

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

**LUCILLE HUTTON, by ELAINE K. ESPOSITO, her next friend, and ELAINE K. ESPOSITO, Individually,**  
Plaintiffs,

vs.

**AUDUBON OF KANSAS, INC., a Kansas corporation, JOE R. LEONARD, III and ERNEST A. HASCH,**  
Defendants,

and

**LUCILLE HUTTON,**  
Intervenor.

Case No. CI01-24

**ORDER ON DISCOVERY MOTIONS**

**DATE OF HEARING:** February 15, 2002.

**DATE OF RENDITION:** March 11, 2002.

**DATE OF ENTRY:** Court clerk's file-stamp date, per § 25-1301(3).

**TYPE OF HEARING:** In chambers at District Courtroom, Brown County Courthouse, Ainsworth, Nebraska, per § 24-734.

**APPEARANCES:**

For plaintiff: Richard A. DeWitt and Michael D. Kozlik.

For defendants:

Audubon: James D. Gotschall.

Leonard: John P. Heitz.

Hasch: Forrest F. Peetz.

For intervenor: Mark D. Fitzgerald.

**SUBJECT OF ORDER:** Plaintiff's (1) motion for Rule 35 physical and mental examination (filed 2002/02/05), and, (2) motion to compel discovery (filed 2002/02/12).

**PROCEEDINGS:** See journal entry filed February 15, 2002.

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

1. At the hearing on the motions described above, as well as certain other motions ruled upon by the court on the date of hearing, the court received certain affidavits over objection concerning timeliness of service, reserving the possibility of disregarding the exhibits. The reservation was premised upon the rule recited in *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992). The court now concludes that the timeliness objections were properly overruled without reservation. As the court received the subject affidavits and did actually consider them, the reserved possibility of disregarding such materials now makes no difference.

2. This court simply records its agreement with the discussion in plaintiff's letter brief that the requirement of § 25-1332 that opposing affidavits be served "prior to the day of hearing" does not impose any requirement beyond the plain meaning of the words. NEB. REV. STAT. § 25-1332 (Supp. 2001). As to a hearing on February 15, the statute required service of opposing affidavits by February 14 without regard to the particular time on that date. The "day prior to the hearing" is no different in substance than "prior to the day of hearing." In this instance, service at a late afternoon hour on the previous day was admitted. The statute required nothing more.

3. This court explained at some length on the record following hearing why the intervenor's and defendants' jurisdictional arguments were misplaced. While the Legislature may confer jurisdiction upon a county court in cases pertaining to matters relating to guardianship or conservatorship of any person (NEB. REV. STAT. § 24-517), the equity jurisdiction of the district court conferred by the Constitution (NEB. CONST. art. V, § 9) cannot be legislatively limited or controlled. *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985). The court then took under advisement certain discovery motions filed by the plaintiff.

4. The fundamental principle underlying the analysis of these discovery motions is Lucille Hutton's constitutionally protected right to liberty. U.S. CONST. amend. XIV, § 1; NEB. CONST. art. I, § 3. At the hearing, the plaintiff cited, and this court relies upon, the analysis of the Nebraska Supreme Court in *Dafoe v. Dafoe*, 160 Neb. 145, 69 N.W.2d 700 (1955). One of the authorities cited by the *Dafoe* court states: "Since the right of a next friend to prosecute a suit is limited, the person sought to be represented has a *right to repudiate the interference.*" *Id.* at 152, 69 N.W.2d at \_\_\_ (citation omitted) (emphasis supplied). Although not discussed by the *Dafoe* court or the authority cited in that

opinion, such right finds its source in the constitutional right to liberty. To the extent that the plaintiff seeks to control litigation purportedly brought on Lucille Hutton's behalf, the plaintiff infringes on Lucille Hutton's liberty interests.

5. Of course, the right to liberty requires the mental ability to exercise that liberty. As the *Dafoe* court observed, the law presumes such ability to exercise liberty. "The law presumes all persons to be of sound mind, and if adults, capable of managing their own affairs . . ." *Id.* (citation omitted). The mere allegation that the person is not capable of taking care of her own affairs does not destroy the presumption. *Id.*

6. The *Dafoe* court cited authority stating that, in a case where a next friend purports to represent a person's interests and the person objects, "the court should inquire into the mental condition of the person in order to determine the propriety of allowing the next friend, rather than the person [she] assumes to represent, to control the proceeding." *Id.* (citation omitted). The Supreme Court then stated:

The applicable and controlling rule here is that in order to sue as a next friend, where the alleged incompetent controverts the right of the next friend to act in [her] behalf, the plaintiff must plead and prove by a preponderance of the evidence that *at the time of bringing the suit*, the person on whose behalf [she] sues: (1) Does not reasonably understand the nature and purpose of the suit; (2) does not reasonably understand the effect of [her] acts with reference to the suit; and (3) does not have the will to decide for [herself] whether or not the suit should be brought and prosecuted. *Upon failure to establish such criteria, a next friend cannot maintain an action.*

*Id.* at 152-53, 69 N.W.2d at \_\_\_ (emphasis supplied).

7. If Lucille Hutton possesses the presumed capacity, the mere prosecution of the action deprives Lucille Hutton of part of her right to liberty. This court concludes that the only means of protecting that right to liberty requires that this court compel the plaintiff to make the necessary proof at the outset of the case. Allowing the case to proceed through complete discovery and to trial on the merits concerning the instruments attacked by the plaintiff's operative petition would strip Lucille Hutton of that right and render it essentially meaningless. Thus, this court concludes that *Dafoe* requires the plaintiff to meet the threshold requirements before proceeding further.

8. The court further infers from the *Dafoe* discussion that the requirement of pleading and *proof* requires an evidentiary hearing. This court concludes that the plaintiff's second amended petition is sufficient to *plead* the claim that Lucille Hutton lacks capacity to control the lawsuit. In this instance,

this court concludes that due process to protect Lucille Hutton's liberty requires *proof* by witnesses testifying under oath and subject to cross examination and by other evidence properly admissible on the issue.

9. A corollary to this requirement impels this court to allow only such discovery proper under the Nebraska Discovery Rules directly relating to the threshold questions until such time as the plaintiff meets that preliminary burden. The preliminary questions concern Lucille Hutton's capacity at the time of bringing suit, not at the time of the alleged events concerning the substantive claims in the operative petition.

10. The evidence fails to show that the request for production of documents to defendant Audubon of Kansas, Inc. is reasonably calculated to lead to admissible evidence concerning the plaintiff's capacity *at the time of bringing suit*. Granting the motion to compel before the plaintiff proves existence of the *Dafoe* criteria would infringe Lucille Hutton's right to liberty. The motion to compel should be denied at this point.

11. Of course, if the plaintiff were to succeed in establishing the criteria necessary to represent Lucille Hutton's interests in this case, the objections to production asserted by Audubon of Kansas, Inc. would, for the most part, evaporate. This request for production of documents could only have been made after the plaintiff had been properly determined to be acting on Lucille Hutton's behalf. Even if that event now subsequently occurs, the request for production would not "spring" back to life. The propriety of a request must be determined at the time of the request. The denial of the plaintiff's present motion to compel does not preclude a subsequent request for production if the plaintiff is subsequently determined to be properly representing Lucille Hutton's interests.

12. The plaintiff's motion for a Rule 35 mental and physical examination of Lucille Hutton requires some additional analysis. The intervenor concedes that her mental and physical condition are in controversy. Indeed, the *Dafoe* criteria invoke specific elements of the intervenor's mental condition. Thus, the requirement of the first sentence of Rule 35(a), that "the mental or physical condition . . . of a party . . . is in controversy," has been established. Neb. Ct. R. of Discovery 35(a) (rev. 2001).

13. However, Rule 35(a) further specifies that such examination may only be ordered "for good cause shown." *Id.* This court finds no case where the higher Nebraska courts have expressly defined "good cause" in the context of Rule 35(a).

14. For purposes of a statute allowing modification or vacation of an order in a formal testacy proceeding with the time allowed for appeal, “good cause” has been defined as a logical reason or legal ground, based on fact or law, which justifies the action. *In re Estate of Christensen*, 221 Neb. 872, 381 N.W.2d 163 (1986). In regard to extension of time for preparation of a bill of exceptions, “good cause” means the intervention of something beyond the control of the litigant. *Bryant v. State*, 153 Neb. 490, 45 N.W.2d 169 (1950).

15. In the context of the federal equivalent of Rule 35, the United States Supreme Court has characterized the “good cause” requirement as a “plainly expressed limitation on the use of [Rule 35].” *Schlagenhauf v. Holder*, 379 U.S. 104, 118, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964). That Court observed that the specific requirement would be meaningless if good cause could be sufficiently established by merely showing that the desired examination results would be relevant. *Id.* The court agreed that there must be a greater showing of need under Rule 35 than for other rules utilizing only the Rule 26(b) standard. *Id.* The court specifically stated that “[t]he ability of the movant to obtain the desired information by other means is also relevant [to the determination of good cause].” *Id.*

16. In the federal courts prior to adoption of Rule 35, settled law denied the power in a civil action to compel a plaintiff suing for personal injury to submit to a physical examination. *Camden & Suburban Railway Co. v. Stetson*, 177 U.S. 172, 20 S.Ct. 617, 44 L.Ed. 721 (1900); *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734 (1891). Following the promulgation of Rule 35, a sharply divided Supreme Court upheld the rule as a valid exercise of the Rules Enabling Act. *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed. \_\_\_\_ (1941). The *Sibbach* dissent related the history of the pre-rule doctrine:

It rested on considerations akin to what is familiarly known in the English law as the liberties of the subject. To be sure, the immunity that was recognized in the *Botsford* case has no constitutional sanction. It is amenable to statutory change. But the “inviolability of a person” was deemed to have such historic roots in Anglo-American law that it was not to be curtailed “unless by clear and unquestionable authority of law.” In this connection it is significant that a judge as responsive to procedural needs as was Mr. Justice Holmes, should, on behalf of the Supreme Judicial Court of Massachusetts, have supported the *Botsford* doctrine on the ground that “the common law was very slow to sanction any violation of or interference with the person of a free citizen.”

*Sibbach v. Wilson & Co., Inc.*, 312 U.S. at 17-18 (Frankfurter, J., dissenting) (citation omitted).

17. This court doubts that either the *Sibbach* Court or the current Supreme Court would find no constitutional implication in a compelled physical and mental examination of an individual who neither asserts a claim nor interposes a defense, but whose mental condition is attacked by another person purporting to represent that individual in an action involving that individual's property. See *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *State v. Simants*, 245 Neb. 925, 517 N.W.2d 361 (1994). This court merely reads Justice Frankfurter's comment to mean that the *Botsford* rule was not of constitutional origin. That does not mean that implementation of Rule 35 need not comport with due process.

18. In the light of that history, the Supreme Court in *Schlagenhauf* emphasized that the "good cause" and "in controversy" requirements make it very apparent that sweeping examinations of a party who has not *affirmatively* put into issue [her] own mental or physical condition are not to be automatically ordered . . . ." *Schlagenhauf v. Holder*, 379 U.S. at 121 (emphasis supplied). Like *Schlagenhauf*, the intervenor in this case did not assert a claim based on her physical or mental condition. Nor did the intervenor assert a defense based on such condition. Like *Schlagenhauf*, her "condition was sought to be placed in issue by other parties." *Id.* at 119. Under such circumstances, the Supreme Court made it clear that the pleadings were not sufficient to meet the Rule 35 requirements and the rule required "an affirmative showing . . . that there was good cause for the examinations requested." *Id.* at 119-20. No doubt the Court had in mind the comments of Justice Douglas, dissenting in part, who expounded:

But plaintiff's doctors will naturally be inclined to go on a fishing expedition in search of anything which will tend to prove that the defendant was unfit to perform the acts which resulted in the plaintiff's injury. And a doctor for a fee can easily discover something wrong with any patient – a condition that in prejudiced medical eyes might have caused the accident. Once defendants are turned over to medical or psychiatric clinics for an analysis of their physical well-being and the condition of their psyche, the effective trial will be held there and not before the jury. There are no lawyers in those clinics to stop the doctor from probing this organ or that one, to halt a further inquiry, to object to a line of questioning. And there is no judge to sit as arbiter. The doctor or the psychiatrist has a holiday in the privacy of his office. The defendant is at the doctor's (or psychiatrist's) mercy; and his report may either overawe or confuse the jury and prevent a fair trial.

*Schlagenhauf v. Holder*, 379 U.S. at 125 (Douglas, J., dissenting in part).

19. While the trial in this case in equity would be to the court and not to a jury, the same essential qualms expressed by Justice Douglas apply to the deprivation of liberty inherent in a compelled

mental and physical examination of a woman over ninety years of age. Good cause requires something more than a fishing expedition.

20. The Nebraska precedent on the meaning of “good cause” in this context is rather limited.

21. In *Thynne v. City of Omaha* 217 Neb. 654, 351 N.W.2d 54 (1984), the plaintiff sued for personal injuries from an automobile accident. Shortly before trial, the city sought of Rule 35 examination by a clinical psychologist, which the district court denied. On appeal, the Supreme Court found that denial was an abuse of discretion. The court stated that several physicians, including some of those personally retained by Thynne, could not point to an objective physiological cause of Thynne’s continuing pain. Some of these physicians thought there might be an emotional or psychological component to that pain. The Supreme Court considered those facts to establish good cause for her psychological examination.

22. In *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985), the Supreme Court reversed a denial of motion to set aside decree and allow discovery concerning paternity of a child unborn at the time of trial. The wife represented at trial that the husband was the father of the unborn child. There were no reasonable medical tests available at the time of trial to provide reliable information concerning paternity of the unborn child. The child was born soon after the trial, but before entry of decree. The decree was entered some months later, and the husband promptly moved to set aside the decree and for discovery on the paternity issue. The court “hesitate[d] to impose a procedural precept requiring public repudiation of paternity, lest such ill-advised requirement be the source of immeasurable and unnecessary hurt.” *Id.* at 144, 375 N.W.2d at \_\_\_\_\_. In that case, good cause seemed to stem from the wife’s representations at trial, the absence of a reliable prenatal test, and the desire to avoid public embarrassment. This court wonders if evolving medical procedures, which very probably could determine paternity with overwhelming statistical certainty prior to birth, may have removed a large part of the basis for good cause in *Younkin*. And indeed, in the light of changing social mores in the mere span of 17 years, the court’s other concern now seems rather quaint.

23. In *County of Hall ex rel. Tejral v. Antonson*, 231 Neb. 764, 437 N.W.2d 813 (1989), the Supreme Court again considered Rule 35 in a paternity case. The court determined that the verified petition alleging paternity “presented sufficient ‘good cause’ concerning disputed paternity, a matter

‘in controversy,’ which might well be resolved, or at least made more or less probable, by the results from a reliable and accurate scientific test.” *Id.* at 770, 437 N.W.2d at \_\_\_\_\_. This case seems to equate “good cause” with logical relevance. See *State v. Lowe*, 244 Neb. 173, 505 N.W.2d 662 (1993) (evidence that affects the probability that a fact is as a party claims it to be has probative force and often is said to have logical relevance, while evidence lacking in probative value may be condemned as remote or speculative). A “logical relevance” definition renders the “good cause” requirement superfluous. The general standard for discovery under Rule 26(b) already requires relevance. As the United States Supreme Court observed, “good cause” means something more than mere logical relevance. This court believes that the virtually conclusive character of the paternity test results and the interests of the child actually constituted the “good cause” in *Antonson*, and that the Supreme Court would now disapprove the language seeming to equate “good cause” with logical relevance.

24. Although the opinion in *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993) mentions Rule 35, the decision to deny post-mortem paternity testing rests upon a specific statute not relevant here.

25. The plaintiff’s brief asserts the absence of an examination would prejudice plaintiff. However, the plaintiff here acts purely in a representative capacity. Indeed, she purports to represent Lucille Hutton’s interests. Elaine Esposito possesses *no* due process rights as an individual in this action. Further, the plaintiff argues that if the allegedly insane person proves she has the requisite mental capacity further judicial action is unnecessary. The plaintiff misplaces the burden of proof. The plaintiff must prove such incompetence by a preponderance of the evidence, and the intervenor is presumed to be competent.

26. The plaintiff also asserts in her brief that “Lucille voluntarily entered this litigation as an [i]ntervenor.” Where the only alternative effectively surrenders a valuable right to liberty, the intervenor’s action cannot fairly be described as voluntary.

27. The plaintiff relies upon *Bodnar v. Bodnar*, 441 F.2d 1103 (5<sup>th</sup> Cir. 1971) to support the request for examination. There, the district court dismissed the plaintiff’s claim after she refused to submit to a mental examination to determine if she was mentally competent to prosecute the litigation. *Bodnar* simply held that where there is a showing of a substantial question of competency, the judge with protective restrictions *can*, in making that determination, require a medical examination. The dismissal of

the plaintiff's claim without prejudice was affirmed. *Bodnar* provides little help to a judge in making the determination whether the evaluation *should* be ordered.

28. The plaintiff relies upon the medical records and depositions of other doctors to show good cause. As the intervenor's brief points out, this is not a case of an isolated woman living alone on a remote ranch. She has been in a long-term care center attended by physicians and nurses on a regular, often daily, basis for several years. There appears to be no shortage of available witnesses with direct and personal knowledge of the intervenor's condition. Several of these potential witnesses are medical doctors. The ultimate issues at this preliminary level pose questions that every physician in rural Nebraska working with an aging population faces virtually every day. This is not a situation where the plaintiff cannot obtain information regarding Lucille Hutton's physical and mental capacity. Rather, the question is more candidly posed as whether the plaintiff is entitled to compel an examination "to have her own physician to consult with from time to time and also to have her own expert witness testify at trial . . . ." Plaintiff's Motion for Rule 35 Physical and Mental Examination (Rule 35 motion) at ¶ 3. Under the particular facts present in this case, the court concludes that she is not.

29. This court's conclusion is further buttressed by the broad-ranged scope of the proposed examination, testing and methodology proposed by the plaintiff: "such as in the opinion of the examiner is necessary" with testing to consist of "neuro[-]psychological tests including tests for intelligence, reasoning, memory, abstraction, concentration, apraxia and such other tests as ordered by the [c]ourt" using testing methodology consisting of "the proper testing methodology according to generally accepted medical practices and standards." Rule 35 motion at ¶¶ 5 and 6. This language calls to mind the comments of Justice Douglas in *Schlagenhauf*.

30. This court does not intend to entertain successive motions for examination as some sort of "negotiating strategy" for a properly restricted examination.

31. The Rule 35 motion should be denied.

32. Pursuant to the *Dafoe* authority, this court should set the preliminary issues regarding the plaintiff's right to act in a representative capacity for a prompt trial to the court. No pretrial conference is necessary as to that preliminary hearing. Discovery on the substantive issues of the plaintiff's representative claims should be held in abeyance pending ruling on the preliminary issues.

33. Pursuant to Discovery Rule 35, the time for answering or objecting to certain interrogatories should be shortened.

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

1. The plaintiff's motion to compel is denied.

2. The plaintiff's motion for Rule 35 physical and mental examination is denied.

3. The preliminary issues of whether Lucille Hutton: (1) does not reasonably understand the nature and purpose of the suit; (2) does not reasonably understand the effect of her acts with reference to the suit; and (3) does not have the will to decide for herself whether or not the suit should be brought and prosecuted, are scheduled for trial to the court in equity at **Trial Session No. 2002-08** (session consisting of **April 16, 17, 18, 23, and 24**) at such particular date and time to be published on the court's Internet web site at <http://www.nol.org/home/DC8/tri-cal/tr-list.html> as kept continually current.

4. The priority date for such trial shall be **March 11, 2002**, and, the case shall be heard at such trial session in order of priority by date of placement on the trial calendar (the "priority date"), except that criminal cases shall have first priority for trial, and civil cases having statutory priority shall be advanced for trial prior to cases not having statutory priority. The status of the court's trial calendar, kept continually current, shall be determined by viewing the trial list on the court's Internet site.

5. If the trial is not called at the initial trial session provided above, the trial shall automatically be continued to the next "west" trial session thereafter, subject to the following:

a. The court will not consider any motion for continuance not heard by the court before the close of west Trial Session No. 2002-06.

b. The granting of a motion for continuance shall constitute a removal from and replacement to the trial calendar, and which shall change the "priority date" to the date of rendition of such order.

c. Motions for continuance for undisclosed or subsequently occurring schedule conflicts or for other good cause are subject to the usual requirements of Rules 8-3 and 8-4, except that a motion may be heard upon 48-hours notice to opposing counsel when accompanied by an affidavit stating **facts** demonstrating that such conflict or cause was not discoverable in the exercise of reasonable diligence in time to be heard in conformity with the normal requirements of Rules 8-3 and 8-4.

d. If the budgeted time for trial is less than the remaining time available in the current trial session for which the trial is subject to call, the court may continue the trial to a subsequent trial session even if such continuance will have the effect of advancing for earlier trial a case having a later priority date.

6. The court allows 14 days from the service of any interrogatories propounded by any party pursuant to Discovery Rule 33 regarding witnesses, subjects of testimony, and exhibits to be offered at trial on the preliminary issues for the service of answers or objections.

7. All discovery not directly relating to the limited preliminary issues shall be suspended until the preliminary issues are determined by the court.

8. This is an interlocutory order.

Signed in chambers at **Ainsworth**, Nebraska, on **March 11, 2002**;  
DEEMED ENTERED upon file stamp date by court clerk.

If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Note the decision on the trial docket as: [date of filing] **Signed "Order on Discovery Motions" entered.**  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

BY THE COURT:

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William B. Cassel  
District Judge

Mailed to: