

**IN THE DISTRICT COURT OF BOYD COUNTY, NEBRASKA**

**JEROME ENGELHAUPT,**  
Plaintiff,

Case No. 4662

vs.

**ORDER ON MOTIONS**

**FARM CREDIT SERVICES OF THE  
MIDLANDS, a United States corporation,**  
Defendant.

**DATE OF HEARING:** May 12, 2000.

**DATE OF RENDITION:** June 19, 2000.

**DATE OF ENTRY:** Date of filing by court clerk.

**APPEARANCES:**

For plaintiff: George H. Moyer, Jr. with plaintiff.  
For defendant: Christopher R. Hedican.

**SUBJECT OF ORDER:** defendant's (1) motion to compel, (2) second motion to compel,  
and, (2) Rule 37 request for expenses, including attorney's fees.

**PROCEEDINGS:**

The matter came on first for further proceedings relating to the defendant's motion to compel and the court's "Order on Motions" entered on or about February 1, 2000. The "Eeks (phonetic) 8½ by 11 inch canary legal pad" was produced in open court, together with a full copy thereof, which was marked as Exhibit 13. Evidence was adduced and arguments of counsel were heard. The matter was taken under advisement.

The matter came on next upon the defendant's second motion to compel filed on April 17, 2000. The defendant withdrew said motion in open court, except to the extent as the same pertains to the production of the "Eeks" pad. There was no additional evidence. The matter was taken under advisement.

Finally, the matter came on for determination of award of expenses upon the motion to compel pursuant to Neb. Ct. R. of Discovery 37(a)(4). Evidence was adduced for the defendant. No evidence for the plaintiff. Arguments of counsel were heard. The matter was taken under advisement.

**FINDINGS:** The court finds and concludes that:

1. To the extent applicable, the findings set forth in the “Order on Motions” entered on or about February 1, 2000, are incorporated by reference as if fully restated here.

2. At the subsequent hearing contemplated by the previous order, the plaintiff appeared with counsel, and produced the original “Eeks (phonetic) 8½ by 11 inch canary legal pad” for in camera inspection by the court, and also produced a true, accurate, and complete copy of the entire writing for purposes of preservation for appellate review of any portion withheld upon the in camera inspection. The copy was marked as Exhibit 13. For convenience, the court will refer to the legal pad and Exhibit 13 interchangeably.

3. Upon in camera inspection and upon consideration of the evidence during the deposition and during the hearing on the motions to compel, the court determines that the plaintiff’s review of the legal pad in anticipation of, and during the course of, his deposition was limited to the first page. The defendant sustained its burden of proof to that extent. *State v. Schroeder*, 232 Neb. 65, 439 N.W.2d 489 (1989). The defendant’s motion is well-taken as to that first page and relief should be granted accordingly.

4. As to the balance of Exhibit 13, the defendant failed to sustain that burden of proof. *Id.* Therefore, the motions to compel should be denied as to the balance of Exhibit 13.

5. The defendant cites numerous cases from other jurisdictions that review of a document in preparation for, or during the course of, testimony as a witness, including a deposition, constitutes a waiver of the attorney-client privilege. The plaintiff cites no contrary authority, and the court finds no controlling Nebraska authority.

6. The court concludes that by using the first page of the document in preparation for, and during the course of, his deposition, the plaintiff waived any privilege with regard thereto.

7. Pursuant to Neb. Ct. R. of Discovery 37(a)(4), the defendant is entitled to an award of expenses upon the motion to compel, including reasonable attorneys’ fees. The court determines that the award of expenses made by this order is reasonable and should be taxed to the plaintiff as provided herein.

**ORDER:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. With regard to the first page of the “Eeks” pad, the defendant’s motions to compel based upon Neb. Evid. R. 612 are sustained. With regard to the remainder of the “Eeks” pad and the alternative claim under Neb. Ct. R. of Discovery 34, the defendant’s motions to compel are denied.

2. The plaintiff is ordered to produce and serve upon the defendant's counsel of record a full, true, and accurate copy of the first page of the "Eeks" pad within 10 days from the date of entry of this order.

3. Exhibit 13, which shows both the first page and the excised additional pages of the "Eeks" pad, shall be preserved by the official court reporter for appellate review, but shall not be made available to the defendant prior to appeal, and shall not be made available to the defendant on appeal except upon the permission of the appellate court. If requested to include Exhibit 13 as a part of any bill of exceptions, the official court reporter shall include the exhibit as a part thereof under seal, which shall not be opened except upon the permission of the appellate court.

4. The additional relief requested by the defendant to allow the defendant to re-depose the plaintiff at plaintiff's costs with regard to the compelled material is granted. The limited further deposition shall be held at such time and place as counsel may agree, or failing agreement, as may be noticed by the defendant's attorney in compliance with Neb. Ct. R. of Discovery 30.

5. Nothing in this order shall be deemed to amend or modify any progression order previously entered herein, except as to any deadline established for the taking of depositions. With regard to any deadline for taking depositions, the limited further deposition of the plaintiff provided for above shall be exempt from the progression order limitation, but shall be taken prior to the final pretrial conference. The inability to complete such deposition in the exercise of reasonable diligence shall constitute grounds for continuance of the pretrial conference.

6. The defendant's request for an award of reasonable expenses of the motions to compel under Neb. Ct. R. of Discovery 37(a)(4) is granted.

a. The amount of such reasonable expenses is determined to be \$1,088.00.

b. Such amount shall be taxed against the plaintiff as costs upon the entry of any final judgment herein.

c. The court's determinations regarding taxation of expenses as costs and the amount thereof are subject to modification at any time to and including the entry of final judgment.

7. This order is interlocutory in character and does not constitute a final order.

Signed in chambers at Ainsworth, Nebraska, on June 19, 2000.

DEEMED ENTERED as of the date of filing by the court clerk.

If checked, the Court Clerk shall:

Mail a copy of this order to all counsel of record and to any pro se parties.

Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Note the decision on the trial docket as: [date of filing] Signed "Order on Motions" entered in part sustaining and in part overruling defendant's motions to compel.

Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel  
District Judge