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Appellees were pretextual or that his at-will employment status was altered by any provisions of the employee manual. As such, we affirm the grant of summary judgment.

AFFIRMED.

TURBINES LTD., APPELLEE, V. TRANSUPPORT, INCORPORATED, APPELLANT.

808 N.W.2d 643

Filed January 24, 2012. No. A-11-042.

1. **Motions for New Trial: Appeal and Error.** Decisions regarding motions for new trial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
2. **Motions to Vacate: Appeal and Error.** An appellate court reviews a ruling on a motion to vacate for abuse of discretion.
3. **Actions: Rescission: Equity: Appeal and Error.** An action for rescission sounds in equity, and it is subject to de novo review upon appeal.
4. **Attorney and Client.** No person shall represent another through the practice of law unless he or she has been previously admitted to the bar by order of the Supreme Court.
5. **Attorney and Client: Corporations.** A corporation cannot appear in its own person. It must appear by a member of the bar.
6. **Appeal and Error.** To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
7. **Motions to Vacate: Default Judgments.** A default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interests. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation.
8. **Motions for New Trial: Statutes.** A motion for new trial is a statutory remedy, and it can be granted by the court only upon the grounds specified by statute.
9. **Actions: Equity: Contracts: Rescission.** An action to rescind a written instrument is an equity action.
10. **Contracts: Rescission.** Grounds for cancellation or rescission of a contract include, inter alia, fraud, duress, unilateral or mutual mistake, and inadequacy of consideration, which may arise from nonperformance of the agreement.
11. **Breach of Contract: Rescission.** Rescission is a proper remedy when the breach of contract is so substantial and fundamental as to defeat the object of the parties in making the agreement.
12. **Contracts.** Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the

nonoccurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

13. **Contracts: Rescission.** The essential conditions to relief from a unilateral mistake by rescission are: The mistake must be of so fundamental a nature that it can be said that the minds of the parties never met and that the enforcement of the contract as made would be unconscionable. The matter as to which the mistake was made must relate to the material feature of the contract.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Reversed and remanded with directions.

Thomas B. Donner for appellant.

Clarence E. Mock, of Johnson & Mock, for appellee.

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

SIEVERS, Judge.

Turbines Ltd. (Turbines) sought an order for rescission of a contract with Transupport, Incorporated. The district court for Cuming County entered judgment in favor of Turbines and against Transupport for rescission of the contract. The district court subsequently overruled Transupport's motion to vacate judgment and overruled Transupport's motion for new trial. Transupport appeals. We conclude that the evidence was insufficient to prove that Turbines was entitled to rescission.

BACKGROUND

Turbines is a Nebraska corporation that sells and maintains helicopters. Turbines also has an office in Singapore. Marvin Kottman owns Turbines. Transupport is a New Hampshire corporation that sells spare parts for turbine engines. William Foote is the vice president of Transupport. Turbines and Transupport have had a business relationship since the 1980's.

In December 2006 or January 2007, Brian Woodford of Monarch Aviation (Monarch), a Singapore aircraft parts company, contacted Turbines' Singapore office, looking for a "First Stage" turbine nozzle. Turbines did not have the nozzle, which was considered obsolete, in its inventory. To satisfy Monarch's purchase request, Turbines' Nebraska office

contacted Transupport to see if it had the nozzle in its inventory, which Transupport did. Although Monarch was initially interested in purchasing eight nozzles, Monarch ultimately elected to purchase only one nozzle due to concerns about quality.

On January 29, 2007, Turbines sent a purchase order for the turbine nozzle to Transupport, stating that the price was $30,000. Transupport sent the nozzle to Turbines in February 2007. After receiving the nozzle from Transupport, Turbines followed Monarch's instructions and attempted to send the nozzle directly to Monarch's client in Malaysia.

However, in February 2007, the nozzle was seized by the U.S. Customs and Border Protection (Customs) because the nozzle was on the "United States Munitions List." Customs asserted that because the nozzle was on the munitions list, it could not be exported without a Directorate of Defense Trade Controls license endorsement. Kottman disagreed with Customs' conclusion and asserted that the nozzle was classified as a "Dual-Use" item that did not require a license for export. After several futile attempts to resolve the issue with Customs, Kottman contacted the U.S. Department of State (State Department). In November 2008, the State Department sent a letter to Kottman stating that the nozzle did not require a State Department license. However, Customs would not release the nozzle until Turbines met certain requirements, including payment of holding or storage fees. Turbines did not feel that it should have to pay the holding or storage fees because the nozzle had been illegally seized, and ultimately, on January 21, 2009, Customs decided to remit the nozzle to Turbines without payment of the fees.

Shortly after Customs seized the nozzle and before the State Department ruled the nozzle did not require a license for export, officers from U.S. Immigration and Customs Enforcement (ICE) contacted Kottman. ICE informed Kottman that it possessed information that Woodford, of Monarch, was redirecting munitions list goods from permitted destinations, such as Malaysia, to Iran, a prohibited destination. Under federal Iranian Transactions Regulations, 31 C.F.R. Part 560, a person is prohibited from exporting goods, technology, or

services if that person "know[s] or [has] reason to know" that such items are intended to be redirected to Iran. See 31 C.F.R. § 560.205(a)(1) (2011).

In August 2007, Kottman learned that Woodford's wife was arrested on a previously sealed federal indictment. The indictment alleged conspiracy to defraud the United States, attempted exportation of arms and munitions, laundering of monetary instruments, and money laundering.

Due to the information provided by ICE and the indictment of Woodford's wife, Turbines could not export the nozzle to Monarch without exposing Kottman and Turbines to criminal prosecution. Thus, when Customs released the nozzle to Turbines in January 2009, Turbines returned the nozzle to Transupport. Transupport refused to refund the purchase price to Turbines but returned the nozzle to Turbines after Turbines filed this lawsuit, and as we understand the record, Turbines or its counsel has the nozzle.

On March 10, 2010, Turbines filed its suit against Transupport, seeking rescission of the contract. In its complaint, Turbines alleged that it agreed to purchase a turbine nozzle from Transupport for $30,000; that the parties' purchase agreement was subject to "'inspection, and acceptance[,] by [the] end user," which, according to Turbines' allegations, was Monarch, a Singapore company; that Turbines subsequently learned the real end user was probably located in Iran; and that Turbines could not legally export the nozzle under these circumstances. Turbines asked the court for a rescission of the contract between Turbines and Transupport and asked the court to order Transupport to return the $30,000 purchase price. On May 4, Turbines filed a motion for default judgment alleging that Transupport failed to timely answer the complaint. Foote, as registered agent for Transupport, wrote a letter to the clerk of the district court "[i]n response to the complaint." The letter was filed on June 2.

In a pretrial order filed on August 5, 2010, the district court noted that "[Transupport] waived [its] appearance" at the pretrial conference held that same day. In its order, the district court extended the discovery deadline to November 1 and set trial for November 29.

On November 22, 2010, Turbines filed a "Motion to Strike Answer, Motion for Default Judgment, and Notice of Hearing." Turbines asked the court to strike the "purported Answer" of Transupport because it was not drafted and filed by an attorney licensed or permitted to practice law within Nebraska.

Trial was held on November 29, 2010. Turbines was represented by counsel, but no representative of Transupport appeared. Turbines adduced evidence, and the matter was submitted to the court. Turbines argued alternative grounds for judgment: (1) Transupport did not obey the notice to appear, and the evidence shows that Turbines is entitled to a rescission, or (2) since no formal or proper answer was filed, Turbines is entitled to a default judgment. The court said that it thought the motion to strike Transupport's answer should be sustained and that the case could proceed as a motion for default judgment. However, the court also said it wanted to go "beyond that" and rule on the merits of the complaint based on the evidence presented. The court's expressed rationale was that whether it treated the matter as a motion for default judgment or as a trial on the merits would make no difference, because the evidence would only be in support of the complaint because Transupport chose not to appear. After evidence was adduced, the court then stated, "[T]he evidence is pretty clear today that the parties understood and believed that the customer was somebody other than either of the two parties in this case, and it was ultimately the customer of [Turbines] to whom the nozzle would be provided." Finally, the court stated that the elements of the transaction could not be completed and that equitable jurisdiction of the court could be used to allow rescission of the contract.

In its "Judgment" filed on December 7, 2010, the district court found that Turbines was entitled to rescission of its agreement with Transupport, although the oral rationale recounted above was not part of the judgment. Accordingly, the district court granted judgment in favor of Turbines and against Transupport for rescission of the contract between them. The district court specifically ordered Turbines, who had possession of the nozzle, to return it to Transupport, and Transupport was ordered to pay $30,000 to Turbines.

On December 15, 2010, counsel for Transupport filed his appearance. That same day, Transupport also filed the following: a motion for new trial, a motion to vacate judgment, a motion for leave to file an answer out of time, a motion for additional time to complete discovery, and the affidavit of Transupport's counsel alleging that Transupport had a meritorious defense warranting a vacation of the judgment. We note that the motion for new trial would toll the time to perfect an appeal.

A hearing on the motions was held on December 21, 2010. In its order filed on January 5, 2011, the district court considered the motion for new trial and the motion to vacate judgment separately. The district court denied Transupport's motion for new trial because Transupport had alleged the statutory grounds for vacating or modifying judgment (Neb. Rev. Stat. § 25-2001 (Reissue 2008)), rather than the grounds for a new trial (Neb. Rev. Stat. § 25-1142 (Reissue 2008)).

The district court also denied Transupport's motion to vacate judgment. The district court found that the evidence adduced by Transupport did "not satisfy any of the asserted seven statutory grounds described in § 25-2001." The district court also refused to use its inherent powers to vacate the judgment, finding that Transupport inexplicably failed to participate in the proceedings for several months and therefore must live with the consequences of its inaction. Transupport filed this timely appeal.

ASSIGNMENTS OF ERROR

Transupport assigns that the district court erred in (1) striking the answer filed by Transupport, (2) overruling Transupport's motion to vacate, (3) denying Transupport's motion for new trial, and (4) determining that Turbines was entitled to rescission.

STANDARD OF REVIEW

[1] Decisions regarding motions for new trial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

[2] An appellate court reviews a ruling on a motion to vacate for abuse of discretion. *Obad v. State*, 277 Neb. 866, 766 N.W.2d 89 (2009).

[3] An action for rescission sounds in equity, and it is subject to de novo review upon appeal. *Ord, Inc. v. AmFirst Bank*, 276 Neb. 781, 758 N.W.2d 29 (2008).

ANALYSIS

Transupport's Answer.

Transupport assigns as error that the district court struck Transupport's "answer." What the court struck was a letter to the court written by Foote, Transupport's registered agent, and filed on June 2, 2010, in response to Turbines' complaint. At the hearing on November 29, which Transupport did not attend or participate in, the district court sustained Turbines' motion to strike Transupport's "answer" because the letter or answer was not filed by an attorney licensed in Nebraska.

[4] As a general rule, no person shall represent another through the practice of law unless he or she has been previously admitted to the bar by order of the Supreme Court. *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989). Neb. Rev. Stat. § 7-101 (Reissue 2007) provides:

> Except as provided in section 7-101.01, no person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. No such paper shall be received or filed in any action or proceeding unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding. It is hereby made the duty of the judges of such courts to enforce this prohibition. Any person who shall violate any of the provisions of this section shall be guilty of a Class III misdemeanor, but this section shall

not apply to persons admitted to the bar under preexisting laws.

[5] The facts in the present case are similar to those in *Galaxy Telecom v. SRS, Inc.*, 13 Neb. App. 178, 689 N.W.2d 866 (2004), wherein a registered agent for the defendant wrote a letter in response to the plaintiff's petition. The defendant failed to attend several hearings, and the plaintiff was eventually awarded default judgment. On appeal, this court held that the responsive letter filed by the registered agent on behalf of the defendant was a nullity and did not constitute an answer. We reasoned as follows:

> The Nebraska Supreme Court has held that proceedings in a suit by a person not entitled to practice law are a nullity, and the suit may be dismissed. *Anderzhon/Architects v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996). Accord *Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992). "It is axiomatic that a corporation cannot appear in its own person. It must appear by a member of the bar." *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 849, 83 N.W.2d 904, 910 (1957). The truth of this statement by the Nebraska Supreme Court becomes apparent upon reviewing § 7-101 set forth above. [The registered agent] is not a party to the lawsuit, nor is he a member of the Nebraska bar. [He] was not authorized to defend the present action by using or subscribing his own name, or by drawing pleadings or other papers to be signed and filed by a party. Accordingly, we do not give any effect to the papers signed and filed by [him] on behalf of [the defendant].

Galaxy Telecom, 13 Neb. App. at 185, 689 N.W.2d at 872-73. The same reasoning applies in the present case. Foote is not a party to the lawsuit, nor is he a member of the Nebraska bar. Foote was not authorized to defend Transupport in the present action by using or subscribing his own name, or by drawing pleadings or other papers to be signed and filed by a party. The responsive letter filed by Foote on behalf of Transupport was a nullity and did not constitute an answer. The district court did not err in striking Transupport's letter or answer.

[6] Transupport argues, but does not specifically assign as error, that the district court should have allowed it additional time to timely file an amended answer. To be considered by an appellate court, an error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *Gengenbach v. Hawkins Mfg.*, 18 Neb. App. 488, 785 N.W.2d 853 (2010). Thus, we do not address this claim.

Motion to Vacate Judgment.

Transupport argues that the district court erred in overruling its motion to vacate. The district court overruled Transupport's motion to vacate because Transupport failed to appear at court proceedings until after the trial.

The record shows that Transupport was served on March 16, 2010. After Transupport failed to answer, Turbines moved for default judgment on May 4, setting a hearing on the motion for June 3. On June 2, the clerk of the Cuming County District Court received a letter from Foote, as Transupport's registered agent, "[i]n response to the complaint." On June 3, the district court entered a pretrial progression order setting a pretrial conference for August 5. The court gave notice to Transupport, which was not yet represented by counsel. The district court held a pretrial conference on August 5, at which no one appeared for Transupport. In its pretrial order, the district court noted that "[Transupport] waived [its] appearance." Trial was set for 9 a.m. on November 29, and notice was sent to Transupport. On November 22, Turbines moved to strike Transupport's answer and moved for default judgment, setting the hearing on such motion for the same date as the trial. Notice of the motion and hearing thereupon was mailed to Foote at Transupport on November 22. Transupport did not appear at the November 29 proceeding. In a "Judgment" filed on December 7, the district court found in favor of Turbines for rescission of the contract and ordered Transupport to pay Turbines $30,000. It was not until December 15 that counsel for Transupport entered an appearance and filed various motions.

[7] The Nebraska Supreme Court has held:

> "'A default judgment will not ordinarily be set aside on the application of a party who, by his own fault, negligence, or want of diligence, has failed to protect his own interests. Such a party will not be permitted to ignore the process of the court and thereby impede the termination of litigation.'"

First Fed. Sav. & Loan Assn. v. Wyant, 238 Neb. 741, 747, 472 N.W.2d 386, 391 (1991), quoting *Fredericks v. Western Livestock Auction Co.*, 225 Neb. 211, 403 N.W.2d 377 (1987). Transupport relies upon the proposition found in *Beliveau v. Goodrich*, 185 Neb. 98, 100, 173 N.W.2d 877, 879 (1970): "It is the policy of the law to give a litigant full opportunity to present his contention in court and for this purpose to give full relief against slight and technical omissions." See, also, *Lee Sapp Leasing v. Ciao Caffe & Espresso Inc.*, 10 Neb. App. 948, 640 N.W.2d 677 (2002). In *Lee Sapp Leasing, supra*, there was a failure to timely answer interrogatories in garnishment, and default judgment resulted. We found that the district court abused its discretion in failing to sustain the motion to vacate. We found first of all that the notice given to the garnishee before judgment was entered was "very poor." *Id.* at 958, 640 N.W.2d at 686. And we cited the fact that in the garnishee's showing of a meritorious defense, there was an affidavit contrary to the garnishment affidavit, asserting that the garnishee was holding no assets of the judgment debtor, and the fact that supporting documentary evidence was attached thereto. As a consequence, we said:

> To allow a final judgment for more than $85,000 upon the basis of this record would clearly be a great injustice. The question is whether such an injustice should be perpetrated in the interest of judicial efficiency. We believe the cases we have cited, discussed, and quoted from above clearly hold such an injustice is not necessary in the interest of judicial efficiency.

10 Neb. App. at 960-61, 640 N.W.2d at 687.

This case is different and distinguishable from *Lee Sapp Leasing* in a number of ways. First, the three-page, single-spaced letter of May 28, 2010, by Foote to the clerk of the

district court leaves no doubt that Foote was in possession of the complaint, as he attempted a detailed refutation, paragraph by paragraph, of the complaint. Foote ended the letter by stating that "Transupport requests simple dismissal of this case on the side of [Transupport]." No dismissal occurred, but, rather, on June 3, the court entered and sent to Transupport a "Pretrial Progression Order Civil Docket." Importantly, in addition to explicitly setting a pretrial conference for 1 p.m. on August 5 at the Cuming County courthouse, the order said, "The pretrial conference shall be attended by the attorney that will act as lead counsel at the time of trial." Thus, Transupport was effectively told by the court, "Get a lawyer to appear for you!" Additionally, the ultimate issue in this case was whether Transupport was going to end up with the $30,000 or the nozzle (which it could return to inventory and sell again, as it had not been used)—a very different outcome from that which occurred with respect to the garnishee in *Lee Sapp Leasing.* In addition to ignoring the court's order setting the pretrial conference for August 5, Transupport ignored Turbines' motion to compel discovery, which was noticed for hearing at the time of the pretrial conference. Then Transupport ignored the court's order of August 5 setting the trial for November 29, which order was sent to Transupport given that counsel had not shown up to represent it at the pretrial conference as the court had directed. Finally, the court on November 29 remarked that while it could enter default, it wanted evidence on the merits. So, as opposed to the judgment in *Lee Sapp Leasing*, this was not a default, but a judgment on the merits after a trial. Given the above-recited course of events, the entry of this judgment is hardly the sort of "injustice" we found and reversed in *Lee Sapp Leasing*, 10 Neb. App. at 960, 640 N.W.2d at 687. The record is clear that Transupport failed to participate in court proceedings for several months. Despite having notice of hearings and trial, Transupport ignored the court's orders, failed to appear for trial, and cannot realistically claim that an injustice has occurred. Because Transupport, through its own fault and want of diligence, failed to protect its own interests, the district court did not abuse its discretion in overruling Transupport's motion to vacate.

Motion for New Trial.

[8] Transupport argues that the district court erred in denying its motion for new trial. However, in its argument, Transupport essentially repeats its argument regarding the motion to vacate judgment. A motion for new trial is a statutory remedy, and it can be granted by the court only upon the grounds specified by statute. *Cotton v. Gering Pub. Sch.*, 1 Neb. App. 1036, 511 N.W.2d 549 (1993). In its motion for new trial, Transupport set forth seven "reasons" for a new trial, which consisted of almost verbatim language from § 25-2001(4)—the statute giving the district court the power to vacate or modify its judgment or orders. The statute setting forth grounds for a new trial is § 25-1142. Transupport has neither identified nor argued any statutory basis under § 25-1142 that would justify a new trial. Therefore, under such circumstances, we could hardly conclude that the district court abused its discretion in denying Transupport's motion for new trial when no statutory ground for granting a new trial was identified and argued.

Rescission.

[9-11] Transupport argues that the district court erred in determining that Turbines was entitled to rescission. An action to rescind a written instrument is an equity action. *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990); *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985). Our review is de novo review upon appeal. See *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998). "Grounds for cancellation or rescission of a contract include, inter alia, fraud, duress, unilateral or mutual mistake, and inadequacy of consideration, which may arise from nonperformance of the agreement." *Eliker v. Chief Indus.*, 243 Neb. 275, 278, 498 N.W.2d 564, 566 (1993), citing 13 Am. Jur. 2d *Cancellation of Instruments* § 23 (1964). *Eliker, supra*, also holds that rescission is a proper remedy when the breach of contract is so substantial and fundamental as to defeat the object of the parties in making the agreement. *Eliker* involved a contract for construction of a house, but the nonperformance was such that the house that had been bargained for was uninhabitable for all practical purposes. In *Gallner v. Sweep Left, Inc.*, 203 Neb. 169, 277 N.W.2d 689 (1979), the

court said that where contractual promises are mutual and dependent, the failure of one party to perform authorizes the other to rescind the contract.

As is evident from the recitation of the chain of events between Transupport and Turbines, the core agreement between the parties was really quite simple: Transupport would deliver a specific nozzle and Turbines would pay $30,000 for it. There is no dispute that both parties performed their obligations under the contract—Turbines paid the agreed-upon price, and Transupport provided the specified nozzle. With this important premise in place, which plainly distinguishes *Eliker* from the instant case, we turn to the decision of the district court.

The district court's judgment of December 7, 2010, recites that evidence was adduced and that the court finds that "[Turbines] is entitled to rescission of its agreement with [Transupport]." The court did not articulate its grounds for granting rescission in its order, but did discuss its reasoning on the record at the close of the November 29 hearing. The court said that the contract underlying this action was "pretty much an oral contract with terms set forth as offered and accepted during the course of the correspondence, and [that] there may be some confusion in the minds of the parties as to what is meant by customer," but the court found that the evidence was pretty clear that the parties understood that the customer was somebody other than the two parties. The court then found that there was probably disagreement as to "the complete elements of the transaction which was never completed, and . . . that when [the parties] cannot do that," the equitable jurisdiction of the court can be used to allow rescission to return the parties to their former position. The former position of the parties is that Transupport would get back its nozzle and Turbines would have its $30,000 returned. The implicit, if not explicit, underpinning of the district court's decision is that part and parcel of the contract was that Turbines would be successful in exporting the nozzle to its customer.

We quote the heart of Turbines' argument that we should uphold the district court's decision granting rescission:

> [T]he record establishes all three requirements of U.C.C. § 2-615 and common law contractual principles related

> to supervening impracticability. The contract between Turbines and Transupport was "subject to inspection and acceptance" by Turbines' customer, Monarch; the supervening indictment of [Woodford and his wife] created the real possibility continued attempts to export the nozzle would subject Turbines to federal criminal liability; and the inability to export the nozzle to the intended customer through Turbines was an event both Turbines and Transupport assumed would not occur.

Brief for appellee at 20.

Initially, we note that comment 2 to Neb. U.C.C. § 2-615 (Reissue 2001) states, "This section excuses a seller from timely delivery of goods contracted for, where his or her performance has become commercially impracticable because of unforeseen supervening circumstances . . . ." While § 2-615 might excuse Turbines from delivery of the nozzle to Monarch, there is no failure of the seller, Transupport, to deliver, and as such, § 2-615 is not applicable to this case.

The second difficulty with Turbines' argument is that in the documents which arguably form the contract, there is no mention of Monarch or either of its indicted principals, Woodford and his wife. Thus, the premise of the argument that the nozzle was subject to inspection by Monarch is not borne out by the record. Rather, an e-mail from Kottman to Foote indicates that Kottman wrote, "The customer has requested the markings on the nozzle" and that Kottman apparently cut and pasted into his e-mail portions of an e-mail from the unidentified customer in response to pictures he had been sent of the nozzles—pictures we infer Turbines got from Transupport—which said, "[W]e would like to know exactly what is inscribed on each Nozzle, as this does not show up on the pix." Thus, on January 19, 2007, Foote e-mailed Kottman with data that he said represent "the extent of any/all text on the nozzles," which data we need not repeat. Foote closed simply with "Does that help?" and signed the e-mail as "Will." Then there is an e-mail correspondence of January 25 involving only Kottman, Woodford, and Tham Wei Min—who apparently was Turbines' contact or employee in Malaysia—wherein Woodford confirmed payment of $35,850 and provided specifics for shipment. The

correspondence ended with a transmittal from Tham Wei Min to Kottman stating, "Seemed that they are ready to move. Pls check remittance. Also note shipping instruction provided by Monarch." Neither Transupport nor Foote was involved in this latter correspondence.

This was followed by what appears to be a "Purchase Order" on a Turbines company form dated January 29, 2007, directed to Transupport, for the nozzle at a price of $30,000 and its shipment to Turbines via "UPS 2nd Day." Under the heading "Remarks," the document provides, "Company C of C" (certificate of conformance) and "Subject to Inspection and acceptance by customer." There is nothing in the purchase order or in the subsequent "Invoice," both of which are discussed in detail below, that says that the "customer" is Monarch rather than Turbines. Kottman testified that the phrase "Subject to Inspection and acceptance by customer" was placed on the purchase order as a result of discussions he had with Transupport, stating, "I had no use for the nozzle, I needed to send it to my customer so that he would accept it, and if for some reason it was unacceptable to the customer it would be returned to [Transupport]." But, there is no evidence that the nozzle was unacceptable either to Turbines or to Monarch. Rather, Turbines was informed by ICE that Woodford was involved in moving embargoed goods to Iran, which meant that Kottman, being informed of such activity, could be in violation of the sanctions imposed on Iran by the U.S. government. Kottman testified that Transupport knew that Turbines planned to export the nozzle to its customer in Asia, but he admitted that Transupport was never told the name of Turbines' customer; nor did Turbines introduce any other evidence that Transupport otherwise knew that Turbines intended to sell the nozzle to Monarch. Further, there is no evidence that Transupport knew, or had reason to know, that exportation by Turbines to Monarch or to Woodford and his wife was illegal, and such an eventuality was not part of the discussion that Kottman testified he had with Transupport about reasons for a potential rejection of the nozzle by the "customer" (irrespective of who that customer was).

However, the purchase order discussed above was not produced by Turbines from its records, but, rather, it

came "[t]hrough discovery from Transupport," according to Kottman. Kottman testified that additional language on the purchase order was not on the document when it was sent to Transupport—implying that such was added for purposes of this litigation sometime after the original was sent by Turbines. This typewritten addition to the purchase order, in what is clearly a different typeface, states, "Turbines . . . is Transupport's customer, acceptance/rejection is always at customer. This way if part is damaged or customer rejects it [sic] can be returned." However, this language is not determinative given that there is no evidence that Turbines' ability to export the nozzle to Monarch was part of the contract between the parties to this suit.

Transupport's invoice for the nozzle, mentioned above, is addressed to Turbines and dated February 2, 2007. It shows a "prepaid" amount of $30,000 and indicates "UPS-BLUE-INS" as, apparently, the shipping method. It also says, "Transupport is not the USPPI for this item." The evidence is that this is a Customs term for "[U.S.] principal party of interest" and that ICE requires every export of goods to have a "USPPI" designation. A certificate of conformance, or "C of C," signed by Foote provides, "No returns with out [sic] prior authorization. No returns after 90 days. Any authorized returns must be in original packaging as supplied by Transupport." The nozzle was not returned to Transupport within 90 days, but because the nozzle was under seizure by Customs, we do not believe that Turbines' failure to return it within such timeframe is determinative. All but one of the remaining exhibits from the November 29, 2010, trial deal with Customs' and the State Department's handling of the export problems that we have already detailed. The final exhibit is the "Criminal Docket for Case #: 1:03-cr-00070-SJ-2," which details the criminal prosecution of Woodford's wife. The exhibit shows that on January 15, 2003, a sealed indictment of her and Woodford was filed in the U.S. District Court for the Eastern District of New York and that such indictment was ordered unsealed on August 24, 2007, which was some 6 months after Turbines and Transupport made their deal and while the nozzle was tied up by Customs.

[12] Of the grounds for rescission outlined in *Eliker v. Chief Indus.*, 243 Neb. 275, 498 N.W.2d 564 (1993), Turbines makes no claim of fraud, duress, or inadequacy of consideration. Thus, we turn to Turbines' claim of supervening impracticability or "supervening frustration" from the Restatement (Second) of Contracts § 265 (1981):

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which *was a basic assumption on which the contract was made*, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

(Emphasis supplied.) In the Restatement's comment *a.* to § 265, the "rationale" is explained as "[t]his section deals with the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other . . . ." Accordingly, Turbines argues that because it could not export the nozzle to Monarch, it was worthless to Turbines and the contract with Transupport for its purchase should be rescinded. However, it is apparent that whether § 265 is applicable to this case is dependent on whether the "basic assumption" on which the parties' contract was made included the fact that Turbines would be able to successfully export the nozzle to its customer in Asia, generally, or in particular, to export it to Monarch. Given Kottman's admission that he never advised Transupport that the ultimate purchaser was Monarch, it is impossible to say that a "basic assumption" of the contract was Turbines' ability to export the nozzle to Monarch. There was no evidence that Turbines could not export it to Malaysia—in fact, Turbines' evidence establishes that the nozzle was a "dual use" item which could be exported to Malaysia—just not to Monarch or to Woodford and his wife.

Thus, the question becomes whether Transupport's generalized knowledge that Turbines intended to resell the nozzle to a customer in Asia is sufficient to find supervening frustration under § 265 of the Restatement. We find that the answer is in the negative. Transupport's generalized knowledge of Turbines' intent to export the nozzle to someone in Asia is patently

insufficient given that the evidence adduced by Turbines shows that the nozzle, as a "dual use" item, is in fact exportable—just not to Monarch. But that was because of ICE's belief that Woodford and his wife were moving embargoed goods to Iran, an eventuality not covered by the contract documents.

Moreover, when we bear in mind that rescission is an equitable doctrine, we find that the equities here cut against allowing rescission. First, the evidence shows that while Transupport required prepayment from Turbines, Turbines did the same as to Monarch—and at a $5,850 markup. The evidence is that while the nozzle is considered "obsolete," there is a market as well as buyers for it in the worldwide market in which Turbines operates. In the final analysis, the equities do not favor rescission.

[13] *Eliker v. Chief Indus.*, 243 Neb. 275, 498 N.W.2d 564 (1993), suggests that a unilateral mistake can be a basis for rescission and, by inference, that Turbines made a unilateral mistake in believing it could export the nozzle to Monarch. If there was any mistake, it was Turbines' mistaken belief that it could export the nozzle to Monarch. And, such mistake would be unilateral because Transupport never knew who Turbines' Asian purchaser was. However, even if Turbines made a unilateral mistake, relief by way of rescission is still not warranted:

> The essential conditions to relief from a unilateral mistake by rescission are: The mistake must be of so fundamental a nature that it can be said that the minds of the parties never met *and that the enforcement of the contract as made would be unconscionable*. The matter as to which the mistake was made must relate to the material feature of the contract. The mistake must have occurred notwithstanding the exercise of reasonable care by the party making it. Relief by way of rescission must be without undue prejudice to the other party, except for the loss of his bargain.

School District v. Olson Construction Co., 153 Neb. 451, 459-60, 45 N.W.2d 164, 168 (1950) (emphasis supplied). Here, we cannot say that enforcement of the contract would be unconscionable. During the trial, Kottman testified as follows:

THE COURT: You indicated initially that at one time you had nozzles like this in your warehouse?
THE WITNESS: Yes.
THE COURT: And you disposed of them?
THE WITNESS: Yes.
THE COURT: Because they were obsolete?
THE WITNESS: Yes. Big mistake.
THE COURT: Didn't know that there was a market for them out there, huh?
THE WITNESS: No, I didn't.

Earlier in his testimony, Kottman was speaking about obsolete warehouse inventory and said that "sometimes there's just a remote operator in some part of the world that might have an engine that's just an old obsolete engine" so "once in a while [one] just find[s] an opportunity to sell to a customer [to whom one] otherwise just would never sell." Therefore, even if Turbines could not export the nozzle to Monarch, it is clear from Kottman's testimony that the nozzle is potentially marketable to others, even if that market is limited. Kottman testified that based on "experience," he knew that this particular nozzle was a dual use item and would not ultimately require an export license. In short, according to Kottman, it was a mistake not to have the nozzle in his inventory, there are potential customers for the nozzle, and it is exportable because it is a dual use item. And, under *School District, supra*, the mistake that was made must relate to the material feature of the contract. Turbines' ability to export the nozzle to Monarch or to Woodford and his wife was simply not a "material feature" of the contract between Turbines and Transupport. Thus, we cannot say that enforcement of the contract would be unconscionable.

CONCLUSION

After our de novo review of the record, we find that the evidence and the applicable law do not support the district court's decision granting Turbines rescission of its contract with Transupport. Therefore, the decision of the district court is reversed, and the cause is remanded to the district court with directions to dismiss the complaint.

REVERSED AND REMANDED WITH DIRECTIONS.