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.

___ N.W.2d ___

Filed December 7, 2012. No. S-11-1003.

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

contract and be reinstated to the induced party's position which existed before entry into the contract.

8. **Contracts: Fraud: Restitution.** Where the induced party to a contract elects to disaffirm or avoid the transaction, it may claim restitution.
9. **Torts: Contracts: Fraud.** Misrepresentation or nondisclosure may render a transaction voidable even if there would be no tort cause of action for deceit.
10. **Pleadings.** A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.
11. **Pleadings: Proof.** The burden of proof of prejudice is on the party opposing amendment of a pleading. Prejudice does not mean inconvenience to a party, but instead requires that the nonmoving party show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendments been timely.
12. **Actions: Pleadings: Words and Phrases.** A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action. Thus, two or more claims in a complaint arising out of the same operative facts and involving the same parties constitute separate legal theories, of either liability or damages, and not separate causes of action.
13. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
14. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
15. **Contracts: Fraud.** An essential element of actionable false misrepresentation is justifiable reliance on the representation.
16. **Fraud.** Whether a party's reliance upon a misrepresentation was reasonable is a question of fact.
17. ____. Justifiable reliance must be determined on a case-by-case basis. In determining whether an individual reasonably relied on a misrepresentation, courts consider the totality of the circumstances, including the nature of the transaction; the form and materiality of the representation; the relationship of the parties; the respective intelligence, experience, age, and mental and physical condition of the parties; and their respective knowledge and means of knowledge.
18. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
19. ____: ____: ____. To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.

20. **Jury Instructions: Appeal and Error.** If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
21. **Contracts: Fraud.** A material misrepresentation may be a basis for avoiding a contract, even if it resulted from an honest mistake.

Appeal from the District Court for Douglas County: THOMAS A. OTEPKA, Judge. Affirmed.

Patrick R. Guinan, of Erickson & Sederstrom, P.C., L.L.O., for appellant.

Joel E. Feistner, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellee.

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

STEPHAN, J.

This case involves a dispute arising from a contractual relationship between InterCall, Inc., and Egenera, Inc. After Egenera failed to pay for certain services InterCall provided pursuant to a contract, InterCall brought an action in the district court for Douglas County. Egenera asserted affirmative defenses and a counterclaim to recover what it claimed to be overpayments. InterCall appeals from a judgment in favor of Egenera on the counterclaim. We affirm.

I. BACKGROUND

1. FACTS

Egenera is a Delaware corporation with its principal place of business in Massachusetts. It is engaged in the sale of business software and routinely uses audioconferencing services provided by outside vendors for both interaction with its customers and internal communication and training.

Prior to March 2007, Egenera obtained audioconferencing services from Raindance Communications (Raindance). Raindance charged Egenera $.05 per minute for conference call service, with no minimum charge. Raindance was subsequently acquired by InterCall, a Delaware corporation conducting business in Nebraska and a provider of audio, Web, and video

conferencing services. After this acquisition, Egenera could have continued its business relationship with Raindance for some period of time, but eventually Raindance's conferencing "platform" would have ended and Egenera would have been required to obtain audioconferencing services from InterCall or some other vendor.

In November or December 2006, Richard Visconte, a global account executive for InterCall, contacted Terry Lehane, the global technical director of customer service for Egenera, to explain the conferencing service platform offered by InterCall. Visconte and Lehane discussed pricing for audio and Web conferencing. In January 2007, Visconte told Lehane that InterCall could provide audioconferencing services at a rate of $.07 per minute. Lehane rejected the offer because it was more than the rate charged by Raindance. Lehane was satisfied with the service provided by Raindance and with its pricing structure, and he was not interested in doing business with InterCall unless it offered a better price and features than Egenera received from Raindance.

Visconte was then given permission by a regional vice president at InterCall to offer Egenera the same rate it had paid Raindance, $.05 per minute, for the audioconferencing services. In an e-mail message to Lehane, Visconte stated that he had been able to "talk [InterCall's regional vice president] into honoring your current Raindance rate of .05 cents and roll you into InterCall's [program] like we talked about, which is great news!" Relying upon this representation, Lehane agreed to the proposal. On behalf of Egenera, Lehane executed a service agreement with InterCall on March 1, 2007.

The service agreement provided for a rate of $.05 per minute for audioconferencing in the continental United States, with a "Monthly Volume Discount" and a "Minimum Annual Commitment" of $44,000 for all services. The agreement further provided:

> BY SIGNING BELOW, EACH PARTY ACKNOWLEDGES AND AGREES THAT: UNLESS INDICATED OTHERWISE, SERVICES ARE CHARGED BY MULTIPLYING ALL INBOUND OR OUTBOUND LEGS OF ALL CONFERENCES BY THE APPLICABLE PER

> MINUTE RATE; SERVICE FEATURES, FEES OR SURCHARGES NOT LISTED HEREIN, INCLUDING CONFERENCE LEGS TO OR FROM A LOCATION OUTSIDE THE CONTINENTAL U.S. WILL BE CHARGED AT INTERCALL'S STANDARD RATES; *CUSTOMER MAY OBTAIN INTERCALL'S STANDARD RATES THROUGH CUSTOMER'S WEB ACCOUNT OR THROUGH CUSTOMER'S SALES OR ACCOUNT REPRESENTATIVE*; SUBJECT TO THE TERMS OF THIS AGREEMENT, ANY RATES INDICATED IN THE RATE INFORMATION OF THIS AGREEMENT WILL REMAIN IN EFFECT FOR THE TERM OF THIS AGREEMENT; AND IT HAS READ AND AGREES TO BE BOUND BY THIS AGREEMENT, INCLUDING THE TERMS AND CONDITIONS ATTACHED HERETO.

(Emphasis supplied.)

The service agreement also provided: "Customer must notify InterCall of any disputed charges within thirty (30) days from the date of the invoice, otherwise Customer hereby agrees to such charges and InterCall will not be subject to making adjustments."

The dispute here involves a $15 "conference minimum charge" which was not mentioned in the service agreement but was included in InterCall's standard rate sheet. Visconte testified that he was not aware of the conference minimum charge and that he never told Lehane about it during the negotiations which led to the execution of the service agreement. The agreement did not mention minimum charges, nor did it reference a Web site where information about additional charges could be obtained. InterCall's standard rates are updated on a monthly basis in a standard rate agreement which is typically not attached to service agreements because of the frequency of change. Any of InterCall's customers can obtain a copy of the standard rate sheet through the customer's Web account or by contacting a customer representative. No employee of Egenera asked Visconte to provide a copy of InterCall's standard rate sheet.

Egenera received and paid invoices for audioconferencing services provided by InterCall from March 2007 until

September 2008. The invoices were processed by employees in Egenera's accounts payable department who had not been involved in negotiating the service agreement with InterCall. In the fall of 2008, an Egenera employee reviewed these invoices as a part of the company's budget process. During this review, the employee noticed that the invoices reflected billing for conference minimum charges, which he considered to be unusual and not part of the contract. For example, a 3-minute call at $.05 per minute totaled $.15, but a charge of $14.85 was added to make the total charge $15. The charges were brought to the attention of Kevin Kerrigan, Egenera's chief financial officer, who reviewed the service agreement and found no reference to a minimum charge. Kerrigan ultimately determined that during the period from March 2007 to September 2008, Egenera paid InterCall a total of $453,684.25 for audioconferencing services, of which $104,652.96 represented conference minimum charges.

Kerrigan contacted InterCall and demanded a refund of this amount. InterCall agreed to give Egenera a credit for the minimum charges on its October 1, 2008, invoice and to waive such charges going forward, but it declined to refund the charges previously billed and paid. Egenera continued to use InterCall's audioconferencing services from October 2008 through April 2009, but refused to pay any portion of the $51,445.14 billed for those services, despite the fact that no minimum charges were included in this amount.

2. Procedural History

In its complaint, InterCall sought to recover the unpaid amounts which it had billed Egenera for services after September 2008, solely on the theory of breach of contract. Egenera responded with an answer denying liability to InterCall and raising various affirmative defenses. Egenera also filed a counterclaim seeking recovery of the alleged "overcharges" attributable to conference minimum charges on various theories, including fraud in the inducement. After filing its reply, InterCall moved for summary judgment.

The district court granted InterCall's motion with respect to its claim for unpaid invoices accrued from October 2008

through April 2009, amounting to $51,445.14, noting that none of these invoices included conference minimum charges. However, with respect to Egenera's counterclaim, the district court concluded that there were genuine issues of material fact regarding Egenera's claim that it was fraudulently induced by InterCall to enter into the original service agreement.

A jury trial was held on the counterclaim. Shortly before trial, and apparently with leave of the district court, Egenera filed an amended counterclaim in which it asserted two alternative theories of recovery, one based upon fraudulent misrepresentation and the second based on material misrepresentation. With respect to the latter, it alleged:

> InterCall made misrepresentations to Egenera as to material facts . . . with respect to cost and pricing issues for audio conferencing services which substantially contributed to Egenera's decision to enter into an agreement with InterCall, and Egenera reasonably relied on such misrepresentations in entering into an agreement with InterCall.

After overruling InterCall's motions for a directed verdict, the court instructed the jury on both of Egenera's alternative theories of recovery. The jury returned a verdict in favor of Egenera in the amount of $104,652.96, and the district court entered judgment on the verdict. Subsequently, the district court overruled InterCall's motion for new trial or, in the alternative, to alter or amend the judgment. InterCall perfected this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state.

II. ASSIGNMENTS OF ERROR

InterCall assigns, summarized and restated, that the district court erred in (1) not finding as a matter of law that Egenera failed to prove that InterCall misrepresented a fact that Egenera reasonably and justifiably relied upon; (2) allowing Egenera to untimely amend its counterclaim to allege material misrepresentation, a cause of action not recognized in Nebraska; (3) instructing the jury; and (4) overruling InterCall's motion for new trial or motion to alter or amend the judgment.

III. STANDARD OF REVIEW

[1] 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.[1]

[2] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[2]

[3] 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.[3]

[4] 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.[4]

IV. ANALYSIS

1. MATERIAL MISREPRESENTATION

We begin by addressing InterCall's argument that material misrepresentation is not a recognized theory of recovery under Nebraska law. Misrepresentation is a familiar concept in contract law. The Restatement (Second) of Contracts defines misrepresentation as "an assertion that is not in accord with the facts."[5] A misrepresentation may be either fraudulent or material.[6] "A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so."[7]

[5,6] A contract is voidable by a party if his or her "manifestation of assent is induced by either a fraudulent or a material

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[1] *Roos v. KFS BD, Inc.*, 280 Neb. 930, 799 N.W.2d 43 (2010).

[2] *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011).

[3] *Steele v. Sedlacek*, 267 Neb. 1, 673 N.W.2d 1 (2003).

[4] See *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

[5] Restatement (Second) of Contracts § 159 at 426 (1981).

[6] *Id.*, comment *a*.

[7] *Id.*, § 162(2) at 439.

misrepresentation by the other party upon which [he or she] is justified in relying."[8] A misrepresentation "induces a party's manifestation of assent if it substantially contributes to [the party's] decision to manifest his [or her] assent."[9]

InterCall acknowledges that material misrepresentation is an affirmative defense to an action on a contract. But it contends that Nebraska has never recognized a tort based upon material misrepresentation. While this is true, the threshold question is whether Egenera's counterclaim sounds in contract or in tort. We find it sounds in contract.

[7-9] 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 contract and be reinstated to the induced party's position which existed before entry into the contract.[10] Where the induced party elects to disaffirm or avoid the transaction, it may claim restitution.[11] "Misrepresentation or nondisclosure may render a transaction voidable even if there would be no tort cause of action for deceit."[12]

Egenera did not ratify or affirm the original contract after it discovered the existence of the minimum charges. To the contrary, it renegotiated the contract to remove those charges going forward from October 1, 2008. The district court was inconsistent in its characterization of these facts. In its order granting InterCall's motion for summary judgment with respect to amounts billed after October 1, 2008, the district court noted that Egenera had affirmed the original contract by suing for damages. But later in the same order, the court characterized the first agreement as having been replaced by a new agreement which did not include minimum charges. In determining

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[8] *Id.*, § 164(1) at 445.

[9] *Id.*, § 167 at 453.

[10] *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985).

[11] 7 Corbin on Contracts § 28.13 (rev. ed. 2002).

[12] *Id.* at 71.

that InterCall was entitled to summary judgment on its claim for amounts due under the second agreement, the court reasoned that the "amounts sought by InterCall [were] an attempt to recover on invoices billed after the parties *renegotiated* the price terms of their contract." (Emphasis supplied.) The court further noted that "[a]ny alleged misrepresentations that took place pursuant to the earlier contract have no bearing upon the subsequent agreement and therefore cannot act as a bar to InterCall's recovery."

Thus, while InterCall sued Egenera for breach of the second contract, Egenera's counterclaim related to the first. It was not a claim for tort damages, but, rather, a claim for restitution relating to its avoidance of the original contract on the basis of InterCall's alleged misrepresentations. Because Egenera's restitution claim sounded in contract, it could be asserted on alternative theories of fraudulent and material misrepresentation.

2. Timeliness of Amendment

InterCall argues that even if material misrepresentation was a viable theory of recovery, the district court abused its discretion in permitting Egenera to assert it by amending its counterclaim on the eve of trial. Trial of the case commenced on July 27, 2011. InterCall states in its brief that the district court granted Egenera leave to file its amended counterclaim on July 20, citing to an unspecified portion of the supplemental transcript which contains no order bearing that date. The transcript includes a copy of the praecipe for supplemental transcript, which requests inclusion of a "[j]ournal entry entered July 20, 2011." There is a handwritten notation by an unknown author next to that request, stating "not pleading or order Jdg's note can't be ctfd." The amended counterclaim is file stamped July 28, 2011. Although InterCall states that leave to amend was granted over its objection, we find no such objection in the record. Thus, although we can reasonably conclude that the district court granted Egenera leave to file its amended counterclaim, the record does not inform us of its reasoning for doing so.

[10,11] When a party seeks leave of court to amend a pleading, our rules require that "leave shall be freely given when justice so requires."[13] A district court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.[14] The Nebraska rules governing the amendment of pleadings are similar to those of the Federal Rules of Civil Procedure,[15] and in applying our rules, we have looked to federal decisions interpreting the corresponding federal rule for guidance.[16] Federal courts have held that "[d]elay alone is not a reason in and of itself to deny leave to amend; the delay must have resulted in unfair prejudice to the party opposing amendment."[17] The burden of proof of prejudice is on the party opposing the amendment.[18] "Prejudice does not mean inconvenience to a party," but instead requires that the nonmoving party "'show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely.'"[19]

[12] InterCall contends that it was prejudiced by the introduction of a new cause of action on the eve of trial. We disagree. Before and after the amendment, Egenera had a single cause of action to recover the minimum charges under the

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[13] Neb. Ct. R. Pldg. § 6-1115(a); *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

[14] *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011).

[15] See Fed. R. Civ. P. 15(a)(2).

[16] See, *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 740 N.W.2d 362 (2007); *Ichtertz v. Orthopaedic Specialists of Neb.*, 273 Neb. 466, 730 N.W.2d 798 (2007).

[17] *Roberson v. Hayti Police Dept.*, 241 F.3d 992, 995 (8th Cir. 2001). See, also, *Bailey v. First Nat. Bank of Chadron*, 16 Neb. App. 153, 741 N.W.2d 184 (2007).

[18] *Roberson, supra* note 17.

[19] *Cuffy v. Getty Refining & Marketing Co.*, 648 F. Supp. 802, 806 (D. Del. 1986), quoting *Heyl & Patterson Intern. v. F. D. Rich Housing*, 663 F.2d 419 (3d Cir. 1981).

original contract. Material misrepresentation as alleged in the amended counterclaim was not a new cause of action, but, rather, an alternative theory of recovery. As we explained in *Poppert v. Dicke*[20]:

> A cause of action consists of the fact or facts which give one a right to judicial relief against another; a theory of recovery is not itself a cause of action. Thus, two or more claims in a complaint arising out of the same operative facts and involving the same parties constitute separate legal theories, of either liability or damages, and not separate causes of action.

InterCall also argues that the amendment injected new facts into the case which prejudiced its ability to present its defense to the counterclaim. The record does not support this argument. The operative facts alleged in paragraphs 1 through 10 of the amended counterclaim are almost identical to the corresponding paragraphs in the original counterclaim. Both theories of recovery focus on representations made by InterCall which induced Egenera to discontinue its business relationship with Raindance and enter into a new contractual relationship with InterCall. As we have noted, there is no indication in the record that InterCall objected to the amendment, and likewise, the record does not reflect that InterCall requested a continuance because of any new factual issues resulting from the amendment.

[13] It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.[21] On the record before us, the district court did not abuse its discretion in granting Egenera leave to amend its counterclaim.

3. MOTIONS FOR DIRECTED VERDICT

[14] InterCall argues that its motion for directed verdict made at the close of Egenera's case and renewed at the close of

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[20] *Poppert v. Dicke*, 275 Neb. 562, 566, 747 N.W.2d 629, 633 (2008).

[21] *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

all the evidence should have been sustained, because Egenera did not prove that there had been a misrepresentation or that it had justifiably or reasonably relied upon any alleged misrepresentation. In addressing this argument, we are guided by the principle that a directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.[22] If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.[23]

(a) Misrepresentation

InterCall argues there was no evidence of a misrepresentation. It contends that Visconte truthfully told Lehane that Egenera would be charged a rate of $.05 per minute for audioconferencing. But one can draw a reasonable inference that Visconte represented and Lehane understood that conference calls would be billed at this rate regardless of their duration. There was evidence that Egenera was unwilling to enter into a new agreement for audioconferencing services with InterCall at a price greater than it was paying to Raindance, which did not include a minimum charge. Visconte was aware of this, and his January 9, 2007, e-mail message to Lehane indicating that he had been authorized to "honor[] your current Raindance rate of .05 cents and roll you into InterCall's [program]" can be fairly understood to mean that he was offering to match the Raindance price. Indeed, that is what Visconte himself thought he was doing, because he was unaware that the $.05 per minute rate he was quoting to Lehane was subject to a minimum charge of $15 for each call, regardless of the length of the call. Comment *a*. to § 159 of the Restatement (Second) of Contracts notes that "a statement intended to be truthful may be a misrepresentation because of ignorance or

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

[23] *Id*.

carelessness."[24] Likewise, a misrepresentation may consist of a "half-truth," i.e., a statement which is "true with respect to the facts stated, but [which] may fail to include qualifying matter necessary to prevent the implication of an assertion that is false with respect to other facts."[25] Given the context of the negotiations between Visconte and Lehane, there is a basis for a reasonable inference that Visconte represented that Egenera would pay $.05 per minute for all conference calls, regardless of call duration.

There is no evidence that Visconte knowingly failed to disclose the existence of the minimum charge, because he was admittedly unaware of it. But the fact that he was not completely familiar with InterCall's pricing structure during the negotiations with Egenera could reasonably be viewed as proof that his representations to Egenera regarding the price which it would pay for InterCall's audioconferencing services were made "recklessly, without regard to whether it is true" so as to constitute an element of fraudulent misrepresentation.[26] And the record supports Egenera's claim that the misrepresentation was material, in that it substantially contributed to Egenera's willingness to enter into a new contractual relationship with InterCall.

(b) Reliance

[15] An essential element of actionable false misrepresentation is justifiable reliance on the representation.[27] InterCall argues that Egenera could not have justifiably relied on Visconte's representations regarding a flat per-minute charge because the contract included language referring to InterCall's standard rates, which included the minimum charge, and because the minimum charge was reflected on monthly invoices which Egenera received before the renegotiation of the contract.

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[24] Restatement, *supra* note 5, comment *a*. at 427.

[25] *Id*., comment *b*. at 427.

[26] *Id*., § 162, comment *b*. at 440-41.

[27] *Growney v. C M H Real Estate Co*., 195 Neb. 398, 238 N.W.2d 240 (1976); *Camfield v. Olsen*, 183 Neb. 739, 164 N.W.2d 431 (1969).

[16,17] Whether a party's reliance upon a misrepresentation was reasonable is a question of fact.[28] A party is justified in relying upon a representation made to the party as a positive statement of fact when an investigation would be required to ascertain its falsity.[29] Justifiable reliance must be determined on a case-by-case basis.[30] In determining whether an individual reasonably relied on a misrepresentation, courts consider the totality of the circumstances, including the nature of the transaction; the form and materiality of the representation; the relationship of the parties; the respective intelligence, experience, age, and mental and physical condition of the parties; and their respective knowledge and means of knowledge.[31]

The record in this case supports a reasonable inference that Visconte represented to Lehane as a positive statement of fact that Egenera would be charged $.05 per minute for conference calls, the same amount it had been paying to Raindance. This price term was the key point in the negotiations which led to the execution of the original service agreement. There had been no discussion of minimum charges, and the service agreement itself made no mention of such charges. There is no evidence that InterCall's standard rate sheet was made available to Lehane or any other Egenera employee before the service agreement was executed. Although the service agreement provided that the standard rate information could be obtained "through customer's web account or through customer's sales or account representative," there was evidence that the information necessary for Egenera to access its "Web Account" was not provided by InterCall until after the service agreement had been executed. Likewise, at the time it executed the service agreement, Egenera could not have learned from Visconte that the standard rates included the minimum charge, because Visconte was not aware of those charges. On this record, reasonable minds could draw different inferences

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[28] *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001); *Cao v. Nguyen*, 258 Neb. 1027, 607 N.W.2d 528 (2000).

[29] *Fitl v. Strek*, 269 Neb. 51, 690 N.W.2d 605 (2005); *Cao, supra* note 28.

[30] *Lucky 7 v. THT Realty*, 278 Neb. 997, 775 N.W.2d 671 (2009).

[31] *Id.*

and conclusions on whether Egenera reasonably relied upon the representations of Visconte that InterCall would charge the same price for conference calls that Egenera had been paying to Raindance.

(c) Resolution

Because there was evidence upon which the jury could reasonably have concluded that InterCall misrepresented the price it would charge Egenera for conference call services, and that Egenera reasonably relied upon that misrepresentation, the district court did not err in overruling InterCall's motions for directed verdict.

4. JURY INSTRUCTIONS

[18-20] InterCall argues that two of the jury instructions given by the district court were erroneous and that the court erred in refusing to give two instructions requested by InterCall. In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[32] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.[33] If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.[34]

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[32] *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007); *Domjan v. Faith Regional Health Servs.*, 273 Neb. 877, 735 N.W.2d 355 (2007).

[33] *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008); *Castillo v. Young*, 272 Neb. 240, 720 N.W.2d 40 (2006).

[34] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006); *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004).

InterCall first challenges instruction No. 1.C., which sets forth Egenera's burden of proof with respect to material misrepresentation. The instruction states:

> Before Egenera can recover against InterCall on its claim of material misrepresentation, Egenera has the burden of proving, by the greater weight of the evidence, each and all of the following:
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> 1. That InterCall made the claimed representation to Egenera;
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> 2. That the representation was false;
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> 3. That the representation was material;
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> 4. That this representation substantially contributed to Egenera's decision to agree to the service agreement;
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> 5. That Egenera's reliance on this representation was reasonable; and
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> 6. That Egenera sustained damages as a result of this reasonable reliance.
>
> It is not necessary that InterCall knew that the representation was false. It may be that it was honestly mistaken.

InterCall contends that the last sentence of the instruction is an erroneous statement of law. The sentence is taken directly from NJI2d Civ. 15.22, which is applicable to contract actions. This pattern instruction reflects the elements of material misrepresentation stated in § 162(2) of the Restatement (Second) of Contracts. The Restatement at § 159 defines "misrepresentation" as "an assertion that is not in accord with the facts."[35] A comment to this definitional section states:

> [A]n assertion need not be fraudulent to be a misrepresentation. Thus a statement intended to be truthful may be a misrepresentation because of ignorance or carelessness, as when the word "not" is inadvertently omitted or when inaccurate language is used. But a misrepresentation that is not fraudulent has no consequences under this Chapter unless it is material. Whether an assertion is material is determined by the rule stated in § 162(2).[36]

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[35] Restatement, *supra* note 5, § 159 at 426.

[36] *Id.*, comment *a*. at 427.

[21] Thus, NJI2d Civ. 15.22 is a correct statement of contract law. A material misrepresentation may be a basis for avoiding a contract, even if it resulted from an honest mistake.

InterCall also argues that this instruction was deficient because it did not include "caveats" such as those set forth in two instructions which it requested and the court declined to give.[37] Proposed instruction No. 10 stated: "A person who signs a contract without reading it cannot later relieve himself/herself of its burdens." Proposed instruction No. 13 stated: "Reliance on an implied misrepresentations [sic] is unreasonable if a written contract provision explicitly states a fact completely contradictory to the claimed misrepresentation."

For the reasons more fully set forth in our discussion above regarding the evidence of reasonable reliance, we find no error in the giving of instruction No. 1.C. or the refusal to give requested instructions Nos. 10 and 13. The service agreement signed by Lehane did not include any facts "completely contradictory" to Visconte's representation that Egenera would be charged a flat fee of $.05 per minute for conference calls, the same as under its prior agreement with Raindance. As we have noted, Egenera did not have access to the standard rate sheet via its Web account until after the agreement was executed, and it could not have learned of the minimum charge by asking Visconte, because he was unaware of it himself.

InterCall also contends that the district court erred in giving instruction No. 4, which stated: "An intent to deceive is not a necessary element for proof of fraudulent misrepresentation. A representation is fraudulent if, when made, it was known to be false or was made recklessly as a positive assertion without knowledge concerning the truth of the representation."

InterCall contends that this instruction "is not a pattern jury instruction"[38] and is inconsistent with instruction No. 1.B., which instructed the jury on the elements of fraudulent misrepresentation. One of those elements was that "the representation

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[37] Brief for appellant at 34.

[38] *Id*. at 35.

was made fraudulently." Instruction No. 4 simply informs the jury what constitutes fraud. It is consistent with our cases holding that fraud can be based on a false statement that, when made, was "'known to be false or made recklessly without knowledge of its truth and as a positive assertion.'"[39] The instruction was thus a correct statement of the law, and the district court did not err in giving it.

5. MOTION FOR NEW TRIAL

Finally, InterCall argues that the district court erred in overruling its motion requesting a new trial or, in the alternative, to alter and amend the judgment. InterCall's argument in this regard is based upon the same arguments which we have considered and rejected above. For the reasons underlying our disposition of those issues, we conclude that the district court did not abuse its discretion in overruling InterCall's post-trial motion.

V. CONCLUSION

For the reasons discussed herein, we affirm the judgment of the district court.

AFFIRMED.

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[39] *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 805, 660 N.W.2d 168, 175 (2003). See, also, *Nebraska Nutrients, supra* note 28.