that "things of this nature were regulated as securities" and that they were hoping to find an exemption. He also claimed to have said as much to Woolley. Klasna admitted that he did not remember whether he had specifically asked Woolley to look into securities law, but he said that it was implied, if not stated outright.

Klasna stated that FFG had collected funds for the sale of the FIT Program before Woolley rendered her opinion, but that those funds were put in safekeeping until they were certain the FIT Program could be released. Klasna could not recall a specific conversation with Woolley about whether the FIT Program was a security until after investors raised the issue. Klasna alleged that even after investors questioned whether the FIT Program required registration, Woolley continued to assure him that the FIT Program met the definition of a trust and was exempt. Klasna also stated he did not believe that Woolley understood the FIT Program or the potential securities problems.

The remainder of the opinion shall remain unmodified.

FORMER OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

WRIGHT, J., not participating.

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BRYAN S. BEHRENS, AN INDIVIDUAL, ET AL., APPELLANTS AND CROSS-APPELLEES, V. CHRISTIAN R. BLUNK, AN INDIVIDUAL, ET AL., APPELLEES AND CROSS-APPELLANTS.

___N.W.2d___

Filed December 30, 2010. No. S-10-342.

1. **Pretrial Procedure: Appeal and Error.** An appellate court reviews a trial court's sanction for failure to comply with a proper discovery order for abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Judgments: Appeal and Error.** As to questions of law, an appellate court decides such questions independently of the lower court's conclusions.

4. **Rules of the Supreme Court: Pretrial Procedure.** The Nebraska Rules of Discovery are substantially patterned after the corresponding discovery rules in the Federal Rules of Civil Procedure. And Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in construing similar Nebraska rules.
5. **Constitutional Law: Self-Incrimination: Pretrial Procedure.** The constitutional privilege against self-incrimination applies to discovery in a civil action.
6. **Constitutional Law: Self-Incrimination.** The Fifth Amendment privilege against compulsory self-incrimination is personal; it attaches to the person, not to potentially incriminating information or materials in the hands of third parties.
7. **Corporations: Self-Incrimination.** A corporation has no right to invoke the privilege against self-incrimination.
8. **Rules of the Supreme Court: Pretrial Procedure: Parties.** Under Neb. Ct. R. Disc. § 6-326(b)(1), whether a party seeking discovery is the plaintiff or defendant, that party is only entitled to discovery of nonprivileged information or material.
9. **Actions: Constitutional Law: Pretrial Procedure: Self-Incrimination.** Before a trial court dismisses an action because the plaintiff has invoked the Fifth Amendment in response to discovery requests, it must first (1) balance the parties' interests and (2) consider whether a less drastic remedy could accommodate the plaintiff's privilege against self-incrimination and maintain fairness to the defendant.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for further proceedings.

David A. Domina and Terry A. White, of Domina Law Group, P.C., L.L.O., for appellants.

Mark C. Laughlin and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., for appellees Christian R. Blunk and Berkshire & Blunk.

William R. Johnson, of Lamson, Dugan & Murray, L.L.P., for appellees Christian R. Blunk and Abrahams, Kaslow & Cassman, L.L.P.

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

CONNOLLY, J.

## SUMMARY

Bryan S. Behrens and three other plaintiffs appeal from the district court's order that dismissed with prejudice their attorney

malpractice action against Christian R. Blunk and the law firms for which Blunk worked. After Behrens invoked his Fifth Amendment privilege against compulsory self-incrimination, the court dismissed the action as a sanction for Behrens' failure to comply with its order compelling discovery. We conclude that the court erred when it failed to balance the parties' interests and consider less drastic remedies before dismissing the plaintiffs' action. We reverse, and remand for further proceedings.

## BACKGROUND

In December 2008, the plaintiffs filed their complaint. The plaintiffs include the following parties: Behrens; the Bryan Behrens Co., Inc. (BBC), a Nebraska corporation that Behrens owns; National Investments, Inc. (NII), a Nevada corporation that Behrens owns; and Thomas Stalnaker, a court-appointed receiver requested by the Securities and Exchange Commission to collect and make available for claims all assets owned by Behrens, BBC, and NII. The plaintiffs sued Blunk for legal malpractice. In addition, the plaintiffs sued Berkshire and Blunk, Blunk's former partnership. They also sued Abrahams Kaslow & Cassman LLP, the firm that later employed Blunk. The plaintiffs alleged that Blunk's negligent acts occurred when he was employed at both firms. In April 2009, the federal government indicted Behrens on charges of securities fraud, mail fraud, wire fraud, and money laundering.

### CRIMINAL ALLEGATIONS

The criminal allegations give context to the civil action. The indictment alleged a Ponzi scheme. Behrens owned a company that provided financial planning advice and offered insurance products to clients. He was registered to sell securities. In 2002, he purchased NII, which was a Nevada real estate investment company. Behrens defrauded 25 NII investors out of $8.2 million. He induced some of his insurance and securities clients to cash out their annuities or investment accounts and invest in NII. He told investors that (1) they were investing in NII; (2) their investments would produce a 7- to 9-percent rate of return, with little to no risk; and (3) they would receive

back their principal in 5 to 10 years. Behrens would normally issue a promissory note to investors with these promises. Instead of investing their money in real estate, he used it to support an extravagant personal lifestyle and other businesses that he acquired. He deposited the investors' money into bank accounts that he controlled and then transferred the money to other bank accounts to conceal its source. He used the investment money from later investors to make monthly payments to earlier investors.

## PLAINTIFFS' CIVIL ACTION

In the plaintiffs' civil complaint, they generally alleged that Blunk negligently advised Behrens to purchase NII to "borrow" funds from Behrens' insurance and investment clients and rechannel the funds through BBC. Specifically, Blunk allegedly advised Behrens to (1) issue high-interest promissory notes from NII, which Blunk drafted; (2) use investors' money to create an investment pool; (3) have NII loan the money to Behrens; (4) create BBC to borrow funds from Behrens to acquire and operate retail businesses. Behrens allegedly followed Blunk's advice in using BBC to acquire retail businesses, including a floral business, convenience store, and grocery store. The complaint also alleged that Blunk personally borrowed $55,000 from the investment fund and failed to repay the loan. The complaint included a second cause of action to recover the loan principal plus interest.

Blunk alleged several affirmative defenses, including that the plaintiffs' claims were barred under the doctrines of contributory negligence, equitable estoppel, unclean hands, and mitigation of damages.

## PROCEDURAL HISTORY

As stated, the federal government filed its indictment in April 2009. In May, the defendants in the civil case issued requests for documents and interrogatories. On June 8, the plaintiffs moved for an order to stay the civil action pending the criminal proceeding. The plaintiffs attached the federal indictment. In July, the defendants moved to compel discovery. On July 28, the plaintiffs' attorney wrote the defendants'

attorney that Behrens would invoke his Fifth Amendment right if he requested a deposition. Behrens' federal public defender had advised Behrens not to respond to the civil discovery requests and to invoke his Fifth Amendment privilege until the criminal trial was completed.

In August 2009, Blunk filed a suggestion of bankruptcy with the court. The district court clerk told the plaintiffs' attorney that the court had stayed further proceedings because of the bankruptcy filing. In October, the court dismissed the action without prejudice for lack of prosecution, but the district court reinstated the action in November.

In November 2009, the defendants again moved to compel discovery. The court's docket sheet shows that the court sustained the motion in part, and in part overruled it, but the court apparently did not issue a written order. This order, however, effectively overruled the motion to stay, and the defendants agree that the court did overrule that motion. In December, the defendants moved for summary judgment. They asked for a dismissal, arguing that the plaintiffs could not maintain the action and that Behrens could not assert his Fifth Amendment privilege against self-incrimination.

In January 2010, the plaintiffs responded to the defendant law firms' requests for documents and interrogatories. Behrens repeated that his attorney had advised him not to incriminate himself and that he was invoking his Fifth Amendment privilege. He stated that his criminal trial was scheduled for April 12, 2010 (10 weeks later) and that after the trial, he would respond. For most individual requests, he stated that a more complete set of responsive documents were in Blunk's or the defendant law firms' possession. Behrens also stated that to the extent documents were produced by the defendants or in the receiver's possession, they would be made available to the defendants for review and copying at a mutually convenient time. Behrens invoked his Fifth Amendment privilege in response to requests for promissory notes, bank statements, financial statements, tax returns, articles of incorporation, and documents from other attorneys who had represented him. Behrens gave the same basic response to interrogatories. After receiving these responses, the defendants moved for dismissal

as a sanction for the plaintiffs' failure to comply with the discovery order.

In March 2010, the court overruled the defendants' motion for summary judgment. It concluded that the plaintiffs' failure to comply with discovery requests did not affect the genuine issues of material fact raised by the complaint. But the court granted the motion to dismiss the action as a discovery sanction. The court recognized that Behrens' criminal trial was still pending. It relied, however, on cases holding that a party can invoke his or her Fifth Amendment rights as a shield in a party's defense, but not as a sword to limit discovery in a civil case that the party brings against others. The court concluded that the delay had prejudiced the defendants and dismissed the action.

## ASSIGNMENTS OF ERROR

The plaintiffs assign, restated, that the court erred as follows:

(1) concluding that Behrens could not assert his privilege against self-incrimination in a civil case;

(2) finding that the plaintiffs had failed to respond to discovery requests when they had identified the receiver as the party having the requested information and documents and agreed to make the documents available;

(3) finding that the defendants were prejudiced by a 6-week delay when they failed to adduce any facts showing prejudice; and

(4) dismissing the action.

On cross-appeal, Blunk and the defendant law firms assign that the court erred in overruling their motion for summary judgment.

## STANDARD OF REVIEW

[1-3] We review a trial court's sanction for failure to comply with a proper discovery order for abuse of discretion.[1] A judicial abuse of discretion exists when reasons or rulings of

[1] See, *Martindale v. Weir*, 254 Neb. 517, 577 N.W.2d 287 (1998); *Greenwalt v. Wal-Mart Stores*, 253 Neb. 32, 567 N.W.2d 560 (1997).

a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[2] As to questions of law, however, we decide such questions independently of the lower court's conclusions.[3]

[4] We note that the plaintiffs urge us to adopt the Eighth Circuit's rule of closely scrutinizing an order of dismissal as a discovery sanction.[4] It is true that the Nebraska Rules of Discovery are substantially patterned after the corresponding discovery rules in the Federal Rules of Civil Procedure. And Nebraska courts will look to federal decisions interpreting corresponding federal rules for guidance in construing similar Nebraska rules.[5] But other federal courts, including the U.S. Supreme Court, have reviewed orders of dismissal as a discovery sanction for abuse of discretion.[6]

All federal courts recognize that an order of dismissal is among the harshest sanctions a court can impose for discovery violations.[7] Instead of applying a higher level of scrutiny to review orders of dismissal, most federal courts have set out

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[2] *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010).

[3] See *D & S Realty v. Markel Ins. Co., ante* p. 567, 789 N.W.2d 1 (2010).

[4] *Sentis Group, Inc., Coral Group, Inc. v. Shell Oil*, 559 F.3d 888 (8th Cir. 2009).

[5] See *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000).

[6] See, *National Hockey League v. Met. Hockey Club*, 427 U.S. 639, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976); *Vallejo v. Santini-Padilla*, 607 F.3d 1 (1st Cir. 2010); *Agiwal v. Mid Island Mortg. Corp.*, 555 F.3d 298 (2d Cir. 2009); *Collins v. Illinois*, 554 F.3d 693 (7th Cir. 2009); *Ashby v. McKenna*, 331 F.3d 1148 (10th Cir. 2003); *Ware v. Rodale Press, Inc.*, 322 F.3d 218 (3d Cir. 2003); *Valley Engineers Inc. v. Electric Engineering Co.*, 158 F.3d 1051 (9th Cir. 1998); *Gonzalez v. Trinity Marine Group, Inc.*, 117 F.3d 894 (5th Cir. 1997); *Freeland v. Amigo*, 103 F.3d 1271 (6th Cir. 1997); *U.S. v. Shaffer Equipment Co.*, 11 F.3d 450 (4th Cir. 1993); *Shortz v. City of Tuskegee, Ala.*, 352 Fed. Appx. 355 (11th Cir. 2009) (unpublished opinion).

[7] See, e.g., *National Hockey League, supra* note 6; *Smith v. Gold Dust Casino*, 526 F.3d 402 (8th Cir. 2008); *Benitez-Garcia v. Gonzalez-Vega*, 468 F.3d 1 (1st Cir. 2006); *Zocaras v. Castro*, 465 F.3d 479 (11th Cir. 2006).

standards or factors that they consider in determining whether a trial court has abused its discretion.[8]

We agree with the majority approach. An order of dismissal is obviously a death sentence for a plaintiff's action. But as the U.S. Supreme Court has stated, in appropriate circumstances, a district court must have the discretion to impose the extreme sanction of dismissal: This discretion exists "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."[9] In this case, we will set out the standard, as a matter of law, for dismissing an action when a party has invoked his or her privilege against self-incrimination.

## ANALYSIS

The court apparently did not issue a written order compelling discovery or overruling the plaintiffs' motion to stay. In its order dismissing the action, the court assumed that Behrens had a right to refuse to respond to discovery on Fifth Amendment grounds. But it concluded that the plaintiffs could not maintain their civil action against the defendants because Behrens had asserted his privilege against self-incrimination.

The defendants rely on cases in which courts have held that a civil case can be dismissed if the plaintiff invokes his or her privilege against self-incrimination and refuses to permit discovery.[10] But the most recent federal appellate case they cite

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[8] See, *Southern New England Telephone Co. v. Global NAPs*, 624 F.3d 123 (2d Cir. 2010); *Garcia v. Berkshire Life Ins. Co. of America*, 569 F.3d 1174 (10th Cir. 2009); *Phillips v. Cohen*, 400 F.3d 388 (6th Cir. 2005); *Computer Task Group, Inc. v. Brotby*, 364 F.3d 1112 (9th Cir. 2004); *Rice v. City of Chicago*, 333 F.3d 780 (7th Cir. 2003); *U.S. v. $8,221,877.16 in U.S. Currency*, 330 F.3d 141 (3d Cir. 2003); *Gonzalez, supra* note 6; *Mut. Federal Sav. & Loan v. Richards & Associates*, 872 F.2d 88 (4th Cir. 1989).

[9] *National Hockey League, supra* note 6, 427 U.S. at 643.

[10] See, e.g., *Stockham v. Stockham*, 168 So. 2d 320 (Fla. 1964); *Christenson v. Christenson*, 281 Minn. 507, 162 N.W.2d 194 (1968); *Franklin v. Franklin*, 365 Mo. 442, 283 S.W.2d 483 (1955); *Laverne v. Incorporated Vil. of Laurel Hollow*, 18 N.Y.2d 635, 219 N.E.2d 294, 272 N.Y.S.2d 780 (1966).

was decided in 1969.[11] And the Ninth Circuit later backed away from that case. It clarified that under U.S. Supreme Court precedent, a plaintiff's proper invocation of the Fifth Amendment cannot result in automatic dismissal.[12]

And federal cases that are more recent agree with that statement. Federal courts have rejected automatic dismissal of a civil action based solely on the plaintiff's invocation of his or her Fifth Amendment privilege against self-incrimination during discovery.[13] We agree with these courts that a rule of automatic dismissal is inconsistent with U.S. Supreme Court precedent and discovery rules protecting the privilege.

[5] As we have previously recognized, under U.S. Supreme Court decisions, the constitutional privilege against self-incrimination applies to discovery in a civil action:

> "Though by its terms applicable only in criminal proceedings, the Fifth Amendment privilege against self-incrimination has long been held to be properly asserted by parties or witnesses in civil proceedings.[14] The privilege may be invoked by anyone whose statements could incriminate him, either by directly admitting the commission of illegal acts or by relating information which would 'furnish a link in the chain of evidence needed to prosecute the claimant.'[15] The privilege protects persons 'against being forced to make incriminating disclosures at any stage of the proceeding if they could not be compelled

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[11] See *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969).

[12] See *Campbell v. Gerrans*, 592 F.2d 1054 (9th Cir. 1979).

[13] See, *McMullen v. Bay Ship Management*, 335 F.3d 215 (3d Cir. 2003); *Serafino v. Hasbro, Inc.*, 82 F.3d 515 (1st Cir. 1996); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979); *Campbell, supra* note 12. See, also, *Steffan v. Cheney*, 920 F.2d 74 (D.C. Cir. 1990); *Attorney General of U.S. v. Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982); 8 Charles Alan Wright et al., Federal Practice and Procedure § 2018 (3d ed. 2010) (citing cases).

[14] *McCarthy v. Arndstein*, 266 U.S. 34, 40, 45 S. Ct. 16, 69 L. Ed. 158 (1924).

[15] *Hoffman v. United States*, 341 U.S. 479, 486-87, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).

> to make such disclosures as a witness at trial.'[16] It therefore applies not only at trial, but at the discovery stage as well.[17]"[18]

Under this precedent, Behrens, as a plaintiff, was obviously a party that could assert the privilege in response to requests for incriminating information or materials.

[6,7] We recognize that the Fifth Amendment privilege against compulsory self-incrimination is personal; it attaches to the person, not to potentially incriminating information or materials in the hands of third parties.[19] But the record does not reflect that Behrens turned over any of the requested information or materials to the receiver. So for this analysis, we assume that Behrens validly invoked the privilege. We have also held that a corporation has no right to invoke the privilege against self-incrimination.[20] Here, the court did not consider separate sanctions against these plaintiffs. Thus, we consider only whether its sanction of dismissal was proper based on Behrens' invocation of his Fifth Amendment privilege.

[8] Under Neb. Ct. R. Disc. § 6-337(b)(2), if a party fails to obey a court order to provide or permit discovery, the court may impose further "orders in regard to the failure as are just," including "dismissing the action." But the rule is not without limitations. Under Neb. Ct. R. Disc. § 6-326(b)(1), a party may obtain discovery "regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action, *whether it relates to the claim or defense* of the party seeking

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[16] *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 927 (7th Cir. 1983).

[17] See, *Lefkowitz v. Turley*, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973); *United States v. Kordel*, 397 U.S. 1, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970).

[18] *Wilson v. Misko*, 244 Neb. 526, 546-47, 508 N.W.2d 238, 252 (1993), quoting *Kramer v. Levitt*, 79 Md. App. 575, 558 A.2d 760 (1989).

[19] See, *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 104 S. Ct. 2720, 81 L. Ed. 2d 615 (1984); *United States v. Nobles*, 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975); *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993).

[20] See *Schuessler, supra* note 19.

discovery." (Emphasis supplied.) Thus, under § 6-326(b)(1), whether a party seeking discovery is the plaintiff or defendant, that party is only entitled to discovery of nonprivileged information or material.

Section 6-326(b)(1) of our discovery rules mirrors Fed. R. Civ. P. 26(b)(1). Because the Fifth Amendment privilege applies to material subject to discovery, federal courts have held that a valid invocation of the privilege is proper under rule 26 and does not justify a court's imposition of sanctions.[21] In addition, the U.S. Supreme Court has prohibited states from imposing penalties that make it costly for a party to invoke the privilege:

> "The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." . . .
>
> In this context "penalty" is not restricted to fine or imprisonment. It means . . . the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly."[22]

Following Supreme Court precedent, federal courts have also held that an automatic dismissal is a costly and impermissible penalty for invoking the privilege.[23] Yet, federal courts have recognized that due process precludes plaintiffs from proceeding to trial while denying the very materials needed by their adversaries to mount a defense: "In a civil trial, a party's invocation of the privilege may be proper, but it does not take place in a vacuum; the rights of the other litigant are entitled to

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[21] See, *S.E.C. v. Graystone Nash, Inc.*, 25 F.3d 187 (3d Cir. 1994); *Wehling, supra* note 13.

[22] *Spevack v. Klein*, 385 U.S. 511, 514-15, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) (citations omitted).

[23] See, e.g., *Serafino, supra* note 13; *Wehling, supra* note 13; *Campbell, supra* note 12.

consideration as well."[24] Instead of upholding a dismissal anytime a plaintiff invokes the Fifth Amendment, these courts have concluded that the issue is whether the court can accommodate the privilege and maintain fairness for the party seeking discovery. These courts require a balancing of the parties' competing interests and consideration of less drastic remedies.[25]

> When plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome, remedies would be an ineffective means of preventing unfairness to defendant.
>
> The district court's task in this case was complicated by the presence of competing constitutional and procedural rights. In focusing solely on [the defendant's] right to the requested information, the court failed to attribute any weight to [the plaintiff's] right to his day in court. . . . [T]he court should have measured the relative weights of the parties' competing interests with a view toward accommodating those interests, if possible. This balancing-of-interests approach ensures that the rights of both parties are taken into consideration before the court decides whose rights predominate.[26]

It is true that in some circumstances, dismissal may be necessary to prevent prejudice to the party seeking discovery.[27] In those circumstances, a court may impose a dismissal as a necessary measure to prevent unduly disadvantaging the opponent—not as a sanction for invoking the privilege against self-incrimination.[28] But "'[t]he detriment to the party asserting [the privilege against self-incrimination] should be no more than is

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[24] *Graystone Nash, Inc., supra* note 21, 25 F.3d at 191. Accord *Wehling, supra* note 13.

[25] See, *McMullen, supra* note 13, citing *Graystone Nash, Inc., supra* note 21; *Serafino, supra* note 13; *Wehling, supra* note 13; and 8 Wright et al., *supra* note 13.

[26] See *Wehling, supra* note 13, 608 F.2d at 1088.

[27] See *Serafino, supra* note 13.

[28] See *id.*, citing *Wehling, supra* note 13.

necessary to prevent unfair and unnecessary prejudice to the other side.'"[29]

[9] We have previously held that "[t]here is no constitutional right to have civil proceedings stayed pending the outcome of a criminal investigation."[30] But we nonetheless required trial courts to balance the competing needs of the parties under their inherent power to do justice.[31] Consistent with that opinion, we adopt the reasoning of these federal courts. We hold that before a trial court dismisses an action because the plaintiff has invoked the Fifth Amendment in response to discovery requests, it must first (1) balance the parties' interests and (2) consider whether a less drastic remedy could accommodate the plaintiff's privilege against self-incrimination and maintain fairness to the defendant.

Here, the only finding in the court's order relevant to this balancing was that the possible delay would prejudice the defendants if Behrens' trial did not take place as scheduled. We conclude that the court's finding was insufficient to support the court's dismissal of the plaintiffs' action as a matter of law.

In his responses to discovery requests, Behrens stated that he would respond to the requests after his criminal trial. And when the court entered its order, Behrens' trial was scheduled to begin in 40 days. This was not a case in which the criminal indictment was uncertain or the speculative nature of the delay was unreasonably long. Although judicial efficiency is desirable, delay may sometimes be required to reach a just result under § 6-337(b)(2) of our discovery rules.[32] Nor did the court explain how a further delay of 40 days would prejudice the defendants or consider the hardship imposed on Behrens by proceeding with the civil action before the criminal trial.

Because the court's findings were insufficient to support an order of dismissal, we reverse the order and remand the cause for further proceedings.

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[29] *McMullen, supra* note 13, 335 F.3d at 218, quoting *Graystone Nash, Inc., supra* note 21. Accord *Wehling, supra* note 13.

[30] *Schuessler, supra* note 19, 243 Neb. at 428-29, 500 N.W.2d at 534.

[31] See *id.*

[32] See, e.g., *McMullen, supra* note 13; *Wehling, supra* note 13.

## CONCLUSION

We conclude that the court erred in applying a rule of automatic dismissal when a plaintiff invokes his or her privilege against self-incrimination during discovery. We determine that in such circumstances, a trial court must balance the parties' interests and consider whether a less drastic remedy would suffice. Under this rule, the court's findings were insufficient to support an order of dismissal. We reverse the order and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.