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estate, we cannot say that the county court's decision to deny the application was arbitrary, capricious, or unreasonable. Gregory's assignment of error is without merit.

CONCLUSION

The county court did not err in finding that a special administrator was not necessary to protect Fauniel's estate. Therefore, the county court's judgment is affirmed.

AFFIRMED.

KATHRYN PODRAZA AND TERRANCE PODRAZA, APPELLANTS AND CROSS-APPELLEES, V. NEW CENTURY PHYSICIANS OF NEBRASKA, LLC, APPELLEE AND CROSS-APPELLANT.

789 N.W.2d 260

Filed October 15, 2010. No. S-09-990.

1. **Summary Judgment.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Parol Evidence: Appeal and Error.** The applicability of the parol evidence rule is a matter of law, for which an appellate court has an obligation to reach a conclusion independent of the lower court's decision.
3. **Evidence: Appeal and Error.** Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.
4. **Parol Evidence: Contracts: Intent.** The parol evidence rule gives legal effect to the contracting parties' intention to make their writing a complete expression of the agreement that they reached, to the exclusion of all prior or contemporaneous negotiations.
5. **Contracts: Parties: Intent.** In order for those not named as parties to recover under a contract as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interest of such unnamed parties were contemplated and that provision was being made for them.
6. **Contracts: Parties: Intent: Proof.** One suing as a third-party beneficiary has the burden of showing that the provision was for his or her direct benefit. Unless one can sustain this burden, a purported third-party beneficiary will be deemed merely incidentally benefited and will not be permitted to recover on or enforce the agreement.
7. **Contracts: Parties: Intent.** General release language is an insufficient expression of an intent to grant rights under a contract to persons who were neither

named parties nor privies to named parties to the contract, and the parties' actual intent controls.

8. ____: ____: ____. Under the intent rule, general releases which fail to specifically designate who is discharged either by name or by some other specific identifying terminology are inherently ambiguous, and the actual intent of the parties will govern.

9. ____: ____: ____. Under the intent rule, the element of specific identification is only met when the reference in the release is so particular that a stranger can readily identify the released party and his or her identity is not in doubt.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Affirmed in part, and in part reversed and remanded.

Steven H. Howard, of Dowd, Howard & Corrigan, L.L.C., for appellants.

Patrick G. Vipond and John M. Walker, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Kathryn Podraza and her husband, Terrance Podraza, brought suit against New Century Physicians of Nebraska, LLC (New Century), to recover for injuries allegedly sustained after New Century's physicians failed to timely discover her appendicitis during two visits to the emergency room at Lakeside Hospital in Omaha, Nebraska. Lakeside Hospital is owned by Alegent Health (Alegent), but its emergency rooms and urgent care centers are staffed by physicians employed by New Century. The Podrazas settled their claims with Alegent. The principal issue in this case is whether the release agreement between the Podrazas and Alegent operates to bar the current suit against New Century.

II. BACKGROUND

On December 11, 2005, Kathryn visited the emergency room at Lakeside Hospital, complaining of severe abdominal pain. According to Kathryn, she told the emergency room

physician that the pain radiated through her entire abdominal area. A noncontrast CT scan performed during her visit was considered generally "unremarkable," but a report on the scan indicated calcification in the region of the appendix, which could be "highly suspicious" if "the patient hurts in the region of the appendix or is symptomatic for appendicitis."

Kathryn was discharged without a clear diagnosis and told to return if her condition worsened. On December 15, 2005, she returned to the emergency room, reporting severe abdominal pain, vomiting, diarrhea, and small amounts of blood in the urine. A different attending physician diagnosed her with cystitis and gastritis, and she was again sent home.

Kathryn's condition continued to deteriorate, and she reported to the emergency room for a final time on December 20, 2005. She was diagnosed with a ruptured appendix and admitted to the hospital for surgery. Kathryn experienced a lengthy recovery, and she alleges that the delay in her diagnosis caused unnecessary pain and suffering, medical bills, lost income, scarring and disfigurement, loss of bodily function, and other damages. Terrance alleges loss of consortium.

1. Relationship Between Alegent and New Century

Shortly after Kathryn's recovery, the Podrazas entered into discussions with Alegent concerning compensation for her injuries. The Podrazas stated they were surprised to learn at that time that the emergency room physicians at Lakeside Hospital were not employed by Alegent, but were provided through an independent contractor agreement with Premier Health Care Services, Inc. (Premier Health), the parent company of New Century.

Alegent contracted for Premier Health to provide qualified physicians to work at Alegent's hospital departments of emergency medicine and Alegent's express care locations and to provide medical directors responsible for coordinating and overseeing the quality, availability, safety, and appropriateness of those physicians' services. Under the agreement, the physicians were directed to work alongside Alegent's nonphysician personnel, including nurses and technical and paramedical personnel. Dr. Jeff Snyder, the regional medical director for

Premier Health, explained that New Century physicians working at the Alegent-owned emergency rooms and urgent care centers were "seamlessly integrated into the Alegent healthcare system" and that "[b]y all outward appearances Premier Health and New Century physicians are Alegent physicians, right down to the employee identification tags provided by Alegent." Alegent was responsible for providing the equipment, supplies, and ordinary utilities and services.

The agreement between Alegent and Premier Health provided that none of its provisions were intended to create any relationship between the parties other than that of "independent entities contracting with each other solely for the purpose of effecting the provisions of this Agreement." Furthermore, "[n]either of the parties . . . shall have the authority to bind the other or shall be deemed or construed to be the agent, employee or representative of the other" except as specifically provided in the agreement.

2. Release Agreement

Neither Premier Health nor New Century participated in the settlement negotiations between the Podrazas and Alegent, and it is unclear whether they were aware the negotiations were taking place. While disclaiming liability for what it considered a "doubtful and disputed claim," Alegent agreed to forgive the Podrazas' copay liability for their hospital bills, which totaled $1,765.33, and to pay an additional $11,234.67 in cash, for a total settlement of $13,000.

The release signed by the Podrazas and Alegent stated in pertinent part that in consideration for $13,000, the Podrazas agreed to "release, acquit and forever discharge the said **Released Parties,** and all others directly or indirectly liable or claimed to be liable, if any, from any and all claims and demands, actions and causes of action, damages, [and] claims for injuries," which were

> in any way growing out of any and all care received by Kathryn Podraza at Alegent Health, Alegent Health - Lakeside Hospital, their staff, employees, designees or representatives, successors and assigns and any officers, directors, or any corporation, organization, affiliate, or

> subsidiary of Alegent Health, as a result of medical services received, or the alleged lack thereof, performed at Alegent Health - Lakeside Hospital during the period of December 11, 2005 through and including December 29, 2005.

The "Released Parties" were defined as "Alegent Health and/or Alegent Health - Lakeside Hospital, any person employed by or entity owned by or affiliated with Alegent Health, any subsidiary or affiliated corporation, their directors, officers or others on their behalf." Premier Health and New Century were not specifically named. They were not signatories to the release agreement and did not contribute to the settlement payment.

The release recited that it contained the entire agreement between the parties and that there were "no agreements or understandings between the parties hereto, other than those expressed or referred to herein." The Podrazas also affirmed, through the agreement, that they had read the release and understood its contents. The Podrazas were not represented by an attorney.

3. Suit Against New Century

After their settlement with Alegent, the Podrazas began discussions with representatives of the two emergency room physicians and New Century. No agreement could be reached, and the Podrazas brought this suit. New Century initially answered with only a general denial of any negligence on the part of its physicians and a denial of proximate causation and the nature and extent of the Podrazas' injuries. But several months later, New Century was allowed to amend its answer to plead accord and satisfaction based upon the release agreement with Alegent. It then moved for summary judgment based upon that release.

The Podrazas responded by presenting deposition and affidavit testimony that the parties to the release agreement did not intend for the agreed-upon amount to fully compensate them for their loss, nor did they intend for the agreement to release New Century. Rather, the Podrazas testified that Alegent had specifically told them the release would not apply to any subsequent action against the emergency room physicians and that

Alegent had encouraged them to pursue the physicians, New Century, and the physicians' medical malpractice insurance provider, even giving them their contact information.

The parties stipulated that Lakeside Hospital would submit evidence rebutting any claim that Alegent had made representations to the Podrazas regarding their ability to pursue New Century after the release. The trial court concluded there was an issue of fact as to the parties' actual intent concerning who was released by the agreement. But the issue was whether the parties' actual intent could be considered at all, because New Century claimed that the parol evidence rule barred consideration of anything other than the plain terms of the written agreement.

The trial court initially denied New Century's motion for summary judgment, concluding that regardless of the language of the written release, parol evidence was admissible to ascertain the parties' intent as concerned persons or entities not parties to the agreement. The trial judge issuing this determination retired, and New Century filed a renewed motion for summary judgment and/or motion to reconsider before a different district court judge. The Podrazas, in turn, moved for partial summary judgment, alleging that the terms of the release unambiguously excluded New Century because it was undisputed that New Century was not an "affiliate" of Alegent.

The new trial judge denied both New Century's renewed motion for summary judgment and the Podrazas' motion for partial summary judgment. The court concluded that New Century was "'affiliated with'" Alegent, but determined that parol evidence could nevertheless be considered to show whether the parties actually intended New Century to benefit from the release.

After New Century filed a motion for clarification, the trial court reversed its determination as to the applicability of the parol evidence rule and found that summary judgment in favor of New Century should be granted. The court reasoned that New Century should be considered a party to the agreement and that, thus, the Podrazas could not vary the written terms of the release. The Podrazas appealed the trial court's judgment, and New Century cross-appealed.

III. ASSIGNMENTS OF ERROR

The Podrazas assert that the trial court erred in (1) granting summary judgment on the basis that the release barred the Podrazas' action against New Century, (2) receiving into evidence on the matter of summary judgment Snyder's affidavit and its attachments, (3) denying the Podrazas' motion for partial summary judgment on the matter of the release, and (4) ordering that the Podrazas were not entitled to discovery of all e-mail communications between New Century's attorneys and its expert witness.

In its cross-appeal, New Century asserts that the trial court erred in admitting the Podrazas' affidavits insofar as they sought to vary the terms of the written agreement.

IV. STANDARD OF REVIEW

[1] In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[1]

[2] The applicability of the parol evidence rule is a matter of law, for which we have an obligation to reach a conclusion independent of the lower court's decision.[2]

[3] Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.[3]

V. ANALYSIS

1. Release

On its face, the agreement between Alegent and the Podrazas purports to release the "Released Parties" and "all others directly or indirectly liable or claimed to be liable, if any,

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[1] *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 722 N.W.2d 65 (2006).

[2] See, *In re Estate of Hockemeier, ante* p. 420, 786 N.W.2d 680 (2010); *Zender v. Vlasic Foods, Inc.*, No. 94-56499, 1996 WL 406145 (Cal. App. Aug. 29, 1996) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 91 F.3d 158 (9th Cir. 1996)).

[3] See, *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008); *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004).

from any and all claims and demands, actions and causes of action, damages, [and] claims for injuries." The "Released Parties" were defined as "Alegent Health and/or Alegent Health - Lakeside Hospital, any person employed by or entity owned by or affiliated with Alegent Health, any subsidiary or affiliated corporation, their directors, officers or others on their behalf." The parties dispute whether New Century is "affiliated with" Alegent. But the threshold question is whether the Podrazas' intent must be construed solely from the four corners of this agreement.

[4] The parol evidence rule states that if negotiations between the parties result in an integrated agreement which is reduced to writing, then, in the absence of fraud, mistake, or ambiguity, the written agreement is the only competent evidence of the contract between them.[4] This rule gives legal effect to the contracting parties' intention to make their writing a complete expression of the agreement that they reached, to the exclusion of all prior or contemporaneous negotiations.[5]

Different rules apply, however, when it is not a contracting party who seeks to rely on the legal presumption that the writing is a complete integration. We have held that the parol evidence rule cannot be invoked by a stranger to the agreement to prevent a party to the writing from adducing extraneous evidence as to its terms, even if that evidence varies or contradicts the written agreement.[6] Stated otherwise, we have said that the parol evidence rule operates only between parties to such instrument and those claiming under them.[7]

[5] New Century effectively asserts that because it is encompassed by the plain language of the agreement, it is not a stranger to it. Instead, it claims under the agreement to be a third-party beneficiary, and thus evokes the parol evidence

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[4] See *Sack Bros. v. Great Plains Co-op*, 260 Neb. 292, 616 N.W.2d 796 (2000).

[5] See 2 E. Allan Farnsworth, Farnsworth on Contracts § 7.2 (3d ed. 2004).

[6] See, *Grover, Inc. v. Papio-Missouri Riv. Nat. Res. Dist.*, 247 Neb. 975, 531 N.W.2d 531 (1995); *State Bank of Beaver Crossing v. Mackley*, 121 Neb. 28, 236 N.W. 165 (1931).

[7] *State Bank of Beaver Crossing v. Mackley, supra* note 6.

rule.[8] As a matter of general contract law, we have strictly construed who has the right to enforce a contract as a third-party beneficiary. In order for those not named as parties to recover under a contract as third-party beneficiaries, it must appear by express stipulation or by reasonable intendment that the rights and interest of such unnamed parties were contemplated and that provision was being made for them.[9] The right of a third party benefited by a contract to sue thereon must affirmatively appear from the language of the instrument when properly interpreted or construed.[10]

[6] Authorities are in accord that one suing as a third-party beneficiary has the burden of showing that the provision was for his or her direct benefit.[11] Unless one can sustain this burden, a purported third-party beneficiary will be deemed merely incidentally benefited and will not be permitted to recover on or enforce the agreement.[12]

(a) "All Others Liable" Language

[7] More particular rules have emerged for persons claiming to be third-party beneficiaries to release agreements.[13] We have held that general release language, such as the Podrazas' release of "all others directly or indirectly liable or claimed to be liable," is an insufficient expression of an intent to grant rights under a contract to persons who were neither named parties nor privies to named parties to the contract, and the parties' actual intent controls.

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[8] See 11 Samuel Williston, A Treatise on the Law of Contracts § 33:11 (Richard A. Lord ed., 4th ed. 1999) (third-party beneficiaries are persons claiming under contract for purpose of stranger-to-the-agreement exception to parol evidence rule).

[9] See *Molina v. American Alternative Ins. Corp.*, 270 Neb. 218, 699 N.W.2d 415 (2005).

[10] See *Haakinson & Beaty Co. v. Inland Ins. Co.*, 216 Neb. 426, 344 N.W.2d 454 (1984).

[11] 13 Samuel Williston, A Treatise on the Law of Contracts § 37:8 (Richard A. Lord ed., 4th ed. 2000 & Supp. 2010).

[12] *Id.*

[13] See Annot., 13 A.L.R.3d 313 (1967).

In *Scheideler v. Elias*,[14] for example, we considered whether a general release of all persons liable, signed as part of a settlement with a tort-feasor, could be enforced by physicians later sued for negligent treatment of the victim's injuries. We found the general release language to be inconclusive in light of the circumstances under which the contract was created, and we held that parol evidence should be considered to determine the parties' actual intent.[15] To view the contract any other way, we explained, would strangle justice, not serve it, as unwary laymen would often accept less reparation from one tort-feasor, intending to pursue others, "'"'"'only to find later they have walked into a trap.'"'"'"[16] Not considering the parties' actual intent would give nonparty tort-feasors "'"'"'an advantage wholly inconsistent with the nature of their liability.'"'"'"[17]

Our holding in *Scheideler* was limited to the discharge of successive tort-feasors, and we have not squarely addressed these releases under current joint tort-feasor liability. But we have consistently looked to actual intent as concerns unnamed parties encompassed by broadly termed release agreements. Thus, under our prior common-law concept of unity of discharge for joint tort-feasors, we held that settlement with one of several joint wrongdoers is not a defense to an action against another unless it was agreed between the parties to the settlement that such payment was in full of all damages suffered.[18] And we held that parol evidence is always admissible to determine the parties' true intent under such circumstances, even when the terms of the release explicitly state that the victim acknowledges receipt of full payment and satisfaction for his or her injuries.[19]

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[14] *Scheideler v. Elias*, 209 Neb. 601, 309 N.W.2d 67 (1981).

[15] *Id.*

[16] *Id.* at 612, 309 N.W.2d at 73.

[17] *Id.*

[18] *Menking v. Larson*, 112 Neb. 479, 199 N.W. 823 (1924). See, also, *Scheideler v. Elias, supra* note 14; *Holland v. Mayfield*, 826 So. 2d 664 (Miss. 1999).

[19] See, *Menking v. Larson, supra* note 18; *Fitzgerald v. Union Stock Yards Co.*, 89 Neb. 393, 131 N.W. 612 (1911).

(b) Intent Rule

That joint and several liability for noneconomic damages has since been abrogated[20] only strengthens the principle that broad or universal language is not enough to release nonparty joint tort-feasors without consideration of the parties' actual intent.[21] Neb. Rev. Stat. § 25-21,185.11 (Reissue 2008) is consistent with this when it states: "A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable shall discharge that person from all liability to the claimant but shall not discharge any other persons liable upon the same claim unless it so provides."

Other courts have relied on this language, derived from the Uniform Contribution Among Tortfeasors Act,[22] in adopting the so-called specific-identity rule for persons who are not parties to release agreements. Under the specific-identity rule, it is conclusively presumed that the liability of a party not named or otherwise specifically identified by the terms of the release is not discharged.[23]

[8] But many courts, under the same statutory language, have adopted a less stringent intent rule for interpreting releases as to nonparty tort-feasors. Under the intent rule, general releases which fail to specifically designate who is discharged either by name or by some other specific identifying terminology are inherently ambiguous, and the actual intent of the parties will govern.[24] Some of these courts create a rebuttable presumption, consistent with comparative fault principles, that a release benefits only those persons specifically designated.[25]

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[20] Neb. Rev. Stat. § 25-21,185.10 (Reissue 2008).

[21] See *Hansen v. Ford Motor Co.*, 120 N.M. 203, 900 P.2d 952 (1995).

[22] Unif. Contribution Among Tortfeasors Act §§ 1 to 6, 12 U.L.A. 201 (2008).

[23] See, e.g., *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); *Young v. State*, 455 P.2d 889 (Alaska 1969).

[24] See, e.g., *Luther v. Danner*, 268 Kan. 343, 995 P.2d 865 (2000); *Hansen v. Ford Motor Co., supra* note 21. See, also, 13 A.L.R.3d 320, *supra* note 13.

[25] *Luther v. Danner, supra* note 24; *Hansen v. Ford Motor Co., supra* note 21.

We view the intent rule as consistent with our case law governing third-party beneficiaries and the release of nonparty joint tort-feasors as discussed above, and we hereby adopt it. We also adopt a rebuttable presumption that a release benefits only those specifically designated and that in accordance with general principles for third-party beneficiaries, it is the unnamed party claiming under the release who has the burden to show an actual intent to benefit him or her. The intent rule, like our holding in *Scheideler* and under our unity of discharge case law, considers broad releases to be inherently ambiguous as to unnamed parties. Since we have traditionally considered the parties' actual intent in such circumstances, we reject the specific-identity rule, which conclusively presumes any party not named or otherwise sufficiently specified was not intended to be released.

Accordingly, the broad description of "Released Parties" in the agreement between the Podrazas and Alegent is not conclusive of whether those parties actually intended to confer a benefit upon New Century. The question next becomes whether the definition of "Released Parties" in the agreement, as including entities "affiliated with" Alegent, is a sufficiently specific designation such that inquiry into the parties' actual intent is no longer warranted by the intent rule.

(c) "Entity Affiliated With" Language

[9] Under the intent rule, actual intent governs as to everyone except those discharged by name "'or by some other specific identifying terminology.'"[26] However, this element of specific identification is only met when the reference in the release is so particular that a stranger can readily identify the released party and his or her identity is not in doubt.[27] The intent to release a person who did not participate in the agreement or pay consideration must be clearly manifest.[28]

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[26] *Luther v. Danner, supra* note 24, 268 Kan. at 349, 995 P.2d at 870, quoting *Hansen v. Ford Motor Co., supra* note 21.

[27] See *Duncan v. Cessna Aircraft Co., supra* note 23. See, also, e.g., *Country Club of Jackson, Miss. v. Saucier*, 498 So. 2d 337 (Miss. 1986).

[28] See, *Smith v. Falke*, 474 So. 2d 1044 (Miss. 1985); Restatement (Second) of Torts § 885(1) (1979).

The relevant language of the agreement defines the "Released Parties" as "Alegent Health and/or Alegent Health - Lakeside Hospital, any person employed by or entity owned by or affiliated with Alegent Health, any subsidiary or affiliated corporation, their directors, officers or others on their behalf." The parties dedicate most of their briefs to their opposite conclusions as to what "affiliated with" means. The Podrazas view the phrase narrowly to include only those entities either owned by or controlled by Alegent, and not independent contractors bound only by contract to perform in a designated manner. New Century states that while the Podrazas might be correct for "affiliate" as a noun, as an adjective, "affiliated with" broadly includes any form of close association or allegiance.

Suffice it to say that under the circumstances presented here, "affiliated with" does not satisfy the level of specificity required for a third-party beneficiary to be able to rely solely on the four corners of the agreement. Even if we were to accept New Century's definition, it presents too broad a category for a stranger to be able to easily identify to whom it refers. Moreover, to determine whether any given entity falls under this definition, an intricate knowledge of all contracting entities and their relationship with New Century would be necessary. This likewise does not make those persons readily identifiable.

Certainly, the Podrazas stated that they did not suspect New Century was in any way being described in the release. In light of the language of the release, the fact that New Century did not participate in the settlement, and the alleged assurances by Alegent that the Podrazas could still pursue New Century, such a viewpoint was not unreasonable. As we stated in *Scheideler*, we look to actual intent in order to protect the unwary layman from overly broad release agreements that would give nonparty tort-feasors advantages wholly inconsistent with the nature of their liability.[29] We conclude that the actual intent of the contracting parties in this case must be determined by the trier of fact, and it is New Century's burden to prove it was specifically intended to be benefited by the agreement. We therefore

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[29] *Scheideler v. Elias, supra* note 14.

reverse the trial court's grant of summary judgment, and we remand the cause for further proceedings.

We accordingly find no merit to New Century's cross-appeal. Nor do we find merit to the Podrazas' argument that we may conclude as a matter of law that New Century was not an intended beneficiary of the release. We find no need to determine the Podrazas' second assignment of error concerning conclusions in Snyder's affidavit that New Century may be deemed "affiliated with" Alegent, as that question is inextricably tied to the trier of fact's determination of the parties' actual intent to benefit New Century. We will, however, next address the Podrazas' assignment of error concerning certain paralegal-expert witness e-mail correspondence, because, if the trier of fact finds New Century was not intended to be released by the agreement, this discovery question will remain an issue on remand.

2. Attorney-Expert Communications

The Podrazas' fourth assignment of error relates to their efforts, during discovery, to obtain correspondence between New Century's attorneys and its expert witness. New Century objected to the request, but the parties eventually reached an out-of-court understanding as to most matters. In particular, with regard to proposed expert witness Dr. Edward Mlinek, New Century had produced everything agreed upon, but the parties could not agree whether certain e-mail correspondence from the paralegal for New Century's attorneys to Mlinek was discoverable. The correspondence contained discussions about whether Mlinek could recommend a radiologist for New Century to employ in order to obtain a second opinion as to the interpretation of Kathryn's CT scan.

The Podrazas became aware of this specific correspondence because New Century inadvertently sent it to them, and New Century sought a protection order for the correspondence, claiming it contained privileged work product. The Podrazas argued that the correspondence was not privileged and that it was relevant to show Mlinek's bias, because the paralegal stated in the e-mail: "You [Mlinek] suggested we should have a radiologist interpret the CT scan and hopefully confirm that there is no calcification within the appendix." The Podrazas argued

that the word "hopefully" indicated Mlinek's biased interest in seeing a certain outcome from the radiologist's report. The trial court granted New Century's motion for a protective order on the basis that the e-mail contained inadvertently disclosed work product, and the Podrazas were prohibited from using or further disclosing the correspondence and were ordered to destroy all copies.

Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.[30] We have also more specifically stated that a trial court has discretion in the matter of discovery where material is sought for impeachment purposes.[31] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is clearly untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through the judicial system.[32] The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.[33]

Neb. Ct. R. Disc. § 6-326(b)(3) describes the circumstances under which a party may obtain work product. It states in part:

> Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial

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[30] See, *Sturzenegger v. Father Flanagan's Boys' Home, supra* note 3; *In re Estate of Jeffrey B., supra* note 3.

[31] *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995).

[32] *Bondi v. Bondi*, 255 Neb. 319, 586 N.W.2d 145 (1998).

[33] *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010).

> equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Subsection (b)(4), in turn, specifically relates to expert witnesses:

> Trial Preparation: Experts. Discovery of facts known and opinions held by experts otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial *may be obtained only as follows*:
>
> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
>
> (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivisions (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.
>
> (B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(Emphasis supplied.)

The e-mails contain private discussions between the paralegal for New Century's attorneys and its retained expert, and the Podrazas do not claim that the paralegal should not be considered New Century's representative. They argue instead that the e-mails represent the expert's thoughts, and not those

of the attorneys' office, and that this is somehow determinative. But whether considered attorney work product or the expert's opinions, it is clear from the rules above that, at the very least, the Podrazas had to demonstrate a substantial need for the materials.

There is no such substantial need to use at trial for impeachment purposes someone else's characterization that the retained expert had indicated that an unbiased radiologist would "hopefully" have a favorable reading of the CT scan. This is not a case, such as those relied upon by the Podrazas, where the Podrazas are seeking information necessary to understand the basis for the expert's opinion. Indeed, the correspondence in question relates more to administrative matters within the attorneys' office than to the formation and basis of any expert's testimony. Nor do we find merit to the Podrazas' contention that the inadvertent disclosure waived the protections afforded by the discovery rules. The trial court did not abuse its discretion in granting a protection order in favor of New Century for the e-mail communications.

VI. CONCLUSION

We reverse the trial court's order of summary judgment in favor of New Century, but affirm its grant of a protection order for e-mail correspondence between New Century's attorneys' office and its expert witness. We affirm the trial court's denial of the Podrazas' partial motion for summary judgment.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

JAMES M. SCOTT, APPELLEE, V. COUNTY OF RICHARDSON, APPELLANT.

789 N.W.2d 44

Filed October 15, 2010. No. S-10-039.

1. **Administrative Law: Appeal and Error.** In reviewing an administrative agency decision on a petition in error, both the district court and the appellate court review the decision to determine whether the agency acted within its jurisdiction and whether sufficient, relevant evidence supports the decision of the agency.