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ineffective assistance of trial counsel relating to the allegation that counsel failed to utilize Harper's alleged inconsistent statement to Hayes that Poe was innocent.

CONCLUSION

We affirm the judgment of the trial court in all respects except for the denial of an evidentiary hearing on the issue of whether defense counsel was ineffective for failing to pursue impeachment of Harper with his alleged inconsistent statement. We reverse in part, and remand with directions to conduct an evidentiary hearing on this issue.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., not participating.

PROFESSIONAL MANAGEMENT MIDWEST, INC., ET AL., APPELLANTS, V. LUND COMPANY, APPELLEE.

826 N.W.2d 225

Filed December 7, 2012. No. S-11-948.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Actions: Torts: Negligence.** Whether a statute includes an implied right of action is distinct and separate from the issue whether a statute creates a duty in tort which can be enforced via a negligence action.
4. **Statutes: Actions: Legislature: Intent.** Whether a statute creates a private right of action depends on the statute's purpose and whether the Legislature intended to create a private right of action.
5. **Actions: Legislature: Intent.** Without legislative intent to create not just a private right but also a private remedy, courts cannot create an implied cause of action, no matter how desirable that might be as a policy matter or how compatible with the statute.
6. **Appeal and Error.** The party appealing must point out the factual and legal bases that show the error in the lower court's decision.

7. ____. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.
8. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
9. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.
10. **Torts: Intent: Proof.** To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
11. **Summary Judgment.** In the summary judgment context, a fact is material only if it would affect the outcome of the case.
12. **Brokers: Real Estate: Words and Phrases.** Broadly speaking, a broker is any person who (1) negotiates or attempts to negotiate the listing, sale, purchase, exchange, rent, lease, or option for any real estate or improvements thereon; (2) assists in procuring prospects or holds himself or herself out as a referral agent for the purpose of securing prospects for these purposes; (3) collects rents or attempts to collect rents; (4) gives a broker's price opinion or comparative market analysis; or (5) holds himself or herself out as engaged in any of the foregoing.
13. ____: ____: ____. A designated broker is an individual holding a broker's license who has full authority to conduct the real estate activities of a real estate business.
14. **Brokers: Words and Phrases.** An associate broker is a person who has a broker's license and who is employed by another broker to participate in any activity in which a broker engages.
15. ____: ____. A salesperson is anyone employed by a broker who is not himself or herself a licensed broker.
16. ____: ____. Associate brokers and salespersons under the supervision of a designated broker are called affiliated licensees.
17. ____: ____. Once engaged in a brokerage relationship with a client, the designated broker and affiliated licensees are called licensees.
18. **Brokers: Agents: Words and Phrases.** Within the context of a brokerage relationship, which is an agency relationship, a licensee is the limited agent of the client.
19. **Real Estate: Agents: Words and Phrases.** A single agent represents only one party in a real estate transaction.

20. **Real Estate: Agents.** Unless there is an agreement specifically designating a limited agent as a seller's agent, a landlord's agent, a subagent, or a dual agent, the limited agent is considered a buyer's or tenant's agent.
21. **Brokers: Agents: Words and Phrases.** A dual agent has entered into a brokerage relationship with and therefore represents both the seller and buyer or both the landlord and tenant.
22. **Brokers: Agents.** A designated broker is not considered to be a dual agent even though his or her affiliated licensees represent parties on both sides of the transaction so long as the broker exercises his or her powers to appoint in writing those affiliated licensees who will be acting as limited agents of the client to the exclusion of all other affiliated licensees.
23. **Brokers: Agents: Words and Phrases.** A subagent is a designated broker, together with his or her affiliated licensees, engaged by another designated broker to act as a limited agent for a client.
24. **Brokers.** According to Neb. Rev. Stat. § 76-2423(1) (Reissue 2009), the fiduciary relationship between a broker and client shall commence at the time that the licensee begins representing a client and continue until performance or completion of the representation.
25. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
26. **Brokers: Agency.** A brokerage relationship is a limited agency relationship.
27. **Brokers: Statutes.** With certain exceptions, the statutes governing brokerage relationships supersede any common-law duties and responsibilities of brokers, including those of a fiduciary nature.
28. **Brokers.** A broker's commission generally becomes payable on completion of the transaction which the broker was employed to negotiate, unless there is a stipulation in the contract of employment to the contrary.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Theodore R. Boecker, Jr., of Boecker Law, P.C., L.L.O., for appellants.

Jennifer D. Tricker and Robert A. Stark, of Baird Holm, L.L.P., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and CASSEL, JJ.

CASSEL, J.

I. INTRODUCTION

Professional Management Midwest, Inc. (PMMI), and two of its officers brought suit against Lund Company (Lund), a

brokerage firm, to recover damages that allegedly resulted when the president of PMMI independently engaged Lund's services to locate and lease new office space while PMMI was still liable under a previous lease, which PMMI later breached. The district court granted summary judgment in favor of Lund after concluding, for various reasons, that the brokerage company was not liable to PMMI for engaging in such actions under the theories of inducement, tortious interference, or negligence. Finding no error in the district court's judgment, we affirm.

II. BACKGROUND

PMMI is a corporation that provides health care management consulting in Nebraska and neighboring states. At all times relevant to this case, Donald Pedersen, James W. Huntington, and Tony C. Clark were the sole officers and shareholders of PMMI. For several years, Pedersen served as president of the corporation.

In 2005, PMMI leased office space at 4905 South 107th Avenue, Omaha, Nebraska (107th Avenue property), from William and Mary Doucette, the landlords of the 107th Avenue property. Alvin Shipps and Mark Thurber served as real estate agents for PMMI in the transaction. Both Shipps and Thurber were affiliated with Lund. Mark Covert, also an agent at Lund, served as both listing agent and property manager for the Doucettes. Pedersen, as PMMI's president, initially signed a "Standard Intent to Lease Agreement," which set forth the terms of the proposed lease. On behalf of PMMI, Pedersen later signed a business property lease for the 107th Avenue property (107th Avenue lease). The lease was for a term of 5 years 1 month, to begin on September 15, 2005. The lease provided that PMMI would be held in default or breach of the lease if, among other things, it failed to pay rent when due or vacated or abandoned the premises. Upon default, the Doucettes would be allowed to retake the premises, terminate the lease, and recover from the tenant all damages proximately resulting from the breach. Pedersen, Huntington, and Clark signed personal guarantees as part of the 107th Avenue lease.

Sometime in late 2006, PMMI began having trouble making timely rent payments under the 107th Avenue lease. These financial troubles ultimately motivated Pedersen to contact Shipps for help in finding cheaper office space, and on January 17, 2007, Pedersen signed a lease, in his personal capacity, for office space at 11711 Arbor Street, Suite 215, in Omaha (Arbor Street property). Immediately upon signing the lease, Pedersen moved PMMI's equipment and staff from the 107th Avenue property to the Arbor Street property.

Once Covert learned that PMMI had vacated the 107th Avenue property, he sent a letter to Pedersen to "remind" him that PMMI was obligated under the lease until October 15, 2010. Covert had previously sent Pedersen a notice of default on January 22, 2007. On February 7, Covert prepared a "Commercial Tenant's Notice to Vacate" and sent the notice to his superiors at Lund, informing them that PMMI had vacated the 107th Avenue property effective February 1. At some point around this time, Pedersen tendered his 107th Avenue property keys to Covert. However, in a February 20 letter, Covert stated: "Landlord has not accepted surrender of the Premises. The payment of your rental obligations shall be required for the remaining term of the lease."

Soon thereafter, the Doucettes filed a complaint against PMMI, Pedersen, Huntington, and Clark to collect damages for breach of the 107th Avenue lease. In the district court's ultimate ruling on the Doucettes' complaint, it found that PMMI breached the lease and that Pedersen, Huntington, and Clark were joint and several guarantors but entered judgment against Pedersen alone in the amount of $96,971.50. The court dismissed the Doucettes' claim against Huntington and Clark with prejudice. Nevertheless, in April or May 2007, Huntington and Clark each individually paid $20,000 to the Doucettes.

Following the district court's June 2008 finding that PMMI breached the 107th Avenue lease but prior to the judgment against Pedersen in April 2010, PMMI, Huntington, and Clark (collectively appellants) initiated the instant case against Lund for inducement to breach a lease, tortious interference with a business relationship, and negligence.

Lund filed a motion for summary judgment in February 2011, and both parties adduced evidence at a hearing on March 18.

On October 18, 2011, the district court granted the motion for summary judgment. The court made findings related to the scope of Lund's liability, whether there was inducement to breach a lease, whether there was tortious interference, and Lund's duty to appellants for purposes of negligence. We summarize only those findings of the court with which appellants take issue.

The district court first considered whether there was a private right of action for inducement to breach. Appellants alleged that such a right of action was created by Neb. Rev. Stat. § 81-885.24(13) (Reissue 2008), which gives the State Real Estate Commission power to censure, suspend the license of, or impose a civil fine on a licensed broker if he or she has been found guilty of "[i]nducing any party to a contract of sale or lease to break such contract for the purpose of substituting, in lieu thereof, a new contract with another principal." Appellants had argued to the court that a violation of this licensure statute could be used to prove breach in the same manner that violation of a traffic law could be used to establish negligence of the driver. The court did not accept this reasoning. It stated:

> First, with regard to the alleged "inducement," this case does not involve a claim of negligence. Both cases cited by [appellants] are negligence cases. Second, this is a code of conduct established by the [State] Real Estate Commission for real estate agents and brokers. Violation can lead to discipline, but there is nothing in Nebraska law that would allow an individual to bring a private civil action against an agent or broker for violation of this prohibition.

Despite having found that there was no private right of action for inducement to breach, the district court engaged in a factual analysis of this claim and concluded that Lund did not engage in any actions which would constitute inducement.

The district court similarly found that Lund did not engage in actions which would constitute tortious interference, because

there was no "unjustified intentional act on the part of Lund and/or any of its agents." The court concluded that there was "no evidence to support this allegation."

Finally, the district court discussed whether Lund owed a duty to appellants at the time of PMMI's breach in 2007. The court determined that Lund owed no duty to Huntington or Clark, because they were guarantors. Neither did Lund owe a duty to PMMI, according to the court, because "the agency relationship between PMMI and Lund terminated when the 107th Avenue Lease began" in 2005. As such, "[t]hat Pedersen chose to contact Lund to secure the Arbor Street property in 2007 and negotiate a lease that Pedersen signed in his personal capacity, not on behalf of PMMI, is clearly not a breach of duty, if such a duty even exists, that Lund may have to PMMI."

Despite this conclusion, the district court again undertook a factual analysis of appellants' negligence claim. It reasoned that "expert testimony is necessary to support a claim of breach of the standard of care in this case because the alleged negligence cannot be presumed to be within the comprehension of laypersons." Appellants had not offered any expert testimony, so the court concluded that "[e]ven if, *arguendo*, such a duty did exist, there is absolutely no evidence in the record as to the standard of care that is owed by a real estate agent to PMMI, Clark or Huntington." (Emphasis in original.)

Because the district court found that appellants' claims of inducement to breach a lease, tortious interference, and negligence had no merit, it granted summary judgment in favor of Lund.

Appellants timely appealed, and pursuant to statutory authority,[1] we moved the case to our docket.

III. ASSIGNMENTS OF ERROR

Appellants allege, restated and reordered, that the district court erred in (1) concluding that (a) there is no private cause of action under § 81-885.24(13) against a real estate broker for

[1] See Neb. Rev. Stat. § 24-1106 (Reissue 2008).

inducement to breach a contract of sale or lease and (b) there was insufficient evidence to find that Lund induced a breach of the 107th Avenue lease, (2) concluding that there was insufficient evidence to find that Lund tortiously interfered with PMMI's lease agreement with the Doucettes, (3) concluding that PMMI's agency relationship with Lund terminated when the 107th Avenue lease began, (4) concluding that there was insufficient evidence to find that Lund breached its fiduciary duties, (5) concluding that appellants needed expert testimony to establish the standard of care owed by Lund, and (6) granting Lund's motion for summary judgment because there were no material issues of fact.

IV. STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[2]

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[3]

V. ANALYSIS

1. Inducement to Breach Lease

Appellants argue that the district court erred both in determining that § 81-885.24(13) did not create a private cause of action for inducement to breach a lease and in finding that even if there were a private cause of action, there was insufficient evidence to find inducement. We discuss each of these assignments of error in turn.

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[2] *Heritage Bank v. Bruha*, 283 Neb. 263, 812 N.W.2d 260 (2012).

[3] *Westin Hills v. Federal Nat. Mortgage Assn.*, 283 Neb. 960, 814 N.W.2d 378 (2012).

(a) Private Cause of Action Under § 81-885.24(13)

Appellants assign error to the district court's conclusion that § 81-885.24(13) did not create a private right of action against a real estate broker for inducement to breach a contract of sale or lease. Section 81-885.24(13) is part of the Nebraska Real Estate License Act[4] and gives the State Real Estate Commission power to censure, suspend the license of, or impose a civil fine on a licensed agent or broker if he or she has been found guilty of the unfair trade practice of "[i]nducing any party to a contract of sale or lease to break such contract for the purpose of substituting, in lieu thereof, a new contract with another principal."[5]

Before the district court and on appeal, appellants' argument for this private right of action is based in negligence. They argue that a violation of § 81-885.24(13) could be used to prove breach of a duty for purposes of negligence in the same manner as "violations [of a traffic law] can be utilized to establish negligence [of] a driver."[6]

[3] But as the Restatement (Third) of Torts explains, "[t]he body of law addressing [whether an implied right of action should be found in a statute] is robust, is distinct from tort law, and entails an assessment of legislative action."[7] Nevertheless, "[c]ourts frequently have not made a clear distinction between implied rights of action and statutorily supported tort duties when addressing whether a private claim can be maintained."[8] On occasion, we have not made this distinction clear. For example, in *Strauel v. Peterson*,[9]

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[4] See Neb. Rev. Stat. §§ 81-885 to 81-885.55 (Reissue 2008 & Cum. Supp. 2012).

[5] § 81-885.24(13).

[6] See brief for appellants at 15.

[7] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 38, Reporter's Note comment *c*. at 736 (Proposed Final Draft No. 1, 2005) (approved in 2011).

[8] *Id*.

[9] *Strauel v. Peterson*, 155 Neb. 448, 52 N.W.2d 307 (1952).

this court responded to an argument that a statute created a duty in tort by considering whether an implied right of action accrued from the statute. In that case, we held that there was no private right of action despite the fact that the question on appeal was framed by the parties as one of statutorily created duties in tort. In the face of this blurred distinction, we now recognize that whether a statute includes an implied right of action is distinct and separate from the issue whether a statute creates a duty in tort which can be enforced via a negligence action.

[4,5] This distinction exposes the problem in appellants' argument for a private cause of action for inducement under § 81-885.24(13). Although claiming to argue for recognition of a private right of action, the substance of appellants' argument in no way supports such a finding. Whether a statute creates a private right of action depends on the statute's purpose and whether the Legislature intended to create a private right of action.[10] Without legislative intent "to create not just a private right but also a private remedy," courts cannot create an implied cause of action, "no matter how desirable that might be as a policy matter or how compatible with the statute."[11] Appellants argue neither that the Legislature intended to create a private right of action against offending licensees under § 81-885.24(13) nor that the purposes of the statute would support implying such a right. In making their argument for a private right of action, appellants address solely the question whether § 81-885.24(13) creates a duty in tort, the violation of which is evidence of negligence. This is a distinct issue that is irrelevant to the question whether § 81-885.24(13) creates an implied right of action.

[6] In their reply brief, appellants seem to acknowledge that legislative purpose and intent are the sole factors relevant to the implied right of action inquiry, but push the burden of presenting evidence of such intent or purpose onto Lund. In effect, appellants argue that Lund has the burden on appeal of

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[10] See, e.g., *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011), *cert. denied* 565 U.S. 967, 132 S. Ct. 463, 181 L. Ed. 2d 302.

[11] *Id.* at 604, 799 N.W.2d at 296.

proving that the district court ruled correctly. Such an argument is wholly incorrect and ignores the basic proposition that the party appealing "must point out the factual and legal bases that show the error" in the lower court's decision.[12]

Because appellants fail to address the factors relevant to deciding whether a private right of action exists, we do not reach this assignment of error.

(b) Insufficient Evidence of Inducement

[7] Given that we do not reach the previous assignment of error regarding § 81-885.24(13), we need not review the district court's finding that appellants adduced insufficient evidence to find that Lund induced a breach of the 107th Avenue lease. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[13]

2. Tortious Interference

(a) Insufficient Evidence of Tortious Interference

Appellants allege that the district court erred in concluding that there was insufficient evidence to find tortious interference with the 107th Avenue lease, arguing that on this issue and others, the court's order was "drafted as if the [c]ourt reviewed evidence, made factual determinations and entered an [o]rder after a trial."[14] Because (1) appellants misconstrue the court's finding, ignoring that it was a finding of sufficiency as a matter of law, and (2) it is not improper to consider whether a party adduced sufficient evidence to meet its evidentiary burden in summary judgment, this assignment of error lacks merit.

First, appellants' argument that the district court erred in concluding that there was insufficient evidence misconstrues the court's finding. The court neither employed the phrase

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[12] *Mandolfo v. Mandolfo*, 281 Neb. 443, 452, 796 N.W.2d 603, 612 (2011).

[13] *In re Trust Created by Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011).

[14] Brief for appellants at 11.

"insufficient evidence" nor spoke in terms of sufficiency of evidence. Rather, the court stated that it "can find no evidence to support this allegation" of tortious interference. In making this finding, the court was not weighing conflicting evidence. As the court's subsequent analysis revealed, it was addressing whether appellants' evidence was satisfactory legal proof of tortious interference. In other words, the court was weighing the sufficiency of the evidence *as a matter of law*.

[8,9] Second, the district court's analysis was proper because consideration of a motion for summary judgment also requires a court to consider the quantitative sufficiency of the evidence. The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.[15] This standard explicitly invokes the idea of sufficiency of evidence. Furthermore,

> [a]fter the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[16]

Courts also speak in terms of "sufficiency" when considering whether the nonmoving party met this burden. In fact, this court has defined the decisive question on appeal from summary judgment as "whether [the nonmoving party] produced sufficient evidence to present a genuine issue of material fact."[17] Indeed, any burden of proof necessarily requires a court to determine whether the party with the burden of proof adduced sufficient evidence to meet that burden. In claiming that the district court erred in finding that there was insufficient evidence to find that Lund tortiously interfered with the

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[15] *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012).

[16] *Id.* at 578, 810 N.W.2d at 747.

[17] *Deviney v. Union Pacific RR. Co.*, 280 Neb. 450, 455, 786 N.W.2d 902, 907 (2010).

107th Avenue lease, appellants overlook the evidentiary burdens applicable in the summary judgment procedure.

In the instant case, appellants were in the position of the nonmoving party, and thus, once Lund adduced sufficient evidence to show that it was entitled to judgment as a matter of law if Lund's evidence remained uncontroverted at trial, they had the burden of showing the existence of material issues of fact that would have precluded judgment as a matter of law in favor of Lund, the moving party. Because appellants had a burden of proof in the summary judgment hearing, the district court did not err in considering whether appellants produced sufficient evidence to meet that burden of proof.

(b) Existence of Material Issue of Fact

Lund was the moving party and carried the initial burden of showing its entitlement to judgment on the tortious interference claim. As the original plaintiffs, appellants would have had the burden of proving the elements of tortious interference at trial. Failure to meet this burden would have resulted in judgment for Lund. Consequently, Lund was entitled to judgment as a matter of law at the summary judgment stage if it affirmatively showed that appellants would be unable to prove one or more of the elements of tortious interference at trial.

[10] To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.[18]

Although the procedural history is slightly different from that of the instant appeal, the case of *Aon Consulting v. Midlands Fin. Benefits*[19] is instructive in considering whether

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[18] *Recio v. Evers*, 278 Neb. 405, 771 N.W.2d 121 (2009).

[19] *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008).

appellants could prove the elements of tortious interference. In *Aon Consulting*, William Pearson left his position with Aon Consulting, Inc. (Aon), to take a similar position with Midlands Financial Benefits, Inc. (Midlands), whereupon he proceeded to breach a nonsolicitation agreement he had with Aon. Aon brought suit against Midlands for tortious interference, but the action was dismissed on Midlands' motion for directed verdict. On appeal, this court agreed with the district court that Aon failed to prove an unjustified intentional act of interference on the part of Midlands. In so concluding, this court highlighted three pertinent facts: (1) "Pearson contacted Midlands about employment and . . . Midlands neither solicited nor recruited Pearson," (2) Pearson "told Midlands that . . . the agreement was unenforceable," and (3) "Midlands did not expect or require Pearson to solicit customers he had served while employed by Aon," which was the action that breached the nonsolicitation agreement.[20] Given these facts, this court reasoned that "the most that can be said is that Midlands hired an experienced individual who sought employment and relied in good faith upon his representation that, according to his attorney, his nonsolicitation agreement with a prior employer was unenforceable."[21] Consequently, this court held that "the district court did not err in determining that Aon presented no evidence to support a reasonable inference that Midlands intentionally and unjustifiably interfered with its contractual relationship with Pearson."[22]

For purposes of the instant appeal, it is important to note that Aon's case for tortious interference failed because of the existence of three facts: (1) Pearson established contact with Midlands, the party who allegedly interfered with Aon's contractual relationship with Pearson; (2) Pearson represented to Midlands that the nonsolicitation agreement was not enforceable, which agreement was the contract with which Midlands supposedly interfered; and (3) Midlands did not require Pearson

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[20] *Id.* at 664, 748 N.W.2d at 645.

[21] *Id.*

[22] *Id.*

to engage in the actions which ultimately breached the agreement. Together, these three facts combined to show that there was no unjustified intentional act of interference on the part of Midlands.[23]

These same three facts in the instant case establish that there was no unjustified intentional act of interference by Lund. First, it is significant that Lund did not initiate the communication with Pedersen, a fact that is not disputed by appellants. Rather, Pedersen telephoned Shipps of his own volition and requested assistance in finding cheaper office space. Second, Lund's evidence showed that Pedersen represented to Shipps, prior to viewing any property or signing the Arbor Street lease, that "he had made arrangements" with the Doucettes. Lund also produced evidence that Shipps "was of the understanding" that any liability under the 107th Avenue lease "had been taken care of." Such an understanding disproves any intent by Lund to interfere with the 107th Avenue lease, a lease Lund believed had been terminated. Third, in showing Pedersen the Arbor Street property and ultimately negotiating the Arbor Street lease, Shipps did not require Pedersen to breach the 107th Avenue lease or terminate business relations with the Doucettes. Although appellants argue that "looking for additional office space" would "necessarily" cause PMMI to stop paying rent under the 107th Avenue lease,[24] Pedersen incurred no obligation to cease making other rent payments or to withdraw from other leases by viewing the Arbor Street property or even by signing the Arbor Street lease. Thus, as in *Aon Consulting*,[25] the party that allegedly interfered did not expect or require breach of the prior business relationship.

Because Pedersen initiated contact with Shipps and represented to him that liability under the 107th Avenue lease was terminated and because the new lease negotiated by Shipps did not require Pedersen to breach the 107th Avenue lease, we

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[23] See *id*.

[24] Brief for appellants at 14.

[25] *Aon Consulting v. Midlands Fin. Benefits, supra* note 19.

find that Lund adduced sufficient evidence to disprove that it engaged in an unjustified intentional act of interference. Thus, Lund established a prima facie case for summary judgment.

[11] At this point in the summary judgment proceedings, the burden shifted to appellants to produce sufficient evidence to establish the existence of a material issue of fact that prevented judgment for Lund.[26] We recognize that appellants' evidence did call into question Lund's evidence on certain factual matters, such as how much Pedersen disclosed to Lund about his plans to vacate the 107th Avenue property and when such disclosures were made. However, not all issues of fact preclude summary judgment, but only those that are material. In the summary judgment context, a fact is material only if it would affect the outcome of the case.[27] Accordingly, because Lund showed that appellants could not prove an unjustified intentional act of interference under the precedent of *Aon Consulting*, the only way for appellants to establish a material issue of fact would have been to contradict Lund's evidence on one of the three facts identified in *Aon Consulting*.

In reviewing the record, we find no evidence to contradict that Pedersen established contact with Shipps, that Pedersen told Shipps that he had made arrangements with the Doucettes to prevent liability under the 107th Avenue lease, and that the Arbor Street lease did not require Pedersen to breach the 107th Avenue lease. Because appellants did not show the existence of material issues of fact on these issues, the district court did not err in holding that appellants' evidence failed to support a finding of tortious interference.

3. Negligence

Three of appellants' assignments of error relate to their negligence claim against Lund. The first challenges the district court's finding that the agency relationship arising from Lund's representation of PMMI in leasing the 107th Avenue property terminated prior to Lund's supposed breach of its duties under that relationship. The second addresses the sufficiency of

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[26] See *In re Estate of Cushing, supra* note 15.

[27] *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

appellants' evidence of breach. And the third finds error with the court's holding that appellants were required to adduce expert testimony to establish the appropriate standard of care. Because of the result we reach, we discuss only the first of these assignments of error.

(a) Duration of Agency Relationship Between PMMI and Lund

Appellants' negligence claim against Lund depended upon a finding that Lund owed fiduciary duties to PMMI at the time of the alleged breach. The relationship between Lund and PMMI began when Pedersen engaged Lund's services to find new office space in 2005. The district court determined that this relationship concluded when the 107th Avenue lease was signed and that Lund owed no continuing duties to PMMI when Pedersen signed the Arbor Street lease in 2007. Appellants argue that the relationship with Lund and the resulting fiduciary duties continued until at least that latter point in time. As such, this assignment of error requires us to define and delimit the agency relationship between a real estate broker and the lessee he or she represents. We need not determine whether Lund's actions breached the fiduciary duties owed within that relationship, because we find that the agency relationship between Lund and PMMI ended no later than October 4, 2005, when Lund received its commission.

In 1994, the Legislature passed a series of statutes "to codify in statute the relationships between real estate brokers or salespersons and persons who are sellers, landlords, buyers, or tenants of rights and interests in real property."[28] Because these statutes "shall supersede the duties and responsibilities of the parties under the common law, including fiduciary responsibilities of an agent to a principal,"[29] appellants' citation to various cases defining the fiduciary duties owed by a real estate broker and their discussion of foreseeability of harm as creating duties are both irrelevant to our consideration of this issue.

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[28] Neb. Rev. Stat. § 76-2401 (Reissue 2009).

[29] Neb. Rev. Stat. § 76-2429 (Reissue 2009).

Before we can define the relationship between Lund and PMMI, it is first necessary to understand the terminology used in the statutes and to identify the parties according to those terms.

[12] Neb. Rev. Stat. §§ 76-2401 to 76-2430 (Reissue 2009) govern the agency relationships between what we commonly refer to as a "broker" and his or her clients.[30] Broadly speaking, a broker is any person who (1) "negotiates or attempts to negotiate the listing, sale, purchase, exchange, rent, lease, or option for any real estate or improvements thereon"; (2) "assists in procuring prospects or holds himself or herself out as a referral agent for the purpose of securing prospects" for these purposes; (3) "collects rents or attempts to collect rents"; (4) "gives a broker's price opinion or comparative market analysis"; or (5) "holds himself or herself out as engaged in any of the foregoing."[31] When a client engages a broker to perform any of the above-listed services, the resulting agency relationship is called a brokerage relationship.[32]

[13] Within the context of a brokerage relationship, the broker is categorized as either a designated broker or an affiliated licensee of the designated broker. A designated broker is "an individual holding a broker's license who has full authority to conduct the real estate activities of a real estate business."[33] In a corporation such as Lund, the board of directors identifies a designated broker for the entire real estate business to whom is given "full authority to conduct the real estate activities of the . . . corporation."[34]

[14-17] In all real estate operations other than sole proprietorships, the designated broker retains associate brokers or salespersons to assist with the work of serving clients. An associate broker is "a person who has a broker's license and who is employed by another broker to participate in any activity [in

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[30] See § 76-2401.

[31] § 81-885.01(2) (definition as adopted by § 76-2405).

[32] See § 76-2405.

[33] § 81-885.01(4) (definition as adopted by § 76-2410).

[34] *Id.*

which a broker engages]."[35] A salesperson is anyone employed by a broker who is not himself or herself a licensed broker.[36] Associate brokers and salespersons under the supervision of a designated broker are called affiliated licensees.[37] Once engaged in a brokerage relationship with a client, the designated broker and affiliated licensees (either associate brokers or salespersons) are called licensees.[38]

[18] Within the context of a brokerage relationship, which, we recall, is an agency relationship, a licensee is the limited agent of the client.[39] There are three types of limited agents, each of which owes slightly different fiduciary duties to the client: single agent, dual agent, and subagent.[40]

[19,20] A single agent "represents only one party in a real estate transaction."[41] Depending on the client, a single agent is more specifically called the buyer's agent, the landlord's agent, the seller's agent, or the tenant's agent.[42] Unless there is an agreement specifically designating the limited agent as the seller's agent, the landlord's agent, a subagent, or a dual agent, the limited agent is considered the buyer's or tenant's agent.[43]

[21,22] A dual agent "has entered into a brokerage relationship with and therefor[e] represents both the seller and buyer or both the landlord and tenant."[44] Dual agency requires the written informed consent of all parties to the real estate transaction.[45] A designated broker is not considered to be a dual agent even though his or her affiliated licensees represent parties on

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[35] § 81-885.01(3) (definition as adopted by §§ 76-2404 and 76-2412).

[36] See § 81-885.01(6) (definition as adopted by §§ 76-2404 and 76-2412).

[37] See § 76-2404.

[38] See § 76-2412.

[39] See §§ 76-2413 and 76-2416.

[40] See § 76-2416.

[41] § 76-2414.

[42] See *id*.

[43] See § 76-2416(2).

[44] § 76-2411.

[45] See *id*.

both sides of the transaction so long as the designated broker exercises his or her powers to "appoint in writing those affiliated licensees who will be acting as limited agents of th[e] client to the exclusion of all other affiliated licensees."[46] Section 76-2427 explicitly provides that "[a] designated broker shall not be considered to be a dual agent solely because he or she makes an appointment under this section."

[23] A subagent is "a designated broker, together with his or her affiliated licensees, engaged by another designated broker to act as a limited agent for a client."[47]

Having thus outlined the various terms used in the statutory scheme, we turn to the case at hand. Recall that we are concerned only with the relationship between Lund and PMMI in 2005. While Lund did enter into a second brokerage relationship with PMMI, or at least Pedersen, in late 2006 or early 2007, it is that second relationship that appellants allege breached the continuing duties arising under the first brokerage relationship in 2005. As such, the brokerage relationship with which we are concerned is that arising from the leasing transaction in 2005.

In that brokerage relationship, the client was PMMI. Shipps and Thurber together were licensees, specifically tenant's agents. Shipps and Thurber were also affiliated licensees, whose designated broker was John Lund.

Although outside the specific brokerage relationship between Lund and PMMI, we note that Covert was also an affiliated licensee of John Lund and served as a licensee to the Doucettes for lease of the 107th Avenue property. Dual agency was argued before the district court, but appellants did not assign error to the court's finding that Lund was not engaged in dual agency. Therefore, we need not address this finding.

[24] As tenant's agents, Shipps and Thurber undoubtedly owed fiduciary duties to PMMI for the duration of the brokerage relationship.[48] However, § 76-2423 is clear that once the

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[46] § 76-2427.

[47] § 76-2415.

[48] See § 76-2418(1).

brokerage relationship terminated, Shipps and Thurber—and, by extension, Lund—ceased to owe duties to PMMI except for limited duties of confidentiality and accounting for money and property received during the relationship. According to statute, the fiduciary relationship between a broker and client "shall commence at the time that the licensee begins representing a client and continue until performance or completion of the representation."[49] Thus, to determine when Lund's representation of PMMI was performed or completed, we must first define and delimit that representation.

[25] Appellants urge us to characterize the relationship between PMMI and Lund as almost unlimited, arguing that Lund owed a "continuing duty"[50] for the duration of the 107th Avenue lease and that Lund should be liable for any foreseeable injury even if the company was not "still technically an 'agent' within an active agency."[51] But such an interpretation of a brokerage relationship and the duties arising therefrom conflicts with the statutory scheme governing those relationships, as our analysis below will reveal. Because our standard of review dictates that we interpret the statutes governing brokerage relationships "so that different provisions are consistent, harmonious, and sensible,"[52] we reject appellants' argument on the scope of a brokerage relationship.

[26,27] A brokerage relationship is a limited agency relationship,[53] and the services a broker can offer to a client are limited by statute.[54] When the Legislature adopted the statutes governing brokerage relationships in 1994, it made clear that the resulting statutory scheme would supersede any common-law duties and responsibilities of brokers, including those of

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[49] § 76-2423(1)(a).

[50] Brief for appellants at 25.

[51] *Id.* at 24.

[52] *AT&T Communications v. Nebraska Public Serv. Comm.*, 283 Neb. 204, 211, 811 N.W.2d 666, 672 (2012).

[53] See §§ 76-2416 to 76-2418.

[54] See § 81-885.01(2) (definition as adopted by § 76-2405).

a fiduciary nature.[55] Accordingly, with certain exceptions not applicable here,[56] the fiduciary duties owed by a broker to his client now derive only from performance of these limited services.

In the instant case, PMMI engaged Lund to provide two of the brokerage services defined by statute: "procuring prospects . . . for the . . . renting [or] leasing . . . of any real estate" and "negotiat[ing] or attempt[ing] to negotiate the . . . rent [or] lease . . . for any real estate."[57] Because PMMI was relying upon Lund to locate office space available to lease, we can also define the relationship between PMMI and Lund as that of tenant and tenant's agent, respectively, in which case Lund owed duties for its representation of PMMI as the tenant "in a leasing transaction."[58]

Based on these statutory provisions, Lund's representation of PMMI had three purposes: (1) to identify acceptable rental property, (2) to negotiate the lease, and (3) to execute the leasing transaction. Once these three things were accomplished, the representation was fully performed and any fiduciary duties owed by Lund to PMMI ceased. Following our rules of statutory interpretation, we give the undefined terms in these provisions their plain, ordinary meaning.[59]

Our case law does not define when a leasing transaction terminates. Under Neb. Rev. Stat. § 36-105 (Reissue 2008), it is clear that a lease contract for longer than 1 year becomes enforceable only once it is "signed by the party by whom the lease or sale is to be made." But there is no corresponding statutory provision or proposition in case law defining when the leasing transaction, as opposed to the lease contract, is terminated.

[28] We are, however, able to ascertain that the leasing transaction in the instant case—and, by consequence, Lund's

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[55] See § 76-2429.

[56] See § 76-2422(6).

[57] § 81-885.01(2) (definition as adopted by § 76-2405).

[58] § 76-2414(4).

[59] See *J.M. v. Hobbs*, 281 Neb. 539, 797 N.W.2d 227 (2011).

representation of PMMI—was terminated long before Lund's alleged breach in 2007. A broker's commission generally "becomes payable on completion of the transaction which the broker was employed to negotiate, unless there is a stipulation in the contract of employment to the contrary."[60] Thus, if a broker is employed as a tenant's agent whose purpose is to represent the tenant in a leasing transaction, as Shipps was in the instant case, the broker's commission can be disbursed only after the leasing transaction—the underlying transaction for which the commission was earned—is completed. Lund received the commission for its representation of PMMI on October 4, 2005. Therefore, the leasing transaction for which Shipps represented PMMI was concluded by October 2005 at the very latest. We need not determine whether the leasing transaction actually concluded prior to that date because it is clear that Lund's representation of PMMI concluded long before Pedersen engaged Lund to search for cheaper office space property in late 2006 or early 2007. The district court did not err in holding that Lund's fiduciary relationship with PMMI terminated prior to 2007.

(b) Other Assignments of Error Related to Negligence

Because we find that any duties owed by Lund to PMMI by virtue of their brokerage relationship terminated prior to the alleged breach of those duties in 2007, we need not reach appellants' assignment that the district court erred in finding that there was insufficient evidence of breach.[61] Because Lund owed PMMI no duties at the time of the alleged breach, neither is there need to discuss whether the court erred in requiring appellants to adduce expert testimony to prove the standard of care owed by Lund.

4. Summary Judgment

Finally, appellants generally allege that the district court erred in granting summary judgment in favor of Lund. In the

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[60] 12 C.J.S. *Brokers* § 211 at 275 (2004).

[61] See *In re Trust Created by Hansen, supra* note 13.

separate argument section for this assignment, appellants make mostly factual arguments as to why the court should not have granted summary judgment in favor of Lund, attempting to show that there were material issues of fact. Appellants' only legal argument under this assignment of error asserts that Lund was liable for the negligent acts of its agents, a legal conclusion with which the district court agreed. Otherwise, appellants do not advance any legal arguments distinct from those we have already dismissed as lacking merit.

Given our previous findings that there was no tortious interference and that Lund owed no duty to PMMI in 2007, which prevents a finding of negligence,[62] and without recognition of an implied private cause of action for inducement, appellants are legally barred from succeeding on any of their theories of relief. For these same reasons, any issues of fact that exist are not considered material.[63]

Because appellants' purely factual arguments are of no avail in challenging these legal bars to relief or in raising material issues of fact, we find no merit to this assignment of error. The district court did not err in granting summary judgment in favor of Lund.

VI. CONCLUSION

We hold that Lund, as a real estate broker, cannot be held liable to PMMI for inducement, tortious interference, or negligence for assisting Pedersen to enter into a new lease while knowing that PMMI remained liable under a previous lease. From our conclusion that the limited brokerage relationship between Lund and PMMI was terminated, at the very latest, upon the payment of Lund's commission regarding the 107th Avenue lease, it necessarily follows that Lund owed no fiduciary duties to PMMI at the time of the alleged breach of those duties in 2007. As a matter of law, PMMI's claim that Lund engaged in an unjustified intentional act of interference by assisting Pedersen in locating new office space fails because

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[62] See *Spear T Ranch v. Nebraska Dept. of Nat. Resources*, 270 Neb. 130, 699 N.W.2d 379 (2005).

[63] See *Amanda C. v. Case, supra* note 27.

the assistance was performed at Pedersen's request, in reliance on Pedersen's representation that he had made arrangements to prevent liability under the 107th Avenue lease, and without requirement that Pedersen breach any existing contractual relationships. As for Lund's liability for inducing the breach of a lease under § 81-885.24(13), we do not reach the issue because appellants' arguments for an implied private right of action focus solely on whether the statute imposed a duty in tort—a distinct and separate issue. These holdings make it unnecessary to consider appellants' remaining assignments of error. Because we either do not reach appellants' assignments of error or find them to be without merit, we affirm the judgment of the district court.

AFFIRMED.

McCORMACK and MILLER-LERMAN, JJ., not participating.

INTERCALL, INC., APPELLANT, V.
EGENERA, INC., APPELLEE.
824 N.W.2d 12

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1. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.
2. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
3. **Verdicts: Appeal and Error.** A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
4. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.
5. **Contracts: Fraud.** A contract is voidable by a party if his or her manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which he or she is justified in relying.
6. ____: ____. A misrepresentation induces a party's manifestation of assent if it substantially contributes to the party's decision to manifest his or her assent.
7. ____: ____. A party who has been induced to enter into a contract by a material misrepresentation has, upon discovery of such misrepresentation, an election of remedies: either to affirm the contract and sue for damages or to disaffirm the