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surrounding her birth or her relationship with Buckley prior to the dissolution proceedings. We reverse, and remand for further proceedings where the parties shall adduce relevant evidence concerning Buckley, Teresa, and the child and any other evidence necessary for a correct determination of child custody and child support. This evidence should include, but is not limited to, evidence of the circumstances surrounding the child's conception and the child's relationship with Buckley prior to the dissolution proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RANDALL BOJANSKI AND RHONDA BOJANSKI, APPELLANTS, V. MICHAEL FOLEY AND JOHN WYVILL, APPELLEES.

798 N.W.2d 134

Filed April 26, 2011. No. A-10-572.

1. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. 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.
2. **Constitutional Law: Legislature: Immunity.** The Nebraska Constitution, article V, § 22, provides for a waiver of sovereign immunity: The State may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought.
3. **Tort Claims Act.** The State Tort Claims Act shall not apply to any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.
4. **Political Subdivisions Tort Claims Act.** The requirements of the Political Subdivisions Tort Claims Act apply where an individual is sued in his or her individual capacity, but is performing within the scope of employment.
5. **Political Subdivisions Tort Claims Act: Tort Claims Act.** The provisions in the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act.
6. **Tort Claims Act: Immunity: Waiver: Public Officers and Employees.** While a state employee or officer may be allegedly sued individually, if he or she is acting

within the scope of employment or office, the State Tort Claims Act still applies and provides immunity, unless such has been waived.

7. **Statutes: Immunity: Waiver: Intent.** Statutes that purport to waive the State's sovereign immunity must be clear in their intent and are strictly construed in favor of the sovereign and against the waiver.
8. **Immunity: Waiver: Public Officers and Employees: Libel and Slander: Contracts.** The State has not waived its sovereign immunity with respect to claims against its officers and employees who, while acting in the scope of their duties, are alleged to have committed libel, slander, or interference with contractual rights.
9. **Tort Claims Act: Immunity: Invasion of Privacy.** Invasion of privacy was not added to the list of torts exempted from the State Tort Claims Act, and therefore, sovereign immunity does not extend to the tort of invasion of privacy.
10. **Pleadings: Notice.** A party need not plead specific legal theories in the complaint, so long as the other side receives notice as to what is at issue in the case.
11. **Invasion of Privacy: Liability.** Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy if (1) the false light in which the other was placed would be highly offensive to a reasonable person and (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.
12. **Election of Remedies: Damages.** The doctrine of election of remedies is applicable only where inconsistent remedies are asserted against the same party or persons in privity with such a party; however, a party may not have double recovery for a single injury or be made more than whole by compensation which exceeds the actual damages sustained.
13. **Election of Remedies: Libel and Slander: Invasion of Privacy.** Neb. Rev. Stat. § 20-209 (Reissue 2007) prevents multiple recoveries from a single publication, but it does not force a plaintiff to elect among libel, slander, and invasion of privacy with respect to the claim a plaintiff advances resulting from a single publication by the defendant.
14. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
15. **Pleadings.** An amended pleading supersedes the original pleading, and after the amendment, the original pleading ceases to perform any office as a pleading.
16. **Constitutional Law: Actions.** In order to assert a claim under 42 U.S.C. § 1983 (2006), the plaintiff must allege that he or she has been deprived of a federal constitutional right and that such deprivation was by a person acting under color of state law.
17. **Property: Claims.** To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. The person must have more than a unilateral expectation of it. He or she must, instead, have a legitimate claim of entitlement to it.
18. ____: ____. Property interests are not created by the federal Constitution. Rather, they are created and their dimensions are defined by existing rules or

understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

19. **Constitutional Law: Property.** An injury to reputation by itself is not a liberty or property interest protected under the 14th Amendment.
20. ____: ____. The loss of outside private employment does not come within the ambit of a constitutionally protected property interest.
21. ____: ____. The right to follow a chosen profession free from unreasonable governmental interference comes within both the liberty and property concepts of the 5th and 14th Amendments.
22. **Constitutional Law.** It is the right to pursue a calling or occupation, and not the right to a specific job, that is protected by the 14th Amendment.
23. ____. The federal Constitution protects only against state actions that threaten to deprive persons of the right to pursue their chosen occupation.
24. **Due Process.** State actions that exclude a person from one particular job or job opening are not actionable in suits brought directly under the Due Process Clause.
25. **Conspiracy: Words and Phrases.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
26. **Immunity: Waiver: Public Officers and Employees: Contracts: Conspiracy.** If sovereign immunity has not been waived for interference with contractual rights, then such nonwaiver still prevails even though it is alleged that two or more government employees acted in concert.
27. **Actions: Conspiracy.** Civil conspiracy requires an agreement to participate in an unlawful activity and an overt act that causes injury, so it does not set forth an independent cause of action, but, rather, is sustainable only after an underlying tort claim has been established.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Raymond R. Aranza, of Scheldrup, Blades, Schrock, Smith & Aranza, P.C., for appellants.

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

SIEVERS and CASSEL, Judges, and HANNON, Judge, Retired.

SIEVERS, Judge.

INTRODUCTION

The Autism Center of Nebraska, Inc. (ACN), is a nonprofit organization providing services to people with autism

and pervasive developmental disorders. Nebraska's Auditor of Public Accounts (State Auditor), Mike Foley, released an audit report that was highly critical of ACN and its principal officers, who then filed this suit against the State Auditor (and others) for libel and slander, among other claims. The district court for Douglas County, Nebraska, ultimately sustained motions to dismiss, and the plaintiffs appeal.

PROCEDURAL AND FACTUAL BACKGROUND

ACN was initially incorporated by Randall Bojanski and Rhonda Bojanski, a married couple. Randall served as the chief executive officer, and Rhonda served as the chief operations officer. On June 18, 2008, Foley released an "Investigation of the Autism Center of Nebraska" which was subtitled "*Rampant Improprieties Exposed*" (emphasis in original) and which we shall generally refer to as a "press release." This release to the public and press was critical of a number of facets of ACN's business, noting that 98 percent of its funding was received from government sources and asserting that ACN's "'operational style is an affront to the taxpayers of our State and exploits some of Nebraska's most vulnerable citizens who suffer from autism and developmental disabilities.'" Thereafter, on June 17, 2009, the Bojanskis filed suit in the district court for Douglas County against Foley; against John Wyvill, director of the Division of Developmental Disabilities of the Nebraska Department of Health and Human Services (DHHS); and against DHHS, the Governor, and the State of Nebraska.

On October 16, 2009, an amended petition was filed, but it advanced claims against only Foley and Wyvill, "[i]ndividually." That amended petition contained substantially the same allegations as in the first petition and likewise attached and incorporated by reference Foley's press release of June 18, 2008. A second amended petition was filed against only Foley and Wyvill, "[i]ndividually," on December 11, 2009—this is the operative pleading for purposes of this appeal, and we will hereafter reference it as "the complaint" and the remaining defendants, Foley and Wyvill, as "the defendants." The press

release of June 18, 2008, was incorporated therein by reference. The defendants filed a motion to dismiss on January 8, 2010, which the district court sustained in its entirety on May 10, and the lawsuit was "dismissed with prejudice." The Bojanskis filed this timely appeal.

Because this matter was dismissed in the district court on the pleadings, there is no bill of exceptions and our factual knowledge is limited to the allegations of the complaint and Foley's press release of June 18, 2008, incorporated by reference therein. Because the key to resolution of the appeal is found solely in the pleadings, we recount such in some detail.

The complaint alleges that the defendants are both sued in their "individual capacit[ies]," that the events at issue with respect to Foley occurred "[d]uring the time . . . he served as the State Auditor," and that the events with respect to Wyvill occurred while he "served as the Director of Developmental Disabilities" at DHHS. The Bojanskis allege that in February 2008, the State Auditor as well as DHHS requested an audit of billing practices of ACN. The Bojanskis allege that during the time period of June 18 through June 24, 2008, Foley issued statements to the public and the press "which were libelous, defamatory, [and] slanderous and placed the Bojanskis in a false light." It is alleged that such statements were made through the use of a "Special Evaluation Summary," a press release, and at least one press conference. The complaint, while incorporating the entire press release, selects several statements from it apparently illustrative of the alleged libel and slander. The complaint quotes from Foley's press release as follows:

> "The short story on [ACN] is that unethical management practices at the top of the organization render it unworthy of governmental funding. While I have no doubt that most of its employees are dedicated and honest, I have no confidence in the senior executives of that organization. . . ."
>
> . . . .
>
> "The operational style is an affront to the tax payers of our state and exploits some of Nebraska's most

> vulnerable citizens who suffer from autism and developmental disabilities[.]"
>
> . . . .
>
> "[ACN] maintained 18 different credit card accounts and ran up over $140,000 in charges during a nine month period, with little back-up documentation to show whether those charges were truly related to the care of developmentally disabled clients. Senior executives routinely used the organization's credit cards for personal purchases[.]"
>
> . . . .
>
> "We are convinced now that [ACN] has deliberately falsified some very important records. . . ."

Other quotes from Foley's press release of June 18, 2008, concerning ACN illustrate its tenor and tone:

> [The Bojanskis] set up a sweetheart leasing deal approved by the organization's board that resulted in tens of thousands of dollars in rent payments on an empty house for 10 months. The rental payments were made to a limited liability corporation created for the benefit of the Bojanski children. Rhonda . . . signed the lease as both landlord and tenant; however, the home was actually owned by her parents at the time the lease was created.
>
> [ACN] spent $17,000 in government funds for a deck replacement on the rental house and $2,800 on a new furnace for the rental house despite representations made to the [ACN] board that the Bojanski's [sic] would make capital improvements.
>
> . . . .
>
> [ACN] billed the Omaha Public School District for tens of thousands of dollars for services to an autistic client and then double-billed [DHHS] who also paid [ACN] for services provided at the same time.
>
> The [State A]uditor's report challenges over $226,000 in government payments to [ACN] on the basis that [ACN's] invoices to the government were not properly supported by adequate records. The report casts serious doubt as to whether the services were ever truly provided

> to the developmentally disabled clients. Tens of thousands of dollars of the questionable billings relate to services for developmentally disabled children of employees of [ACN].

The complaint in count I, entitled "SLANDER (Michael Foley)," alleges slander because Foley's statements in the press release carry the implication that the Bojanskis have committed a crime or such statements have subjected them to public ridicule, ignominy, or disgrace. Count II, entitled "LIBEL (Michael Foley)," contends that the statements "are highly offensive to a reasonable person [and] invade the privacy of [the Bojanskis]." This count alleges that Foley "had knowledge or acted in reckless disregard as to the falsity of the publicized matter" and "placed [the Bojanskis] in a false light." In count III, entitled "INTERFERENCE WITH CONTRACTUAL RELATIONSHIP," such is alleged to have occurred because the defendants "directed that [the Bojanskis] be terminated from their individual contracts with ACN." It is alleged that the defendants knew or should have known of the employment contract each of the Bojanskis had with ACN (providing them each compensation of $6,250 per month) and that the "demand that [the Bojanskis' employment] be terminated was an unjustified, intentional act of interference . . . conducted outside the scope of [the defendants'] authority as government officials." Count IV of the complaint is designated as "CIVIL RIGHTS VIOLATIONS" and alleges that the defendants, acting under color of law, deprived the Bojanskis of their liberty and property interests without due process of law, in violation of the 5th and 14th Amendments to the U.S. Constitution, by interfering with their employment contracts and making accusations that foreclosed the Bojanskis' freedom to take advantage of employment opportunities with ACN or other employers. The Bojanskis allege that the actions of the defendants "were so outrageous [as] to fairly shock the contemporary consci[ence]." In count V, entitled "CONSPIRACY," the Bojanskis allege that the defendants, in combination with one another, acted to accomplish "by concerted action an unlawful object by unlawful or oppressive means" that interfered with the Bojanskis' employment

contracts and employment relationships with ACN and continued to prevent them from being employed by ACN. With respect to each of the five counts, the Bojanskis allege damages in the form of lost wages, lost income, lost future wages, lost fringe benefits, and pain and humiliation, plus "other general damages." We note that attached to the complaint, in addition to the press release, are the employment and deferred compensation agreements of both Randall and Rhonda with ACN.

DISTRICT COURT DECISION

Following the filing of the complaint, the defendants filed a motion to dismiss asserting that as to count I, Foley is immune from suit for slander under Neb. Rev. Stat. § 81-8,219(4) (Reissue 2008), and that he is immune under the same statute for the libel alleged in count II. Additionally, the motion to dismiss asserts that the claim of false light is not a separate cause of action but merely an element of the claim for invasion of privacy. The defendants also assert that the Bojanskis alleged different causes of action for the same alleged acts, violating Neb. Rev. Stat. § 20-209 (Reissue 2007). With respect to count III of the complaint, both defendants claim immunity from suit for interference with a contractual relationship, due to sovereign immunity pursuant to § 81-8,219(4). They assert that as to count IV, the Bojanskis have failed to state a claim upon which relief can be granted under 42 U.S.C. § 1983 (2006). Finally, with respect to count V, conspiracy, the defendants assert that it is not a separate cause of action and applies only if an underlying tort has been proved and that both defendants are immune from all torts alleged by the Bojanskis.

On May 11, 2010, the trial court entered its signed and file-stamped order sustaining the defendants' motion to dismiss without comment other than that such dismissal was with prejudice. The Bojanskis filed their notice of appeal on June 4.

ASSIGNMENTS OF ERROR

The Bojanskis assign seven errors, five of which can be reduced to the assertion that the trial court erred in dismissing

each of the five counts of the complaint. For their sixth assignment, the Bojanskis allege that the district court erred in finding that a claim for invasion of privacy cannot be brought as a part of the claim for libel and false light. The seventh assignment of error is that the district court erred in dismissing the negligence claim against the governmental defendants, which was alleged in the original petition; but we note that that claim was not reasserted in the operative complaint and that neither the Governor, the State, nor DHHS was named as a defendant in the operative complaint.

STANDARD OF REVIEW

[1] In the Nebraska Supreme Court's decision in *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010), the court set forth the proper standard of review for a case such as this. Because our present pleading rules are derived from the Federal Rules of Civil Procedure, the court engaged in a detailed examination of the proper standard in light of two U.S. Supreme Court decisions: *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Thus, for simplicity's sake, we refer the interested reader to *Doe* for that involved discussion and limit our opinion to simply setting forth the operative rule from *Doe* as well as the *Doe* court's observation, "[W]e believe that the Court's decision in *Twombly* provides a balanced approach for determining whether a complaint should survive a motion to dismiss and proceed to discovery." 280 Neb. at 506, 788 N.W.2d at 278.

> [W]e hold that to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. 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.

Id.

ANALYSIS

Libel, Slander, Interference With Contract, and Conspiracy.

The defendants argue that the district court's dismissal of counts I, II, III, and V is correct because the defendants are protected from such claims by the doctrine of sovereign immunity. While the Bojanskis' operative complaint asserts or designates that they are suing the defendants "[i]ndividually," it is clear that the audit at the core of this lawsuit was performed by Foley because he is the State Auditor. And, the public release of the information upon which the Bojanskis premise their claims is part of the audit process. In short, Foley performed the actions involved in this litigation not as an individual, but, rather, as a constitutional officer of the executive branch of the government of the State of Nebraska. See Neb. Const. art. IV, § 1. Thus, consistent with the above standard of review for a motion to dismiss, it is not "plausible" to view the claims against Foley "individually." With respect to Wyvill, the only allegation is that he was a director at DHHS, the state department with which ACN contracted and by which it was paid. The Bojanskis' lawsuit simply "lumps" Wyvill in with Foley; thus, it follows that it is not "plausible" to view the claims as being against Wyvill "individually." That being said, the Bojanskis argue that "there is nothing, either statutorily or in state regulations, which allows the State Auditor to commit libel or slander as a function of its office." Brief for appellants at 22.

[2-8] This argument begs the real question, which is whether the State Auditor can be liable under Nebraska law, assuming there was libel and slander, when acting within the scope of his or her official duties, as Foley plainly was. Obviously, the State, as a political and governmental entity, can act only through its constitutional officers and employees. The Nebraska Constitution, article V, § 22, provides for a waiver of sovereign immunity: "The [S]tate may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." The Legislature has so provided via the State Tort Claims Act. However, a defendant may affirmatively plead that the plaintiff has failed to state a

cause of action under § 81-8,219 of the act because an exception to the waiver of sovereign immunity applies. See *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005). Neb. Rev. Stat. § 81-8,209 (Reissue 2008) of the State Tort Claims Act provides in part:

> The State of Nebraska shall not be liable for the torts of its officers, agents, or employees, and no suit shall be maintained against the state, any state agency, or any employee of the state on any tort claim except to the extent, and only to the extent, provided by the State Tort Claims Act.

Section 81-8,219(4) provides that the State Tort Claims Act shall not apply to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." In *Cole v. Wilson*, 10 Neb. App. 156, 627 N.W.2d 140 (2001), an inmate sued his public defender, claiming that, as here, the suit was against the defendant in his individual capacity. We rejected that argument, holding that "[t]he requirements of the Political Subdivisions Tort Claims Act apply where an individual is sued in his or her individual capacity, but is performing within the scope of employment." *Cole*, 10 Neb. App. at 160, 627 N.W.2d at 144. The Supreme Court has said that generally, provisions in the Political Subdivisions Tort Claims Act should be construed in harmony with similar provisions in the State Tort Claims Act. See *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994). Thus, while a state employee or officer may be allegedly sued "individually," if he or she is acting within the scope of employment or office, the State Tort Claims Act still applies and provides immunity, unless such has been waived. See *Cole, supra*. Clearly, there is no waiver of immunity for claims of libel, slander, or interference with contract rights under the applicable statute. Statutes that purport to waive the State's sovereign immunity must be clear in their intent and are strictly construed in favor of the sovereign and against the waiver. See *King v. State*, 260 Neb. 14, 614 N.W.2d 341 (2000). It is clear that the State has not waived its sovereign immunity with respect to claims against its officers and

employees who, while acting in the scope of their duties, are alleged to have committed libel, slander, or interference with contractual rights. Accordingly, the district court correctly sustained the motion to dismiss with respect to the Bojanskis' suit for libel, slander, and interference with contractual rights against the defendants. The complaint also attempts to plead a cause of action called interference with "business expectancies." See brief for appellants at 22. However, this is merely another name for the Bojanskis' claim that as a result of the defendants' actions, their employment relationships with ACN were interfered with and terminated. Strictly construing the waiver of sovereign immunity, as we must, we conclude that such claim is within the ambit of sovereign immunity extending to "interference with contract rights" and that thus, the district court's dismissal as to such was likewise correct. See § 81-8,219(4).

Was Claim for Invasion of Privacy Properly Dismissed?

[9] The Bojanskis assign as error the district court's dismissal of their claim for invasion of privacy on the ground that such "shall be dismissed as a separate cause of action and therefore cannot be brought with part of the claim for libel and false light." Initially, we note that because the district court's order of dismissal provided no reasoning or rationale, we do not know the basis of its dismissal in general, or of any particular claim. Thus, we cannot comment on its reasoning, only on the ultimate result reached. That said, we note that in *Wadman v. State*, 1 Neb. App. 839, 845-46, 510 N.W.2d 426, 430 (1993), this court held:

> In construing a statute, an appellate court must look to the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served and then place on the statute a reasonable construction which best achieves its purpose, rather than a construction which will defeat the statutory purpose. *State v. Seaman*, 237 Neb. 916, 468 N.W.2d 121 (1991). We find that the Legislature intended to waive the State's immunity from suit, except when there is an exception specifically

> exempting certain conduct, such as those exceptions enumerated in § 81-8,219. We note that § 81-8,219 has been amended three times (in 1986, 1988, and 1992) subsequent to the enactment of the right of privacy laws. *Invasion of privacy was not added to the list of torts exempted from the State Tort Claims Act.*
>
> The trial court was incorrect in finding that the State has not waived its sovereign immunity to be sued for the tort of invasion of privacy.

Since our *Wadman* opinion, § 81-8,219 has been amended in 1993, 1999, 2004, 2005, and 2007, yet claims for invasion of privacy are still not among those claims for which sovereign immunity provides protection for State employees or officers. Our examination of the operative complaint reveals that in paragraphs 1 through 12, which are the introductory factual allegations, a number of the assertions in Foley's press release are alleged by the Bojanskis to be false, to place the Bojanskis in a false light, and to "violate their rights to privacy." For example, the complaint alleges at paragraph 9: "g. Foley made reference to the Bojanskis' use of credit cards and improper charges to [ACN]. Such statement is false and is without foundation. Further, such statements violate the Bojanskis' privacy rights."

[10,11] The structure of the operative complaint is that after the 12 introductory paragraphs, there are "counts" set forth—for example, "COUNT II LIBEL (Michael Foley)." In this count, despite the implied limiting label of "LIBEL," the allegations of paragraphs 1 through 12 are incorporated and it is alleged that "[t]he statements made by the [d]efendants placed [the Bojanskis] in a false light and constituted a violation of Neb. Rev. Stat. §20-204." In *Vande Guchte v. Kort*, 13 Neb. App. 875, 883, 703 N.W.2d 611, 619 (2005), citing *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985), we said: "A party need not plead specific legal theories in the complaint, so long as the other side receives notice as to what is at issue in the case." Thus, despite the label of count II as "LIBEL," given the allegations quoted above, the Bojanskis have pleaded a claim for invasion of privacy under Neb. Rev. Stat. § 20-204 (Reissue 2007). That statute provides:

> Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places that person before the public in a false light is subject to liability for invasion of privacy, if:
>
> (1) The false light in which the other was placed would be highly offensive to a reasonable person; and
>
> (2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

The defendants' response to the assertion that the invasion of privacy claim should not have been dismissed is to cite us to § 20-209, which provides:

> No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication, exhibition, or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

[12] We have found no reported case in which § 20-209 has been discussed in connection with conduct by a state official or employee which is alleged to be libelous as well as constituting an invasion of privacy. Nor have we found any authority dealing with § 20-209 and the Political Subdivisions Tort Claims Act. The defendants argue that because the Bojanskis have asserted claims for libel and slander, they cannot "stack causes of action all arising from" the same conduct, and that "[a] plaintiff must select one cause of action from the statutory listing and may not proceed on multiple causes of action relating to a single publication." Brief for appellees at 7-8. No authority is cited for this proposition. Furthermore, the defendants' argument is at odds with the general rule that the doctrine of election of remedies is applicable only where inconsistent remedies are asserted against the same party or persons in privity with such a party; however, a party may not have double recovery for a single injury or be made "'"more than whole"'" by compensation which exceeds the actual damages sustained.

Genetti v. Caterpillar, Inc., 261 Neb. 98, 120, 621 N.W.2d 529, 546 (2001). And, the defendants do not mention our decision in *Wadman v. State*, 1 Neb. App. 839, 510 N.W.2d 426 (1993), let alone explain why it would not be the controlling authority on whether there is a waiver of sovereign immunity with respect to claims for invasion of privacy.

[13,14] Finally, we find that § 20-209 prevents multiple recoveries from a single publication, but that it does not force a plaintiff to elect among libel, slander, and invasion of privacy with respect to the claim a plaintiff advances resulting from a single publication by the defendant. Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning. *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 759 N.W.2d 464 (2009). We think this is the only logical result when the statute is read in conjunction with the authority regarding alternative pleading. And it is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. *Steffen v. Progressive Northern Ins. Co.*, 276 Neb. 378, 754 N.W.2d 730 (2008). Our role, to the extent possible, is to give effect to the statute's entire language and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible. See *In re Interest of Tamantha S.*, 267 Neb. 78, 672 N.W.2d 24 (2003), *disapproved on other grounds, In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

In this case, the Bojanskis did not elect a single theory of recovery, but, rather, asserted all available theories of recovery. As it turns out, the libel and slander claims do not survive the motion to dismiss because of sovereign immunity. But, under *Wadman, supra*, sovereign immunity does not protect the defendants from a claim of invasion of privacy occasioned by Foley's press release of June 18, 2008. And, contrary to the defendants' argument, § 20-209 does not prevent the Bojanskis from advancing an invasion of privacy action, even though claims for libel and slander are barred by the doctrine of sovereign immunity. For all of these reasons, we hold that the district court erred in sustaining the motion to dismiss as to the claim for invasion of privacy, and we reverse the district court's dismissal to that extent.

Negligence.

[15] The Bojanskis assign, "The District Court erred in dismissing the negligence claim against the governmental Defendants. (Count IX, Petition)." The reference in the assignment of error can only be to the original "petition" filed herein on June 17, 2009, which does contain a negligence allegation, although such is actually designated as "COUNT VIIII . . . NEGLIGENCE," not "Count IX." However, that pleading was superseded by an amended petition and then a second amended petition, the latter being what we have dealt with as the operative pleading and which we have designated as "the complaint." An amended pleading supersedes the original pleading, and after the amendment, the original pleading ceases to perform any office as a pleading. See *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996). Thus, under this rule, we need not discuss this assignment of error any further, because there is no negligence claim asserted in the Bojanskis' operative pleading.

Did Trial Court Err in Dismissing Bojanskis' 42 U.S.C. § 1983 Civil Rights Claim?

[16-18] In order to assert a claim under 42 U.S.C. § 1983, the plaintiff must allege that he or she has been deprived of a federal constitutional right and that such deprivation was by a person acting under color of state law. See *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008). The Bojanskis allege that Foley's actions which form the basis for the now-rejected claims of libel, slander, and interference with employment contractual rights also were violations of their constitutional rights, giving rise to a cause of action under 42 U.S.C. § 1983. The Bojanskis allege deprivation of due process and equal protection claims, in violation of the 5th and 14th Amendments to the U.S. Constitution, because of the defendants' interference with their employment because of alleged statements made by the defendants directing that ACN terminate the Bojanskis' employment. To support the argument that their termination from their private employer, ACN, states a cause of action under 42 U.S.C. § 1983, the Bojanskis direct us to *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d

548 (1972). *Roth* dealt with the failure of a state university to rehire an untenured professor who had only a 1-year contract, and the Court found that he had no property right entitled to due process protection. The Court said:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. The Bojanskis point to their employment contracts with ACN, attached to the operative complaint, as the source of their expectation of continued employment. The contracts do not provide for a set term of employment, but by implication provide that ACN can terminate their employment only for "cause." The complaint alleges that the Bojanskis were terminated from their employment because the defendants insisted upon their termination by ACN and that such termination was "a condition to allow ACN to continue its contract with DHHS." We take these allegations as true, as we must for purposes of the motion to dismiss. In *Roth*, the university professor was denied relief when the U.S. Supreme Court found that he had no liberty or property interest protected by the 14th Amendment:

> Thus, the terms of the [professor's] appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that

> secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the [professor] surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

408 U.S. at 578 (emphasis omitted).

[19,20] Given the terms of the contracts between the Bojanskis and ACN, we find that *Roth* is distinguishable from this case, although the holdings of *Roth* obviously provide guidance. The complaint here alleges a property interest by way of an expectation of continuing employment given the contracts earlier mentioned. The Bojanskis further rely upon *McMath v. City of Gary, Ind.*, 976 F.2d 1026 (7th Cir. 1992), which holds that deprivation of an occupational liberty interest exists when an employee is fired for publicly announced reasons that impugn his or her moral character to the point of stigmatization in future employment. We recognize that under *Paul v. Davis*, 424 U.S. 693, 709, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976), injury to reputation, such as by defamation, is not by itself a deprivation of a protected "'liberty'" interest. In the present case, there are allegations that the cause of the termination was the insistence by the defendants that the Bojanskis be terminated from employment by ACN, which they alleged caused them economic loss and adversely affected their ability to gain similar employment. Thus, the defendants' argument that the Bojanskis' "tort claims are not magically transformed into claims for due process violations protected by the Fourteenth Amendment by virtue of [the defendants'] positions as state officials," brief for appellees at 10, misses the mark given the allegations of loss of employment by virtue of the alleged insistence of the defendants that the Bojanskis be terminated from employment by ACN. The defendants further argue that the Nebraska Supreme Court has "squarely rejected," *id.*, the Bojanskis' argument in *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998). While *Gordon* is a complicated case, the short story is that the plaintiff was a lawyer who represented a bank. In his lawsuit, he alleged that as a result of the defendants'

actions, his relationship with the bank was terminated and he lost his position with his law firm. The Supreme Court's opinion says the plaintiff characterized his claim as one alleging that "'individuals working for the State of Nebraska and the United States Government conspired with private individuals to destroy the reputation, professional standing, earning ability, and employment of [the plaintiff].'" *Id.* at 653-54, 587 N.W.2d at 354. The court then said with respect to the plaintiff's 42 U.S.C. § 1983 claim:

> We are aware of no authority recognizing a constitutionally protected right of a lawyer to represent a particular client or work for a particular law firm. Such relationships among private parties and entities are usually terminable at will or governed by contract. They do not constitute intimate human relationships or groups formed for the purpose of exercising First Amendment rights which are subject to a constitutionally protected freedom of association. See *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984). [The plaintiff] does not allege any form of public employment which would implicate his freedom of speech under the First Amendment. See, e.g., *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53 (1997).
>
> An injury to reputation by itself is not a liberty or property interest protected under the 14th Amendment. *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991); *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976); *Lynch v. City of Boston*, 989 F. Supp. 275 (D. Mass. 1997). Likewise, the loss of outside private employment does not come within the ambit of a constitutionally protected property interest. *Id.* In general, any damages for loss of employment opportunities that flow from harm to reputation may be recoverable under state tort law, but not under § 1983. *Siegert, supra.*
>
> Construing the operative petition in a light most favorable to [the plaintiff], we conclude it does not contain factual allegations sufficient to constitute a cause of action

> under § 1983, because it does not allege a deprivation of a right, privilege, or immunity guaranteed by the Constitution or laws of the United States.

Gordon, 255 Neb. at 654, 587 N.W.2d at 354-55.

[21-24] In *McCool v. City of Philadelphia*, 494 F. Supp. 2d 307 (E.D. Pa. 2007), the plaintiff challenged a restriction that required that firefighters for the city of Philadelphia live within certain geographic boundaries, and he claimed constitutional violations giving rise to a 42 U.S.C. § 1983 claim. The federal court rejected the plaintiff's claim, and we quote its summary of the applicable law which closely parallels the Nebraska Supreme Court's holding in *Gordon, supra*:

> The right "to follow a chosen profession free from unreasonable governmental interference comes within both the liberty and property concepts of the Fifth and Fourteenth Amendments." *Piecknick v. Commonwealth*, 36 F.3d 1250, 1259 (3d Cir.1994). Indeed, "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915). However, "it is the right to pursue a calling or occupation, and not the right to a specific job, that is protected by the Fourteenth Amendment." *Piecknick*, 36 F.3d at 1259 (*quoting Wroblewski v. City of Washburn*, 965 F.2d 452, 455 (7th Cir. 1992)). Thus, the Constitution protects only against state actions that threaten to deprive persons of the right to pursue their chosen occupation. *Id.* Accordingly, state actions that exclude a person from one particular job or job opening are not actionable in suits brought directly under the due process clause. *Id.* (*quoting Bernard v. United Township High Sch. Dist. No. 30*, 5 F.3d 1090, 1092 (7th Cir.1993)).

McCool, 494 F. Supp. 2d at 325.

Here, the operative complaint with respect to the 42 U.S.C. § 1983 claim alleges the termination of the Bojanskis' employment by ACN, a particular employer, rather than the loss of the right to pursue an occupation, and thus, we find that the

claim fails under the principles outlined above in *Gordon v. Community First State Bank*, 255 Neb. 637, 587 N.W.2d 343 (1998), and *McCool, supra*, and in the authority cited by those opinions. Therefore, we find that the district court properly sustained the motion to dismiss as to the 42 U.S.C. § 1983 claim because such claim does not allege the violation of a constitutional right. And, under the factual scenario alleged by the Bojanskis, they have not stated a claim to relief that is plausible on its face; nor are facts alleged that suggest the existence of the missing element and raise a reasonable expectation that discovery will reveal evidence of the element, i.e., the loss by state action of the right to pursue their occupation. Thus, we affirm this portion of the district court's decision.

Did District Court Err in Dismissing Bojanskis' Claim of "Civil Conspiracy"?

[25-27] The allegation of "COUNT V CONSPIRACY" is that the defendants acted in concert to accomplish an unlawful object by unlawful or oppressive means—the object is alleged to have been "to interfere with [the Bojanskis'] employment contract[s] and employment relationship[s] with ACN" and to prevent their continued employment by ACN. A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means. *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997). The defendants, citing *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985), argue that there is a failure to state a claim upon which relief can be granted because there is no allegation that they acted outside of their authority. But, we find that such allegation was made, at least with respect to the claim of contractual interference. However, although we reject that argument by the defendants, the claim of civil conspiracy is resolved against the Bojanskis on the simple basis that if sovereign immunity has not been waived for interference with contractual rights, which obviously includes interference with the Bojanskis' employment contracts with ACN, such nonwaiver logically still prevails even though it is alleged that two or more government employees acted in concert. Any

other result would be an absurd construction of § 81-8,219 and would eviscerate the protection from suits for contractual interference provided for in such statute. In *K & S Partnership v. Continental Bank, N.A.*, 952 F.2d 971, 980 (8th Cir. 1991), the court said:

> [L]iability for civil conspiracy is in substance the same thing as aiding and abetting liability. Civil conspiracy requires an agreement to participate in an unlawful activity and an overt act that causes injury, so it "do[es] not set forth an independent cause of action" but rather is "sustainable only after an underlying tort claim has been established." *McCarthy v. Kleindienst*, 741 F.2d 1406, 1413 n. 7 (D.C.Cir.1984); *accord Mizokami Bros. v. Mobay Chem. Corp.*, 660 F.2d 712, 718 n. 8 (8th Cir.1981); *Rotermund v. United States Steel Corp.*, 474 F.2d 1139, 1145 (8th Cir.1973).

The Bojanskis cannot establish the underlying tort of interference with a contractual relationship, because sovereign immunity for such has not been waived. Thus, there can be no actionable civil conspiracy claim against the defendants. Therefore, the district court properly dismissed the civil conspiracy claim against them.

CONCLUSION

In summary, we conclude that the district court for Douglas County properly dismissed all of the Bojanskis' claims against the defendants except for the claim for invasion of privacy, as sovereign immunity for such a claim has been waived by the Legislature. Therefore, this claim, given the standard for the resolution of a motion to dismiss, survives, as the Bojanskis have met the standard of stating a claim to relief on this basis that is plausible on its face. Therefore, we remand the claim for invasion of privacy to the district court for further proceedings. In all other respects, the district court's decision on the motion to dismiss is affirmed.

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