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At the hearing on the motion to withdraw his plea, he requested that the court take judicial notice of a six-page portion of the U.S. statutes. The court took judicial notice of the section titled "Immigration and Nationality" which contains numerous provisions regarding different classes of "Deportable Aliens." See 8 U.S.C. § 1227. He did not identify which section of the statute was applicable to him. The mere introduction of pages of federal statutory language is not sufficient to find Llerenas-Alvarado alleged and showed that he is subject to an immigration consequence which was not included in the advisement given. Llerenas-Alvarado failed to meet both prongs of the test required to withdraw his plea pursuant to § 29-1819.02.

CONCLUSION

We find that the district court did not abuse its discretion in overruling Llerenas-Alvarado's motion to withdraw his plea of no contest, because Llerenas-Alvarado knowingly, intelligently, and voluntarily entered his plea, and that the advisements given by the court satisfied the requirements of § 29-1819.02. The decision of the district court is affirmed.

AFFIRMED.

JOSE LUIS AGUIRRE, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, A CORPORATION, APPELLEE.

828 N.W.2d 180

Filed March 12, 2013. No. A-12-493.

1. **Judgments: Res Judicata.** The applicability of the doctrine of res judicata is a question of law.
2. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Judgments: Res Judicata.** The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
4. **Res Judicata.** The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause of action.

5. **Federal Acts: Railroads: Workers' Compensation.** The Federal Employers' Liability Act, much like the Nebraska Workers' Compensation Act, is a railroad employee's exclusive remedy for a workplace accident.
6. **Federal Acts: Railroads: Employer and Employee.** If the plaintiff is not an employee of the defendant railroad, the Federal Employers' Liability Act does not apply.
7. **Dismissal and Nonsuit: Claims.** Dismissal of a claim on the ground that the claim is not the proper remedy is not an adjudication on the merits.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Reversed and remanded.

James R. Welsh and Christopher Welsh, of Welsh & Welsh, P.C., L.L.O., for appellant.

Kyle Wallor and John M. Walker, of Lamson, Dugan & Murray, L.L.P., for appellee.

INBODY, Chief Judge, and SIEVERS and RIEDMANN, Judges.

RIEDMANN, Judge.

INTRODUCTION

Jose Luis Aguirre appeals the decision from the district court for Douglas County granting the motion to dismiss of Union Pacific Railroad Company (Union Pacific). The district court found Aguirre's claim was barred by the doctrine of res judicata, because he had filed a previous claim against Union Pacific based on the same set of facts. Because we find that the district court's decision Aguirre was not a Union Pacific employee was not a judgment on the merits and that therefore, res judicata does not apply, we reverse, and remand.

BACKGROUND

Aguirre filed a cause of action against Union Pacific under the Federal Employers' Liability Act (FELA) in the district court for Douglas County on December 22, 2009. Aguirre alleged that he was an employee of Union Pacific and sustained injuries in an accident which occurred on October 21, 2007, as a result of Union Pacific's negligence. The district court granted Union Pacific's motion for summary judgment, finding that Aguirre was not an employee of Union Pacific at the time of the accident.

Aguirre filed a second action in the district court for Douglas County against Union Pacific on September 27, 2011. In this claim, Aguirre sought to recover under a common-law negligence theory for the same injuries he sustained in the October 21, 2007, accident. Union Pacific filed a motion to dismiss, which the district court granted. The district court concluded that the doctrine of res judicata barred Aguirre's second action because there had been a previous judgment on the merits and both causes of action arose from the same basic facts.

Aguirre filed a motion to alter or amend the court's decision, which motion the district court denied. This timely appeal followed.

ASSIGNMENTS OF ERROR

Aguirre assigns the district court erred in (1) finding that the present claim and the FELA claim were the same cause of action, (2) finding that the prior summary judgment in the FELA claim was "'on the merits,'" and (3) dismissing the present claim on the doctrine of res judicata when the FELA claim was a mistake as to the proper remedy for his claim.

STANDARD OF REVIEW

[1,2] The applicability of the doctrine of res judicata is a question of law. See *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011). On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

ANALYSIS

Aguirre argues on appeal that the district court erred in applying the doctrine of res judicata to dismiss his common-law negligence action. Because the applicable law for each of Aguirre's assignments of error is the same, we address them all together.

[3,4] The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *Cole v. Clarke*, 10 Neb.

App. 981, 641 N.W.2d 412 (2002). The doctrine of res judicata rests on the necessity to terminate litigation and on the belief that a person should not be vexed twice for the same cause of action. *Id.*

[5,6] In his first action, Aguirre claimed he was an employee of Union Pacific and sought recovery under the FELA. See 45 U.S.C. § 51 et seq. (2006). The FELA, much like the Nebraska Workers' Compensation Act, is a railroad employee's exclusive remedy for a workplace accident. See *Chapman v. Union Pacific Railroad*, 237 Neb. 617, 467 N.W.2d 388 (1991). If the plaintiff is not an employee of the defendant railroad, the FELA does not apply. See 45 U.S.C. § 51 et seq. The district court granted Union Pacific's motion for summary judgment and dismissed Aguirre's complaint, finding that he was not a Union Pacific employee. We conclude this was not a judgment on the merits.

[7] The Nebraska Supreme Court has not addressed whether a common-law negligence claim can be maintained following the dismissal of a FELA claim, but it has held that dismissal of a claim on the ground that the claim is not the proper remedy is not an adjudication on the merits. See *Warren v. County of Stanton*, 145 Neb. 220, 15 N.W.2d 757 (1944). See, also, *U.S.D. No. 464 v. Porter*, 234 Kan. 690, 676 P.2d 84 (1984) (doctrine of res judicata does not apply where remedy is denied as not being appropriate, rather than upon merits of case).

In a decision more analogous to the FELA, the Nebraska Supreme Court has addressed whether a determination by the Workers' Compensation Court that a plaintiff's injury did not arise out of the course and scope of her employment had collateral estoppel effect on a subsequent suit for negligence. See *Marlow v. Maple Manor Apartments*, 193 Neb. 654, 228 N.W.2d 303 (1975).

In *Marlow*, the plaintiff brought a workers' compensation action against her employer for injuries she sustained when she slipped outside her place of business while returning from a personal errand. The compensation court found that the injury did not occur within the course and scope of her employment and dismissed her claim. She then filed a negligence action in

district court for the same injuries. The district court granted summary judgment for her employer, finding that the action was barred because she had previously filed a workers' compensation action.

The Nebraska Supreme Court reversed, stating:

> The operative fact is one of coverage, not of election to file a claim for compensation. If coverage exists, even though for some reason compensation may not be payable, the Workmen's Compensation Act is exclusive. If the accident does not arise out of and in the course of the employment, there is no coverage, and the parties then are not subject to the act. An adjudication that an injury does not arise out of or in the course of the employee's employment is a conclusive determination only of the fact that the Workmen's Compensation Court lacks jurisdiction in the matter. This determination does not bar recourse to the tort remedy, if one exists.

Marlow, 193 Neb. at 659, 228 N.W.2d at 306.

As in *Marlow*, the operative fact in the instant case is one of coverage, not of election to file a claim for compensation. While we recognize the district court did not dismiss Aguirre's FELA claim because it lacked jurisdiction in the matter, the rationale of *Marlow* applies here because the district court determined Aguirre was not subject to the provisions of the FELA. In finding that Aguirre was not a Union Pacific employee, the district court determined the FELA was not the proper remedy. This decision was not a judgment on the merits of the claim, and Aguirre was, therefore, entitled to file a second suit under a common-law negligence theory. Accordingly, we find that the district court erred in applying the doctrine of res judicata and dismissing the action.

CONCLUSION

For the foregoing reasons, we conclude the district court erred in granting Union Pacific's motion to dismiss based on the doctrine of res judicata. Therefore, we reverse, and remand.

REVERSED AND REMANDED.