RICHARD McCAULLEY AND MICHELLE McCAULLEY, HUSBAND AND WIFE, APPELLANTS, V. NEBRASKA FURNITURE MART, INC., A NEBRASKA CORPORATION, APPELLEE.

838 N.W.2d 38

Filed August 13, 2013. No. A-12-463.

1. **Uniform Commercial Code: Contracts: Sales.** Neb. U.C.C. § 2-201 (Reissue 2001) provides that a contract for the sale of goods for the price of $500 or more is not enforceable unless there is a writing sufficient to indicate that a contract for sale has been made between the parties.
2. **Uniform Commercial Code: Contracts.** Under the Uniform Commercial Code, a writing is not insufficient because it incorrectly states a term agreed upon.
3. ____: ____. Neb. U.C.C. § 2-207(1) (Reissue 2001) provides that a written confirmation sent within a reasonable time after oral negotiations operates as an acceptance even though it states terms additional to those agreed upon, unless acceptance is expressly made conditional on assent to the additional terms.
4. ____: ____. Neb. U.C.C. § 2-207(2) (Reissue 2001) provides that when the contract being entered into is not between two merchants, the additional terms are to be construed as proposals for addition to the contract.
5. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute.
6. ____: ____. In construing statutory language, an appellate court attempts to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.
7. **Statutes.** It is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
8. **Uniform Commercial Code: Contracts: Notice.** Neb. U.C.C. § 2-207(2) (Reissue 2001) specifically indicates that between merchants, proposed additional terms become part of the contract unless notification of objection to them is given within a reasonable time after notice of them is received.
9. **Waiver.** When a judicial admission is invoked, the language constitutes a waiver of all controversy and renders indisputable the facts admitted, constituting a limitation of the issues.
10. **Pleadings: Waiver.** An admission made in a pleading on which the trial is had is more than an ordinary admission and is a judicial admission, constituting a waiver of all controversy so far as the adverse party takes advantage of it, limiting the issues.
11. **Contracts: Rescission.** Rescission of a contract means to abrogate, annul, avoid, or cancel it and may be effected by one of the parties declaring rescission without the consent of the other if a legally sufficient ground therefor exists.
12. ____: ____. In determining whether a rescission took place, courts look not only to the language of the parties, but to all of the circumstances.

13. **Accord and Satisfaction: Words and Phrases.** An accord and satisfaction is an agreement to discharge an existing indebtedness by rendering some performance different from that which was claimed due.
14. **Accord and Satisfaction.** To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance.
15. ____. The principle questions in determining whether a discharge by accord and satisfaction has taken place include whether the parties in fact agreed that the performance rendered should operate as a final discharge and satisfaction and whether that performance constitutes a sufficient consideration for a return promise or for a discharge.
16. ____. The question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered in full satisfaction is a question of fact.

Appeal from the District Court for Douglas County: TIMOTHY P. BURNS, Judge. Reversed and remanded for further proceedings.

Jason R. Fendrick, John G. Liakos, and Michael J. Matukewicz, of Liakos & Matukewicz, L.L.P., for appellants.

Brian T. McKernan, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

The primary dispute in this case is whether a pricing error clause became an effective part of a contract to purchase furniture entered into between Richard McCaulley and Michelle McCaulley, husband and wife, and Nebraska Furniture Mart, Inc. (NFM). There is no dispute that the parties orally agreed on terms of the contract, and there is no dispute that the pricing error clause was never discussed by the parties. There is no dispute that the pricing error clause was included in every written confirmation sent to the McCaulleys by NFM. After considering the possible ways in which the McCaulleys could be held to have agreed to the pricing error clause's inclusion in the contract, we conclude that the McCaulleys never assented

to the clause's inclusion in the contract and that the district court erred in finding otherwise.

II. BACKGROUND

The McCaulleys appeal an order of the district court for Douglas County, Nebraska, finding in favor of NFM in this breach of contract action. On appeal, the McCaulleys challenge the district court's finding that their contract with NFM included a pricing error clause, that the clause was not ambiguous, that the clause applied to the facts of the present case, and that judgment in favor of NFM was appropriate. We find that the district court erred in finding that the pricing error clause was a part of the parties' contract, and we reverse, and remand for further proceedings.

The events giving rise to this cause of action began in April 2008, when the McCaulleys went to NFM to purchase furniture for their home. The McCaulleys sought to purchase a bed, two bed chests, and a dresser, all of which were to be special ordered by NFM on their behalf. A NFM sales associate performed an in-home consultation, determined the availability and cost of ordering the furniture for the McCaulleys, and subsequently called them with a price quote. According to Michelle, the associate quoted her a price of $4,195.20 for the bed, a price of $2,470 total for the bed chests (i.e., $1,235 each), and a price of $4,105.50 for the dresser; the total for all four pieces was $10,770.70. The McCaulleys accepted the prices quoted to them over the telephone, and were not asked to sign any document to finalize the sale. The McCaulleys paid a deposit on the furniture, for which NFM charged the McCaulleys' credit card $3,500.

Michelle testified that when the McCaulleys spoke with the sales associate on the telephone, the associate did not mention any other terms or conditions of the sale and did not mention anything about NFM's ability to revise or alter the parties' agreement because of pricing errors.

NFM sent the McCaulleys an invoice for the purchase, indicating an order date of May 6, 2008, and reflecting a total price for the four pieces of furniture of $13,240.70. The invoice indicated that the bed chests were priced at $2,470 each. Michelle

testified that the price for the bed chests agreed to during the McCaulleys' telephone conversation with the sales associate was $2,470 total (i.e., $1,235 each). Michelle testified that she called the sales associate, that the associate apologized and indicated NFM would fix the error, and that NFM then sent a revised invoice.

The revised invoice reflected a total price for the furniture of $10,840.70. Michelle testified that the price was still slightly different than what the parties had agreed to during the initial telephone conversations, but that it was close enough that the McCaulleys did not seek any additional changes. For this purchase totaling nearly $11,000, the total difference between the price orally agreed to and the price reflected on the revised invoice was $70.

Both the initial invoice and the revised invoice were two-page documents. The second page of both included a paragraph that provided as follows:

> 9. MISCELLANEOUS
>
> a. Pricing or mathematical errors are subject to revision by NFM upon written notice to Buyer.

Michelle testified that the additional terms on the second page of the invoices had never been mentioned to her by the sales associate and that the McCaulleys had not taken action to notify NFM that they were accepting any additional terms to the telephone order.

The McCaulleys' furniture had not yet arrived by August, and they contacted NFM. At that time, NFM informed the McCaulleys that "there was an issue with the pricing." Michelle testified that NFM informed them that they would need to pay a price higher than that originally agreed upon for the furniture. NFM subsequently sent another invoice to reflect the additional price, and that invoice indicated a total price of $14,550. That invoice did not include a breakdown of price for individual items and included only the total figure.

Richard testified that he received a telephone call from NFM's president in August 2008 concerning the pricing of the furniture. He testified that NFM's president told him that NFM could not complete the sale without the change in pricing and that NFM did not need to honor the original agreement of

the parties because NFM could claim there had been a pricing error.

NFM's president testified that the sales associate had made a pricing error in her original price quote to the McCaulleys because the price quoted was actually below the cost of NFM's securing the furniture from the manufacturer. He testified that the invoices sent to the McCaulleys were standard form contracts that NFM uses and that the contracts include a pricing error clause. He testified that he informed the McCaulleys that they were not under an obligation to buy the furniture at the adjusted price and that NFM would refund their deposit if they elected not to proceed.

Michelle testified that the McCaulleys then contacted a furniture store in Maryland about receiving a price quote for purchasing the furniture from them. Michelle testified that the Maryland furniture store quoted them a price of $15,789 for all of the furniture. She testified that they learned that the manufacturer was discontinuing the model of bed they were trying to purchase, so they purchased the bed from the other furniture store for $7,460, which was slightly more than $3,250 higher than the price NFM had originally quoted for the bed.

Michelle testified that NFM refunded the McCaulleys' deposit by crediting the deposit back to the McCaulleys' credit card. She testified that the McCaulleys did not take any affirmative steps to receive the refund, but also acknowledged that the McCaulleys did not take any steps to retender the deposit to NFM.

On September 26, 2008, the McCaulleys filed a complaint seeking declaratory relief. The McCaulleys alleged that they had a written purchase agreement with NFM, that they had tendered a downpayment to NFM, that NFM refused to honor the price set forth in the written purchase agreement, and that they were ready, willing, and able to honor the purchase agreement. The McCaulleys attached to the complaint a copy of the second two-page invoice that they had received from NFM as the written purchase agreement between the parties. They sought declaratory relief, damages, and/or specific performance.

On October 24, 2008, NFM answered the complaint. NFM alleged that the written purchase agreement of the parties included a pricing error provision that barred the McCaulleys' breach of contract action, and NFM set forth a variety of other alternative defenses.

On April 27, 2012, the district court entered an order rendering judgment in favor of NFM. The court found that disposition of the case was governed by the Uniform Commercial Code, that the parties initially had an oral agreement, that the written invoices contained additional terms being offered, and that the McCaulleys' notification to NFM of an error on the first written invoice and then receipt of a second written invoice containing the pricing error provision resulted in such provision's becoming part of the written contract between the parties. The court found that there was evidence a pricing error had occurred and that, accordingly, NFM had not breached its contract with the McCaulleys by providing notice of a price adjustment. This appeal followed.

III. ASSIGNMENTS OF ERROR

The McCaulleys have alleged several errors related to the court's judgment in favor of NFM. The McCaulleys allege that the district court erred in finding that the pricing error clause was a part of the parties' contract, in finding that the clause was not ambiguous, in finding that there had actually been a pricing error, and in rendering judgment in favor of NFM.

IV. ANALYSIS

The primary dispute in this case is whether the pricing error clause became an effective part of the contract entered into between the McCaulleys and NFM. There is no dispute that the parties orally agreed on terms of the contract, and there is no dispute that the pricing error clause was never discussed by the parties. There is no dispute that the pricing error clause was included in every written confirmation sent to the McCaulleys by NFM. After considering the possible ways in which the McCaulleys could be held to have agreed to the pricing error clause's inclusion in the contract, we conclude that the McCaulleys never assented to the clause's

inclusion in the contract and that the district court erred in finding otherwise.

As noted, there is no dispute in this case that the McCaulleys orally agreed to purchase a bed, two bed chests, and a dresser from NFM. During the parties' oral discussions, they agreed to prices for each piece of furniture, totaling more than $10,000. The McCaulleys paid a deposit on the furniture.

[1] Neb. U.C.C. § 2-201 (Reissue 2001) provides that a contract for the sale of goods for the price of $500 or more is not enforceable unless there is a writing sufficient to indicate that a contract for sale has been made between the parties. As such, although the McCaulleys agreed to purchase, and NFM agreed to sell, and the parties agreed on the price of the furniture, a writing was required in order to create an enforceable contract. As such, NFM sent the McCaulleys a written confirmation in the form of an invoice.

[2] The first invoice indicated the order date, listed each piece of furniture the parties had agreed the McCaulleys would purchase from NFM, and included prices for each of the pieces of furniture. The invoice, however, indicated a price for the two bed chests that was double what the parties had agreed upon during the oral discussions. At this point in time, an enforceable contract was created between the McCaulleys and NFM, because the invoice served as a writing confirming the oral agreement, even though the pricing term was incorrectly stated. See § 2-201(1) (writing is not insufficient because it incorrectly states term agreed upon).

In addition to the specific terms that the parties had agreed upon during their oral discussions, the first invoice included a second page of additional terms. There is no dispute in this case that the additional terms included on the second page of the invoice were never discussed between the parties.

The McCaulleys contacted NFM and notified NFM that the pricing reflected on the invoice was not consistent with what the parties had orally agreed to. Upon being notified that the pricing reflected on the first invoice did not accurately set forth the terms of the parties' oral agreement, NFM agreed to revise the pricing portions of the invoice and issue a revised invoice to the McCaulleys. The revised invoice reflected a total price

for the furniture that was $70 more than the total orally agreed to by the parties, and Michelle testified that although the pricing set forth on the revised invoice still did not match what the parties had orally agreed to, it was close enough that the McCaulleys were willing to accept the prices set forth on the revised invoice. There is no assertion by the parties that the McCaulleys took any affirmative action to represent to NFM they were agreeing to any change in the price or they were aware of or agreeable to any additional terms. Our review of the record does not reveal any evidence that any affirmative action or representation was made, either. The parties continued to have an enforceable contract. See § 2-201(1).

In addition to the specific terms that the parties had agreed upon during their oral discussions, the revised invoice included a second page of additional terms that was identical to the second page of additional terms included in the first invoice. There is no dispute in this case that the additional terms included on the second page of the invoice were never discussed between the parties. The crux of the issue in this case is whether those additional terms, or more specifically, one of those additional terms (the pricing error clause), became a part of the contract.

[3] Neb. U.C.C. § 2-207(1) (Reissue 2001) provides that a written confirmation sent within a reasonable time after oral negotiations operates as an acceptance even though it states terms additional to those agreed upon, unless acceptance is expressly made conditional on assent to the additional terms. As such, the written invoices sent from NFM to the McCaulleys were effective to serve as acceptance and written confirmation of the oral agreement of the parties, regardless of NFM's inclusion of a page of additional terms that had not been discussed between the parties.

[4] Section 2-207(2) provides that when the contract being entered into is not between two merchants, the additional terms are to be construed as proposals for addition to the contract. Because the McCaulleys are not merchants, the additional terms that NFM included on the second page of the invoices, including the pricing error clause, are to be construed as proposals for addition to the contract. As proposals, the additional

terms would not be considered part of the contract unless some action on the part of the McCaulleys could reasonably be construed as assent to inclusion of the terms.

There is no assertion in this case that the McCaulleys ever made an express representation that they were aware of the additional terms proposed by NFM and that they were assenting to inclusion of those additional terms in the contract. As such, the pricing error clause cannot be considered to have become part of the contract by way of express acceptance.

1. McCaulleys' Failure to Object to Additional Terms

NFM asserts on appeal that the McCaulleys were placed on notice of the additional terms with each invoice sent by NFM and that because the McCaulleys never objected to the additional terms, the terms should be considered part of the contract. NFM has cited this court to no authority that would hold that a merchant's proposals for additional terms included in a written confirmation to a nonmerchant should become part of the contract unless the nonmerchant objects to the additional terms. We conclude that such an interpretation would require us to disregard the specific language of § 2-207(2) and would be contrary to basic principles of statutory construction.

[5-7] The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute. *Amen v. Astrue*, 284 Neb. 691, 822 N.W.2d 419 (2012). See, also, *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012); *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011); *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). The court attempts to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence. *Amen v. Astrue, supra*; *Butler Cty. Sch. Dist. v. Freeholder Petitioners, supra*; *City of North Platte v. Tilgner, supra*; *Pfizer v. Lancaster Cty. Bd. of Equal., supra*. It is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Pfizer v. Lancaster Cty. Bd. of Equal., supra*.

[8] The plain language of the Legislature in § 2-207(2) makes a distinction between contracts entered into between two merchants and contracts entered into where at least one of the parties is a nonmerchant. Section 2-207(2) specifically indicates that "[*b*]*etween merchants* [proposed additional] terms become part of the contract unless . . . notification of objection to them . . . is given within a reasonable time after notice of them is received." (Emphasis supplied.) This provision would be rendered essentially meaningless if we accepted NFM's assertion that the McCaulleys' failure to object should have the effect of making the additional terms a part of the contract. Such an interpretation would obviate the need to indicate that such is true between merchants, and the Legislature's inclusion of those words indicates that the rule should not be the same when at least one of the parties is not a merchant. It is not within the province of this court to read the words "between merchants" out of the statute, and we find no merit to NFM's assertion that the McCaulleys' failure to object was sufficient to make the additional terms a part of the contract.

2. Judicial Admission

NFM also asserts that the McCaulleys should be held to have assented to inclusion of the additional terms in the contract as a result of judicial admissions made in the course of these proceedings. We find this assertion to be meritless.

[9,10] NFM notes that when a judicial admission is invoked, the language constitutes a waiver of all controversy and renders indisputable the facts admitted, constituting a limitation of the issues. See *Lange Building & Farm Supply, Inc. v. Open Circle "R", Inc.*, 210 Neb. 201, 313 N.W.2d 645 (1981). NFM also notes that an admission made in a pleading on which the trial is had is more than an ordinary admission and is a judicial admission, constituting a waiver of all controversy so far as the adverse party takes advantage of it, limiting the issues. *Radecki v. Mutual of Omaha Ins. Co.*, 255 Neb. 224, 583 N.W.2d 320 (1998).

In *Lange Building & Farm Supply, Inc. v. Open Circle "R", Inc., supra*, the Nebraska Supreme Court was presented

with a breach of contract action wherein one of the primary disputes was whether the defendant corporation had been a party to the contracts sued upon. In its answer, the defendant corporation admitted that "the same contract sued upon by the plaintiff existed between the plaintiff and the defendant corporation." *Id.* at 204, 313 N.W.2d at 647 (emphasis omitted). The Supreme Court held this to be a judicial admission sufficient to raise a legitimate fact question as to the liability of the defendant corporation.

In *Radecki v. Mutual of Omaha Ins. Co., supra*, the Nebraska Supreme Court was presented with claims brought by an insured alleging that an insurance company had denied a claim in bad faith and had breached a contract. One of the issues in the case concerned the period of time that the plaintiff had been employed by a university. In its answer, the defendant insurance company had admitted that the plaintiff was "'employed at [the university] as a professor of computer science until August 31, 1991,'" and had admitted that the plaintiff "'was among the eligible class persons to receive benefits under [a] disability contract . . . until August 31, 1991.'" *Id.* at 239, 583 N.W.2d at 330. The Supreme Court noted that there was evidence to suggest the plaintiff's active employment ended in May 1991, but concluded that the defendant insurance company had made a judicial admission that he was employed by the university through August 31.

The alleged judicial admissions in the present case are entirely distinguishable from the situations presented in either authority cited by NFM in support of the assertion that the McCaulleys judicially admitted that the pricing error clause was part of the contract. NFM alleges that the McCaulleys judicially admitted the clause was part of the contract by asserting in their complaint that there was a written contract and by attaching a copy of the two-page written invoice to the complaint, by answering in response to a request for admissions that the two-page written invoice attached to their complaint was the controlling agreement between themselves and NFM, and by testifying at trial that the two-page written invoice was a true and correct copy of the written contract between themselves and NFM.

Unlike the clear and specific admissions of the particular facts at issue in the authorities cited by NFM, the statements of the McCaulleys do not constitute admissions that the pricing error clause or any other additional terms were assented to and became part of the contract. The McCaulleys' statements—in the complaint, in the response to the request for admissions, and during testimony at trial—merely indicate that the written invoices sent by NFM to the McCaulleys served as the written confirmation necessary to create a contract and that the invoices contained two pages. There was never a statement by the McCaulleys to indicate that the additional terms proposed by NFM on the second page were actually accepted or agreed upon. Indeed, the entire basis of the McCaulleys' complaint and cause of action in this case was the assertion that the additional terms (and specifically the pricing error clause) were *not* ever agreed to and made a part of the contract. The statements that the exhibit (which included both pages) was a true and accurate copy of the contract do not amount to an admission that the additional terms proposed by NFM were accepted by the McCaulleys.

To accept NFM's assertion that the statements of the McCaulleys in this case and the attaching of both pages of the invoice to the complaint amount to a judicial admission that the McCaulleys assented to the additional terms proposed by NFM would essentially encourage a plaintiff in the position of the McCaulleys to attach only part of the invoice sent by NFM to the complaint, instead of providing the court with the complete document and provisions at issue. Accepting NFM's assertion would also result in the absurd conclusion that the McCaulleys filed a lawsuit alleging that the pricing error clause on the second page of the invoice was not ever agreed to or part of the contract and simultaneously admitting that it was part of the contract merely by attaching it to the complaint.

We find no merit to NFM's assertion that the McCaulleys judicially admitted that the pricing error provision was agreed to and made a part of the contract.

3. District Court's Rationale

In finding judgment in favor of NFM in this case, the district court recognized that the statutory provisions discussed above governed the outcome of this case, recognized that the additional terms NFM placed on the invoices were merely proposals for addition to the contract, and acknowledged that the McCaulleys never explicitly agreed to the additional terms becoming part of the contract.

The district court concluded that the additional terms did not become part of the contract upon the McCaulleys' receipt of the first invoice. However, the court concluded that after the McCaulleys contacted NFM to point out that the pricing term set forth on the first invoice was not consistent with the parties' oral agreement and NFM sent a revised invoice containing all of the same proposed additional terms, then the proposed additional terms did become part of the contract. The court did not explain why a second proposal to add previously undiscussed terms to the contract somehow became part of the contract without any actual assent on behalf of the McCaulleys and did not otherwise explain how the McCaulleys had assented to inclusion of the additional terms. We determine the district court erred in finding that notice to the McCaulleys that NFM was proposing additional terms, without an act of assent by the McCaulleys, was sufficient to add the proposed additional terms to the parties' contract for all of the reasons discussed above.

4. Rescission

NFM also asserts that this court should find that the McCaulleys rescinded the contract because they "accepted" a refund of the deposit paid to NFM. Because the McCaulleys did not take any action regarding the refund of their deposit, we find no merit to this assertion.

The evidence in this case indicates that the McCaulleys initially paid a deposit toward the purchase of the furniture, prior to any invoice's being sent by NFM as written confirmation of the parties' contract. The McCaulleys paid that deposit by authorizing a charge on a credit card. Subsequently, after NFM

notified the McCaulleys that it would not provide the furniture for the previously agreed-to price, NFM unilaterally refunded the McCaulleys' deposit by crediting the amount of the deposit back to the McCaulleys' credit card. There is no evidence to indicate that NFM discussed this with the McCaulleys, that NFM informed the McCaulleys that it was going to be done, or that the McCaulleys wanted the deposit refunded. The evidence indicates that the McCaulleys did not attempt to tender the amount of the deposit back to NFM. NFM asserts that refunding the deposit under these circumstances should constitute a rescission of the contract by the McCaulleys.

We initially note that NFM has cited this court to no Nebraska authority for its assertion that these circumstances demonstrate a rescission of the contract by the McCaulleys. Instead, NFM indicates that "[m]any courts have held that the acceptance of a refund amounts to rescission of a contract" and cites us to two cases from other jurisdictions. Brief for appellee at 11. We find neither case supports NFM's assertion.

NFM cites us to *Brooks v. Boykin*, 194 Ga. App. 854, 392 S.E.2d 46 (1990), and *Gondolfo v. New York Life Insurance Company*, 68 Misc. 2d 961, 328 N.Y.S.2d 457 (1971), in support of its assertion that the circumstances of this case demonstrate rescission by the McCaulleys. It is true that in both of those cases one party to a contract tendered a refund of a deposit and the court held that the other party's acceptance of that refund constituted rescission or accord and satisfaction. The circumstances of both cases, however, are markedly different than the present case in the most important of ways. In both cases, the party tendering the refund issued a check and the other party took affirmative action to negotiate the check and accept a refund. See *id*. In both cases, the appellate court stressed the act of cashing the check as important to a determination of rescission or accord and satisfaction.

There was no issuance of a refund check or cashing of a refund check in the present case. Instead, NFM unilaterally credited money back to the McCaulleys' credit card, requiring no affirmative action on the part of the McCaulleys to demonstrate any intention to rescind the contract or to accept the refund as an accord and satisfaction. NFM has also not cited

this court to any authority that would require a party to reject a credited refund or tender the deposit back under circumstances such as these.

[11,12] The Nebraska Supreme Court has noted that rescission of a contract means to abrogate, annul, avoid, or cancel it. *Hoeft v. Five Points Bank*, 248 Neb. 772, 539 N.W.2d 637 (1995). The court noted that rescission may be effected by one of the parties declaring rescission without the consent of the other if a legally sufficient ground therefor exists. *Id.* In determining whether a rescission took place, courts look not only to the language of the parties, but to all of the circumstances. *Id.*

In *Hoeft v. Five Points Bank, supra*, the Nebraska Supreme Court concluded that rescission of a contract had not been demonstrated. In that case, the parties had engaged in oral negotiations that a jury concluded had resulted in the formation of an oral contract. Subsequent to the oral discussions, one of the parties authored a letter explaining what the parties had agreed upon. Several years later, the same party sent another letter in which he indicated that it had "'become necessary to make the terms of [his prior] letter null and void.'" *Id.* at 781, 539 N.W.2d at 644. He specifically indicated in the second letter that the prior letter was "'hereby rescinded and in no further effect.'" *Id.* However, because the author of the letter had indicated that the other party could call to discuss the matter further and because the other party had responded by claiming that the author had no right to declare the agreement void, the Supreme Court concluded that there was no rescission of the agreement.

[13-16] With regard to accord and satisfaction, the Nebraska Supreme Court has held that an accord and satisfaction is an agreement to discharge an existing indebtedness by rendering some performance different from that which was claimed due. *Peterson v. Kellner*, 245 Neb. 515, 513 N.W.2d 517 (1994). To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance. *Id.* The principle questions in determining whether a discharge by accord and satisfaction has

taken place include whether the parties in fact agreed that the performance rendered should operate as a final discharge and satisfaction and whether that performance constitutes a sufficient consideration for a return promise or for a discharge. *Id.* The question of whether a payment rendered by the obligor, and later asserted to be in satisfaction, was so tendered to the claimant that he knew or should have known that it was tendered in full satisfaction is a question of fact. *Id.*

In this case, as NFM recognizes on appeal, the district court did not rule on any assertion of rescission or accord and satisfaction. Our review of the record reveals that there was no evidence or testimony to indicate that the McCaulleys and NFM discussed the refund, that NFM indicated that it was tendering the refund back in satisfaction of any obligations under the parties' contract, that the McCaulleys understood the credit to be an attempt to fulfill the contract, or that the McCaulleys accepted the refund as satisfaction of the contract. We cannot find this, on appeal, to be an alternative basis for affirming the trial court's judgment.

5. Resolution

The parties in this case did have an enforceable contract for the purchase of furniture. They engaged in oral discussions, they came to an agreement concerning the furniture to be purchased and the price to be paid, and the McCaulleys paid a deposit. Their oral agreement would not have been enforceable as a contract because the total price of the furniture far exceeded the $500 limitation for oral contracts for the purchase of goods set forth in § 2-201(1). The contract became enforceable when NFM sent a written confirmation of the agreed-upon terms to the McCaulleys.

The written confirmation, in the form of multiple invoices, included a number of terms that without dispute were never discussed by the parties during their oral discussions. According to § 2-207(2), the additional terms, which included the pricing error clause at issue in this case, became proposals by NFM for inclusion in the contract. Those proposals, to become a part of the contract, had to be assented to by the McCaulleys. There is no evidence that the McCaulleys ever expressly assented

to the additional terms. The McCaulleys were not required to object to the additional terms to prevent them from becoming part of the contract. The McCaulleys did not judicially admit that the additional terms were agreed to. The McCaulleys also did not rescind the contract by failing to retender the deposit to NFM.

Based on the record presented to us, the parties did have an enforceable contract, but the additional terms proposed by NFM, including the pricing error clause, were not ever accepted and made a part of the contract. The district court erred in concluding otherwise. As such, we reverse, and remand for further proceedings.

V. CONCLUSION

The district court erred in finding that the pricing error clause was a part of the contract between the McCaulleys and NFM. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
MATHEW J. HEATH, APPELLANT.
838 N.W.2d 4

Filed August 13, 2013. No. A-12-742.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only where the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Hearsay: Words and Phrases.** Under the Nebraska Evidence Rules, hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
3. **Rules of Evidence: Hearsay.** With certain exceptions, hearsay is generally not admissible.
4. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.