuperscript{336} Moreover, leaving some semblance of a statute of limitation in place through a two-part test was consistent with other substantive areas of law that provide for some definitive statute of limitations.\textsuperscript{337} Indeed, even the \textit{Scott} case, while foreshadowing some possible willingness to let equity creep into workers' compensation law, stated that an "unexpiring" statute of limitations was unacceptable.\textsuperscript{338}

That the \textit{Scott-White} test involved two distinct considerations was later supported when the Nebraska Supreme Court decided \textit{Snipes v.}

\begin{itemize}
\item \textsuperscript{332} \textit{Id.}
\item \textsuperscript{333} \textit{Id. at 642-43.}
\item \textsuperscript{334} \textit{Id. at 643} (emphasis added). \textit{Cf. Scott}, 289 N.W. at 368 (holding that "[e]quitably, an increased disability, where compensation has been paid periodically for more than six months under a valid agreement or a formal award, must be treated as analogous to a latent injury and subject to the application of the limitation provision of the statute.").
\item \textsuperscript{335} \textit{White}, 431 N.W.2d at 641; \textit{cf. Scott} (referencing equity and justice for the same principle embraced in \textit{White}).
\item \textsuperscript{336} \textit{See White}, 431 N.W.2d at 643.
\item \textsuperscript{337} \textit{See, e.g., Lindner v. Kindig}, 826 N.W.2d 868, 872-73 (Neb. 2013). The court addressed constitutional claims and held that statutes of limitations rest on a common understanding that wrongs for which the law grants a remedy are subject to a requirement that, in fairness, the party wronged must pursue the remedy in a timely fashion. This understanding, in turn, addresses three concerns: first, for stale claims, where memories fade and witnesses and records may be missing; second, for repose—that after some period of time, claims should not continue unresolved; and third, that a plaintiff cannot sleep on his or her rights and then suddenly demand a remedy, without creating a greater wrong against the party charged and a wrong against the peace of the community.
\item \textsuperscript{338} \textit{Lindner}, 826 N.W.2d at 872-73 (internal citations omitted).
\end{itemize}

\textit{Scott}, 289 N.W. at 368.
Vickers.\textsuperscript{339} In that case, the plaintiff had an accepted workers’ compensation claim, for which benefits had been paid.\textsuperscript{340} On the other hand, there was no specific allegation of a material increase in disability.\textsuperscript{341}

While there was no evidence of a material increase in disability in \textit{Snipes}, the court determined that there was also no evidence that the plaintiff had any reason to bring suit earlier than he did.\textsuperscript{342} For example, it did not appear from the facts recited by court that the plaintiff was entitled to indemnity benefits or reimbursement for outstanding medical expenses.\textsuperscript{343} Indeed, the parties stipulated that Snipes “had no claim against Sperry Vickers between August 14, 1992, and March 9, 1995.”\textsuperscript{344} As the court put it, Snipes “had no compensable claims to file” from the last date benefits were paid up until incurring additional medical expenses for replacement eye glasses.\textsuperscript{345}

With the above-referenced facts in mind, the court in \textit{Snipes} turned to the test articulated in the \textit{White} decision and cited the same language found in that case.\textsuperscript{346} Although the facts in \textit{Snipes} demonstrated that the plaintiff did not have an increase in disability, the \textit{Snipes} court nevertheless continued its discussion of whether there was any “reasonable occasion” for the plaintiff to have filed suit earlier.\textsuperscript{347} Citing the stipulation that Snipes did not have any claim before his recent prescription for stronger glasses, the court then dismissed Snipes’ claim.\textsuperscript{348} While the court dismissed the claim, it also made clear that whether there was a reasonable occasion to bring suit did not necessarily apply strictly to the alleged worsening.\textsuperscript{349} This analysis therefore reaffirmed that a substantial worsening claim did have two elements.\textsuperscript{350}

\begin{itemize}
\item \textsuperscript{339} Cf. Scott, 289 N.W. at 368 (holding the claimant must show a substantial worsening and that there was no reason to bring suit earlier), \textit{with White}, 431 N.W.2d at 643 (noting that the question remains whether the claimant had reason to bring the claim sooner) \textit{and} \textit{Snipes v. Vickers}, 557 N.W.2d 662 (Neb. 1997) (noting that there was no reason to file a claim earlier, the plaintiff having no claim until a new prescription was issued).
\item \textsuperscript{340} \textit{See} \textit{Snipes}, 557 N.W.2d at 665 (stating Sperry Vickers paid for various medical expenses, glasses, temporary disability benefits, and permanent disability benefits).
\item \textsuperscript{341} \textit{Id.} at 667-68.
\item \textsuperscript{342} \textit{Id.}
\item \textsuperscript{343} \textit{See id.} at 666-67 (summarizing payments made by Sperry Vickers).
\item \textsuperscript{344} \textit{Id.} at 664, 665.
\item \textsuperscript{345} \textit{Id.}
\item \textsuperscript{346} \textit{Id.} at 667 (quoting \textit{White}, 431 N.W.2d at 643).
\item \textsuperscript{347} \textit{Id.} at 668.
\item \textsuperscript{348} \textit{Id.}
\item \textsuperscript{349} \textit{Id.}
\item \textsuperscript{350} \textit{Id.} The court noted in a concurring opinion that “while § 48-137 barred Snipes’ claim based on the evidence before us, the courthouse door is not necessarily forever locked in the event of a material increase in disability resulting from the February 2, 1984, injury.” \textit{Id.}
\end{itemize}
Beyond implicitly reaffirming the two-part White test, the court in Snipes also paid deference to the Unicameral’s authority to legislate in addressing the argument raised by Snipes that unless the court allowed his claim, future claimants would simply create a reason to bring suit periodically in order to keep the statute of limitations from running. In response to this argument, the court quoted the trial court in observing that “[Snipes] may very well be correct, but this problem was undoubtedly foreseen by the [L]egislature which chose to make no exceptions.”

While the foregoing cases involving judicial legislation generally favor plaintiffs, the Nebraska Supreme Court also reached a defense-oriented decision that it later identified as an example of impermissible creation of law by the Judiciary. In that case, Hilt Truck Lines v. Jones, the Nebraska Supreme Court outlined an affirmative defense that originated from an examination of whether an employee who made misrepresentations during the hiring process was nevertheless a “covered employee” under the Act. As a follow up to this analysis, the court then considered whether such a worker could be denied benefits, considering that the contract for hire was illegal. Ultimately the court turned to persuasive treatises in order to consider whether the claim would be barred according to the terms of section 48-115.

In its ultimate decision in Hilt, the Nebraska Supreme Court determined that the false statements made by the plaintiff’s decedent were not sufficient “to terminate the relation of master and servant existing at the time of the injury . . . at least where there is no causal connection between the injury and the misrepresentation.” Similar to this conclusion, the court found that a defense outlined in Larson’s did not support the employer’s denial of the claim in Hilt under the present facts. On the other hand, the court noted that false representations could otherwise serve to avoid a claim but only where (1) a false statement as to the employee’s physical condition was knowingly and willfully made, (2) reliance on the statement on the part of the employer can be shown, and (3) a connection existed between the false statement and the eventual injury. It was this very defense that

351. Id.
352. Id.
354. 281 N.W.2d 399 (Neb. 1979).
355. Hilt, 281 N.W.2d at 403.
356. Id.
357. Id. (citing 56 C.J.S. Master and Servant § 180e (1948)).
358. Id. at 400.
359. Id. (citing 1 B. Larson, Workmen’s Compensation Law, § 47.53, 8-201 (1983)).
360. Id.
was successfully raised by the employer at trial in the *Bassinger* case and brought up on appeal to the Nebraska Supreme Court in 2011.\(^{361}\)

In *Bassinger*, the Nebraska Supreme Court ostensibly held that judicial legislation would no longer be used to expand the Nebraska Workers’ Compensation Act.\(^{362}\) In that case, the plaintiff had made misrepresentations to her employer that she had no prior restrictions, had never been involved in a workers’ compensation claim, and was capable of performing the job for which she was applying.\(^{363}\) When she later injured herself while working for that employer, an investigation uncovered these facts to be false.\(^{364}\) Accordingly, the employer and its insurer denied Bassinger’s claim, which denial was sustained following trial in the Nebraska Workers’ Compensation Court.\(^{365}\)

Although the plaintiff in *Bassinger* appealed the dismissal of her claim from the three-judge review panel of the Nebraska Workers’ Compensation Court, she did not include in her appeal at that level that the *Hilt* test should be overturned.\(^{366}\) Instead, the plaintiff suggested that the trial court’s decision should be reversed in light of the defendant’s alleged failure to prove a proximate relationship between the plaintiff’s misrepresentation and the subsequent injury.\(^{367}\) It was not until further appeal before the Nebraska Supreme Court that the plaintiff alleged that the misrepresentation defense from *Hilt* should be reversed.\(^{368}\) Notwithstanding this omission, the appellate court concluded that Bassinger did not waive her argument and addressed the *Hilt* defense in rendering its decision, ironically citing stare decisis as a reason that Bassinger was not required to assert the lower courts’ adherence to the very case she sought to overturn.\(^{369}\)

After hearing the appeal, the Nebraska Supreme Court ruled that because the *Hilt* defense represented a judicially created exception to the Nebraska Workers’ Compensation Act, it was overturned.\(^{370}\) The court in *Bassinger* further noted that it was not in the business of legislating from the bench, even if the end result was achieving a “laudable goal,” as the court labeled the misrepresentation defense.\(^{371}\) In the end, the court found that the *Hilt* defense ran contrary to Ne-

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361. *Bassinger*, 806 N.W.2d at 403.
362. *Id.* at 403, 404.
364. *See id.*
365. *See id.*
366. *Id.* at 398-99.
367. *Id.*
368. *Id.* at 400.
369. *Id.* (this rationale was ironic in that the court ignored stare decisis in every other context of its decision).
370. *Id.* at 403-04.
371. *Id.* at 403.
braska's "workers' compensation jurisprudence," meant to further the "beneficent purpose" of the Act.\textsuperscript{372}

Not taken into account by the court in Bassinger were two important facts that may have changed its rationale, if not the outcome.\textsuperscript{373} First, the Hilt exception was created as a result of examining whether misrepresentations made in applying for employment rendered the contract for employment void such that the claimant could not be said to be a covered employee under the Act.\textsuperscript{374} As such, equitable considerations did not serve as a basis for the misrepresentation defense in Hilt.\textsuperscript{375} Indeed, nowhere within the Hilt decision are equitable considerations referenced as support for the rule.\textsuperscript{376} Second, Hilt had stood for over thirty years before being set aside by the Nebraska Supreme Court.\textsuperscript{377} If this length of time was insufficient to entitle the Hilt decision protection under the doctrine of stare decisis or the notion of legislative acquiescence even, it is difficult to understand how any case could become law after shorter periods of time elapsed.\textsuperscript{378}

While the court in Bassinger also cited the "beneficent purpose[s]" of the Nebraska Workers' Compensation Act as a basis for striking down the Hilt defense, it is worth noting that this same rationale is not ordinarily cited as an excuse for equitable expansion of the Nebraska Workers' Compensation Act.\textsuperscript{379} In fact, the Nebraska Supreme Court has recurrently noted that the Nebraska Workers' Compensation Court, being a court of limited jurisdiction, does not have equitable powers.\textsuperscript{380} Moreover, this notion also applies to appellate courts in that they, too, are precluded from interjecting equitable considerations in interpreting the Nebraska Workers' Compensation

\begin{itemize}
\item \textsuperscript{372} Id. at 402.
\item \textsuperscript{373} See id. at 399-406.
\item \textsuperscript{374} Id. at 401.
\item \textsuperscript{375} Id. at 401-02.
\item \textsuperscript{376} See id. at 399-406.
\item \textsuperscript{377} Id.
\item \textsuperscript{378} Cf. Hilt, 281 N.W.2d 399 (articulating the misrepresentation defense, which stood undisturbed for almost 40 years), with Lenz, 848 N.W.2d 623 (applying the doctrines of stare decisis and legislative acquiescence to uphold an equitable exception to the statute of limitations that was announced less than 25 years earlier in White v. Sears, Roebuck). In fairness, the equitable exception to the statute of limitations actually traces its roots back more than 70 years, having first been suggested in State v. Scott. To acknowledge this, however, the Nebraska Supreme Court would have had to also acknowledge the equitable language used in Scott to establish the exception. Such a reference would have deprived the court in Lenz of its suggestion that the exception to the section 48-137 statute of limitations was rooted in statutory construction, rather than the Hilt considerations it believed to have been equitable in nature. See Lenz, 848 N.W.2d 623.
\item \textsuperscript{379} Cf. Bassinger, 806 N.W.2d at 402 (citing beneficent purposes of Nebraska Workers' Compensation Act), with Lenz, 848 N.W.2d at 628 (stating the limitations of the court in workers' compensation claims).
\item \textsuperscript{380} See Lenz, 848 N.W.2d at 628 (citing Bassinger, 806 N.W.2d at 402).
\end{itemize}
Act. For this reason, and applying the doctrine of stare decisis, one would have expected the Bassinger holding against judicial legislation to last well into the future. As Lenz v. Central Parking demonstrated, however, little assurance can be taken from Bassinger that future decisions by the Nebraska Supreme Court will be limited to the black letter law found within the Nebraska Workers' Compensation Act.

B. EVOLUTION OF THE THEORY OF LEGISLATIVE ACQUIESCENCE, FROM BIRTH TO DELINQUENCY

Examining the Legislature's behavior in response to judicial interpretations of statutes initially presented a reasonable framework for statutory construction. Incrementally, this method of divining legislative intent pivoted from a review of legislative action to inferring intent from legislative inaction. Such a shortcut, however innocuous its beginnings may have been, has now created an overt judicial takeover of legislative authority that dilutes the separation of powers in Nebraska state government. The growing conflict created by the expansion of legislative acquiescence as a tool of statutory construction must be addressed if the rule of law is to retain its integrity.

Legitimate investigations of legislative intent can be seen in some of the earlier cases decided by the Nebraska Supreme Court. For

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381. See Bryson v. Vickers, 584 N.W.2d 44, 51 (Neb. 1998) (stating that "[t]he compensation court is a court of statutory creation, and its powers are limited to those delineated in the statutes.").

382. Bassinger, 806 N.W.2d at 403.

383. Cf. Bryson, 584 N.W.2d 44 (equitable considerations are not taken into account in workers' compensation matters at trial or on appeal) and Bassinger, 806 N.W.2d 395, with Lenz, 848 N.W.2d 623 (enforcing an equitable exception to the statute of limitations on the basis of stare decisis and legislative acquiescence).

384. See Lenz, 848 N.W.2d at 626 (incorrectly suggesting a reason that Bassinger overturned Hilt while not affecting White).


386. Cf. Gomez, 61 N.W.2d at 347-48 (comparing positive legislative action with judicial interpretation of the same written statutes), with Dawes v. Wittrock Sandblasting & Painting, 667 N.W.2d 167, 182 (Neb. 2003) (disapproved on other grounds) (attaching presumption that where judicial legislation has not evoked a legislative amendment, the Legislature has affirmatively approved judicial conduct) and Lenz v. Cent. Parking Sys. of Nebraska, 848 N.W.2d 623, 626 (Neb. 2014) (upholding prior judicial legislation creating an equitable exception to statute of limitations using doctrines of legislative acquiescence and stare decisis).


388. See Gomez, 61 N.W.2d at 347-48; see also infra notes 403-04 and accompanying text.

389. See, e.g., Gomez, 61 N.W.2d at 348; see also State v. Hocutt, 300 N.W.2d 198, 200 (Neb. 1981); cf. Potter, 851 N.W.2d at 103 (applying legislative acquiescence without any objective test for triggering its use).
example, where there was legislation passed by the Unicameral, later interpreted by the courts and subsequently changed by the Unicameral, legitimate inferences can be drawn from such action and reaction by the court and the Legislature respectively. 390 Moreover, when there is a lack of legislative history available to the courts, reliance upon such active legislative response to judicial interpretation makes sense. 391 These were precisely the circumstances presented in Gomez v. State ex rel. Larez.

In its attempts to determine the legislative intent as to the scope of the then-existing Paternity Act, 392 the Nebraska Supreme Court in Gomez began with an obvious starting point: searching for legislative history. 393 Unfortunately, because there was no express legislative journal available, the court concluded that “the legislative intent . . . [had to] be ascertained from what [wa]s contained in the act together with an analysis of previous legislation on the subject and the presumptive regard which was given to earlier pronouncement of . . . ” the Nebraska Supreme Court. 394 In light of the legislative and judicial activity leading up to the decision in Gomez, this task was easily accomplished. 395

The Paternity Act at issue in Gomez had first been enacted in 1869 and contained language applying to “any woman.” It was amended in 1875 to limit it to any “unmarried woman.” Then, in 1903, the Nebraska Supreme Court interpreted the language from the 1869 version to apply to any woman, regardless of her marital status. 396 In light of this history, the Nebraska Supreme Court had little trouble concluding that the repeal of the 1875 version of the Paternity Act represented the Legislature’s intentional return to applying the act to “any woman.” 397 Even still, the court held that “unless the statement be regarded as pure obiter dicta and therefore was not considered of any force and effect by the Legislature it is to be reasonably though not conclusively presumed that the act of 1941 was enacted with reference to and with the pronouncement in contemplation.” 398

Beyond presuming that the Legislature had responded directly to the Nebraska Supreme Court’s interpretation of the Paternity Act, there was other support for the Gomez court’s conclusion as to legisla-

390. See Gomez, 61 N.W.2d at 348.
391. See id.
393. Gomez, 61 N.W.2d at 347.
394. Id. at 348.
395. Id.
396. Id. at 349 (citing Parker v. Nothomb, 91 N.W. 395 (Neb. 1903)).
397. Id. at 348.
398. Id. at 349.
tive intent. The amended language itself, for example, replaced the word “any” with the word “unmarried” to modify the class of women who could bring suit making it clear that the Legislature intended to restrict the class of possible plaintiffs. Thereafter, however, this language was repealed and language elsewhere in the Paternity Act, referring to “children born out of wedlock” replaced the former term, “bastards.” Hence, the legislative intent was evident when examined from any perspective, even without attaching a presumption to the legislative response to judicial interpretation of the Paternity Act.

Under the limited circumstances outlined in Gomez, drawing an inference from legislative action in order to determine legislative intent was useful. The same could be said going forward if such inferences were limited to those cases where, (1) statutory language was at issue, (2) with no legislative history, (3) affirmative activity undertaken by the Legislature, (4) close in time to judicial interpretations of the statute at issue, and (5) express support for the presumptive intent found elsewhere in or near the same statute. Unfortunately, the idea of legislative acquiescence has been greatly expanded since Gomez to the point where it now applies without any test or check on its application.

Pivoting from legislative action undertaken directly in response to a judicial holding, the Nebraska Supreme Court eventually applied the same idea of legislative acquiescence to passive legislative inaction. One such example of questionable analysis of legislative intent, or lack thereof, can be seen in the decision of Dawes v.

399. Id.
400. Id. (noting that “[t]o avoid this possible condition of things, we apprehend, was the sole aim and object of the legislature in amending the law as it did in 1875 by inserting the word ‘unmarried’ after the word ‘any,’ so that the section should read that on complaint made by ‘any unmarried woman,’ instead of ‘any woman,’ as originally existing.”).
401. Id. at 348 (citing Neb. Rev. Stat. § 13-113 (R.S. Supp. 1943)).
402. See id. at 348-49.
403. See id.
404. Cf. id. at 348 (examining actual legislative response to judicial construction of statute), with Lenz, 848 N.W.2d at 628 (lacking any legislative history to examine, considering that equitable rule at issue was judicially created). Moreover, if such inference is to rise to the level of a presumption, the test should articulate under what circumstances the presumption can be rebutted.
405. Potter, 851 N.W.2d at 103 (applying legislative acquiescence doctrine).
406. See Ersperger Adver. Co. v. Dept. of Labor, 333 N.W.2d 646 (Neb. 1983) (providing that “where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court’s determination of its intent.”) (citing People v. Hairson, 263 N.E.2d 849 (Ill. 1970), cert. denied 402 U.S. 972 (1971); Santanelli v. City of Providence, 250 A.2d 849 (R.I. 1969); Hocutt, 300 N.W.2d 198).
In that case, the Nebraska Supreme Court held that “[w]hen judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court[s'] interpretation.” The court further noted that the Unicameral “not only acquiesced in our interpretation of section 48-151 regarding repetitive trauma injuries, but has declined the ‘express invitation’ of a majority of this court to consider and amend our interpretation.” Still, the court did at least hold that the doctrine of stare decisis remained an important consideration and supported a rejection of the appeal considering the strong policies behind the doctrine.

While its reference to the stare decisis doctrine was encouraging, the *Dawes* decision is problematic for at least two reasons. One, *Dawes* oversimplifies the adage from long ago that that silence is consent. That it refers to legislative silence compounds the problem with this assumption. Two, *Dawes* erroneously assumes that the Nebraska Unicameral can act in concert and respond to a judicial invitation to legislate. Indeed, given term limits, the number and diversity of the legislative members from one term to the next, and the competing interests represented in the legislative chamber, it is remarkable that the Unicameral is able to accomplish what it does in any given session, let alone in response to an “express invitation” of the court. Such a judicial invitation, however, was referenced by the court in *Bassinger*.

Examining the invitation to legislate extended to the Unicameral by the Nebraska Supreme Court in *Bassinger*, the difficulty in

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408. Id. at 182.
409. Id.
410. Id.
411. See infra notes 412-14 and accompanying text.
412. See, e.g., *Wulf v. Kunnath*, 827 N.W.2d 248, 250 (Neb. 2013) (noting that “[s]ilence and inaction may manifest consent where a reasonable person would speak if he or she objected.”) (internal citations omitted); see also *Day v. Miller*, 95 N.W. 359 (Neb. 1901) (providing that actions of one litigant “were sufficient to arouse [other litigant’s] suspicion and put him upon inquiry . . . .”).
413. See infra notes 440-512 and accompanying text.
414. Compare infra note 415 and accompanying text, with *Dawes*, 667 N.W.2d at 182 (disapproving on other grounds) (attaching presumption that where judicial legislation has not evoked a legislative amendment, the Legislature has affirmatively approved judicial conduct).
415. See *Potter*, 851 N.W.2d at 103-04 (suggesting that the Nebraska Supreme Court’s “express invitation” for the Unicameral to enact legislation justified applying the concept of legislative acquiescence).
417. 806 N.W.2d 395 (Neb. 2011).
passing sound legislation can be seen.\textsuperscript{418} In striking down a decades-old defense based upon affirmative misrepresentation, the \textit{Bassinger} court suggested that such policy should be enacted by the Unicameral, rather than created and applied by the Judiciary.\textsuperscript{419} Arguably, by leaving the \textit{Hilt} decision undisturbed for over three decades, the legislature already acted, at least according to the Nebraska Supreme Court’s view that passive inactivity qualifies as legislative acquiescence. Moreover, in response to this invitation, individual members of the Unicameral did actually set out to affect a change.\textsuperscript{420}

Legislative Bill 324 was introduced by Senator Lautenbaugh on January 17, 2013.\textsuperscript{421} This Bill was intended to codify the \textit{Hilt} defense as a part of the Nebraska Workers’ Compensation Act.\textsuperscript{422} Five days later, it was referred to the Business and Labor Committee, then chaired by Senator Steve Lathrop.\textsuperscript{423} Although the Bill was scheduled for committee hearing, it was later indefinitely postponed as of April 17, 2014.\textsuperscript{424}

The failure to pass what the Nebraska Supreme Court described as a “laudable goal” was not for want of effort; rather, where one lone state senator had the power to indefinitely postpone a full vote on the Bill, it can hardly be said that the Unicameral as a whole “acquiesced.”\textsuperscript{425} Instead, this process highlights the folly of assuming that the Legislature can act in unison in response to an “express invitation” by the Nebraska Supreme Court.\textsuperscript{426}

The \textit{Bassinger} decision and subsequently proposed legislation is but one example of why legislative acquiescence makes for bad pol-

\footnotesize{\textsuperscript{418} Cf. \textit{Bassinger}, 806 N.W.2d at 403 (referencing legislative obligation to enact “laudable” policies, \textit{with infra} notes 440-512 and accompanying text).
\textsuperscript{419} \textit{Bassinger}, 806 N.W.2d at 403-04.
\textsuperscript{422} \textit{Id.}
\textsuperscript{423} \textit{Id.} at 222. Sen. Steve Lathrop’s regular profession was that of a plaintiff’s attorney at the law firm of Hauptman, O’Brien, Wolf & Lathrop. See Steven M. Lathrop, http://www.hauptman-obrien.net/attorneys-services/steven-lathrop/. Due to Nebraska term limits, Senator Lathrop could not seek re-election.
\textsuperscript{424} \textit{Bill Titles and Resolutions Introduced in the One Hundred Third Legislature, First Session, 2013, and Pending Before the One Hundred Third Legislature, Second Session, 2014, Carryover Legislation} (January 8, 2014), at 2, \textit{available at} http://nebraskalegislature.gov/FloorDocs/103/PDF/Journal/r2journal.pdf. At the time of writing this article, a second effort to pass a bill identical to LB 324 had been proposed by Senator McCollister. Presently, LB156 is being considered by Senator Lathrop’s replacement as the Chair of the Business and Labor Committee, Senator Burke Harr.
\textsuperscript{425} \textit{Id.}; see \textit{Bassinger}, 806 N.W.2d at 403 (labeling the misrepresentation defense as a “laudable” policy).
\textsuperscript{426} \textit{See, e.g., infra} notes 440-512 and accompanying text.}
icy. 427 It takes little imagination to believe that the affirmative misrepresentation defense that the Unicameral attempted to codify at the court’s invitation in Bassinger is but one of many such efforts that went unfinished. On the other hand, there is no evidence that the Unicameral spoke with one voice in support of other examples of judicial legislation under the acquiescence theory.428

Nowhere is it stated that the Unicameral has an affirmative duty to write legislation on demand, even when in response to an “express invitation” from the Nebraska Supreme Court.429 Even if such an obligation existed, there is no assurance that the Governor would sign every bill that comes before the executive.430 Indeed, a divided government, having differing perspectives among the state senators and the executive, is not necessarily a bad thing.431 By treating an “express invitation” to pass legislation as a judicial edict, however, this reality and the arduous process to pass legislation are ignored.

While there is no written requirement that the Unicameral must legislate upon judicial invitation, the Nebraska State Constitution does specifically define the roles of these two branches to pass law in the case of the Nebraska Legislature and to interpret the same law in the case of the Judiciary.432 Pursuant to the Nebraska Constitution, these powers cannot be delegated from one branch to the other.433 Specifically, article II, section 1 of the Nebraska Constitution provides:

The powers of the government of this state are divided into three distinct departments, the legislative, the executive, and the judicial, and no person or collection of persons being one of these departments shall exercise any power properly be-

427. Cf. Gomez, 61 N.W.2d at 348 (applying a presumption of legislative intent where positive action evinced by Legislature), with Bassinger, 806 N.W.2d 403 (applying concept of legislative acquiescence without legislative history, statute, or legislative response to existing judicial legislation). See also Lenz, 848 N.W.2d 629; Potter, 851 N.W.2d 94.
428. Considering that the legislation proposed by Sen. Lautenbaugh failed to come to the Floor, it was apparent that the Unicameral did not speak with one voice.
432. NEB. CONST., art II, § 1.
433. Id.
longing to either of the others except as expressly directed or permitted in this Constitution.434

While this three-branch system is similar in nature to the Federal Government, the separation of powers is even more rigid than its Federal equivalent.435 For example, the Nebraska State Constitution and Nebraska Supreme Court decisions addressing its provisions make it clear that setting public policy through enacting laws is a function that rests exclusively with the Legislature.436

Although legislative acquiescence had its beginnings in a legitimate exercise of judicial interpretation of existing statutory law in order to determine the legislative intent in resolving ambiguities, this is no longer the case.437 The concept now applies where inaction by the Legislature exists after an “express invitation” by the court.438 Moreover, there is no test to trigger when legislative acquiescence might be implicated and it will often be used in direct contrast to the doctrine of stare decisis.439 Finally, utilizing legislative acquiescence as envisioned by the Nebraska Supreme Court runs afoul of common sense, stare decisis, and the Nebraska Constitution. For these reasons, the notion of legislative acquiescence should be reformed or abandoned outright.

C. Judicial Activism, Coupled with Use of the Concept of Legislative Acquiescence, Has Stripped the Unicameral of Legislative Authority and Has Created Uncertainty as to Future Judicial Decisions

Having established a line of cases based upon equitable principles and judicially created amendments to the Nebraska Workers’ Compensation Act, the Nebraska Supreme Court then cemented most of those holdings in place using the notion of legislative acquiescence.440

434. Id.
437. Cf. Gomez, 61 N.W.2d at 348 (applying a presumption of legislative intent where positive action evinced by Legislature), with Bassinger, 806 N.W.2d 403 (applying concept of legislative acquiescence without legislative history, statute, or legislative response to existing judicial legislation). See also Lenz, 848 N.W.2d 623; Potter, 851 N.W.2d at 103.
438. See Potter, 851 N.W.2d at 103-04 (referencing previously extended “express invitation”).
439. Cf. Gomez, 61 N.W.2d at 348 (noting a lack of legislative history), with Bassinger, 806 N.W.2d 403 (applying concept of legislative acquiescence based upon legislative inaction). See also Lenz, 848 N.W.2d 623; Potter, 851 N.W.2d at 103.
440. See Hilt Truck Lines Inc., v. Jones, 281 N.W.2d 399, 403 (Neb. 1979) (referencing an equitable exception to statute of limitations); see also White v. Sears, Roebuck & Co., 431 N.W.2d 641 (Neb. 1988) (applying exception); Lenz v. Cent. Parking Sys. of Nebraska, 848 N.W.2d 623, 626, 628 (Neb. 2014) (cementing exception under guise that it was not an equitable creation).
At the same time, the court has done away with decades of precedence that it did not view as consistent with “workers’ compensation jurisprudence.” Nowhere is the court’s folly of creating law from whole cloth and justifying it after the fact through legislative acquiescence more apparent than in the recent case of *Lenz v. Central Parking*. The *Lenz* case brought to the Nebraska Supreme Court an opportunity to review *Hilt, Bassinger, Scott, White,* and *Snipes,* all in one decision. Because the parties had stipulated that no benefits had been paid to Lenz within the two-year period before he eventually filed suit, the claim was barred on its face pursuant to the plain language of section 48-137 of the Nebraska Statutes. The only avenue left for the plaintiff in *Lenz* to proceed, then, was in using the non-statutory exception to the statute of limitations applied as first announced in *Scott,* refined in *White,* and reinforced in *Snipes.* On the other hand, the *Bassinger* decision left doubt that the judicially created exception to the statute of limitations was still available.

Beyond suggesting that *Bassinger* overturned those prior cases, creating then reinforcing the judicial exception to the statute of limitations in section 48-137, the employer in *Lenz* also took the position that even if the *White* exception survived, Lenz could not satisfy the two-pronged test from that case. This position was based upon the undisputed fact that Lenz had reason to bring suit earlier than he eventually did, having not been paid all of the benefits to which he was entitled as a result of his original, compensable injury. Lenz knew this to be true because he intentionally submitted some of his bills for medical treatment to the Colorado indigent care program instead of forwarding them to his former employer’s insurer, as he had previously done.

In addition to forwarding his medical bills to a third party for payment, Mr. Lenz was not paid certain indemnity benefits and mileage

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442. 848 N.W.2d 623 (Neb. 2014).
443. *See Lenz, 848 N.W.2d at 623-29.*
444. *Id. at 626.*
445. *Id. at 627* (citing *White, 431 N.W.2d at 641; Snipes v. Vickers, 557 N.W.2d 662* (Neb. 1997)).
446. *See Bassinger, 806 N.W.2d at 404* (holding that judicially created law under the Nebraska Workers’ Compensation Act was disfavored); *see also Oral Argument at 17:01, Lenz, 848 N.W.2d 623* (No. S-13-930) (comments of Associate Justice Connolly, “the reasoning in *Bassinger* is that this court cannot and should not alter the provisions of the Workers’ Compensation Statute by judicial interpretation and isn’t that what *White* did? . . . Didn’t it extend the two year limitations period if certain conditions were met?”).
447. *Lenz, 806 N.W.2d at 626.*
448. *Id.*
449. *Id. at 625.*
reimbursement he later demanded when he eventually filed his petition before the Nebraska Workers’ Compensation Court.\textsuperscript{450} Regarding his claim overall, Mr. Lenz testified that he was a good advocate on his own behalf and would have had no difficulty seeking advice from an attorney earlier.\textsuperscript{451} Why he did not avail himself of this option or why he didn’t even contact the claims representative handling his claim, were unanswered questions at the time of trial.\textsuperscript{452}

It was in the context of the facts recited above that the Nebraska Workers’ Compensation Court entered an award in favor of Lenz at trial.\textsuperscript{453} In reaching its decision, the court rejected the defendant’s argument that \textit{Bassinger} had overturned the \textit{White} decision, stating “[w]hile the Court is flattered that defendants believe the Court can unilaterally overturn the Nebraska Supreme Court’s decision in \textit{White}, the Court respectively [sic] declines to engage in such an act of megalomania.”\textsuperscript{454} Strangely, the trial court then concluded “that any claim for benefits prior to October 28, 2012, is barred by § 48-137."\textsuperscript{455} In no prior cases before the Nebraska Workers’ Compensation Court had the trial court barred part of a claim, while awarding benefits for the balance on the same injury plead.\textsuperscript{456}

When the employer appealed the trial court’s award in favor of Lenz, citing the same arguments raised at trial, the Nebraska Supreme Court removed the case to its docket.\textsuperscript{457} Ultimately, the Nebraska Supreme Court sided with the trial court and affirmed the award as written, including the trial court’s finding that the claim was barred only in part by the statute of limitations pursuant to section 48-137.\textsuperscript{458} In this regard, the appellate court asserted that because the plaintiff in \textit{Lenz} did not cross-appeal the trial court’s finding on that issue, it would not consider it on appeal.\textsuperscript{459} Still, this pronouncement was little more than a convenient reason to avoid the awkward analysis of why Lenz did not bring suit earlier than he did when he so clearly had reason to do so.\textsuperscript{460}

\textsuperscript{450} \textit{Id.} at 626.
\textsuperscript{451} Brief for Appellant at 11, \textit{Lenz}, 806 N.W.2d 395 (No. S-10-00653), 2010 WL 6619484 at *7.
\textsuperscript{453} \textit{Id.}.
\textsuperscript{454} \textit{Id.}.
\textsuperscript{455} \textit{Id.}.
\textsuperscript{456} \textit{See Lenz}, 848 N.W.2d at 623-28.
\textsuperscript{457} \textit{Id.} at 627.
\textsuperscript{458} \textit{Id.} at 630.
\textsuperscript{459} \textit{Id.} at 627.
\textsuperscript{460} \textit{Cf. id.}, with \textit{Snipes}, 557 N.W.2d at 667 (stating that examination involves determination as to whether claimant had reason to bring suit earlier) and Oral Argument at 15:00, \textit{Lenz}, 848 N.W.2d 623 (No. S-13-930) (comments of Associate Justice
In addressing the employer’s arguments on appeal, the Nebraska Supreme Court held that the White test was not overturned by Bas-singer because the prior holding was supposedly based upon statutory construction, where the latter was based upon equitable considerations.\textsuperscript{461} This of course was not the case.\textsuperscript{462} As noted above, Hilt was actually based upon the court’s search for meaning in section 48-115 in determining whether an employee’s prior misrepresentation can void the contract for hire.\textsuperscript{463} Equitable considerations were never mentioned in the Hilt case.\textsuperscript{464} In contrast, the exception to the statute of limitations used in Lenz was born in equity, as expressly noted in the Scott case.\textsuperscript{465} Ignoring this reality, the court in Lenz focused on other aspects of the appeal.\textsuperscript{466}

Before any decision was rendered in Lenz, the court telegraphed their intended result in this regard during oral arguments.\textsuperscript{467} At the same time, the court left hanging any meaningful rationale as to why the White test would not use each element referenced in Scott, White, and Snipes.\textsuperscript{468} Specifically, the questions posed during oral arguments betrayed the Justices’ intent to avoid any serious look to whether Lenz had reason to bring suit earlier.\textsuperscript{469} The Justices also gave clues as to intended support for an expected decision in favor of Lenz.\textsuperscript{470}

During one portion of oral arguments, the Justices asked questions regarding the application of judicial acquiescence.\textsuperscript{471} For example, Associate Justice Wright wondered whether appellant “conceive[d] that the legislature is aware of our decision in White?”\textsuperscript{472} Clarifying, Justice Wright rhetorically wondered whether the Unicameral showed some form of intent in light of the White decision in

\textsuperscript{461} Lenz, 848 N.W.2d at 628.

\textsuperscript{462} Cf. Scott v. State, 289 N.W. 367, 368 (Neb. 1939) (suggesting possibility of equitable exception to statute of limitations), with Hilt, 281 N.W.2d at 403 (examining scope of covered employee having made misrepresentations upon application for employment).

\textsuperscript{463} See Hilt, 281 N.W.2d at 403 (examining scope of covered employee having made misrepresentations upon application for employment); Neb. Rev. Stat. § 48-115 (defining employee as a person under any contract of hire).

\textsuperscript{464} See Hilt, 281 N.W.2d at 399.

\textsuperscript{465} Scott, 289 N.W. at 367, 368, 369.

\textsuperscript{466} See Lenz, 848 N.W.2d at 623-28.

\textsuperscript{467} See generally Oral Argument, supra note 55.

\textsuperscript{468} See Lenz, 848 N.W.2d at 623-28.

\textsuperscript{469} Oral Argument, supra note 55, at 6:03.

\textsuperscript{470} See generally Oral Argument, supra note 55.

\textsuperscript{471} See generally Oral Argument, supra note 55.

\textsuperscript{472} Id. at 5:56.
failing to "enact[ ] any subsequent legislation that would change our
determination in White."473 In response, Lenz’s former employer and
the appellant pointed out that portions of the Act previously ad-
dressed by the court had been amended by the Unicameral, showing
that when the Legislature chooses to enact legislation in response to
judicial pronouncement, it affirmatively does so.474

On the point of how to interpret the White test, the Justices ques-
tioned both parties as to what the elements are or should be.475 In
putting this issue to counsel for Lenz, the court asked if the claimant
"brought or made initial claims during the time of the two year pe-
riod?"476 As the facts dictated, counsel for Lenz conceded that the
claimant could have brought a claim sooner than he did.477 At the
same time, Lenz argued that this fact was irrelevant, considering that
the trial court denied benefits that were more than two years overdue
by the time the petition was eventually filed.478 According to counsel
for Lenz, applying the two-pronged test from White as advocated by
appellant

means in a case like this, when somebody comes along and
says I have had a change in my condition and now that starts
the statute again, all the insurance company, all the em-
ployer has to do is go back into the case, find something that
they could have sued for one medical bill, that they could
have sued for . . . could have said you’re barred.479

It’s worth noting that this aspect of the appeal was not addressed
by the Nebraska Supreme Court, as noted above.480

Turning to the Bassinger pronouncement against judicial legisla-
tion, Associate Justice Wright noted that “[t]he defense argues that
Bassinger means that we can’t judicially legislate by finding excep-
tions to the statute of limitations to 48-137. Can you distinguish Bas-
singer from this case for which we held that we couldn’t . . . judicially
determine that there was a misrepresentation defense?"481 Similarly,
Associate Justice Connolly noted that “the reasoning in Bassinger is
that this court cannot and should not alter the provisions of the Work-
ers’ Compensation Statute by judicial interpretation and isn’t that
what White did? Didn’t it extend the two year limitation period if cer-

473. Id. at 6:07.
474. Id.
475. See id.
476. See generally id.
477. Id. at 10:00.
478. Id.
479. Id. at 15:45.
480. See Lenz, 848 N.W.2d at 623-28.
tation conditions were met?" In response, counsel for Lenz noted that the court has created legislation in the past under a variety of circumstances and seemingly could do so when White and Lenz were decided.

Much like oral arguments, the court's written decision in Lenz favored the employee-plaintiff. For example, the court rejected appellant's argument that Bassinger should have overturned the White exception to the statute of limitations, asserting that Bassinger addressed a judicially created affirmative defense that was "equitable" in nature. The Nebraska Supreme Court then noted that because "the Workers' Compensation Court does not have equity jurisdiction," the Nebraska Supreme Court similarly does "not have the 'authority to apply equitable principles' to the Nebraska Workers' Compensation Act." Finally, the court suggested that its decision in White, creating the exception to section 48-137, differed from the affirmative defense in Bassinger because the prior was ostensibly based upon statutory interpretation. As previously noted, the court was incorrect in this regard.

Besides drawing a false distinction between Bassinger and White, the Nebraska Supreme Court justified its reaffirmation of White in the Lenz decision, citing legislative acquiescence. Specifically, the court noted that White had stood for twenty-six years without evoking a legislative response. Accordingly, the court reasoned, "it is presumed that the Legislature has acquiesced in the court's interpretation." Missing from this analysis was how twenty-six years of reference to White was somehow superior to the nearly forty years during which Hilt went undisturbed.

Turning to the correct application of the section 48-137 exception to the statute of limitations, the Nebraska Supreme Court determined that a claim for a substantial worsening of a compensable claim need

482. Id. at 17:01.
483. See id.
484. Lenz, 848 N.W.2d at 628.
485. Id. (citing Bassinger, 806 N.W.2d at 403, 404).
486. Id.
487. See supra notes 137-64, 384-88, and 403-04 and accompanying text; cf. Scott, 289 N.W. at 367, 368 (referencing equity and justice in making a case for exception to statute of limitations, with Hilt, 281 N.W.2d at 403 (examining meaning of covered employee without making reference to equitable considerations).
488. See Lenz, 848 N.W.2d 623-28 (citing Hilt, 281 N.W.2d 399; White, 431 N.W.2d 641; Bassinger, 806 N.W.2d 395).
489. Id. at 628 (citing White, 431 N.W.2d at 643).
only be brought within two years that the claimant becomes aware or should have become aware of the change for the worse. The court further concluded that “the employee’s petition in White met the requirement of being filed within 2 years of a qualifying change, and we did not discuss whether she could have filed a petition sooner.”

The explanation offered by the court in Lenz omitted important language, both from White and from Snipes v. Vickers in interpreting the White case. Specifically, in both of those cases, the court repeated the notion that payment of compensation “cancels out the initial disability as a reason for filing a claim . . . .” Hence, where benefits are owed and yet remain unpaid prior to eventually bringing suit, there exists reason to institute litigation earlier. Moreover, this element was not deemed irrelevant in the Snipes case since there was no substantial worsening. After Lenz, on the other hand, whether the claimant had reason to bring suit earlier for some reason other than the material change is irrelevant.

Beyond expressly removing the consideration whether Lenz had reason to bring suit earlier, the court in that case also sidestepped the question of whether the statute of limitations in section 48-137 could bar part of the claim, while preserving the balance, as contemplated by the trial court in Lenz. The court’s reasoning in refusing to address this aspect of the appeal was that Lenz had not cross-appealed the issue. This reasoning, however, doesn’t seem to be valid in that the Nebraska Supreme Court has previously addressed issues that weren’t necessarily dispositive to the outcome of the case then before it. In fact, examples of this are found in both Scott and Snipes. Moreover, ruling on this issue could have provided guidance to future litigants as to what remains of the statute of limitations found in sec-

491. Id. (citing White, 431 N.W.2d at 643).
492. Id. at 629 (internal citations omitted).
493. Cf. id. at 623-28 (focusing upon existence of material increase in disability), with Snipes, 557 N.W.2d 662 (noting that payment of benefits cancels out reason for filing claim) and White, 431 N.W.2d at 643.
494. White, 431 N.W.2d at 643.
495. See id.
496. See Snipes, 557 N.W.2d 662.
497. Cf. id. at 667 (noting consideration as to whether claimant had reason to bring claim earlier is relevant in determining whether exception to statute of limitations applies), with Lenz, 848 N.W.2d at 628 (finding that timing of bringing claim related only to material change in condition and not to original underlying claim).
498. See Lenz, 848 N.W.2d at 627.
499. Id. at 627.
500. See Scott, 289 N.W. 367 (addressing possible claim under material change theory that was not at issue in claim); Snipes, 557 N.W.2d 662 (analyzing exception to statute of limitations test in case that did not involve a claim for substantial worsening).
tion 48-137. On the other hand, this also would have placed the Lenz court in the awkward position of explaining why Mr. Lenz’s failure to bring suit earlier was irrelevant to the ultimate outcome in that case. As it stands, however, it appears that Lenz now presents an exception to section 48-137 that has swallowed the rule.

The line of cases decided by the Nebraska Supreme Court, from Scott, to White, to Lenz and beyond, demonstrates a judicial habit of creating law rather than interpreting existing statutory language. While the Bassinger decision gave some hope that the court would take a more measured approach going forward, even if at the expense of stare decisis, such was proven not to be the case when Lenz was decided. Instead, Lenz stands in conflict with a number of cases previously decided by the court.

The conflicts created by the ultimate decision in Lenz and its rationale include the prohibition against “unexpiring” claims found in Scott, the requirement in White and Snipes that a claimant show he had no reason to bring suit earlier, the admonition against legislation from the bench in Bassinger, and the limitation of Gomez, applying presumptions of legislative activity to a presumption attached to inactivity through legislative acquiescence. Of course, after Lenz, the notion of legislative acquiescence now applies not just to statutes, but to case law as well. Furthermore, Lenz leaves the state of stare decisis in question, where a nearly forty-year-old case can be set aside while a case that had a more than a decade less in seniority was left undisturbed. Subsequent to Lenz, the court has further confirmed that legislative acquiescence is here to stay and can be used at the court’s unfettered discretion.

501. Cf. Snipes, 557 N.W.2d 662 (articulating two part White test), with Lenz, 848 N.W.2d 623 (merging test into one element only).
502. Accord Snipes, 557 N.W.2d 662.
503. Cf. Scott, 289 N.W. 367 (applying judicially created equitable exception to statute of limitations), with White, 431 N.W.2d 643 and Lenz, 848 N.W.2d 623 (using stare decisis and legislative acquiescence in support), with Bassinger, 806 N.W.2d 395 (interjecting equitable considerations and enacting legislation judicially is not permitted under the Nebraska Workers’ Compensation Act).
504. See Bassinger, 806 N.W.2d 395.
505. Id.
506. Id.
507. See Lenz, 848 N.W.2d 623 (applying legislative acquiescence to an equitable exception to the statute of limitations that had no statutory basis).
508. Cf. Bassinger, 806 N.W.2d 395 (overturning almost 40 years of precedence), with Lenz, 848 N.W.2d at 628 (refusing to overturn White because it stood undisturbed for approximately 25 years).
Potter,\textsuperscript{510} like Lenz, placed elevated status of prior judicial legislation over the constitutionally delegated duties of the Unicameral.\textsuperscript{511} Using the same justifications of stare decisis and legislative acquiescence in the face of an “express invitation” from the Nebraska Supreme Court, the Potter court asserted its intention to continue to legislate indefinitely into the future.\textsuperscript{512}

VI. CONCLUSION

The Nebraska Supreme Court has created a growing problem that it should take primary responsibility for resolving.\textsuperscript{513} By combining a history of judicial legislation with legislative acquiescence, uncertainty as to past cases and future decisions is pronounced.\textsuperscript{514} Solutions exist to this situation however.\textsuperscript{515} For example, the court could reverse Bassinger,\textsuperscript{516} White,\textsuperscript{517} Lenz,\textsuperscript{518} and Potter.\textsuperscript{519} Such a reversal would be consistent with the court’s statements made in Scott\textsuperscript{520} to the effect that there should be no such thing as a perpetual claim in workers’ compensation.\textsuperscript{521} This would also bring workers’ compensation claims in line with any other civil causes of action, be it tort, contract, or otherwise, by providing a clear bar to cases unless the claimants bring suit in a timely manner. As easily as Hilt\textsuperscript{522} was reversed, so too could the damage created by Lenz be corrected.

Should the Judiciary refuse to reverse prior instances of judicial legislation, perhaps the Nebraska Supreme Court could at least provide greater certainty as to when legislative acquiescence might be implicated when analyzing precedence.\textsuperscript{523} Similarly, the court could reconcile when precedence trumps legislative acquiescence and vice

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\textsuperscript{510} 851 N.W.2d 94 (Neb. 2014).
\textsuperscript{511} Potter, 851 N.W.2d 94, 103.
\textsuperscript{512} Id.
\textsuperscript{513} Cf. Bassinger v. Nebraska Heart Hosp., 806 N.W.2d 395, 403 (Neb. 2011) (discouraging judicial legislation while overturning decades old precedence), with Lenz v. Cent. Parking Sys. of Nebraska, 848 N.W.2d 623, 626 (Neb. 2014) (cementing judicial legislation under pretense of following stare decisis and legislative acquiescence).
\textsuperscript{514} See supra note 513.
\textsuperscript{515} See supra notes 402-03 and accompanying text.
\textsuperscript{516} 806 N.W.2d 395 (Neb. 2011).
\textsuperscript{517} 431 N.W.2d 641 (Neb. 1988).
\textsuperscript{518} 848 N.W.2d 623 (Neb. 2014).
\textsuperscript{519} 851 N.W.2d 94 (Neb. 2014).
\textsuperscript{520} 289 N.W. 367 (Neb. 1939).
\textsuperscript{521} See Scott v. State, 289 N.W. 367, 368 (Neb. 1939) (providing that perpetual and unexpiring claims should not exist).
\textsuperscript{522} 281 N.W.2d 399 (Neb. 1979).
\textsuperscript{523} See Scott, 289 N.W. at 368.
versa.\textsuperscript{524} A test consistent with the facts of Gomez\textsuperscript{525} would help greatly in this respect.

In the absence of some reversal, judicial amendments to the Nebraska Workers’ Compensation Act\textsuperscript{526} are likely to continue, even at a more rapid pace. For example, only several months after Lenz was decided, the Nebraska Supreme Court issued its opinion in Potter v. McCulla.\textsuperscript{527} Like Lenz, the court in Potter used the doctrine of stare decisis in combination with the concept of legislative acquiescence in the face of an “express invitation” in order to justify a prior example of judicial legislation.\textsuperscript{528} Specifically, the court in Potter affirmed its prior definition of ‘suddenly and violently’ under the Act, even though it recognized that it ‘may seem unfair to some employers (or, more aptly, their insurance carriers) under circumstances similar to the instant case . . .’.\textsuperscript{529} On the other hand, the court in Potter also noted that in defining ‘suddenly and violently,’ four Justices of the Nebraska Supreme Court had suggested “that modification of the Nebraska Workers’ Compensation Act to better address the issues involved in repetitive trauma cases is a legislative function, not a judicial one.”\textsuperscript{530} Regrettably, because that dissent was so recently articulated, it does not appear that a solution will come from the Judiciary any time soon.\textsuperscript{531}

\begin{footnotes}
\item[524] See, e.g., Bassinger, 806 N.W.2d 395 (overturning more than 30 years of prece-
dence without reference to stare decisis or legislative acquiescence as support to leave Hill in place).
\item[525] 61 N.W.2d 345 (Neb. 1953).
\item[527] Potter v. McCulla, 851 N.W.2d 94, 97-98 (Neb. 2014).
\item[528] Potter, 851 N.W.2d at 98, 104.
\item[529] Id. at 103 (where symptoms and medical treatment occur while work is being performed for one employer but no work is missed until work is being performed for another employer).
\item[530] Id. (citations omitted).
\item[531] See Lenz, 848 N.W.2d 623 (unanimous opinion); Potter, 851 N.W.2d 94.
\end{footnotes}