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SCHROPP INDUSTRIES, INC., DOING BUSINESS AS PK MANUFACTURING CORP. AND R & C PROPERTIES, A NEBRASKA L.L.C., APPELLEE, V. WASHINGTON COUNTY ATTORNEY'S OFFICE, APPELLANT.

STATE OF NEBRASKA EX REL. WASHINGTON COUNTY ATTORNEY'S OFFICE, RELATOR, V. HONORABLE MARY C. GILBRIDE, JUDGE, DISTRICT COURT FOR WASHINGTON COUNTY, NEBRASKA, AND SCHROPP INDUSTRIES, INC., DOING BUSINESS AS PK MANUFACTURING CORP. AND R & C PROPERTIES, A NEBRASKA L.L.C., RESPONDENTS.

794 N.W.2d 685

Filed February 25, 2011. Nos. S-10-361, S-10-831.

1. **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.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
3. **Mandamus: Appeal and Error.** While the Nebraska Supreme Court will issue a writ of mandamus upon a proper showing by a relator, mandamus lies only to enforce the performance of a mandatory ministerial act or duty and is not available to control judicial discretion.
4. **Pretrial Procedure: Final Orders: Attorney and Client: Appeal and Error.** An interlocutory discovery order compelling the production of documents for which a claim of privilege is asserted can be adequately reviewed on appeal from a final judgment and, thus, is appealable neither as a final order nor under the collateral order doctrine.
5. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
6. ____: ____. A substantial right is not affected during a special proceeding, for purposes of appeal, when that right can be effectively vindicated in an appeal from the final judgment.
7. **Pretrial Procedure: Final Orders: Appeal and Error.** An order granting discovery from a nonparty in an ancillary proceeding is not a final, appealable order.
8. **Mandamus.** A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.
9. **Mandamus: Proof.** In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled

to the particular thing the relator asks and that the respondent is legally obligated to act.

10. **Mandamus: Pretrial Procedure: Appeal and Error.** In determining whether mandamus applies to a discovery issue, the Nebraska Supreme Court considers whether the trial court clearly abused its discretion in not limiting the scope of the discovery.
11. **Pretrial Procedure: Attorney and Client: Affidavits: Proof.** In response to a motion to compel production, the asserting party must make out a prima facie claim that the privilege or doctrine applies. In order to fulfill this burden, the asserting party must submit a motion for protective order, in affidavit form, verifying the facts critical to the assertion of the privilege or doctrine. The motion for protective order must (1) verify that it accurately describes each of the documents in question; (2) list the documents and provide a summary that includes (a) the type of document, (b) the subject matter of the document, (c) the date of the document, (d) the author of the document, and (e) each recipient of the document; and (3) state with specificity, in a nonconclusory manner, how each element of the asserted privilege or doctrine is met, to the extent possible, without revealing the information alleged to be protected.
12. **Mandamus.** A party requesting allegedly privileged material must be given a full and fair opportunity to respond to a motion for protective order. Then, if the district court determines that the party asserting the privilege or doctrine has failed to make out a prima facie claim, it shall order the asserting party to produce the documents. Conversely, if the district court determines that the asserting party has made out a prima facie claim, then it shall (1) order the alleged protected material produced to the court, (2) order the asserting party to submit an index directing the court to the specific portions of each of the listed documents that allegedly constitute protected material, (3) privately review the material outside the presence of all counsel, (4) make a determination of whether the material is protected, and (5) seal the material for purposes of appellate review.
13. **Mandamus: Appeal and Error.** In considering whether to grant a writ of mandamus, the Nebraska Supreme Court considers whether the duty to be enforced was one which existed at the time the petition was filed.
14. **Mandamus: Courts.** A request for relief first presented in a mandamus action will be disregarded inasmuch as the district court cannot have failed to perform an act which was not submitted to it for disposition.

Petition for further review in No. S-10-361 from the Court of Appeals, INBODY, Chief Judge, and MOORE and CASSEL, Judges, on appeal thereto from the District Court for Washington County, MARY C. GILBRIDE, Judge. Judgment of Court of Appeals affirmed. Original action in No. S-10-831. Peremptory writ denied.

Shurie R. Graeve, Washington County Attorney, and Edmond E. Talbott III for appellant-relator.

Michael F. Coyle, Paul M. Shotkoski, and Elizabeth A. Culhane, of Fraser Stryker, P.C., L.L.O., for appellee-respondent Schropp Industries, Inc.

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

GERRARD, J.

In these consolidated cases, the Washington County Attorney's office challenges an order of the Washington County District Court entered in an ancillary discovery proceeding enforcing compliance with a subpoena issued on behalf of a Douglas County court. The county attorney claims that the documents sought by the subpoena are privileged and that the court erred in ordering their production. But the threshold question presented here is what procedure should be followed to secure appellate review of an order granting ancillary discovery—entered by the district court in the county in which the subpoena was served, but issued on behalf of a court in a different county.

I. BACKGROUND

Schropp Industries, Inc. (Schropp), owns a facility in Washington County that was damaged in a fire. Schropp's insurer, Sentry Insurance Company (Sentry), denied coverage, based largely on its conclusion that the fire had been caused by a criminal act of the insured. So, Schropp sued Sentry in Douglas County.

The Washington County Sheriff's Department and the county attorney had conducted an investigation into the fire, and Schropp believed that the county attorney had received information from Sentry as part of the investigation. Schropp wanted access to that information, so, in the Douglas County case, Schropp subpoenaed the records of the Washington County investigation.[1] The county attorney objected and refused to produce the documents, asserting (at least in part) that the information was privileged by Nebraska's Arson Reporting Immunity Act.[2] So, Schropp filed a motion to enforce the subpoena in

[1] See Neb. Rev. Stat. § 25-1273 (Reissue 2008).

[2] See Neb. Rev. Stat. §§ 81-5,115 to 81-5,131 (Reissue 2008).

the district court for Washington County.[3] The county attorney argued that it was improper to bring the enforcement action in Washington County, that the documents were privileged under the Arson Reporting Immunity Act, and that Schropp had no authority to compel production of investigative reports in an ongoing criminal investigation.

Following a hearing, the district court stayed the enforcement proceeding to permit the county attorney to apply for intervention in the Douglas County case. But the motion to intervene in the Douglas County case was apparently denied, so the district court lifted the stay, and conducted an in camera review of the documents. The district court found that there was "no generic privilege which attaches to these documents" under the provisions of the Arson Reporting Immunity Act. The district court rejected the county attorney's claim that the records were privileged and ordered her to produce the documents.

The county attorney appealed to the Nebraska Court of Appeals. The Court of Appeals summarily dismissed the appeal, based upon previous cases in which a party had tried to appeal from a discovery order.[4] The county attorney filed a petition for further review and petitioned this court for a writ of mandamus ordering the district court to vacate the order.[5] We issued an alternative writ of mandamus, and after receiving the district court's answer, we granted the petition for further review and consolidated the appeal, case No. S-10-361, with the mandamus case, No. S-10-831, for briefing and oral argument.

II. ASSIGNMENTS OF ERROR

In her petition for further review, the county attorney assigns that the Court of Appeals erred (1) in concluding that the decision of the trial court was not a final order for purposes of appeal and finding that her remedy was a mandamus action in this court. In her consolidated brief, the county attorney also

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[3] See Neb. Ct. R. Disc. § 6-334(A)(c)(2)(B).

[4] See, e.g., *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

[5] See *State ex rel. Acme Rug Cleaner v. Likes*, 256 Neb. 34, 588 N.W.2d 783 (1999).

assigns that the district court erred in failing to (2) provide her with procedural due process and (3) find that the subpoenaed information was not protected from discovery.

III. STANDARD OF REVIEW

[1-3] 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.[6] But a jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[7] And while this court will issue a writ of mandamus upon a proper showing by a relator, mandamus lies only to enforce the performance of a mandatory ministerial act or duty and is not available to control judicial discretion.[8]

IV. ANALYSIS

In each of these consolidated cases, the county attorney is seeking appellate review of an order entered in an ancillary discovery proceeding, undertaken in one court to aid litigation pending in another court.[9] Ancillary discovery is commonly undertaken in other jurisdictions,[10] and is authorized in Nebraska by § 6-334(A)(c)(2)(B), which provides that if a person served with a subpoena objects, "the party for whom the subpoena was issued may, upon notice to all other parties and the person served with the subpoena, move at any time in the district court in the county in which the subpoena is served for an order to compel compliance with the subpoena." The first question we consider is whether an order granting discovery in an ancillary proceeding is appealable.

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[6] *Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 789 N.W.2d 260 (2010).

[7] *Wright v. Omaha Pub. Sch. Dist.*, 280 Neb. 941, 791 N.W.2d 760 (2010).

[8] See, *State ex rel. Parks v. Council of City of Omaha*, 277 Neb. 919, 766 N.W.2d 134 (2009); *State ex rel. AMISUB v. Buckley*, 260 Neb. 596, 618 N.W.2d 684 (2000).

[9] See, generally, 15B Charles Alan Wright et al., Federal Practice and Procedure § 3914.24 (1992 & Supp. 2010).

[10] See *id.*

1. Appeal: Case No. S-10-361

[4] It is not disputed that, had this discovery dispute been litigated in Douglas County, the district court's order would be neither final nor appealable. We have held that an interlocutory discovery order compelling the production of documents for which a claim of privilege is asserted can be adequately reviewed on appeal from a final judgment and, thus, is appealable neither as a final order nor under the collateral order doctrine.[11] Postjudgment appeals generally suffice to protect the rights of litigants and assure the vitality of the privilege.[12] And any harm resulting from the occasional discovery order that might have been corrected, if interlocutory appeals had been available, is outweighed by the delay and disruption that would occur in the litigation process if we were to allow appeals from every discovery order claimed to implicate privilege.[13]

And, as the U.S. Supreme Court has explained in endorsing that view, "were attorneys and clients to reflect upon their appellate options, they would find that litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review."[14] In particular, "in extraordinary circumstances—*i.e.,* when a disclosure order 'amount[s] to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice—a party may petition the court of appeals for a writ of mandamus."[15] And

> [a]nother long-recognized option is for a party to defy a disclosure order and incur court-imposed sanctions. . . . Such sanctions allow a party to obtain postjudgment review without having to reveal its privileged information. Alternatively, when the circumstances warrant it, a district court may hold a noncomplying party in contempt. The party can then appeal directly from that

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[11] See, *Hallie Mgmt. Co., supra* note 4; *Brozovsky, supra* note 4.

[12] See *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009).

[13] *Hallie Mgmt. Co., supra* note 4.

[14] *Mohawk Industries, Inc., supra* note 12, 558 U.S. at 110.

[15] *Id.*, 558 U.S. at 111.

> ruling, at least when the contempt citation can be characterized as a criminal punishment.[16]

These established mechanisms, the Court explained, facilitate immediate review of more consequential privilege rulings.[17]

But the county attorney contends that the order at issue in this case is appealable, because it occurred in an ancillary proceeding. Because nothing remains pending before the district court for Washington County, the county attorney contends that the order entered by *that* court is final and appealable. But that would create a rule under which the appealability of an interlocutory discovery order would depend upon whether the documents sought are in the same county as the underlying litigation. It would be highly peculiar if the availability of appellate review was different based solely on where the relevant evidence is located. That is one of the reasons why, as a general rule, an order granting discovery against a third party in an ancillary proceeding is not considered appealable.[18]

[5,6] And we agree. Neither the collateral order doctrine nor our final order statute provides a basis for appellate jurisdiction here. Whether a privilege claim can be adequately reviewed on appeal from a final judgment does not depend on whether or not the discovery proceeding is ancillary. And under Neb. Rev. Stat. § 25-1902 (Reissue 2008), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[19] An order granting ancillary discovery does not determine the action and prevent the judgment, nor, obviously, is it made after judgment is rendered. And even if we assume that an ancillary discovery proceeding

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[16] *Id.*

[17] See *Mohawk Industries, Inc., supra* note 12.

[18] See, e.g., *Nicholas v. Wyndham Intern., Inc.*, 373 F.3d 537 (4th Cir. 2004); *A-Mark Auction Galleries v. American Numismatic*, 233 F.3d 895 (5th Cir. 2000); *F.T.C. v. Alaska Land Leasing, Inc.*, 778 F.2d 577 (10th Cir. 1985).

[19] *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

is a special proceeding—a matter we do not decide—we have explained that a substantial right is not affected during a special proceeding, for purposes of appeal, when that right can be effectively vindicated in an appeal from the final judgment.[20] An order granting discovery of allegedly privileged information is not a final order under § 25-1902 for the same reason it is not appealable under the collateral order doctrine.

The fact that nothing remains pending in the ancillary court, following its resolution of the issues, does not change the fact that an ancillary discovery proceeding is merely undertaken to aid the underlying litigation that remains pending in another court. Such an appeal would be equally interlocutory. As the Fourth Circuit has explained, "While the district court's order compelling discovery may seem a self-contained piece of litigation when viewed in isolation, that view fails to capture the full scope of these proceedings."[21] The discovery request at issue is but one of several in this case, and must be examined in the larger context which includes the underlying litigation.[22] When viewed in that context, there is no reason to deviate from the general rule just because the discovery order was ancillary.[23] The same policy concerns that generally militate against interlocutory appeals, even where privilege is asserted,[24] counsel against permitting an interlocutory appeal from an order granting ancillary discovery.

Instead, we conclude that other established mechanisms provide potential avenues of review for a potentially injurious or novel discovery ruling.[25] We have regularly considered discovery orders in the context of mandamus.[26] And we recently

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[20] See, *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007); *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007).

[21] *MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 121 (4th Cir. 1994). Accord *A-Mark Auction Galleries, supra* note 18.

[22] See *A-Mark Auction Galleries, supra* note 18.

[23] See *id.*

[24] See *Hallie Mgmt. Co., supra* note 4.

[25] See *Mohawk Industries, Inc., supra* note 12.

[26] See, e.g., *Stetson v. Silverman*, 278 Neb. 389, 770 N.W.2d 632 (2009); *Buckley, supra* note 8; *Likes, supra* note 5.

endorsed the rules applied in federal courts regarding the appealability of contempt judgments, which permit nonparties to appeal from interlocutory civil contempt orders.[27] Those mechanisms "serve as useful 'safety valve[s]' for promptly correcting serious errors."[28]

[7] We note that some federal courts have recognized a limited exception to these general principles and permitted appeal by a party under the collateral order doctrine from an order *denying* discovery from a nonparty in an ancillary proceeding.[29] But we need not decide the applicability of that principle here. Instead, we hold that an order granting discovery from a nonparty in an ancillary proceeding is not a final, appealable order. Accordingly, the Court of Appeals acted correctly in dismissing the county attorney's appeal in case No. S-10-361.

2. Mandamus Action: Case No. S-10-831

Although we lack jurisdiction over the county attorney's appeal from the district court's order, as suggested above, the county attorney's petition for writ of mandamus provides an alternative path to obtaining review by an appellate court. So, it is in that context that we consider the county attorney's arguments on the merits of the district court's order.

[8-10] In doing so, we are mindful of the fact that a court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.[30] The party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.[31] And in determining whether

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[27] *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[28] *Mohawk Industries, Inc., supra* note 12, 558 U.S. at 111.

[29] See, e.g., *Nicholas, supra* note 18; *In re Madden*, 151 F.3d 125 (3d Cir. 1998).

[30] *Stetson, supra* note 26.

[31] *Council of City of Omaha, supra* note 8.

mandamus applies to a discovery issue, we consider whether the trial court clearly abused its discretion in not limiting the scope of the discovery.[32]

It is important to note, from the outset, that the county attorney does not argue to this court that the disputed documents are actually privileged. In other words, she does not ask this court to find that the documents are actually privileged by the Arson Reporting Immunity Act, or any other privilege. Nor could we evaluate such an argument, given that the disputed materials are not in this court's record. Rather, the county attorney's challenge is directed at the procedure followed by the district court in deciding to order disclosure. The county attorney's arguments, generally speaking, are that the district court failed to give her proper notice that it was preparing to decide the privilege issue and that the court failed to decide all of the privilege issues that were presented to it. We find no merit to either argument, but explaining why will require that we begin by examining the procedural history of the district court proceedings in greater detail.

(a) Procedural History

As noted above, Schropp subpoenaed the disputed materials from the county attorney on September 2, 2009. The county attorney replied with a letter to Schropp dated October 4, 2009, in which the county attorney made an "assertion of and preservation of any all [sic] privileges and objections to disclosure or discovery of information obtained by and on behalf of Sentry Insurance Company pursuant to Nebraska's Arson Reporting Immunity Act . . . not specifically approved by and consented to by the Washington County Attorney."

Schropp filed its motion for an order to compel compliance with the subpoena in the district court on October 19, 2009. A hearing was held in the district court on December 14. At that hearing, the county attorney framed the issue as Schropp's "authority . . . to bring this action to compel a prosecutor to turnover [sic] criminal investigative documents for use in a civil proceeding that is pending in another county." The county

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[32] *Stetson, supra* note 26.

attorney argued, first, that Schropp did not have "standing" to bring its enforcement action in Washington County when there was pending litigation in Douglas County. And the county attorney explained that she had not limited her objection to the Arson Reporting Immunity Act, but was also "not aware of any authority . . . to compel a county attorney's office to turnover [sic] investigative reports in an ongoing criminal investigation to use in a civil proceeding."

The court discussed a briefing schedule with the parties. The county attorney asked if there were particular issues the court wanted the briefs to address, and the court replied:

> Well, for one, I would like you to address the standing issue.
>
> I would also like you to address the issue of why I should have jurisdiction over the enforcement of a subpoena that was issued by a judge in Douglas County[.]
>
> What is the privilege that relates to ongoing criminal investigations is another issue that occurs to me.

The district court made a journal entry that provided Schropp 10 days for further briefing and gave the county attorney 28 days to provide a responsive brief.

On January 13, 2010 (30 days later), the county attorney filed a "Complaint and Motion to Stay Proceedings," a "Complaint and Motion to Quash, for Summary Judgment and Dismissal," and a brief that both supported the motion to quash and responded to Schropp's brief. In the motion to stay, the county attorney argued that complying with Schropp's subpoena "undermines public safety and welfare" and moved to stay the proceedings to permit the county attorney to intervene in the Douglas County case to litigate the privilege issue. The county attorney asserted that a stay was necessary to afford her "due process and fundamental fairness under the laws to seek protection of State secrets, and promote the public interest, and safety." In the motion to quash, the county attorney asserted that Schropp's subpoena sought privileged files, but had "failed to establish standing or legal justification" because Schropp's motion was "prohibited by the doctrine of sub judice." The county attorney's brief accused Schropp of "forum shopping," and continued to assert that Schropp lacked

"standing" and that its subpoena was "prohibited by the doctrine of sub judice."

On February 17, 2010, the district court granted the county attorney's request for a stay. The court explained that it was "unaware whether a timely motion to address the issue of privilege" had been made in Douglas County, so the court stayed the proceedings for 30 days to allow the county attorney "to intervene or otherwise file an application in the Douglas County case seeking a court review of its claim of privilege." But the court stated that the county attorney was to provide the district court with a file-stamped copy of its Douglas County pleading, and if such pleading was not on file within 30 days, the court would reinstate the matter and set it for further hearing on the county attorney's claim of privilege.

On the same day, the county attorney's motion to intervene in the Douglas County case was apparently denied. So, on February 26, 2010, the district court lifted the stay of the Washington County proceedings. The court stated that the county attorney's privilege claim remained to be determined but that no privilege log had been produced by the county attorney. So, the court concluded, "[i]t would appear from the record that the Washington county attorney takes the position that all materials in its file are privileged under the act." The court ordered the county attorney to provide the court, within 7 days, with all the materials in its files that were responsive to Schropp's subpoena, so that the court could conduct an in camera review of the documents.

The court ruled on the privilege issue in a journal entry filed on March 24, 2010. The court noted that the county attorney "has claimed a privilege but has not filed a privilege log as required." So, the court reasoned, the county attorney seemed to be claiming only a generic privilege under the provisions of the Arson Reporting Immunity Act. After examining the procedure for evaluating a privilege claim that was established by this court in *Greenwalt v. Wal-Mart Stores*,[33] which requires the party asserting privilege to state the claimed privileges with specificity, the court explained that it had ordered an in camera

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[33] *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

review "despite the lack of specific claims of privilege." The court said that it had reviewed the 43 compact discs that had been provided by the county attorney, despite the lack of a privilege log or listing of the included documents, and concluded that there was no generic privilege which attached to the documents under the provisions of the Arson Reporting Immunity Act. So, the court overruled the county attorney's claim of privilege and ordered production of the documents.

(b) District Court Procedures

The county attorney claims that the district court failed to provide her with procedural due process. In the context of this argument, she contends that the district court erred in deciding the issue of privilege when, at least according to the county attorney, the issue was not "ripe." Stated generally, the county attorney complains that the district court decided the privilege issue without notifying her it was going to do so.

(i) Procedural Due Process

To begin with, the county attorney's constitutional argument is without merit. The county attorney is a party to this case in her official capacity, representing the interests of Washington County, and while U.S. Const. amend. XIV and Neb. Const. art. I, § 3, prohibit the State from depriving any "person" of life, liberty, or property without due process of law, a county, as a creature and political subdivision of the State, is neither a natural nor an artificial person.[34] In other words, Washington County has no constitutional right to due process that the court could have violated.

(ii) Failure to Give Hearing

Beyond that, the county attorney contends that she was not provided with notice that the court was going to decide the privilege issue; therefore, the county attorney contends, she was not given the opportunity to brief the merits of her privilege claim. The county attorney asserts that her brief was solely dedicated to the issue of "standing" and that "the Court never

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[34] *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002).

requested or indicated that the issue of privilege should have been addressed."[35]

But as described above, the county attorney's argument is inconsistent with the record. When the county attorney asked what her brief should address, she was specifically told by the court to address "the privilege that relates to ongoing criminal investigations." It may have been the county attorney's preference to address the issue of "standing" before arguing and submitting the privilege issue, but at no point in the record did the court endorse that view—and, in fact, the court expressly directed otherwise.

The district court's order of February 26, 2010, made it apparent that the court was going to address the privilege issue, and the county attorney did not object. If the county attorney believed that further briefing or argument was necessary on the privilege issue, the court's February 26 order was her opportunity to provide it, or seek leave to provide it, or object to the court's proceeding. But the record does not reflect that the county attorney did any of those things. And we have often said that one cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.[36]

(iii) Failure to Order Privilege Log

[11,12] The county attorney also claims that the district court failed to follow the procedure established by this court in *Greenwalt*. In *Greenwalt*, we explained:

> In response to a motion to compel production, the asserting party must make out a prima facie claim that the privilege or doctrine applies. In order to fulfill this burden, the asserting party must submit a motion for protective order, in affidavit form, verifying the facts critical to the assertion of the privilege or doctrine.[37] The motion for protective order must (1) verify that it accurately describes each of the documents in question; (2) list the documents and provide a summary that includes (a) the

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[35] Brief for appellant-relator at 9.

[36] *Pierce v. Drobny*, 279 Neb. 251, 777 N.W.2d 322 (2010).

[37] See Neb. Ct. R. Disc. § 6-326(c).

> type of document, (b) the subject matter of the document, (c) the date of the document, (d) the author of the document, and (e) each recipient of the document; and (3) state with specificity, in a nonconclusory manner, how each element of the asserted privilege or doctrine is met, to the extent possible, without revealing the information alleged to be protected.
>
> The party requesting the material must be given a full and fair opportunity to respond to the motion for protective order. Then, if the district court determines that the party asserting the privilege or doctrine has failed to make out a prima facie claim, it shall order the asserting party to produce the documents. Conversely, if the district court determines that the asserting party has made out a prima facie claim, then it shall (1) order the alleged protected material produced to the court, (2) order the asserting party to submit an index directing the court to the specific portions of each of the listed documents that allegedly constitute protected material, (3) privately review the material outside the presence of all counsel, (4) make a determination of whether the material is protected, and (5) seal the material for purposes of appellate review.[38]

The county attorney claims that she never provided the court with a privilege log because she was never ordered, pursuant to the second step of *Greenwalt*, to "submit an index directing the court to the specific portions of each of the listed documents that allegedly constitute protected material."[39] She argues that because the district court ordered an in camera review, the court "had concluded that [the county attorney] had made a prima facie claim."[40]

This, again, is unsupported by the record. The court first noted the county attorney's failure to provide a privilege log, not *after* the court's in camera review, but when the court first

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[38] *Greenwalt, supra* note 33, 253 Neb. at 40, 567 N.W.2d at 566-67.

[39] *Id.* at 40, 567 N.W.2d at 567.

[40] Brief for appellant-relator at 11.

ordered the in camera review. In other words, the "privilege log" at issue was the list and summary of the documents, and specific assertions of privilege, that the county attorney should have initially provided in response to Schropp's motion to compel production.

Greenwalt clearly provides that in response to a motion to compel production, it is the party asserting the privilege—in this case, the county attorney—who has the burden of moving for a protective order and establishing the basis for the privilege claim. But here, the county attorney never moved for a protective order, nor did she file any of the documentation that *Greenwalt* requires in support of such a claim. The county attorney did not make out a prima facie claim for any privilege. The district court explained that "[i]n order to expedite determination of this matter," it was nonetheless conducting an in camera review. But the county attorney cannot be heard to complain about the district court's procedure when the court provided the county attorney's argument with more consideration than it was due. In other words, it was not the district court that failed to follow *Greenwalt*—it was the county attorney.

If the county attorney was dissatisfied with the court's intent to proceed on the privilege issue, the court's February 26, 2010, order gave the county attorney an opportunity to object. And when the court's order noted the lack of a privilege log, the county attorney had the opportunity to provide the materials that she should have filed in the first place.

In short, the county attorney neither filed the motion and documentation required to initiate the *Greenwalt* process nor objected when the court said that it was nonetheless willing to consider her claim. The party asserting privilege has the burden of proving that the documents sought are protected, and it was not the district court's responsibility to order the county attorney to remedy her failure of proof. We find no error in the district court's compliance with *Greenwalt*.

(iv) Ripeness

Finally, the county attorney argues in passing that "the filing of a protective order was not ripe" because there was apparently a protective order entered in Douglas County, by

stipulation of Schropp and Sentry, to maintain confidentiality of the documents.[41] We have said that a claim is not "ripe" for adjudication when it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.[42] That doctrine, however, does not apply here. The existence of a protective order stipulated to by Schropp and Sentry would not preclude the county attorney from pursuing a protective order to protect Washington County's interests.

The county attorney further asserts that it was a "judicial abuse of discretion to rule on the issue of privilege without allowing the [county attorney] an opportunity to present the basis for asserting privilege in response to [Schropp's] Motion to Compel."[43] But Schropp served its subpoena on September 2, 2009, and filed its motion to compel on October 19. The district court decided the privilege issue over 5 months later. Contrary to the county attorney's claim, our review of the record establishes that the county attorney had numerous opportunities to present her privilege claim to the district court. She neither initiated that claim properly, pursuant to *Greenwalt*, nor remedied that deficiency when it became apparent that the district court intended to proceed to the merits of the privilege issue. Nor did the county attorney object to the court's procedure, despite the fact that the court explained its intentions clearly. Therefore, we find no merit to the county attorney's first assignment of error.

(c) Ruling on Privileges

The county attorney's second assignment of error is that the court erred in failing to find that her records were not protected from discovery. But, as noted above, the county attorney does not specifically argue that the materials fall within any particular privilege, nor would the record permit us to evaluate such an argument. Instead, the gravamen of the county attorney's argument is that the district court erred by only addressing the Arson Reporting Immunity Act, and not addressing any other

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[41] Brief for appellant-relator at 11.

[42] *State v. Hansen*, 259 Neb. 764, 612 N.W.2d 477 (2000).

[43] Brief for appellant-relator at 12.

basis for finding the documents privileged. The county attorney asserts that she

> consistently maintained that the investigatory file of a County Attorney is barred from discovery based numerous [sic] privileges. General and specific privileges were asserted. Specifically:
>
> a. A general privilege based on the language of the Arson Reporting Immunity Act . . . .
>
> b. A general privilege based on [Neb. Rev. Stat.] § 84-712.05 [(Cum. Supp. 2010)]; and,
>
> c. Evidentiary privileges based on [Neb. Rev. Stat.] §§ 27-509 . . . (State secrets), 27-503 (lawyer/client), and 27-510 (informer) [(Reissue 2008)].[44]

But the record does not support the county attorney's assertions. Our review of the record has found no point at which the county attorney cited to any of the specific privileges she now asserts, other than the Arson Reporting Immunity Act, nor do the county attorney's citations to the record support her argument.

As support in the record for her assertion that she "consistently maintained" each of these privileges, the county attorney specifically directs us to where she questioned Schropp's "authority" to compel production. This is, obviously, far short of asserting a specific privilege—and far short of meeting her burden of stating, "with specificity," how an asserted privilege is met.[45] Nor does the county attorney find support in her original objection to disclosure, based upon "any all [sic] privileges and objections . . . pursuant to Nebraska's Arson Reporting Immunity Act." Even if we read this as referring to privileges beyond the Arson Reporting Immunity Act, the county attorney's letter did not identify any other privilege with the specificity required to effectively assert it.

[13,14] Because this is a mandamus action, the burden lies on the county attorney to show clearly and conclusively that she is entitled to the relief sought.[46] In considering whether

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[44] Brief for appellant-relator at 12-13.

[45] See *Greenwalt, supra* note 33, 253 Neb. at 40, 567 N.W.2d at 567.

[46] See *Council of City of Omaha, supra* note 8.

to grant a writ of mandamus, an appellate court considers whether the duty to be enforced was one which existed at the time the petition was filed.[47] And a request for relief first presented in a mandamus action will be disregarded inasmuch as the district court cannot have failed to perform an act which was not submitted to it for disposition.[48] Simply put, it is the county attorney's burden to demonstrate that the district court had a ministerial duty to resolve the different privilege claims that she now asserts. And she has not done this, because the record does not show that the claims she is asserting were ever presented to the district court. The district court had no ministerial duty to resolve arguments that were not submitted to it for disposition.

In this context, the county attorney reasserts her claim that the district court failed to follow *Greenwalt*, because the court did not ask the county attorney to specify what part of the disputed documents were privileged; the county attorney argues that by not "requesting a supplemental brief from [the county attorney] addressing the privileges asserted, the Court failed to have sufficient evidence before it to make a ruling to order disclosure of [the county attorney's] investigatory file."[49] However, the district court *did* ask the county attorney to brief the question of what privilege applied. But more fundamentally, the burden of proof was on the county attorney as the party asserting a privilege. It was the county attorney's burden to specifically assert the privileges she was claiming and present a record showing that those privileges applied.[50]

The district court did not err in deciding the privilege issue; we again note that given the county attorney's failure to make a prima facie case under *Greenwalt*, the district court actually did more than it was obliged to do to resolve the issue. Nor did the court err by not addressing privileges that had not

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[47] *Pratt v. Nebraska Bd. of Parole*, 252 Neb. 906, 567 N.W.2d 183 (1997).

[48] *State ex rel. Upper Republican NRD v. District Judges*, 273 Neb. 148, 728 N.W.2d 275 (2007).

[49] Brief for appellant-relator at 13.

[50] See *Greenwalt, supra* note 33.

been raised before it. We find no merit to the county attorney's assignment of error.

(d) Failure to Show Cause

The county attorney also argues, generally, Schropp and the district court have not shown cause that the court's discovery orders should not be set aside. But this argument is not encompassed by the county attorney's assignments of error, and errors argued but not assigned will not be considered on appeal.[51]

V. CONCLUSION

For these reasons, we conclude that the county attorney's appeal was not taken from a final, appealable order, and we affirm the decision of the Court of Appeals dismissing her appeal in case No. S-10-361. We also conclude that the county attorney has failed to meet her burden of showing clearly and convincingly that she is entitled to have the district court's orders vacated, and we deny her request for a peremptory writ of mandamus in case No. S-10-831.

JUDGMENT IN NO. S-10-361 AFFIRMED.
PEREMPTORY WRIT IN NO. S-10-831 DENIED.

WRIGHT, J., not participating.

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[51] See *Shepherd v. Chambers, ante* p. 57, 794 N.W.2d 678 (2011).