filed in a case that the parties had been contemplating.[16] Here, Kari knew that Elizabeth intended to file the voluntary appearance with the dissolution petition, which she filed the next day. We conclude that the voluntary appearance waived service and thus the court had jurisdiction. We affirm.

AFFIRMED.

[16] See, e.g., *Adair, supra* note 13.

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## MANUELA DOMINGO GASPAR GONZALEZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF EFRAIN RAMOS-DOMINGO, DECEASED, APPELLANT, V. UNION PACIFIC RAILROAD COMPANY, APPELLEE.

803 N.W.2d 424

Filed August 19, 2011. No. S-10-115.

1. **Motions to Dismiss: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing a dismissal order, an appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.
3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.
4. **Actions: Evidence: Pretrial Procedure.** In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
5. **Damages: Pleadings: Proof.** One who seeks to avoid the legal effect of a release of a claim for damages has the burden of pleading and proving the facts which entitle such party to relief.
6. **Contracts: Fraud.** In the absence of fraud, one who signs an instrument without reading it, when one can read and has had the opportunity to do so, cannot avoid the effect of one's signature merely because one was not informed of the contents of the instrument.
7. **Releases: Fraud.** A release of a claim for relief should not be upheld if fraud, deceit, oppression, or unconscionable advantage is connected with the transaction.
8. **Releases: Fraud: Intent.** If a releasor was under a misapprehension, not due to his or her own neglect, as to the nature or scope of the release, and if this

misapprehension was induced by the misconduct of the releasee, then the release, regardless of how comprehensively worded, is binding only to the extent actually intended by the releasor. The release, to the extent it purports to release claims other than any understood by the releasor to be included, is ineffective to that extent.

9. **Fraud: Words and Phrases.** Overreaching, which is closely related to fraud, is the result of an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties.
10. **Releases: Fraud.** In circumstances affording an opportunity for overreaching, the law demands good faith on the part of a releasee and a full understanding on the part of the person injured as to his or her legal rights.
11. **Pleadings: Appeal and Error.** An appellate court reviews a district court's decision on a motion for leave to amend a complaint for an abuse of discretion.
12. ____: ____. A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.
13. ____: ____. It is an abuse of discretion for the district court to dismiss a suit on the basis of the original complaint without first considering and ruling on a pending motion to amend.
14. **Rescission: Consideration: Words and Phrases.** Tender or return of consideration is only a condition precedent in a case where rescission is by act of the party—a legal rescission. Tender or return is not a condition precedent in a case involving equitable rescission—an action to obtain a decree of rescission.
15. **Rescission: Consideration: Fraud.** A rescinding party is not required to tender or return consideration when the ground for rescission is fraud in the execution as opposed to fraud in the inducement.
16. **Contracts: Releases: Consideration: Fraud.** When a settlement or release is merely voidable, due to fraud in the inducement, the consideration should be tendered or returned as a condition precedent to maintaining an action on the original claim. But in a case of fraud in the execution, because there never was a contract or release, tender or return of the consideration is not required.
17. **Rescission: Consideration: Fraud.** While the power of a party to avoid a transaction for fraud or misrepresentation may be conditioned on an offer to return the consideration received, a failure to do so does not preclude avoidance if the consideration is merely money paid, the amount of which can be credited in partial cancelation of the injured party's claim, or constitutes a comparatively small part of the whole consideration.
18. **Rescission: Consideration: Equity.** The rule requiring tender or return of consideration is not absolute, is not to be strictly construed where restoration is impossible, and is to be applied in accordance with equitable principles.
19. **Releases: Consideration: Fraud.** A release procured by fraud will be set aside, without tender or return of the consideration, when the releasor, because of conditions of poverty, is unable to meet the tender-or-return requirement and the

fraud remained undiscovered until after the consideration had been expended or otherwise put beyond the releasor's control.

20. **Rescission: Fraud: Time.** A party seeking rescission of a contract on the grounds of fraud, misrepresentation, or business coercion must do so promptly upon the discovery of the facts giving rise to the right to rescind.
21. **Rescission: Fraud: Duress: Time.** Whether one seeking to rescind a contract on the ground that it was procured by fraud or duress has acted with reasonable promptness is ordinarily a question of fact.
22. **Rescission: Time: Equity.** A delay in seeking to rescind a contract is unreasonable only if a litigant has been guilty of inexcusable neglect and, during the lapse of time, circumstances have changed such that permitting rescission would work inequitably to the disadvantage or prejudice of the other party.
23. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.
24. **Fraud: Judgments.** The existence of a fiduciary duty and the scope of that duty are questions of law for a court to decide.
25. **Fraud: Pleadings.** The allegation of the existence of a confidential or fiduciary relationship is a legal conclusion only and insufficient to raise any issue of fact.
26. **Fraud: Words and Phrases.** A fiduciary duty arises out of a confidential relationship which exists when one party gains the confidence of the other and purports to act or advise with the other's interest in mind.
27. **Fraud: Undue Influence: Equity.** In a confidential or fiduciary relationship in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence are thereby created on the other, equity will scrutinize the transaction critically, especially where age, infirmity, and instability are involved, to see that no injustice has occurred.
28. **Fraud: Undue Influence.** Superiority of bargaining power alone does not create a fiduciary duty, because there must also be an opportunity to exercise undue influence.
29. **Pretrial Procedure: Appeal and Error.** Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
30. **Courts: Evidence: Trade Secrets.** The law gives trial courts broad latitude to grant protective orders to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information.
31. **Rules of the Supreme Court: Pretrial Procedure.** Neb. Ct. R. Disc. § 6-326(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.
32. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.

33. **Attorney Fees: Pretrial Procedure.** Attorney fees are a permissible sanction for a discovery violation.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Affirmed in part, reversed and remanded in part for further proceedings, and in part remanded with directions.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, and Horacio J. Wheelock, of Law Office of Horacio Wheelock, for appellant.

Mark E. Novotny, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

GERRARD, J.

Thirteen-year-old Efrain Ramos-Domingo (Efrain) was killed by a Union Pacific Railroad Company (Union Pacific) train in Schuyler, Nebraska, on July 27, 2005. Two days later, Efrain's mother, Manuela Domingo Gaspar Gonzalez (Manuela), was approached by a Union Pacific claims representative and signed a document releasing Union Pacific from liability for Efrain's death, in exchange for $15,000. The primary question presented in this appeal is whether Manuela has alleged facts that would show the purported release to be void or voidable.

## I. BACKGROUND

Manuela filed a complaint in district court on November 27, 2006, alleging claims for wrongful death and breach of fiduciary duty. Specifically, Manuela alleged that the design of the pedestrian crossing at which Efrain had been killed, and the way in which Union Pacific operated trains there, had been negligent and that Union Pacific's negligence had caused Efrain's death.

But Manuela also alleged facts with respect to her release of Union Pacific from liability. Manuela alleged that 2 days after Efrain's death, a Union Pacific claims representative had approached her with respect to settlement. Manuela does not

speak English and had no financial resources, including the means to pay for Efrain's burial. Manuela admitted having signed a release in exchange for $15,000, after which Union Pacific had petitioned the probate court to appoint a Union Pacific representative to act as special administrator of Efrain's estate. (Manuela has since been appointed as Efrain's personal representative.)

Manuela alleged that she had not understood the meaning of the release and had not known that by signing the release, she was giving up the right to pursue legal action against Union Pacific arising from Efrain's death. She alleged that Union Pacific's claims representative had not advised her of the legal consequences of signing the release.

Union Pacific filed a motion to dismiss Manuela's complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). Union Pacific argued that the release barred Manuela's claims and that if Manuela was asking the court to void the release, then she was required to tender the proceeds of the settlement before doing so. The district court sustained the motion to dismiss with respect to the wrongful death claim, reasoning that the release was an "insuperable bar to relief." But the court overruled the motion with respect to the fiduciary duty claim.

Discovery proceeded on the remaining claim. Among other things, Manuela sought to compel Union Pacific to produce information relating to "each 'direct settlement' in which the claimants are not employees of Union Pacific . . . and which involved a death" for the 5 years preceding Efrain's death. Union Pacific objected on the grounds that the information sought was not relevant to the fiduciary duty claim and that the request was overly broad and unduly burdensome. In particular, Union Pacific claimed that the information was not easily available for disclosure. In response, Manuela argued that the information was relevant to show Union Pacific's handling of claims of this kind. And Manuela pointed to deposition testimony of Union Pacific representatives suggesting that Union Pacific maintained a claims database from which it could have easily obtained and supplied the sort of information Manuela was requesting. The district court, without explaining its precise reasoning, denied Manuela's motion.

Manuela also sought to compel production of other documents that, generally speaking, contained information relating to Union Pacific's claims representatives. Manuela sought a privilege log for a document that, according to Union Pacific, contained the handwritten notes of its claims representative about legal advice from counsel for Union Pacific. Manuela also sought documents describing Union Pacific's process for evaluating the performance and productivity of its claims representatives; Union Pacific and Manuela disagreed about their relevance to her fiduciary duty claim. And Manuela sought the Union Pacific file for the claims representative who met with Manuela in this case. Again, Union Pacific and Manuela disputed the relevance of the materials. And again, without particularly explaining its reasoning, the court denied Manuela's motion.

The district court also, upon Union Pacific's motion, entered a protective order with respect to Union Pacific's production of the section of its claims manual dealing with grade crossing accidents. Union Pacific had reservations about producing the document, alleging that it was outdated, was not in use at the time of Efrain's death, was proprietary, and potentially could be used against Union Pacific in other litigation. Union Pacific agreed to produce the document, but asked for and obtained an order from the district court directing the parties to keep the document secure and private, not disclose it for any purpose other than this case, and not distribute it to any third persons other than counsel or retained experts. And the parties were ordered to return the document to Union Pacific once the litigation was concluded.

Manuela moved for attorney fees in association with her motions to compel discovery and submitted an affidavit evidencing expenses that, in her appellate brief, she argues added up to $3,756.70.[1] And in addition to litigating the issues that arose during discovery, Union Pacific filed a motion for summary judgment on Manuela's remaining claim. After a hearing, the district court granted the motion for summary judgment. The court found, as a matter of law, that there was no fiduciary

[1] Brief for appellant at 49.

duty owed by Union Pacific to Manuela and that even if such a duty existed, the release signed by Manuela barred recovery. Therefore, the court dismissed Manuela's remaining claim. But the court, having ruled in Manuela's favor on some discovery issues that are not disputed on appeal, awarded Manuela attorney fees in the amount of $2,500. Manuela appeals.

## II. ASSIGNMENTS OF ERROR

Manuela assigns, as renumbered, that the district court erred by (1) sustaining Union Pacific's motions to dismiss her wrongful death claim, (2) sustaining Union Pacific's motion for summary judgment on her fiduciary duty claim, (3) sustaining Union Pacific's motion for a protective order, (4) overruling her motions to compel discovery, and (5) awarding inadequate attorney fees.

## III. ANALYSIS

It is important to note, at the outset, that the scope of our review is different with respect to each of Manuela's two claims for relief. Because Manuela's fiduciary duty claim was disposed of by summary judgment, we consider the evidence that was presented in support of and opposition to that motion.[2] But with respect to the wrongful death claim, we do not consider the evidence in the record—because that claim was dismissed for failing to state a claim upon which relief could be granted, our review is limited to the allegations in the pleadings.[3] We consider the wrongful death claim first.

### 1. Wrongful Death Claim

[1-4] Manuela's wrongful death claim was dismissed for failure to state a claim. We review a district court's order granting a motion to dismiss de novo.[4] When reviewing a dismissal order, we accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which

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[2] See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010).

[3] See *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

[4] *Id.*

may be drawn therefrom, but not the pleader's conclusions.[5] To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.[6] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[7]

(a) Rescission

[5] Although the issue presented is the viability of Manuela's wrongful death claim, our analysis does not relate to the facts underlying that claim. Rather, our analysis is focused on the release, because its existence is apparent on the face of the complaint, and one who seeks to avoid the legal effect of a release of a claim for damages has the burden of pleading and proving the facts which entitle such party to relief.[8] So, the question is whether Manuela has alleged facts (or could allege facts) sufficient to support an inference that the release is void or voidable. We find that she has.

[6] Manuela argues that the circumstances show her failure to understand the release and the unequal bargaining position that she was in. Union Pacific, on the other hand, relies upon the general rule that in the absence of fraud, one who signs an instrument without reading it, when one can read and has had the opportunity to do so, cannot avoid the effect of one's signature merely because one was not informed of the contents of the instrument.[9] But the key qualifiers in that rule are the ability to read and the absence of fraud. Manuela specifically

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[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] See *Watmore v. Ford*, 229 Neb. 121, 425 N.W.2d 612 (1988), *overruled on other grounds, Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

[9] See, *Walker v. Walker Enter.*, 248 Neb. 120, 532 N.W.2d 324 (1995); *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 531 N.W.2d 523 (1995).

pled that she could not read. And it is longstanding, well-established law that circumstances like these are sufficient to support legal or equitable relief from a release, on grounds of fraud, overreaching, or a simple absence of a meeting of the minds.[10]

[7,8] The general rule is that a release of a claim for relief should not be upheld if fraud, deceit, oppression, or unconscionable advantage is connected with the transaction.[11] If the releasor was under a misapprehension, not due to his or her own neglect, as to the nature or scope of the release, and if this misapprehension was induced by the misconduct of the releasee, then the release, regardless of how comprehensively worded, is binding only to the extent actually intended by the releasor.[12] The release, to the extent it purports to release claims other than any understood by the releasor to be included, is ineffective to that extent.[13] This is because there was no meeting of the minds, or binding mutual understanding, necessary to create a contract.[14]

[9,10] Even an innocent or accidental misrepresentation, if intended to be acted upon by the releasor, and actually relied

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[10] See, e.g., *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757 (2d Cir. 1946); *Provident Life & Accident Ins. Co. v. Bertman*, 151 F.2d 1001 (6th Cir. 1945); *Great Northern Ry. Co. v. Kasischke*, 104 F. 440 (8th Cir. 1900); *Jacobs v. Farmland Mut. Ins. Co.*, 377 N.W.2d 441 (Minn. 1985); *Montoya v. Moore*, 77 N.M. 326, 422 P.2d 363 (1967); *Jordan v. Guerra*, 23 Cal. 2d 469, 144 P.2d 349 (1943); *Palkovitz v. American S. & T. P. Co.*, 266 Pa. 176, 109 A. 789 (1920); *Miller v. Spokane International R. Co.*, 82 Wash. 170, 143 P. 981 (1914); *Lusted v. The Chicago & Northwestern R. Co.*, 71 Wis. 391, 36 N.W. 857 (1888); *Heuter v. Coastal Air Lines, Inc.*, 12 N.J. Super. 490, 79 A.2d 880 (1951); *Davis v. Whatley*, 175 So. 422 (La. App. 1937).

[11] See, *Graham v. Atchison, T. & S. F. Ry. Co.*, 176 F.2d 819 (9th Cir. 1949); *Carpenter International, Inc. v. Kaiser Jamaica Corp.*, 369 F. Supp. 1138 (D. Del. 1974).

[12] *Carpenter International, Inc., supra* note 11.

[13] See, *Pacific Greyhound Lines v. Zane*, 160 F.2d 731 (9th Cir. 1947); *Jordan, supra* note 10; *Miller, supra* note 10; *Davis, supra* note 10.

[14] See *id.* See, also, e.g., *Houghton v. Big Red Keno*, 254 Neb. 81, 574 N.W.2d 494 (1998).

upon, can be effective to avoid a release.[15] Beyond that, a finding of overreaching or duress can support relief in equity from a release. Overreaching, which is closely related to fraud,[16] has been defined as the result of an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties.[17] And in circumstances affording an opportunity for overreaching, the law demands good faith on the part of the releasee and a full understanding on the part of the person injured as to his or her legal rights.[18]

For instance, in *Jordan v. Guerra*,[19] the dispute concerned a release that had been signed by the father of a child who had been struck and killed by a car. He was contacted by the driver of the car and the driver's insurance adjuster, who offered to pay the child's funeral expenses. The adjuster offered the father enough to cover the funeral bill and his lost wages from work and told the father that it was all the family could get. The insurer prepared a release which purported to completely settle any claim arising from the accident, which release the father signed. Later, the father sought to rescind the release, explaining that he had not known that he had a right to anything except the funeral expenses and time lost, which were the only subject of discussion, and that he had thought that was all the release covered. The California Supreme Court affirmed a judgment in the father's favor, explaining that it was

> for the trier of the facts to determine what the [father] understood was covered by the writing and whether his understanding different from the writing was induced by the defendant. If a misconception be found and that the defendant was responsible therefor, the contract insofar as it purports to release claims other than those understood

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[15] See *Doyle v. Teasdale*, 263 Wis. 328, 57 N.W.2d 381 (1953).

[16] See *Vela v. Marywood*, 17 S.W.3d 750 (Tex. App. 2000).

[17] *Schreiber v. Schreiber*, 795 So. 2d 1054 (Fla. App. 2001).

[18] *Jordan, supra* note 10. See, also, *Graham, supra* note 11; *Jacobs, supra* note 10; *Lusted, supra* note 10; *Heuter, supra* note 10.

[19] *Jordan, supra* note 10.

> by the [father] to be included, is ineffective to that extent . . . .[20]

And, the court found, there was sufficient evidence to support the findings that the adjuster had hurried to reach a settlement before the father could secure independent advice, that the settlement was inadequate, and that the adjuster had misled the father into believing that he had no claim beyond funeral expenses and time lost and that those were the only items covered by the release.[21]

Similarly, in *Jacobs v. Farmland Mut. Ins. Co.*,[22] the parents of an accident victim sought to set aside a settlement that had been reached with the tort-feasor's insurance adjuster only 7 days after the accident. The father, who agreed to the settlement, could neither read nor write, although the adjuster claimed to have explained the settlement to him. The Minnesota Supreme Court affirmed the trial court's rescission of the settlement, finding that the circumstances supported findings of "improvidence, unconscionability," and "willful indifference to the rights of others."[23] The court explained that while a finding of fraudulent misrepresentation was not implicit in the jury's findings,

> fraud is a protean legal concept, assuming many shapes and forms. In this case, [the adjuster] was guilty of overreaching, which is a species of fraud, and the jury implicitly so found. [The father] was a simple man, functionally illiterate, and inexperienced. This, combined with his grief, left him vulnerable to a superior negotiator. [The adjuster] was unaware of [the father's] illiteracy, but, as an experienced adjuster, he could not have been unaware of the man's innate incapacity to negotiate effectively. This is not a case of a hard bargain fairly made but an unfair bargain unfairly made.[24]

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[20] *Id.* at 475-76, 144 P.2d at 352.

[21] See *Jordan, supra* note 10.

[22] *Jacobs, supra* note 10.

[23] *Id.* at 444.

[24] *Id.* at 444 n.1.

And in *Heuter v. Coastal Air Lines, Inc.*,[25] the releasor was an uneducated Puerto Rican who understood Spanish, but did not read, write, or understand English. He was injured in an airplane crash and hospitalized. A week after the accident, agents of the airline came to the hospital and, according to the releasor, told him that they were going to buy him some clothes and give him some money. They took him from the hospital in a bathrobe and slippers, provided him with clothes and gave him $316 in cash, then returned him to the hospital. He signed the release proffered to him by the agents with an "X" mark, because he did not know how to write his name. But, he claimed that the release had never been read or explained to him. Nonetheless, the trial court entered summary judgment against him.

On appeal, however, the New Jersey appellate court explained that the rule permitting avoidance of a release was not limited to circumstances involving fraudulent misrepresentation or similar misconduct. Rather, the court explained, it is

> when the release is obtained "from the illiterate, the weak-minded or distressed party, under circumstances which indicate that it was procured by artifice or deception, or by undue pressure and importunity inducing action without advice or time for deliberation, or by advantage taken of distress, or for no or an inadequate consideration, or is otherwise inequitable, that it will come under condemnation."[26]

The court rejected the defense that the agents had made no "affirmative misstatement," explaining that "even assuming the agents refrained from making any affirmative misstatement," the agents' conduct gave rise to a triable issue "as to whether there had been 'imposition practiced upon the signer with intent to deceive him as to the purport of the paper signed.'"[27] And, the court reasoned, the releasor could, to avoid the release,

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[25] *Heuter, supra* note 10.

[26] *Id.* at 494, 79 A.2d at 883.

[27] *Id.* at 495, 79 A.2d at 883.

> properly rely upon the evidence of his illiteracy, his illness, the absence of friends and counsel, his lack of understanding and the omission of all explanation, the haste, pressure and somewhat startling circumstances surrounding the procurement of his mark, and invoke pertinent equitable principles based upon unfair and unconscionable conduct of the defendant.[28]

Case law is, in fact, replete with instances in which persons illiterate in English have been able to obtain relief from releases that were inadequately explained to them or that they simply did not understand.[29] In *Great Northern Ry. Co. v. Kasischke*,[30] the Eighth Circuit explained that the releasee had a duty, when informed that the releasor "could not read or write English, and that he relied upon him for an explanation of the contents of the paper, to explain its purport and the object of asking him to sign it, and to do so fully, in language which the [releasor] could comprehend." In *Miller v. Spokane International R. Co.*,[31] the Washington Supreme Court found the evidence of fraud sufficient when the releasor, who did not speak English, testified that he had signed a release for a personal injury claim that had not been explained to him, and believed that he was being paid for lost wages. In *Palkovitz v. American S. & T. P. Co.*,[32] the Supreme Court of Pennsylvania affirmed a judgment in favor of a releasor who could neither read, write, nor understand English and had placed his mark upon a release of a personal injury claim believing it to merely be a receipt for relief money. And in *Davis v. Whatley*,[33] the Louisiana appellate court also concluded that an illiterate releasor was entitled to relief from a release that he had signed

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[28] *Id.* at 496, 79 A.2d at 883.

[29] See *Heuter, supra* note 10. See, also, e.g., *Kasischke, supra* note 10; *Palkovitz, supra* note 10; *Miller, supra* note 10; *Davis, supra* note 10.

[30] *Kasischke, supra* note 10, 104 F. at 445.

[31] *Miller, supra* note 10.

[32] *Palkovitz, supra* note 10.

[33] *Davis, supra* note 10.

believing to be a receipt, in his case, for payment of his medical bill.

Nebraska law contains similar examples. For instance, in *Ward v. Spelts*,[34] the parties had entered into a contract for the sale of corn. The written contract was for the sale of 3,000 bushels of corn, but the seller claimed that had not been the actual agreement of the parties. The seller could neither read nor write and had made his mark on the contract based on the assurance of the buyers' agent that it embraced the agreement as the seller understood it. We reversed a trial court judgment for the buyers, explaining that "[t]he doctrine, that the carelessness or negligence of a party in signing a writing estops him from afterwards disputing the contents of such writing," does not apply "when the defense is that such writing, by reason of fraud, does not embrace the contract actually made."[35]

Similarly, in *West v. Wegner*,[36] the parties were disputing the validity of a guaranty allegedly executed on a promissory note. The purported guarantor alleged that he had been asked to sign the note only as a witness. He could read and write, but did not have his glasses, and signed the agreement not knowing that it was a guaranty. We affirmed a judgment in his favor, rejecting the creditor's reliance upon the rule that "a party . . . is not permitted to avoid the contract on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was a mere form."[37] That rule, we explained, "does not apply where the controversy is between the parties and the execution of the instrument was induced by fraud."[38]

Courts have also explained that a release can be voided on the ground of duress, which occurs when pressure is brought to force accession to unjust, unconscionable, or illegal demands.[39]

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[34] *Ward v. Spelts*, 39 Neb. 809, 58 N.W. 426 (1894).

[35] *Id.* at 815, 58 N.W. at 428.

[36] *West v. Wegner*, 172 Neb. 692, 111 N.W.2d 449 (1961).

[37] *Id.* at 694, 111 N.W.2d at 450-51.

[38] *Id.* at 694, 111 N.W.2d at 451.

[39] See *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002).

So, for instance, a releasor's dire economic circumstances[40] or threats of legal trouble[41] have been held to undermine the enforceability of a release.[42]

And in *Carroll v. Fetty*,[43] the Supreme Court of Appeals of West Virginia found that duress had been established when the parents of a child struck by an automobile settled with the tort-feasor's insurance adjuster 2 days after the accident, because their undertaker refused to release the child for burial without being paid. The court explained that duress sufficient to suspend the will exercised by a party to a release is sufficient to destroy its legal effect. And, the court said, the parents had been forced to sign the release in order to provide their child with "a prompt and decent burial."[44] The insurance adjuster, knowing of these "unfortunate and appalling circumstances," took advantage of them.[45] The court concluded that where a releasee knows of duress and takes advantage of it in causing the release to be executed, the release may be set aside, provided the duress was sufficient to subvert the will of the parties.[46]

When all of these well-established principles are considered, it is evident that Manuela has alleged facts sufficient to state a claim for relief from the release. She specifically alleged that she does not read or speak English and did not understand the effect of the release. While she has not made specific allegations regarding misinformation or inaccurate language interpretation, affirmative misstatements are not necessary. Manuela has alleged facts that would, if proved, support an inference that the release was void as not representing a binding mutual understanding between the parties. And Manuela has at least

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[40] See *Reliable Furniture Co. v. Fidelity & Guar. Ins. Under.*, 16 Utah 2d 211, 398 P.2d 685 (1965).

[41] See *Montoya, supra* note 10.

[42] See *Macke v. Jungels*, 102 Neb. 123, 166 N.W. 191 (1918).

[43] *Carroll v. Fetty*, 121 W. Va. 215, 2 S.E.2d 521 (1939).

[44] *Id.* at 220, 2 S.E.2d at 524.

[45] *Id.* at 219, 2 S.E.2d at 523.

[46] See *Carroll, supra* note 43.

alleged facts that "raise a reasonable expectation that discovery will reveal evidence"[47] of fraud, overreaching, or duress.

These are, obviously, only allegations, and Union Pacific is entitled to present evidence that its employees acted in good faith and acquitted themselves equitably. But Manuela has alleged facts that could allow a trier of fact to conclude otherwise, and given our standard of review on a motion to dismiss, that is all that is required. On the face of her complaint, Manuela pled a claim for relief, and the district court erred in dismissing it.

Having reached that conclusion, we do not address Manuela's alternative argument that the release was invalid because at the time it was executed, she had not been appointed personal representative of Efrain's estate. Only a decedent's personal representative may bring a claim for wrongful death of that decedent,[48] and the personal representative shall not compromise or settle a claim for damages for wrongful death until the court by which he or she was appointed shall first have consented to and approved the terms of the settlement.[49]

But the complaint in this case, while it suggests that Manuela had not been appointed personal representative at the time the release was executed, does not allege anything about when she was appointed or whether or not the settlement was ever ratified by the personal representative or the probate court. Simply put, there is no basis in the complaint to resolve this issue one way or the other, and given our conclusion above with respect to rescission, we need not address it further.

(b) Alternative Grounds for Dismissal

In arguing for affirmance, Union Pacific offers several alternative reasons which it contends support the district court's dismissal of the claim.

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[47] See *Central Neb. Pub. Power Dist., supra* note 3, 280 Neb. at 538, 788 N.W.2d at 258.

[48] See *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002).

[49] See Neb. Rev. Stat. § 30-810 (Reissue 2008).

*(i) Prayer for Relief*

Union Pacific contends that Manuela's complaint is defective because it does not contain a prayer that the release be voided. We find this argument unpersuasive for two reasons. First, as noted above, Manuela has alleged facts which would support a finding that the release was not simply voidable, but void ab initio. In that case, affirmative relief from the court is not required; as a technical matter, the claim does not involve "rescission" at all, because there is nothing to rescind. Of course, as a practical matter, the court would still need to find that the release was void in order to grant relief on the underlying claim. But if the release is void, then it is not necessary for the court to grant rescission in order to invalidate it.[50]

Second, to the extent that Manuela's complaint should have sought rescission, she asked for leave to amend her complaint at the hearing on Union Pacific's motion to dismiss. Neb. Ct. R. Pldg. § 6-1115(a) provides that leave to amend a pleading "shall be freely given when justice so requires." But the district court, finding that the release was an "insuperable bar to relief," dismissed the wrongful death claim without expressly ruling on that request.

[11-13] We review a district court's decision on a motion for leave to amend a complaint for an abuse of discretion, but a district court's discretion to deny such leave is limited.[51] A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.[52] None of those factors were evident here. And more specifically, it is an abuse of discretion for the district court to dismiss a suit on the basis of the original complaint without first considering and ruling on a pending motion to amend.[53] So, to the extent that Manuela's failure

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[50] See, generally, *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990).

[51] See *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010).

[52] *Id.*

[53] See *id.*

to specifically pray for rescission in her complaint supported the court's decision on Union Pacific's motion to dismiss, the court abused its discretion in not permitting Manuela to amend her complaint.

*(ii) Tender and Restitution*

Union Pacific argues that Manuela was required, as a prerequisite to her suit, to tender back the $15,000 she received as consideration for the release. Union Pacific relies upon *Doe v. Golnick*,[54] in which we held that a plaintiff's claim for rescission of a settlement agreement was barred because she failed to tender the settlement proceeds. We conclude, however, that *Doe* is distinguishable. But explaining how will require an examination of some basic common-law doctrine.

a. Rescission at Law and Rescission in Equity

[14] The general rule upon which we relied in *Doe* was that when a person seeks to avoid the effect of a release, he or she must first tender or return whatever he or she has received for executing the release.[55] We recognized, however, that tender or return of consideration is only a condition precedent in a case where rescission is by act of the party—a legal rescission. Tender or return is not a condition precedent in a case involving equitable rescission—an action to obtain a decree of rescission.[56] The distinction, we have explained, is as follows:

> "Strictly speaking, in a law case, the rescission is by act of the party and is a condition precedent to bringing an action to recover money or thing owing to him by any other party to the contract as a consequence of the rescission, and by his rescission or repudiation of a contract a party merely gives notice to the other party that he does not propose to be bound by the contract. A court of law entertains an action for the recovery of the possession of chattels, or, under some circumstances, for the recovery of land, or for the recovery of damages, and although

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[54] *Doe v. Golnick*, 251 Neb. 184, 556 N.W.2d 20 (1996).

[55] See *id.*

[56] See *id.*

> nothing is said concerning it either in the pleading or in the judgment, a contract or conveyance, as the case may be, is virtually rescinded; the recovery is based on the fact of such rescission and could not have been granted unless the rescission had taken place.
>
> "In equity, on the other hand, the rescission is effected by the decree of the equity court which entertains the action for the express purpose of rescinding the contract and rendering a decree granting such relief. In other words, a court of equity grants rescission or cancellation, and its decree wipes out the instrument, and renders it as though it does not exist."[57]

So, because rescission is not accomplished in equity until the court so decrees, the plaintiff has no obligation before suit to tender or return goods or money received from the defendant.[58] "'This does not mean that the plaintiff is entitled to get back what he gave and keep what he got, too. It means only that he need not make formal tender before suit.'"[59]

The distinction between rescission at law and in equity is difficult to make in a case involving rescission of a settlement agreement, given that the plaintiff generally seeks to prosecute an underlying claim, as opposed to, for instance, obtaining the return of chattel transferred under a contract. In *Doe*, we characterized it as rescission at law, based on the fact that the underlying suit was an action at law.[60] But even when a case seeks rescission at law, there are several exceptions to the tender requirement, many of which are relevant here.

b. Fraud in Inducement and Fraud in Execution

[15] First and most important, it is well established that a rescinding party is not required to tender or return consideration when the ground for rescission is fraud in the execution

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[57] *Haumont v. Security State Bank*, 220 Neb. 809, 815-16, 374 N.W.2d 2, 7 (1985). Accord *Kracl, supra* note 50.

[58] *Kracl, supra* note 50; *Haumont, supra* note 57.

[59] *Kracl, supra* note 50, 236 Neb. at 299, 461 N.W.2d at 73.

[60] See *Doe, supra* note 54.

as opposed to fraud in the inducement.[61] Fraud in the execution goes to the very existence of the contract, such as where a release is misread to the releasor, or where one paper is surreptitiously substituted for another, or where a party is tricked into signing an instrument he or she did not mean to execute.[62] In such cases, as explained above, there was no meeting of the minds, so the consideration received was not received for consenting to the terms of the alleged contract—in other words, it is not a question of a contract voidable for fraud, but of no contract at all.[63] Fraud in the inducement, by contrast, goes to the means used to induce a party to enter into a contract. In such cases, the party knows the character of the instrument and intends to execute it, but the contract may be voidable if the party's consent was obtained by false representations—for instance, as to the nature and value of the consideration, or other material matters.[64]

[16] When a settlement or release is merely voidable, due to fraud in the inducement, the consideration should be tendered or returned as a condition precedent to maintaining an action on the original claim.[65] But in a case of fraud in the execution, because there never was a contract or release, tender or return of the consideration is not required. The principle that consideration should be returned or tendered "'does not apply to cases where a party holds out that he gives the consideration

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[61] See, *Vickers v. Gifford-Hill & Co, Inc.*, 534 F.2d 1311 (8th Cir. 1976); *Ted Price Construction Co. v. Cascade Natural Gas Corp.*, 307 F.2d 741 (9th Cir. 1962); *Marshall v. New York Central Railroad Company*, 218 F.2d 900 (7th Cir. 1955); *Zane, supra* note 13; *Brusseau v. Electronic Data Systems Corp.*, 694 F. Supp. 331 (E.D. Mich. 1988); *McCarty v. Kendall Company*, 242 F. Supp. 495 (W.D.S.C. 1965); *Stewart v. Eldred*, 349 Mich. 28, 84 N.W.2d 496 (1957); *Picklesimer v. Rd. Co.*, 151 Ohio St. 1, 84 N.E.2d 214 (1949); *Jordan, supra* note 10; *Union Life & Accident Ins. Co. v. American Surety Co.*, 113 Neb. 300, 203 N.W. 172 (1925); *Swan v. Great Northern R. Co.*, 40 N.D. 258, 168 N.W. 657 (1918).

[62] See *Swan, supra* note 61.

[63] See *id.*

[64] See *id.*

[65] See *Picklesimer, supra* note 61. See, also, *Union Life & Accident Ins. Co., supra* note 61; *Swan, supra* note 61.

for one thing, and by fraud obtains an agreement that it was given for another thing.'"[66]

So, in *Union Life & Accident Ins. Co. v. American Surety Co.*,[67] this court rejected an argument that a party's right to rescind an instrument was defeated by his failure to tender the premium received, stating that while the tender-or-return argument was based on "familiar principles," they did not apply, because "the right of rescission is based upon the at-one-time existence of the contract." We explained that "where . . . there never was any contract in law, such tender was unnecessary," although the rescinding party "would doubtless be liable as for money had and received."[68]

It is on that basis that our decision in *Doe* is distinguishable. In *Doe*, although our opinion did not discuss it, an examination of the transcript shows that the plaintiff's testimony supported only fraud in the inducement. Although the plaintiff in *Doe* claimed that the settlement had been obtained by duress, she did not assert that the terms of the settlement varied from what she understood them to be. But in this case, as discussed above, Manuela's complaint alleges facts supporting both fraud in the inducement and fraud in the execution. To the extent that she has alleged fraud in the execution, she was not required to tender or return Union Pacific's consideration in order to assert her underlying wrongful death claim.

c. Other Exceptions

[17] But even where fraud in the inducement is alleged, the tender-or-return requirement may not be imposed where it would be inequitable to do so or where the underlying action is for money damages against which the value of the consideration could be set off against a recovery. We have held that while the power of a party to avoid a transaction for fraud or misrepresentation may be conditioned on an offer to return the consideration received, a failure to do so does not preclude

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[66] *Swan, supra* note 61, 40 N.D. at 273, 168 N.W. at 661.

[67] *Union Life & Accident Ins. Co., supra* note 61, 113 Neb. at 305, 203 N.W. at 174.

[68] *Id.* at 305, 203 N.W. at 175.

avoidance if the consideration "'is merely money paid, the amount of which can be credited in partial cancelation of the injured party's claim,'" or "'constitutes a comparatively small part of the whole consideration.'"[69] As the Ninth Circuit has explained, a defendant cannot claim that it is "being unduly harassed, assuming the validity of the releases. That issue can be tried separately, and tried first, and if the court finds in [the defendant's] favor, that will be the end of the matter."[70]

[18,19] And courts have also generally held, as this court did in *Davy v. School Dist. Of Columbus*,[71] that the rule requiring tender or return of consideration "'is not absolute, is not to be strictly construed where restoration is impossible, and is to be applied in accordance with equitable principles.'" So, courts have held that, in the Eighth Circuit's words,

> [a] release procured by fraud will be set aside, without tender or return of the consideration, when the releasor, because of conditions of poverty, is unable to meet the tender-or-return requirement and the fraud remained undiscovered until after the consideration had been expended or otherwise put beyond the releasor's control.[72]

Otherwise, "the wrongdoer goes unwhipped of justice in every case where fraud is practi[c]ed on the improvident or poor, who forsooth have spent some of what was obtained in the

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[69] *Collins v. Hughes & Riddle*, 134 Neb. 380, 390, 278 N.W. 888, 894 (1938). See, *Vavricka v. Mid-Continent Co.*, 143 Neb. 94, 8 N.W.2d 674 (1943); *Aron v. Mid-Continent Co.*, 143 Neb. 87, 8 N.W.2d 682 (1943); *Fox v. State*, 63 Neb. 185, 88 N.W. 176 (1901). See, also, *Hogue v. Southern R. Co.*, 390 U.S. 516, 88 S. Ct. 1150, 20 L. Ed. 2d 73 (1968); *Ted Price Construction Co., supra* note 61; *Taxin v. Food Fair Stores, Inc.*, 197 F. Supp. 827 (E.D. Pa. 1961).

[70] *Ted Price Construction Co., supra* note 61, 307 F.2d at 743.

[71] *Davy v. School Dist. of Columbus*, 192 Neb. 468, 473, 222 N.W.2d 562, 565 (1974). See, also, *Vickers, supra* note 61; *Rachesky v. Finklea*, 329 F.2d 606 (4th Cir. 1964); *Ted Price Construction Co., supra* note 61; *First Nat. Bank & Trust Co. v. Am. Sec. & Trust Co.*, 437 F. Supp. 771 (D.D.C. 1977); *Rase v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 118 Minn. 437, 137 N.W. 176 (1912); *New Amsterdam Casualty Co. v. Harrington*, 11 S.W.2d 533 (Tex. Civ. App. 1928).

[72] *Vickers, supra* note 61, 534 F.2d at 1314. See, also, *Rase, supra* note 71; *Harrington, supra* note 71.

deal before discovering the fraud."[73] As the Ninth Circuit said, in rejecting an argument that an appellant facing financial difficulties was required to return a $21,000 settlement before pursuing a multimillion-dollar claim:

> [T]he suggested rule [does not] appeal to our sense of fairness. There is an uncontradicted showing in the case at bar that appellant is in financial difficulties and cannot raise the $21,000. It does not sit well with us to say to appellant, "you may be able to prove that you were defrauded, that you are entitled to recover the entire $3,067,591 that you claim, and that, by reason of appellees' fraud you bargained your claim away for $21,000, but we will not let you until you have paid up the $21,000, whether you are able to do so or not". This smacks too much of the famous saying of Anatole France: "The law, in its magnificent equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread".[74]

In this case, although Manuela has not specifically alleged an inability to repay the $15,000 she received, she did allege that she has "no financial means," including the means to pay for Efrain's burial. It would be reasonable to infer that the $15,000 has been spent and that Manuela is unable to tender that much money to Union Pacific. Under those circumstances, it is reasonable to infer from Manuela's complaint that "restoration [may be] impossible" within the meaning of our decision in *Davy*[75] and that Manuela may receive equitable relief from the tender-or-return requirement.

### *(iii) Evidence That Manuela's Native Language Is Spanish*

Union Pacific also argues that the release was translated to Manuela in Spanish and that, therefore, she should have understood it. In order to understand this argument, it is necessary to briefly examine the record that was developed on the fiduciary

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[73] *Rase, supra* note 71, 118 Minn. at 441, 137 N.W. at 178.

[74] *Ted Price Construction Co., supra* note 61, 307 F.2d at 743.

[75] *Davy, supra* note 71.

duty claim after the wrongful death claim was dismissed. The evidence, generally summarized, shows that when the release was executed, Manuela was accompanied and advised by the man with whom she was living and a priest who spoke Spanish, who tried to explain the release to her. But Manuela averred that her first language is not Spanish, but Q'anjob'al, a Mayan dialect. She averred that at the time of the settlement, she understood some Spanish, but was not fluent.

Union Pacific takes issue with that averment, pointing out that the affidavit she made for the record was read to her in Spanish. So, Union Pacific argues, she should have been able to understand the release too. But, we note, Manuela also averred that she had become more fluent in Spanish during the nearly 3-year period between the accident and the execution of her affidavit. We also note a distinct lack of evidence in the record suggesting that the release had been translated to her *correctly*.

But, more important, Manuela has appealed from the *dismissal* of her wrongful death claim. As noted above, the scope of our review is limited, on that claim, to Manuela's complaint. In her complaint, she alleged that she did not speak English or understand the release and its legal consequences. Union Pacific's argument is directed at whether she could ultimately prove those facts, but under our standard of review, we ask only whether her allegations are plausible. They are.

*(iv) Reasonable Diligence*

[20-22] Finally, Union Pacific argues that Manuela failed to prosecute her claim for rescission with reasonable diligence. We have said that a party seeking rescission of a contract on the grounds of fraud, misrepresentation, or business coercion must do so promptly upon the discovery of the facts giving rise to the right to rescind.[76] But whether one seeking to rescind a contract on the ground that it was procured by fraud or duress has acted with reasonable promptness is, ordinarily, a question of fact.[77] And a delay is unreasonable only if a litigant has been

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[76] *Bauermeister v. McReynolds*, 253 Neb. 554, 571 N.W.2d 79 (1997).

[77] *McGuire v. Thompson*, 152 Neb. 28, 40 N.W.2d 237 (1949).

guilty of "'inexcusable neglect'" and, during the lapse of time, circumstances have changed such that permitting rescission would work inequitably to the disadvantage or prejudice of the other party.[78]

The complaint here was filed 16 months after the accident, and there is no basis in the complaint for evaluating when Manuela might have learned of the basis for rescission. Nor is there any basis in the complaint for concluding that Union Pacific was somehow unfairly prejudiced by any delay. Nor, we note, would the timeliness of Manuela's claim for rescission be at issue were the release to be found void, as opposed to voidable. On the facts alleged here, we cannot say as a matter of law that Manuela failed to act within a reasonable time[79] or that such a finding would be legally dispositive in any event. Union Pacific's argument provides no basis for affirming the dismissal of Manuela's wrongful death claim.

#### (c) Conclusion on Wrongful Death Claim and Rescission

In sum, we find that Manuela has alleged facts that, if proved, could demonstrate that the release was void on the basis of its failure to represent a binding mutual understanding of the parties or was voidable as the product of fraud, overreaching, or duress. We find no merit to Union Pacific's alternative grounds for affirming the dismissal of Manuela's wrongful death claim. In particular, we find that tender or return of the consideration for the release is not necessary if the release is void due to fraud in the execution and that even if it is merely voidable, Manuela may still be able to prove an exception to the tender requirement. Therefore, we find merit to Manuela's first assignment of error. The district court erred in dismissing her wrongful death claim.

### 2. Fiduciary Duty Claim

[23-25] Manuela argues that the court erred in granting summary judgment against her fiduciary duty claim. In reviewing

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[78] *Kracl, supra* note 50, 236 Neb. at 300, 461 N.W.2d at 74.

[79] See *Macke, supra* note 42.

a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, giving that party the benefit of all reasonable inferences deducible from the evidence.[80] But, we note, the existence of a fiduciary duty and the scope of that duty are questions of law for a court to decide.[81] The allegation of the existence of a confidential or fiduciary relationship is a legal conclusion only and insufficient to raise any issue of fact.[82]

Manuela argues that Union Pacific had a fiduciary duty to act in her interests, which duty its representative breached by permitting her to settle her claim. Evaluating Manuela's argument will, again, require a brief examination of the record that was made after the dismissal of the wrongful death claim and submitted on the motion for summary judgment. Manuela relies on evidence that the Union Pacific claims representative who negotiated the settlement held himself out to Manuela as being concerned about her well-being.

At his deposition, the claims representative explained that based on his knowledge of Efrain's accident, he did not believe Union Pacific had been at fault, but that Union Pacific wants to be a "good neighbor" in Schuyler, so the settlement was an attempt to help Efrain's family with burial expenses. The claims representative offered a $15,000 settlement to pay for the costs of the funeral home, travel to Guatemala to bury Efrain, and incidental expenses. Manuela points to evidence in the record suggesting that Union Pacific's claims representatives are trained to gain the trust and confidence of potential claimants in order to facilitate settlement. And in her affidavit, Manuela averred that Union Pacific employees had told her that "they were here to offer their help."

[26-28] This, according to Manuela, was sufficient to support a finding of a fiduciary duty from Union Pacific to Manuela. We disagree. A fiduciary duty arises out of a confidential

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[80] *A.W., supra* note 2.

[81] *American Driver Serv. v. Truck Ins. Exch.*, 10 Neb. App. 318, 631 N.W.2d 140 (2001).

[82] *Degmetich v. Beranek*, 188 Neb. 659, 199 N.W.2d 8 (1972).

relationship which exists when one party gains the confidence of the other and purports to act or advise with the other's interest in mind.[83] In a confidential or fiduciary relationship in which confidence is rightfully reposed on one side and a resulting superiority and opportunity for influence are thereby created on the other, equity will scrutinize the transaction critically, especially where age, infirmity, and instability are involved, to see that no injustice has occurred.[84] But superiority of bargaining power alone does not create a fiduciary duty, because there must also be an opportunity to exercise undue influence.[85]

Obviously, the mere fact that the parties entered into a settlement agreement is insufficient to support a finding of fiduciary duty.[86] And there was no evidence here that Union Pacific actually gained Manuela's trust or had the opportunity to use its claims representative's relationship with her to influence her. There is no evidence, even in Manuela's affidavit, that she did not understand Union Pacific was an adverse party.[87] Manuela did not aver that Union Pacific's representative had actually gained her confidence or that she entered into the settlement because she trusted Union Pacific.[88] In short, even if Union Pacific held itself out as acting in Manuela's interest, there is no evidence that Manuela believed it or invested sufficient trust in Union Pacific for Union Pacific to have an opportunity to unduly influence her.

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[83] *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995); *Bloomfield v. Nebraska State Bank*, 237 Neb. 89, 465 N.W.2d 144 (1991); *Schaneman v. Schaneman*, 206 Neb. 113, 291 N.W.2d 412 (1980); *Boettcher v. Goethe*, 165 Neb. 363, 85 N.W.2d 884 (1957); *American Driver Serv., supra* note 81.

[84] *Schaneman, supra* note 83.

[85] See, *Bloomfield, supra* note 83; *Schaneman, supra* note 83, *American Driver Serv., supra* note 81.

[86] See, *American Driver Serv., supra* note 81; *Huffman v. Poore*, 6 Neb. App. 43, 569 N.W.2d 549 (1997).

[87] See, *Bellairs v. Dudden*, 194 Neb. 5, 230 N.W.2d 92 (1975); *American Driver Serv., supra* note 81.

[88] See, *Bloomfield, supra* note 83; *Huffman, supra* note 86.

Manuela also suggests that a fiduciary duty was created by the claims representative's, in effect, "practicing law."[89] We agree that the relationship between attorney and client is a fiduciary or confidential relationship.[90] But even if there was evidence suggesting that the claims representative was engaged in something akin to the unauthorized practice of law, there is no evidence to suggest that he would have been *Manuela's* attorney—even had the claims representative been a practicing, licensed attorney, there is no evidence from which an attorney-client relationship between Manuela and the claims representative could be inferred.[91]

And the fiduciary nature of the attorney-client relationship is premised upon the client's right to believe and rely upon his or her attorney's representations and to be governed by the attorney's counsel.[92] As explained above, there is no evidence here that Manuela understood herself to have such a relationship with Union Pacific's claims representative. In the absence of such evidence, the district court correctly concluded that Union Pacific owed no fiduciary duty to Manuela. We find no merit to Manuela's second assignment of error.

### 3. Discovery Issues

[29] Manuela's three final assignments of error are directed at the court's rulings on the parties' disputes during the discovery process. Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.[93]

#### (a) Protective Order

The first argument we address is Manuela's claim that the court erred in granting Union Pacific's motion for a protective

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[89] Brief for appellant at 22.

[90] See *Bauermeister v. McReynolds*, 254 Neb. 118, 575 N.W.2d 354 (1998).

[91] See, *Swanson v. Ptak*, 268 Neb. 265, 682 N.W.2d 225 (2004); *Bauermeister, supra* note 76.

[92] See *Zimmer v. Gudmundsen*, 142 Neb. 260, 5 N.W.2d 707 (1942).

[93] *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

order regarding its claims manual. As described above, Union Pacific obtained an order that the parties were to keep the document secure and private, not disclose it for any purpose other than this case, not distribute it to any third persons other than counsel or retained experts, and return the document to Union Pacific once the litigation was concluded. Manuela claims that was an abuse of discretion.

[30,31] Neb. Ct. R. Disc. § 6-326(c) provides that a trial court may, "for good cause shown, . . . make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." The law gives trial courts broad latitude to grant protective orders to prevent disclosure of materials for many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information.[94] The U.S. Supreme Court has interpreted the language of § 6-326(c) as conferring "broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required."[95] The Court explained that the "trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders."[96]

Union Pacific argued that the claims manual should be protected because, among other reasons, it was outdated, was proprietary, and could be used "inappropriately" in other litigation against Union Pacific. While we recognize that this is not a particularly compelling showing of good cause for a protective order, we also note that Manuela has presented no argument, either to the trial court or this court, explaining how she has been prejudiced by the protective order, and we are mindful of the trial court's broad discretion with respect to protective orders. Because there is no suggestion that Manuela's case has

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[94] *Phillips ex rel. Estates of Byrd v. G.M.Corp.*, 307 F.3d 1206 (9th Cir. 2002).

[95] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984).

[96] *Id.*

been prejudiced by the protective order, we conclude that the court did not abuse its discretion by entering it.

(b) Motions to Compel

Manuela argues that the district court abused its discretion in denying several of her motions to compel, as described above. But given the procedural posture of this case, we decline to address her arguments. As described above, Union Pacific objected to the discovery requests at issue by, among other things, disputing the relevance of the materials sought. And, because the court did not explain its reasoning for denying Manuela's motions, we do not know whether the court agreed with Union Pacific that the materials sought were irrelevant.

This is significant because, at the time that the discovery disputes were resolved, the issues in this case were fundamentally different. Manuela's wrongful death claim had been dismissed, and discovery was being conducted as to her fiduciary duty claim before summary judgment was entered. But we have concluded that the wrongful death claim should not have been dismissed. And we have concluded that judgment was properly entered against Manuela on the fiduciary duty claim.

So, when this case is remanded, the claim upon which discovery was being conducted will be gone and, instead, any discovery will be conducted with respect to the wrongful death claim (and related rescission arguments). This means that the relevance of the disputed materials may well be different. We have no way of knowing whether Union Pacific will continue to dispute their relevance, whether Manuela will continue to seek their production, or whether the district court's ruling on any remaining discovery disputes would be the same given the substitution of claims required by our mandate.

Our appellate review of discovery decisions that were made in an entirely different legal context would be at best advisory, and not particularly good advice at that. In other words, because Manuela's claims for relief have changed, the discovery arguments that the parties had been making are moot. So, we do not address the merits of Manuela's arguments regarding her motions to compel. Rather, we direct the parties and the district court, upon remand, to revisit any remaining discovery

disputes in light of the changed legal context in which they are presented. And we encourage the district court, should it be required to rule on any such disputes, to articulate the basis for its rulings, in order to facilitate possible appellate review of their merits.[97]

(c) Attorney Fees

[32] Finally, Manuela argues that the court awarded her insufficient attorney fees. When an attorney fee is authorized, the amount of the fee is addressed to the trial court's discretion, and its ruling will not be disturbed on appeal absent an abuse of discretion.[98] As described above, in this case, Manuela sought a total of $3,756.70 in attorney fees for discovery disputes, but was awarded only $2,500. Manuela argues that she should have been awarded the full amount she asked for.

But Manuela's motion for attorney fees was based on an affidavit from her attorney, who averred as to her rates and expenses with respect to the entire January 9, 2008, hearing on her motion to compel. Manuela's attorney averred as to the time necessary for the hearing, travel to the hearing, and writing of her brief, and to various travel expenses. And as noted above, while Manuela prevailed on some of the issues presented by her motion to compel, she did not prevail on all of them.

[33] Attorney fees are a permissible sanction for a discovery violation.[99] If a court finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, including, but not limited to, abuses of civil discovery procedures, the court shall assess attorney fees and costs.[100] In this case, however, the district court found some but not all of Manuela's discovery complaints to be warranted, which

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[97] See *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007) (explaining difficulty of reviewing trial court's exercise of discretion when court does not explain reasoning).

[98] *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009).

[99] See, *Coral Prod. Corp. v. Central Resources*, 273 Neb. 379, 730 N.W.2d 357 (2007); *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

[100] Neb. Rev. Stat. § 25-824(4) (Reissue 2008).

means, of course, that not all of Union Pacific's opposition to Manuela's motion to compel was substantially unjustified.[101] In other words, even if some of Union Pacific's conduct was an "abuse" of the civil discovery procedures, not all of it was. Given that finding, the district court did not abuse its discretion in reducing the attorney fees that Manuela requested for the hearing on her motion to compel.

## IV. CONCLUSION

For the foregoing reasons, we conclude that the district court erred in dismissing Manuela's wrongful death claim. As to that claim, the court's judgment is reversed, and the cause remanded for further proceedings consistent with this opinion. But we conclude that the court correctly entered summary judgment against Manuela's fiduciary duty claim, and we affirm the court's judgment in that respect. We affirm the protective order and award of attorney fees. And finally, we neither affirm nor reverse the court's rulings on Manuela's motions to compel; instead, we direct the court upon remand to revisit any discovery issues that the parties continue to dispute.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART FOR FURTHER PROCEEDINGS, AND IN PART REMANDED WITH DIRECTIONS.

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[101] See *Greenwalt, supra* note 99.