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CONCLUSION

We conclude that the court erred in applying a rule of automatic dismissal when a plaintiff invokes his or her privilege against self-incrimination during discovery. We determine that in such circumstances, a trial court must balance the parties' interests and consider whether a less drastic remedy would suffice. Under this rule, the court's findings were insufficient to support an order of dismissal. We reverse the order and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

ZIAD L. ZAWAIDEH, M.D., APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES REGULATION AND LICENSURE AND STATE OF NEBRASKA EX REL. JON BRUNING, ATTORNEY GENERAL, APPELLEES.

792 N.W.2d 484

Filed January 7, 2011. No. S-10-158.

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, taken as true, to state a claim to relief that is plausible on its face.
4. **Actions: Evidence.** 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. **Rules of the Supreme Court: Constitutional Law.** Strict compliance with Neb. Ct. R. App. P. § 2-109(E) (rev. 2008) is required for the Nebraska Supreme Court to address a constitutional claim.
6. **Due Process.** Due process claims are generally subjected to a two-part analysis: (1) Is the asserted interest protected by the Due Process Clause and (2) if so, what process is due?
7. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive persons of interests which constitute "liberty" or "property" interests

within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.

8. **Due Process.** The concept of due process embodies the notion of fundamental fairness and defies precise definition.
9. **Parties: Appeal and Error.** Only a party aggrieved by an order or judgment can appeal, and one who has been granted that which he or she sought has not been aggrieved.
10. ____: ____. A party is not entitled to prosecute error upon that which was made with his or her consent.
11. **Compromise and Settlement: Judgments.** Where a doubt as to the law has been settled by a compromise, a subsequent judicial decision upholding a view favorable to one of the parties affords no basis for that party to upset the compromise.
12. **Courts: Pleadings.** Courts are not required to accept as true legal conclusions or conclusory statements in a pleading—instead, while legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.
13. **Fraud: Proof.** To prove fraudulent concealment, a plaintiff must prove these elements: (1) The defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act or refrain from acting in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.
14. **Contracts: Fraud.** One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
15. **Fraud.** In fraudulent concealment cases, existence of a duty to disclose the fact in question is a matter for the determination of the court, although, if there are disputed facts bearing upon the existence of the duty, they are to be determined by the trier of fact under appropriate instructions as to the existence of the duty.
16. **Contracts.** A fact basic to a transaction is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, and they may be material, but they are not basic.
17. **Fraud.** A statement that is true but partial or incomplete may be a misrepresentation, because it is misleading when it purports to tell the whole truth and does not.
18. ____. A statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue. When such a statement is made, there is a duty to disclose the additional information necessary to prevent it from misleading the recipient.
19. **Fraud: Intent.** Whether or not a partial disclosure of the facts is a fraudulent misrepresentation depends upon whether the person making the statement knows

> or believes that the undisclosed facts might affect the recipient's conduct in the transaction in hand. The recipient is entitled to know the undisclosed facts insofar as they are material and to form his or her own opinion of their effect.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

William M. Lamson, Jr., and Denise M. Destache, of Lamson, Dugan & Murray, L.L.P., for appellant.

Jon Bruning, Attorney General, and Michael J. Rumbaugh for appellees.

HEAVICAN, C.J., GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN and CARLSON, Judges.

GERRARD, J.

Nebraska's Uniform Credentialing Act (UCA)[1] regulates persons providing health and health-related services. The UCA permits complaints against a credential holder to be resolved by entry of an "assurance of compliance," a voluntary agreement between the Attorney General and the credential holder that the credential holder will not engage in specified conduct. The appellant in this case, Ziad L. Zawaideh, M.D., entered into such an assurance of compliance. He asserts that although the assurance of compliance was not supposed to be a disciplinary sanction, it actually had the effect of one because of its collateral consequences on his career.

The primary issue Zawaideh presents in this appeal is whether the execution of the assurance of compliance, and the Attorney General's refusal to vacate it, deprived Zawaideh of due process of law. We find no merit to Zawaideh's due process arguments. But we do find that Zawaideh has alleged sufficient facts to at least state a claim for fraudulent concealment, and we reverse the district court's order of dismissal to that extent.

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[1] See Neb. Rev. Stat. §§ 38-101 to 38-1,140 (Reissue 2008 & Cum. Supp. 2010).

BACKGROUND

Legal Context

The UCA provides for the credentialing of persons and businesses that provide health, health-related, and environmental services,[2] including physicians.[3] We are aware that the UCA has been substantially recodified since some of the underlying events in this case took place[4]; however, Zawaideh's arguments appear to be directed at the statutes as they currently exist, and neither party has identified any relevant changes; so for the sake of simplicity and convenience, we cite to the current statutory scheme.

When a complaint is made against a credential holder pursuant to the UCA, the Division of Public Health of the Department of Health and Human Services (Department) is responsible for the initial investigation.[5] The Department is required, for most professions or businesses, to provide the Attorney General with a copy of all complaints it receives and advise the Attorney General of any investigation that may involve a credential holder's violation of statutes, rules, or regulations.[6] The Attorney General then determines what statutes, rules, or regulations may have been violated and the appropriate legal response.[7]

One of the Attorney General's options is to refer the matter to the appropriate professional board for the opportunity to resolve the matter by recommending that the Attorney General enter into an assurance of compliance with the credential holder in lieu of filing a disciplinary petition.[8] Upon the board's advice, the Attorney General may contact the credential holder to agree to an assurance of compliance.

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[2] See § 38-103.

[3] See § 38-101(19).

[4] See 2007 Neb. Laws, L.B. 463.

[5] See §§ 38-114 and 38-1,124.

[6] See § 38-1,107(1).

[7] *Id.*

[8] *Id.*

> The assurance shall include a statement of the statute, rule, or regulation in question, a description of the conduct that would violate such statute, rule, or regulation, the assurance of the credential holder that he or she will not engage in such conduct, and acknowledgment by the credential holder that violation of the assurance constitutes unprofessional conduct. Such assurance shall be signed by the credential holder and shall become a part of the public record of the credential holder. The credential holder shall not be required to admit to any violation of the law, and the assurance shall not be construed as such an admission[.][9]

The UCA expressly provides that "[a]n assurance of compliance shall not constitute discipline against a credential holder."[10]

Plaintiff's Allegations

The district court dismissed Zawaideh's complaint in this case pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). As a result, the following facts are taken from the allegations made in the complaint[11]:

Zawaideh alleged that he is a physician, licensed by and practicing in the State of Nebraska. In 2006, the Department began an investigation into a case involving obstetrical care Zawaideh provided to a patient in 2001. Terri Nutzman, an assistant attorney general, sent Zawaideh a proposed petition for disciplinary action and offered the option of an agreed settlement that would have constituted a disciplinary action against Zawaideh's license. Zawaideh refused, denying any unprofessional conduct. After another proposed disciplinary settlement was refused, Nutzman offered Zawaideh an assurance of compliance, to provide that Zawaideh would no longer provide obstetrical care. Nutzman emphasized that the assurance of compliance was not a disciplinary procedure. Zawaideh had already given up obstetrical care, so he agreed.

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[9] § 38-1,108(1).

[10] § 38-1,107(1).

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

Zawaideh alleges that he was not informed of any adverse effects that might be caused by the assurance of compliance. But, according to Zawaideh, the Attorney General's office knew or should have known that as a practical matter, assurances of compliance were causing professional difficulties for many physicians who had signed them.

As provided by the UCA, Zawaideh's assurance of compliance was made part of his public record.[12] He alleges that it is referenced on the Department's Web site and is available to the general public upon request.

Zawaideh is also licensed to practice medicine in the State of Washington. Zawaideh alleges that the Washington Department of Health learned "via public record" of the assurance of compliance and initiated a disciplinary action based solely on the assurance of compliance. Washington entered a disciplinary order that was reported to the National Practitioner Data Bank.[13] And Zawaideh alleges that the assurance of compliance has led to the termination of his professional board certification and board eligibility which, in turn, has "created difficulties" for him in recredentialing with hospitals and insurance plans.

Zawaideh alleges that he would not have entered into the assurance of compliance had he known about the potential consequences, which he alleges were issues known to Nutzman at the time she assured Zawaideh that the assurance of compliance was not disciplinary. According to Zawaideh, the incident that formed the basis of the investigation into his conduct is no longer subject to discipline under Nebraska law,[14] and terminating the assurance of compliance would allow him to have the Washington disciplinary order removed and restore his board eligibility with the American Board of Family Medicine. So, Zawaideh asked the Department and the Attorney General to rescind the assurance of compliance and expunge the public record. Each declined.

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[12] See § 38-1,108(1).

[13] See 42 U.S.C. § 11101 et seq. (2006).

[14] See *Mahnke v. State*, 276 Neb. 57, 751 N.W.2d 635 (2008).

Based on these facts, Zawaideh's complaint asserts four claims for relief against the Department and the Attorney General:

(1) The UCA is facially unconstitutional because it permits discipline to be carried out without due process of law, as assurances of compliance are not appealable.

(2) The UCA is unconstitutional as applied in this case because Zawaideh no longer practices obstetrics, of his own accord, and the underlying occurrence is no longer subject to discipline under Nebraska law.

(3) The Attorney General carried out his statutory authority in an arbitrary and capricious manner.

(4) The Attorney General committed fraudulent misrepresentation by concealing the material fact that the assurances of compliance were having the effect of a disciplinary order on other physicians.

Procedural History

The Department and the Attorney General filed a motion to dismiss the complaint pursuant to § 6-1112(b)(6). After a hearing, the district court granted the motion. The district court found that Zawaideh had not alleged that the assurance of compliance damaged any of Zawaideh's liberty or property interests. So, the court concluded that Zawaideh had not stated a constitutional due process claim. The court found no merit to Zawaideh's assertion that the Attorney General had acted in an arbitrary and capricious manner. And the court rejected Zawaideh's fraudulent misrepresentation claim, based on its conclusion that the Attorney General had no duty to disclose the possibility of collateral consequences to the assurance of compliance. Zawaideh appeals.

ASSIGNMENTS OF ERROR

Zawaideh assigns that the district court erred in finding (1) that his complaint failed to state a claim with regard to the constitutionality of the UCA, on its face and as applied; (2) that the Attorney General's office did not act in an arbitrary and capricious manner in carrying out its statutory duties; and (3) that Nutzman's conduct in negotiating the assurance of compliance did not constitute fraudulent misrepresentation.

STANDARD OF REVIEW

[1-4] An appellate court reviews a district court's order granting a motion to dismiss de novo.[15] 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 may be drawn therefrom, but not the pleader's conclusions.[16] To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, taken as true, to state a claim to relief that is plausible on its face.[17] 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.[18]

ANALYSIS

Generally speaking, this case presents an instance of buyer's remorse. Zawaideh entered into a voluntary agreement with the Attorney General, but later found he did not like the deal—at least the deal as Zawaideh claims it was represented to him by the Attorney General. But as explained in more detail below, Zawaideh's change of mind does not mean that the agreement was unlawful or that the Attorney General was obliged to release Zawaideh from it. Instead, Zawaideh's only viable claim for relief rests on his allegation that the Attorney General concealed the potential consequences of the agreement from him before he entered into it.

Due Process Claims

[5] We begin with Zawaideh's constitutional arguments, which underlie his first and second assignments of error. We first note that although Zawaideh is presenting a facial challenge to the constitutionality of a statute, he did not file a

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[15] *Central Neb. Pub. Power Dist., supra* note 11.

[16] *Id.*

[17] *Id.*

[18] *Id.*

notice of a constitutional question pursuant to Neb. Ct. R. App. P. § 2-109(E) (rev. 2008), which requires that a party challenging a statute's constitutionality file and serve notice with the Supreme Court Clerk at the time of filing the party's brief.[19] And we have repeatedly held that strict compliance with § 2-109(E) is required for the court to address a constitutional claim.[20] Therefore, we do not address Zawaideh's claims regarding the constitutionality of various statutes. However, we do consider his claims that the application of those statutes in this instance violated his right to due process.

The district court, in concluding that Zawaideh had not stated a claim for relief, relied upon the Eighth Circuit's decision in *Kloch v. Kohl*.[21] Because *Kloch* involved a similar argument against the predecessors to the same Nebraska statutes, it is worth examining in some detail. At the time *Kloch* was brought, the statutes at issue permitted the Attorney General to refer a complaint to the appropriate professional board for a recommendation of an assurance of compliance *or* "the opportunity to resolve the matter by issuance of a letter of concern."[22] Like an assurance of compliance, a "letter of concern" was not "discipline," but was part of the public record.[23] Unlike an assurance of compliance, however, a letter of concern was not the product of an agreement between the credential holder and the Attorney General.[24]

The plaintiff in *Kloch* was a credentialed physician who received a letter of concern arising out of an allegation that he had failed to keep proper medical records.[25] The plaintiff denied the allegation and asked the Board of Medicine to reconsider, but it refused, so he sued, alleging that his due process rights

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[19] See *Parker v. State ex rel. Bruning*, 276 Neb. 359, 753 N.W.2d 843 (2008).

[20] See *id.*

[21] *Kloch v. Kohl*, 545 F.3d 603 (8th Cir. 2008).

[22] See Neb. Rev. Stat. § 71-171.01 (Reissue 2003).

[23] See *id.*

[24] See *id.*

[25] *Kloch, supra* note 21.

had been violated because he had been denied notice and an opportunity to be heard.[26]

But the Eighth Circuit concluded that the plaintiff had not alleged the deprivation of a protected liberty or property interest. The court explained that "[a] plaintiff is entitled to due process only when a protected property or liberty interest is at stake. . . . Abstract injuries, by themselves, do not implicate the due process clause."[27] The court noted that a letter of concern differed from a formal censure or other discipline, and found that "the significance of a letter of concern to subsequent proceedings was minimal."[28] The court concluded that although the public availability of letters of concern could be cause for apprehension, "[a]s a constitutional matter, however, [the plaintiff] is not entitled to due process protection for damage to his reputation alone; and he has failed to show that his medical license was tangibly impaired."[29]

Zawaideh argues that *Kloch* is distinguishable, because in this case, he alleged practical consequences to the assurance of compliance: the effects on his Washington license and his board certification. We agree that *Kloch* is distinguishable in those respects, although a good argument can be made that Zawaideh's complaint should be directed in part at the State of Washington, not the State of Nebraska. But *Kloch* is also distinguishable in a more fundamental way that demonstrates the defect in Zawaideh's due process claim: unlike a letter of concern, an assurance of compliance is *voluntary*.

[6-8] Although Zawaideh is not perfectly clear on this point, it is apparent that he is advancing a procedural due process claim. Due process claims are generally subjected to a two-part analysis: (1) Is the asserted interest protected by the Due

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[26] See *id.*

[27] *Id.* at 607 (citation omitted). See, also, *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003); *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991).

[28] *Kloch, supra* note 21, 545 F.3d at 608.

[29] *Id.* at 609.

Process Clause and (2) if so, what process is due?[30] Procedural due process limits the ability of the government to deprive persons of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.[31] The concept of due process embodies the notion of fundamental fairness and defies precise definition.[32]

[9,10] It is difficult to see how Zawaideh was denied notice and an opportunity to be heard when he negotiated with the Attorney General and affirmatively agreed to the entry of the assurance of compliance. Zawaideh's argument seems to be that due process requires some sort of review procedure for the *continuation* of the assurance of compliance. But it is well established that only a party aggrieved by an order or judgment can appeal, and one who has been granted that which he or she sought has not been aggrieved.[33] A party is not entitled to prosecute error upon that which was made with his or her consent.[34] Zawaideh entered into the assurance of compliance voluntarily, and the fact that he is dissatisfied with his choice does not mean his due process rights were violated by the State.[35]

And Zawaideh does not dispute the fact that had he refused the assurance of compliance, any discipline imposed upon him would have required a hearing and permitted a judicial review

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[30] *State v. Hess*, 261 Neb. 368, 622 N.W.2d 891 (2001); *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991).

[31] *Hess, supra* note 30; *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998).

[32] *Hess, supra* note 30; *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999). See, also, *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

[33] See, e.g., *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004).

[34] See *id.*

[35] See, e.g., *Lighton v. University of Utah*, 209 F.3d 1213 (10th Cir. 2000); *Dorr v. Bd. of Cert. Public Accountants*, 146 P.3d 943 (Wyo. 2006); *Dodge v. Detroit Trust Co.*, 300 Mich. 575, 2 N.W.2d 509 (1942).

that would have satisfied the requirements of due process. That process was available to him—he simply declined to pursue it, and settled the complaint instead. In other words, the review procedure to which Zawaideh claims he was entitled was available to him, but he waived it.[36]

Zawaideh contends that the Attorney General's refusal to discontinue the assurance of compliance is "arbitrary and capricious." We read this argument as being part of Zawaideh's due process claim, because simply alleging an "arbitrary and capricious" action is not, in itself, a claim for relief.

Zawaideh argues the Attorney General's action was arbitrary and capricious because, under our decision in *Mahnke v. State*,[37] entered after his assurance of compliance, he would no longer be subject to disciplinary action because the investigation into his conduct "was based on a single incident."[38] But we held in *Mahnke* that "a physician should not be subject to discipline for a single act *of ordinary negligence*."[39] A physician is still subject to discipline for a "single incident" *other* than ordinary negligence.[40] And Zawaideh's complaint alleges *none* of the facts regarding the underlying incident, other than that it "involv[ed] the provision of obstetrical care to a patient . . . on December 14, 2001." This provides us with no factual basis to conclude that the underlying incident involved only ordinary negligence.

[11,12] It is far from clear that *Mahnke*, even if it applied to the incident underlying the investigation, would provide any basis for relief. Generally speaking, where a doubt as to the law has been settled by a compromise, a subsequent judicial decision upholding a view favorable to one of the parties affords no

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[36] See *Garcia Financial Group v. Virginia Accelerators*, 3 Fed. Appx. 86 (4th Cir. 2001). See, also, *Schwartz v. U.S.*, 976 F.2d 213 (4th Cir. 1992); *Pitts v. Bd. of Educ. of U.S.D. 305, Salina, Kansas*, 869 F.2d 555 (10th Cir. 1989); *Stewart v. Bailey*, 556 F.2d 281 (5th Cir. 1977).

[37] *Mahnke, supra* note 14.

[38] Brief for appellant at 9.

[39] *Mahnke, supra* note 14, 276 Neb. at 70, 751 N.W.2d at 645 (emphasis supplied).

[40] See, e.g., § 38-179.

basis for that party to upset the compromise.[41] But even if an attack on the assurance of compliance was permitted, Zawaideh has only alleged a legal conclusion regarding the applicability of *Mahnke*—not the facts supporting that conclusion. And courts are not required to accept as true legal conclusions or conclusory statements—instead, while legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.[42] On this particular issue, Zawaideh has made no well-pleaded factual allegations.

In sum, we find no merit to the due process claims presented in Zawaideh's first and second assignments of error. Zawaideh voluntarily entered into the assurance of compliance, and notions of "fundamental fairness"[43] are not violated by the State's refusal to permit Zawaideh to withdraw it.

Fraudulent Misrepresentation or Concealment

[13] Zawaideh also argues he stated a claim for fraudulent misrepresentation or concealment, based upon the allegedly false impression given by the Attorney General's failure to inform Zawaideh of other cases involving collateral consequences to assurances of compliance. To prove fraudulent concealment, a plaintiff must prove these elements: (1) The defendant had a duty to disclose a material fact; (2) the defendant, with knowledge of the material fact, concealed the fact; (3) the material fact was not within the plaintiff's reasonably diligent attention, observation, and judgment; (4) the defendant concealed the fact with the intention that the plaintiff act or refrain from acting in response to the concealment or suppression; (5) the plaintiff, reasonably relying on the fact or facts as the plaintiff believed them to be as the result of the concealment, acted or withheld action; and (6) the plaintiff was damaged by the plaintiff's action or inaction in response to the concealment.[44] We note that the only issue presented in

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[41] See *Dodge, supra* note 35.

[42] See *Doe v. Board of Regents, ante* p. 492, 788 N.W.2d 264 (2010).

[43] See *Hess, supra* note 30, 261 Neb. at 374, 622 N.W.2d at 899.

[44] *Knights of Columbus Council 3152 v. KFS BD, Inc., ante* p. 904, 791 N.W.2d 317 (2010).

this appeal is whether Zawaideh has alleged facts supporting the existence of a duty on the part of the Attorney General to disclose the possible collateral consequences of the assurance of compliance. Other aspects of Zawaideh's fraudulent concealment claim, and possible defenses to that claim, are not at issue here.

[14,15] Zawaideh's argument relies upon the Restatement (Second) of Torts § 551,[45] under which one who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but *only* if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.[46] Existence of a duty to disclose the fact in question is a matter for the determination of the court, although, if there are disputed facts bearing upon the existence of the duty, they are to be determined by the trier of fact under appropriate instructions as to the existence of the duty.[47]

Although the circumstances of each case typically determine whether a duty to disclose exists, there are several situations which have been consistently recognized as creating a duty to disclose,[48] and Zawaideh relies upon three in particular: (1) matters known to the defendant that the plaintiff was entitled to know because of a fiduciary or other similar relation of trust or confidence between them; (2) matters known to the defendant that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and (3) facts basic to the transaction, if the defendant knows that the plaintiff is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade, or other objective circumstances, would reasonably

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[45] Restatement (Second) of Torts § 551 (1977).

[46] *Knights of Columbus Council 3152, supra* note 44.

[47] See, Restatement, *supra* note 45, comment *m*.; *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000), *overruled in part on other grounds, Knights of Columbus Council 3152, supra* note 44.

[48] See *Streeks, supra* note 47.

expect a disclosure of those facts.[49] But we note that, generally speaking, the adversarial context of settlement negotiations weighs against a duty to disclose.[50]

First, Zawaideh argues that the Attorney General owed him a fiduciary duty, based in the fiduciary relationship between public officers and the people they have been elected or appointed to serve.[51] But we have never held that a public officer's duty to act in the public interest extends to particular members of the public, particularly those whose conduct is being investigated by the public officer. The Attorney General's fiduciary duties were owed to the public in general, not Zawaideh in particular, and it would place the Attorney General in an untenable position to suggest that his duty to the public generally requires him, in an adversarial proceeding, to act with the adversary's interests in mind. There is simply nothing in the facts alleged in this case to imply that the Attorney General had a confidential relationship to an opposing party in an adversarial proceeding.

[16] Nor do we agree that the collateral consequences of an assurance of compliance were facts basic to the transaction. A "fact basic to the transaction" is a "fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with."[52] Other facts may serve as important and persuasive inducements to enter into the transaction, and they may be material, but they are not basic.[53] Nutzman was under no duty, generally speaking, to inform Zawaideh of the consequences of the assurance of compliance. As explained below, it was Nutzman's decision to discuss *some* but not *all* of those consequences that may have triggered a duty of disclosure. In other words, any duty

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[49] See *id.*

[50] See, e.g., *Hardin v. KCS Intern., Inc.*, 199 N.C. App. 687, 682 S.E.2d 726 (2009); *Kwiatkowski v. Drews*, 142 Wash. App. 463, 176 P.3d 510 (2008); *Poly Trucking v. Concentra Health Services*, 93 P.3d 561 (Colo. App. 2004).

[51] See *Nebraska Legislature on behalf of State v. Hergert*, 271 Neb. 976, 720 N.W.2d 372 (2006).

[52] See Restatement, *supra* note 45, comment *j.* at 123.

[53] See *id.*

to disclose arose as a result of Nutzman's statement that the assurance of compliance was not disciplinary—it did not exist simply because of the nature of the transaction.

[17] But finally, Zawaideh argues that the Attorney General was required to disclose the possibility of collateral consequences in order to prevent Zawaideh from being misled by Nutzman's representation that the assurance of compliance was not disciplinary. Nutzman's representation was literally true, at least as far as Nebraska law is concerned.[54] But literal truth is not the standard. A statement that is true but partial or incomplete may be a misrepresentation, because it is misleading when it purports to tell the whole truth and does not.[55]

[18,19] For instance, a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue.[56] So when such a statement is made, there is a duty to disclose the additional information necessary to prevent it from misleading the recipient.[57] And whether or not a partial disclosure of the facts is a fraudulent misrepresentation depends upon whether the person making the statement knows or believes that the undisclosed facts might affect the recipient's conduct in the transaction in hand.[58] The recipient is entitled to know the undisclosed facts insofar as they are material and to form his or her own opinion of their effect.[59]

In this case, Zawaideh alleges that he was told that the assurance of compliance "was not a disciplinary procedure." In law, "discipline" usually refers to a sanction or penalty imposed after an official finding of misconduct.[60] But the word "discipline"

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[54] See § 38-1,107(1).

[55] See Restatement, *supra* note 45, comment *g*. See, also, *Knights of Columbus Council 3152, supra* note 44.

[56] See Restatement, *supra* note 45, § 529, comment *a*.

[57] See *id*., § 551, comment *g*. See, also, *Knights of Columbus Council 3152, supra* note 44.

[58] See Restatement, *supra* note 45, § 529, comment *b*.

[59] See *id.*

[60] Black's Law Dictionary 531 (9th ed. 2009).

can more generally denote punishing or rebuking someone formally for an offense.[61] Given Zawaideh's allegations, the procedural posture of this case, and our standard of review, we find it at least plausible that Nutzman's representation that the assurance of compliance was not disciplinary led Zawaideh to believe that the assurance of compliance would result in no punishment or rebuke. And Zawaideh alleged that Nutzman attended a meeting of the Nebraska Board of Medicine and Surgery, at which meeting, the board discussed problems that other physicians were having as a consequence of assurances of compliance. So it is a plausible allegation Nutzman knew that Zawaideh could also face such consequences and that informing Zawaideh of that possibility might affect his decision to sign the assurance of compliance.

In other words, Zawaideh has alleged that the Attorney General misled him by stating only favorable matters and omitting unfavorable ones. Those facts could, if substantiated, support a finding that Nutzman had a duty to inform Zawaideh of the fact that other physicians had suffered "disciplinary" consequences from assurances of compliance. Other issues, such as whether the fact was within Zawaideh's reasonably diligent attention or whether Zawaideh reasonably relied on Nutzman's statement, or any potential affirmative defenses, are not before us in this proceeding, and we make no comment on them. Rather, those matters are left to further proceedings in the district court following remand.

CONCLUSION

We affirm the district court's order of dismissal with respect to Zawaideh's due process claims—his first, second, and third claims for relief. However, we reverse the district court's order with respect to Zawaideh's fraudulent concealment claim and remand the cause for further proceedings on that claim.

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

WRIGHT and CONNOLLY, JJ., not participating.

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[61] Concise Oxford American Dictionary 255 (2006).