

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

JUDGMENT OF DISMISSAL

DATE OF TRIAL: April 16 and 17, 2002.
DATE OF RENDITION: July 17, 2002.
DATE OF ENTRY: See clerk's file-stamp date.
APPEARANCES:
For plaintiff: Richard A. DeWitt and Michael D. Kozlik with plaintiff initially, and subsequently without plaintiff.
For defendants:
Audubon: James D. Gotschall.
Leonard: Initially, Forrest F. Peetz for John P. Heitz, and subsequently, John P. Heitz, with defendant.
Hasch: Forrest F. Peetz with defendant.
For intervenor: Mark D. Fitzgerald and Ronald E. Temple without intervenor except during intervenor's testimony.
SUBJECT: Evidentiary hearing on limited, preliminary issues described in Order on Discovery Motions.
PROCEEDINGS: See journal entry on trial entered on April 22, 2002.
FINDINGS: The court finds and concludes:

1. This court conducted a preliminary evidentiary hearing regarding the status of the plaintiff's claim to represent Lucille Hutton as next friend, relying upon the analysis and procedure contemplated in *Dafoe v. Dafoe*, 160 Neb. 145, 69 N.W.2d 700 (1955). The fundamental principle underlying that analysis, albeit unarticulated in the *Dafoe* opinion, is each individual's constitutionally protected right to liberty. U.S. CONST. amend. XIV, § 1; NEB. CONST. art. I, § 3.

2. The court previously sustained a demurrer to the plaintiff's amended petition which sought to assert claims both as a representative of Lucille Hutton and in the plaintiff's own individual capacity. Like the court in *Dafoe*, this court determined that the plaintiff has no standing in her own right. The plaintiff's second amended petition did not persist in the individual claim. This court previously determined that upon entry of final judgment the plaintiff's individual claim stated in the first amended petition must be dismissed. The viability of the plaintiff's representative claim occupies the balance of this court's attention.

3. As this court noted in its previous ruling on discovery motions, 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.*" *Dafoe, supra* at 152, 69 N.W.2d at ___ (citation omitted) (emphasis supplied). To the extent that the plaintiff purports to control litigation brought on Lucille Hutton's behalf, the plaintiff seeks to infringe on Lucille Hutton's liberty.

4. 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.*

5. 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 ____.

6. 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 maintains that the only effective means of protecting that right to liberty requires that this court compel the plaintiff to make the necessary proof at the outset. Therefore, this court considers whether the plaintiff sustained her burden of proof on the threshold requirements.

7. The parties have compiled a lengthy and detailed record. This court has spent considerable hours reviewing the testimony and numerous exhibits. A detailed summary of all of the testimony and exhibits would require more length of discussion than the decision justifies. This court undertakes to highlight those matters the court determined to be particularly significant, but omission of discussion does not suggest that the court has overlooked a witness’s testimony or an exhibit. For example, medical records of Lucille Hutton appear in various exhibits and are duplicated in multiple exhibits due to the nature of the deposition evidence. Very little discussion appears herein regarding medical records. While the court has considered the records for the relevant material, the opinions of medical experts and the observations of care-giving personnel relying upon such records provides much greater persuasive value than the underlying records themselves.

8. Many of the witnesses testified by deposition. The court has of course given the same consideration to the deposition testimony as that presented in person.

Nonetheless, certain very critical witnesses, particularly Lucille Hutton and Avery Gurnsey, testified personally, and to a degree greater than usual, the conduct and demeanor of those particular witnesses were especially critical to the decision. The conduct and demeanor criteria do not strongly affect the court's view of the testimony of any of the various physicians.

9. The plaintiff's initial petition in this case (Exhibit 20) and her amended petition (Exhibit 3) establish the scope of the claims that the plaintiff seeks to represent. While the videotaped deposition of Lucille Hutton (Exhibits 13 and 14) from a guardianship action and an earlier deposition (Exhibit 34) in her deceased husband's probate proceeding have been considered, the court finds Lucille Hutton's testimony during the trial in this case to be much more significant to the issues determined.

10. Testimony established that Lucille Hutton has resided for several years at the Rock County Hospital, an acute care facility. The hospital also operates a co-located long-term care facility. Although there was some contradiction in the testimony, this court concludes that Mrs. Hutton is classified as a private-pay resident of the acute-care facility rather than the long-term care facility. This makes very little difference in the analysis. Either way, she is and for several years has been receiving regular direct nursing care and periodic attention from supervising physicians.

11. The plaintiff presented deposition testimony (Exhibit 20) of Dr. John F. Aita, a neurologist, who was employed by the plaintiff and had no direct professional relationship with Mrs. Hutton. Dr. Aita opined that Lucille Hutton has moderate dementia, may well have Parkinson's disease, and suffers from urinary incontinence. He also stated opinions that she would not have the ability to perform certain mental functions, mostly relating more directly to the guardianship context in which the testimony was generated. However, Dr. Aita acknowledged that as much as 80 percent of the population may have some level of dementia by age 90. Dr. Aita also acknowledged that the critical determination of capacity comes from the physician's perception of the individual patient's presentation. This

admission, in the light of other testimony of medical experts regarding the effects of stress and change of environment, persuades the court that Dr. Aita's perceptions resulted from viewing the unrepresentative presentation of Lucille Hutton during her highly stressful deposition.

12. The plaintiff also presented deposition testimony (Exhibit 24) of Dr. Timothy R. Malloy, director of geriatrics for the Department of Family Medicine at the University of Nebraska Medical Center. Like Dr. Aita, Dr. Malloy's perceptions stemmed from the materials provided by the plaintiff. Dr. Malloy was not Lucille Hutton's doctor and did not examine her. Dr. Malloy admitted that a Mini Mental State Exam (MMSE) is not a "standalone" test to determine mental capacity. Dr. Malloy opined that Lucille Hutton has dementia, most likely of the Alzheimer's type, and that the dementia is moderately advanced. However, Dr. Malloy conceded that even a person with the most advanced dementia makes judgments and that such persons can make good judgments including on such matters as who to trust or not trust among the people around them. Dr. Malloy also admitted that the medical records showed instances of good judgments by Lucille Hutton concerning her medical needs and the trustworthiness of people around her.

13. Certain exhibits which are technically part of the intervenor's evidence were offered at the beginning of the plaintiff's case along with other exhibits offered by plaintiff en masse. For convenience, those matters are discussed as they arise rather than in any technical order.

14. The guardianship trial testimony of Carolyn Doke, a registered nurse at the Rock County Hospital (Exhibit 36), shows that Lucille Hutton is a relatively private individual with fewer visitors than other residents and who likes to keep to herself. Her testimony also includes observations regarding high and low blood sugar situations of Mrs. Hutton's diabetes that affect her orientation during such times. Milinda Turpin, a licensed practical nurse at Rock County Hospital, also testified through the transcript of her guardianship trial testimony (Exhibit 37). Ms. Turpin discussed Lucille Hutton's

independent personality and physical problems. Ms. Turpin reported that Lucille Hutton's condition had improved during the months following the immediate aftermath of her husband's death and with adjustments in her insulin and other medications.

15. Tara Swanson, a registered nurse and director of nursing at Rock County Hospital testified by deposition (Exhibit 38). Ms. Swanson related opinions of various nursing personnel that Lucille Hutton is capable of making her own decisions. Ordinarily, such opinions would be subject to hearsay objection, but the deposition reserved objections other than form and foundation to trial and no objections were interposed at trial. Nurse Swanson testified that "I think we have all talked about it." (E38, 12:21) Swanson referred to Lorie Raschke, Kim Steinhauser, and Caroline Doke. Swanson testified that Raschke and Steinhauser both stated opinions that Lucille Hutton was capable of making her own decisions. Swanson related that Doke discussed Hutton's diabetic condition and expressed the view that except for diabetic episodes Hutton does answer questions appropriately and "seems to be able to." (E38, 14:4-5)

16. Tara Swanson also testified to hearsay several times removed regarding Lucille Hutton's expression of a desire not to be visited by the plaintiff. Again, no such objection was made at trial. Indeed, the plaintiff testified that after she became aware of Lucille Hutton's expressed desire against such visits, the plaintiff respected that wish and did not visit further. The plaintiff's own conduct constitutes an admission that Mrs. Hutton possessed some level of competence on that subject.

17. Dr. John B. Byrd, a family practice physician also certified in geriatrics, testified by deposition. At the time of his deposition, he remained the medical director of the Rock County Hospital. Dr. Byrd had practiced medicine at the Rock County Hospital for a year from September, 2000, to September, 2001, under a contractual arrangement. He was the only physician there during that time and "took care of basically all the patients in the Rock County Hospital and Clinic." (Exhibit 17, 9:23-25) When Dr. Byrd first encountered Mrs. Hutton, she was experiencing frequent episodes of hypoglycemia, i.e., low

blood sugar. Dr. Byrd reduced the amount of insulin being administered as treatment for Mrs. Hutton's diabetes. When her blood sugar level was corrected, she improved a great deal. During that time, Dr. Byrd also treated Mrs. Hutton for urinary tract infections which would sometimes cause incontinence. Mrs. Hutton also experienced functional incontinence at times, where the patient is continent but cannot get to the bathroom because she is frail and the nurse may not provide assistance in time. Dr. Byrd testified that Mrs. Hutton resided in the facility because she was unable to care for herself and her husband could not care for her. Dr. Byrd distinguished that physical condition from capacity. Dr. Byrd observed that Mrs. Hutton suffered a mild and appropriate depression after the loss of her husband, and that she recovered from that depression in an appropriate amount of time.

18. Dr. Byrd administered an MMSE which on its face would indicate moderate to severe dementia. However, he emphatically disclaimed the suggestion that Mrs. Hutton had a moderate to severe dementia. Dr. Byrd agreed that it is not proper to use the MMSE exclusively or solely to determine mental functioning. Dr. Byrd testified that in July, 2001, Mrs. Hutton was experiencing a late Stage 1 or early Stage 2 level of dementia; i.e., a mild to early moderate level. He believed that she had Alzheimer's disease, at the late Stage 1 (mild) or early Stage 2 (moderate) level. Dr. Byrd testified that Mrs. Hutton's dementia is not reversible. However, Dr. Byrd testified that Mrs. Hutton does have the capacity to make appropriate decisions for herself, or to seek the aid and guidance of a trusted advisor.

19. While other witnesses have relied upon the recorded results of Dr. Byrd's MMSE to criticize his scoring or suggest a lower score, Dr. Byrd's testimony persuasively explains the surface discrepancy. His nurse administered part of the test and encountered a communication problem because of Mrs. Hutton's hearing impairment and the nurse's relatively high-pitched voice. Dr. Byrd re-administered the suspect parts of the test and confirmed better than reported results.

20. Dr. Robert A. Randall, a general family practice physician and rancher from Atkinson, testified by deposition. For a period of time from 1994 to 1998, Dr. Randall

assisted in providing physician coverage at the Rock County Hospital and Clinic on a one-day-a-week-and-some-vacations basis. Dr. Randall was the primary physician for Mrs. Hutton's husband from 1982 or '83 until his death. Dr. Randall was Mrs. Hutton's regular physician from 1983 to 1990, and also saw her when he was on call at Bassett from 1994 to 1998.

21. In 2001, after her husband's death, Mrs. Hutton sent word through a friend that she would like to see Dr. Randall. He arranged an informal, friendly visit on a Sunday afternoon for 30 to 45 minutes. He described her as "wonderfully delightful" and "great" on that occasion. (Exhibit 18, 12:7-10) Two or three weeks later, Avery Gurnsey, Mrs. Hutton's lawyer, called Dr. Randall to request a more official visit. Dr. Randall observed that Gurnsey seemed surprised to learn that Dr. Randall had recently visited Mrs. Hutton, and inferred that Gurnsey was not aware of the prior visit. The more formal visit occurred on July 22, 2001. He performed an assessment of her mental condition, in a relaxed, friendly, and unstructured fashion.

22. Dr. Randall thought the primary issue of important was the matter of her judgment, and expressed the opinion that Mrs. Hutton knew that she had things of value, knew that there were things that needed to be attended to in her life and after her death, knew that she was really not capable of personally handling all of that, and was placing trust in her attorney. He testified that, in his opinion, she "did wonderful" regarding orientation. (E18, 23:10) She didn't know what month it was and didn't know what day it was, but she expressed the knowledge that she didn't know and told Dr. Randall, as he summarized her expression, "I have been here for so long and every day just runs together, and it's hard for me to keep track of it, and I can't remember what day it is, even." (E18, 23:13-15) He recalled that Mrs. Hutton looked out of the window to see whether it was day or night, which he thought was really quite appropriate. "She was not completely oriented, but she knew that and she had an idea why." (E18, 23:24-25)

23. Dr. Randall testified that Mrs. Hutton did suffer from some degree of dementia. But he stated that it would “be very rare to find a ninety-year-old that didn’t suffer from some degree of dementia, an acquired decrease in intellectual capacity. I mean, I guess I haven’t seen [a ninety-year-old person] that I know about . . . [t]hat didn’t have some degree [of dementia].” (E18, 32:20-25)

24. Dr. Randall testified persuasively that the likelihood would be quite good that Mrs. Hutton would perform poorly for someone with whom she did not have some familiarity from the past. He also testified that he would be very surprised if Mrs. Hutton did not have some element of depression, but stated that he did not think that was causing her any difficulty in understanding what she wants done or how she plans to manage her affairs. He acknowledged that she had physically declined over the years that he had known her, but that she “still has the same smile, some of the same sense of humor, all of those things. Some are remarkably similar, but, obviously, twenty years has caused a change.” (E18, 43:1-4) Dr. Randall did not review any of Mrs. Hutton’s current medications, because he thought that “if I could make the assessment and that she showed that she was able to know what she needed to do as far as her affairs [were concerned], it didn’t make any difference what medications she was on.” (E18, 49:4-7)

25. Dr. Randall characterized Mrs. Hutton’s dementia as

someone that has a great deal of memory loss as far as short-term and maybe even some long-term. She has a problem with orientation as to time. There is no doubt about it, no doubt about it. She would have difficulty, very much difficulty with calculations. She would have difficulty balancing a checkbook, all of those types of things. If she were driving, she probably would get lost. But she still knows things related to her affairs, how she wants – what she wants done with them. . . . While there could be a lot of things that are going pretty strange, [she] still [has] some fundamental things of [her] own security that are very vivid to [her].

(E18, 51:14-23 and 52:11-14) He also described her as “just suspicious enough that she would say [before entering into a contractual arrangement], wait a minute, I am going to get my lawyer on this first before I do this.” (E18, 53:4-6)

26. Dr. Hugh F. Leigh, a general practice physician, testified by deposition. He practiced at Bassett from 1983 to 1992, and then from May, 1997, to December, 1999. He was involved with care and treatment of Mrs. Hutton from 1997 to December, 1999. He did not observe any mental deficits with Mrs. Hutton during that time. Without objection at trial, he described some hearsay information from “a friend” about a subsequent change in Mrs. Hutton’s condition. However, he had no personal observations regarding any such change and the absence of sufficient information concerning the reliability of the hearsay communication renders that hearsay unreliable and the court gives it no weight.

27. The plaintiff attributes significance to a letter sent by Lucille Hutton to a relative in 1999, in which Lucille states: “I am so poor at writing – letters especially letters. [M]y muscles don’t work and my thinker doesn’t work either.” (Exhibit 11) (emphasis in original) This court concludes that the statement “my thinker doesn’t work either” was a mere pleasantry between elderly individuals. The author demonstrates reasoning ability in several other respects in the course of this letter, including obvious thought to the addressing of future reply correspondence. The reliance on this casual phrase between relatives casts more doubt on the plaintiff’s motives than the intervenor’s capacity.

28. Dr. Carl B. Greiner, a physician who is board-certified in psychiatry and neurology and a professor of psychiatry at the University of Nebraska Medical Center, testified at considerable length. Dr. Greiner did not examine or treat Mrs. Hutton. He had no significant opportunity to make the critical determination of capacity that comes from the physician’s perception of the individual patient’s presentation, as described by Dr. Aita. This does not reflect or imply any criticism on that account of Dr. Greiner or the other physicians who testified on behalf of the plaintiff. It simply means that they, of necessity, approach the issues from a different perspective than that of Mrs. Hutton’s regular physicians.

29. In many ways, Dr. Greiner’s opinions resemble the other physician’s expressions. Dr. Greiner testified that Mrs. Hutton has dementia, most likely of the

Alzheimer's type, superimposed by delirium at times. This is entirely consistent with Dr. Byrd and generally consistent with Dr. Randall. Both of these physicians had testified that Mrs. Hutton has dementia, and Dr. Byrd believed Mrs. Hutton has Alzheimer's disease. Dr. Byrd particularly testified regarding delirium experienced at times by Mrs. Hutton at times from particularly high or particularly low blood sugar levels and from urinary tract infections. Dr. Greiner opined that Mrs. Hutton has a moderate level of dementia, but admitted that a slight improvement was possible. Dr. Byrd has testified that Mrs. Hutton's dementia was at the upper range of mild or lower range of moderate. This court simply does not find much difference between the physicians regarding their opinions of Mrs. Hutton's medical condition.

30. Dr. Greiner testified that Mrs. Hutton has decreased ability to conduct executive functions. Executive functioning may be generally understood as decision making, although that is not precisely correct from the medical perspective. Executive functioning constitutes the uppermost level of brain activity. He testified that the mental processes necessary for Mrs. Hutton to understand the present lawsuit include an adequate level of attention, adequate memory, and the ability to perform executive functions. Dr. Greiner testified that Mrs. Hutton has a "decreased ability" to conduct executive functions. But he did not testify that she lacked the ability to do so. Dr. Greiner testified that Mrs. Hutton had a moderate level of decreased cognitive capacity and that she could have difficulty understanding complex documents. But he did not testify that she lacked the ability to understand. Dr. Greiner testified that Mrs. Hutton was functioning at a basic level and that she could have difficulty dealing with complex concepts such as this lawsuit. But he did not testify that she could not deal with such complex concepts. Dr. Greiner testified that Mrs. Hutton's volition was sufficiently diminished that she could have difficulty expressing her volition. But he did not testify that she lacked the ability to express her volition. He expressed similar opinions on the ultimate *Dafoe* criteria, stating that it would

be “difficult” for her to perform those functions, but never testified that she could not do so.

31. On cross examination, Dr. Greiner was pointedly questioned regarding classification in the hierarchy of executive functioning of specific instances of Mrs. Hutton’s functioning documented in the medical records. The court observed a subtle tendency to resist higher-level classifications and to only begrudgingly acknowledge instances of higher-level functioning.

32. Dr. Greiner criticized Dr. Byrd’s documentation of the MMSE, characterizing the conduct of the examination by two different examiners (nurse and doctor) as problematic and criticizing Dr. Byrd for giving credit for unreported answers. Dr. Greiner opined that Dr. Byrd over scored the examination. Dr. Greiner could not, however, independently score the examination results because of illegible handwriting and absent documentation. This court agrees that Dr. Byrd did not document the test results in a fashion allowing replication or comparison. That does not mean that Dr. Byrd’s *testimony* regarding the test results should be disregarded. After all, the MMSE only comprises a tool to be used by a qualified expert. As Dr. Aita testified, the critical determination of capacity comes from the physician’s perception of the individual patient’s presentation.

33. Dr. John Cherry, a physician who is board certified in general surgery, testified on behalf of the intervenor and defendants after being released from the subpoena issued at the request of the plaintiff. The plaintiff elected not to call Dr. Cherry. Dr. Cherry is now the Chief of Staff for the Rock County Hospital and the Rock County Long Term Care Facility. He was hired on December 1, 2001, although he had previously provided locum tenens coverage. In his present employment, Lucille Hutton is one of his patients.

34. Dr. Cherry had examined Mrs. Hutton approximately six times prior to trial. He confirmed the prior testimony concerning Mrs. Hutton’s insulin-dependent diabetes. Although Dr. Greiner had characterized Mrs. Hutton as a “brittle” diabetic, i.e., someone

having greater than normal difficulty adjusting to the use of insulin, Dr. Cherry disagreed. Dr. Cherry stated that he did not observe the radical changes he associated with the classification of a brittle diabetic.

35. Dr. Cherry testified that Mrs. Hutton does at times experience low blood sugar. During such times she has confusion and hunger. Upon treatment with orange juice, the confusion and hunger go away. Similarly, Mrs. Hutton does at times experience high blood sugar, characterized by confusion. Upon treatment with insulin, the confusion goes away. Dr. Cherry stated that Mrs. Hutton is easily awakened, and knows who she is and where she is. He characterized her as alert and oriented on each of the examinations. He testified that she does experience recurrent urinary tract infections. He stated that diabetics, the elderly, and women generally have more trouble with such infections. During such times, the patient may suffer from incontinence and confusion. However, he noted that the incontinence and confusion dissipate after treatment with antibiotics.

36. Dr. Cherry confirmed the testimony of other witnesses regarding Mrs. Hutton's hearing impairment and the resulting difficulty in communications. He testified that techniques of speaking very loudly and very slowly seem to work. He directed his nurse to perform an MMSE, compared it to Dr. Byrd's MMSE, and found the results quite similar, characterizing them as "stable." He opined that Mrs. Hutton is competent, and suggested that an appropriate strategy for making complex decisions associated with this lawsuit would be for Mrs. Hutton to obtain assistance from other people with whom she was already familiar. Dr. Cherry stated that stress, such as the stress associated with this case, can confuse Mrs. Hutton and cause her blood sugar level to rise. This would require monitoring of her blood sugar level. The cross examination raised sufficient problems with Dr. Cherry's testimony that this court considers it primarily as corroborative of the other physician testimony. Ultimately, Dr. Cherry characterized Mrs. Hutton as clear as most 90-year-olds.

37. Lorie Ann Raschke, a charge nurse at Rock County Hospital, testified. Her observations support the physician's opinions. She related observations of Mrs. Hutton concerning this lawsuit. The case bothers Mrs. Hutton. Mrs. Hutton "closes up." Raschke stated that Mrs. Hutton does understand why things are going on, and has remarked that she cannot trust certain people. Raschke candidly acknowledged instances where Mrs. Hutton was lethargic, unconscious, unresponsive, confused, or required assistance with personal hygiene, as well as other physical difficulties.

38. Kimberly Steinhauser, a licensed practical nurse at Rock County Hospital, testified by deposition. Steinhauser corroborated other testimony already described. She testified that Mrs. Hutton reads magazines, including news magazines and magazines relating to animals, and reads any kind of newspaper. She has sometimes discussed the articles that she had read with Steinhauser. Steinhauser described a playful conversation with Mrs. Hutton the morning of Steinhauser's deposition in August, 2001, in which Steinhauser presented Mrs. Hutton's medication, Mrs. Hutton asked what they were, Steinhauser replied that Mrs. Hutton knew what they were, and Mrs. Hutton then indeed told Steinhauser what the medications were. Steinhauser confirmed that Mrs. Hutton can suffer from periods of unresponsiveness or confusion associated with high or low blood sugar or urinary tract infection, but that on appropriate treatment "she is fine." (Exhibit 53, 16:23) The nursing staff refers to such instances as "spells," and the recovery time can vary from 15 minutes to a day or two depending upon the cause.

39. Susan Jilg, the social services designee at the Rock County Hospital, testified primarily regarding her interactions with Mrs. Hutton. She related observations regarding Lucille Hutton's conversation with Dr. Evan Evans, an optometrist, regarding a vision examination and discussion of alternative courses of action. Jilg saw and heard the dialog, and stated that Mrs. Hutton responded appropriately. Although Mrs. Hutton frequently attends the plan-of-care meetings regarding her care, she sometimes chooses not to attend. Jilg confirmed through highly persuasive testimony that Mrs. Hutton made her own

judgments about visits from long unseen relatives taking an interest in her business. Mrs. Hutton communicated her wishes not to see those relatives directly to Jilg, even though those communications were later repeated by Avery Gurnsey.

40. Linda Wegener, an employee of the Rock County Clerk, testified regarding her conversations with Mrs. Hutton. Wegener had performed typing services for Mrs. Hutton's husband, and met Mrs. Hutton through him. Wegener visits Mrs. Hutton frequently and has discussed the lawsuit with her. Wegener testified that Mrs. Hutton is not pleased with the filing of the lawsuit and told Wegener "they're after my money."

41. Avery Gurnsey, a lawyer in Bassett, testified at great length and in considerable detail regarding his representation of Harold and Lucille Hutton, and after Harold's death of continuing representation of Lucille. It is clear from that testimony that Harold primarily conducted the couple's business matters, although Lucille was involved to some extent. Gurnsey's testimony confirmed the testimony of other witnesses regarding the strategies necessary to successfully communicate with Lucille Hutton because of her hearing impairment and other physical limitations.

42. His testimony of their conversations relating to the guardianship action that the plaintiff previously initiated and pursued in county court demonstrates her understanding of that proceeding and her exercise of volition. Upon being informed of the guardianship action, Mrs. Hutton asked Gurnsey, "what can we do to stop her?" She remarked that she had not seen the plaintiff since the plaintiff was a "girl," and made a statement to the effect that, "they knew they couldn't budge Harold, but I'm not that easy." Upon being served by the sheriff with notice in the guardianship action, after Gurnsey explained the document, Mrs. Hutton responded, "we can't let that happen."

43. Gurnsey testified that after the present action was initiated, he visited Mrs. Hutton at the hospital and explained the petition filed by the plaintiff and the purpose of the suit to set aside the transactions. Gurnsey stated that Mrs. Hutton was shocked and upset by the lawsuit and when asked by Gurnsey if she wanted to get involved in this case, Mrs.

Hutton responded that she wanted to do anything she could to assist Audubon. They specifically discussed intervention in the case. Certainly, the language used in the successive petitions in this case has been complex. The legal concepts and principles are complex. However, the ultimate effect of the suit, if successful, can be reduced to quite simple and basic language. The “legalese” can be translated to simple, plain English and that is clearly one of the functions of a lawyer for even the most intelligent and highly-functioning nonlawyer. Gurnsey testified regarding the language used to explain the lawsuit, its concepts, and its goals to Mrs. Hutton. Those explanations were clear, concise, and basic.

44. Gurnsey testified that in December, 2001, shortly after the guardianship action was concluded, he reported the development to Mrs. Hutton, who replied, “I’m jubilant.” He testified that Mrs. Hutton asked if there was anything they could do to prevent these lawsuits, and expressed some interest in pursuing an action for malicious prosecution.

45. The plaintiff had conceded that John Smith, a nephew of Harold Hutton, may have paid the filing fee in this case. (Mrs. Hutton later testified that Harold Hutton’s sister had married John Smith’s father.) Gurnsey testified that Lucille Hutton expressed unhappiness with John Smith, expressed dislike of Smith’s inquiries about Lucille Hutton’s business after Harold’s death, and expressed great offense at the filing by John Smith of a petition to be appointed as personal representative in Harold’s estate.

46. Gurnsey’s contemporaneous notes of conversations with Lucille Hutton were offered into evidence by the plaintiff. (Exhibit 54) The notes illuminate some of the conversations during the course of this proceeding as to matters not covered expressly during Gurnsey’s testimony. They are too lengthy to summarize with any degree of totality, but they generally show the communication between a lawyer and an elderly client embroiled in litigation. One example of Lucille Hutton’s participation in the discussions of this case occurred shortly before the trial on these limited issues. On April 11, 2002, in discussing the case Mrs. Hutton stated that she knew the plaintiff wanted to prove that Mrs.

Hutton was, and then made a circular motion with her finger around the side of her head to indicate “crazy,” but that [Mrs. Hutton] was not going to let her.

47. The court received the testimony of Lucille Hutton in a room at the Rock County Hospital. Lucille Hutton’s severe hearing impairment became immediately apparent. This court is not soft-spoken and typically speaks in a loud and distinct voice. This court did so in an initial attempt to administer the oath. It became immediately apparent that the ordinary long form of oath could not be heard or understood by Mrs. Hutton when pronounced by the court in a typical, relatively loud voice. The court had to shorten the oath to the promise to tell the truth and practically shout the words. Mrs. Hutton then responded appropriately.

48. The plaintiff’s counsel demonstrated great courtesy to Mrs. Hutton and treated her with respect and dignity. None of this court’s comments or findings should be construed as any criticism of counsel. The examination was conducted in conformity with the highest degree of professional standards. The plaintiff’s counsel conducted the direct examination in a firm and distinct manner, but appears to be naturally rather soft-spoken. It was apparent to the court that Mrs. Hutton did not hear many of the plaintiff’s questions in whole or in part. Mrs. Hutton’s own trial counsel practically shouted the questions at times, kept his questions very short, and had much greater success in being heard and understood. When the plaintiff’s lawyer was asking Mrs. Hutton about her age at her next birthday, and obviously not being heard by Mrs. Hutton, he asked a simple question in a somewhat louder voice to try to get through, asking Mrs. Hutton if she would be fifteen at her next birthday. Mrs. Hutton evidently heard that question, and with a wry look of some bemusement on her face, responded “and then some.”

49. The accuracy of some of Mrs. Hutton’s factual statements can be challenged. For example, she apparently referred to Dr. Cherry as “Dr. Barry.” Of course, it may be that is how she has heard and understood the name. But as to the matters of her wishes surrounding this lawsuit, she expressed her wishes clearly and concisely. Mrs. Hutton

stated that she did not want the plaintiff to handle her business. She stated that she wanted Audubon (the defendant, Audubon of Kansas, Inc.) to keep the ranch. She stated that she did not want Elaine Esposito filing any lawsuits in her, i.e., Mrs. Hutton's, name. When asked what she would say to Elaine Esposito, Mrs. Hutton responded that she would say "you don't know anything." When asked what she would tell the judge, she replied that the judge will have to know it all.

50. When all of the medical evidence is considered, the court concludes that Mrs. Hutton does suffer from a moderate dementia, probably of the Alzheimer's variety, and that during periods of high or low blood sugar or urinary tract infection, experiences brief periods of delirium. However, the court finds it particularly significant that all of the physicians who were responsible for the supervision of this lady's care and treatment unanimously opined her competence during the periods of their care and treatment outside of those temporary periods of delirium. Dr. Greiner's strongest adverse opinion was that Mrs. Hutton "would have difficulty" understanding, relating, and deciding, and not that Mrs. Hutton could not do so. The medical evidence was essentially unanimous that even while subject to moderate dementia, an individual can make judgments and those judgments can be good judgments. To the extent that the evidence presented the views of nursing personnel, those nursing personnel uniformly indicated a belief in Mrs. Hutton's competence.

51. Although the plaintiff's medical experts did not have the opportunity to examine Mrs. Hutton, this is not a situation where Mrs. Hutton sought and obtained opinions from physicians with whom she had no previous professional relationship. There is nothing to suggest that these physicians acted as "partisans" or "advocates." While there was some criticism of the conduct and recording of Dr. Byrd's MMSE, no physician relied exclusively upon the result or suggested that any such flaws impaired the ultimate opinions.

52. The explanations provided to Mrs. Hutton and her responses, in the light of her age and medical situation, demonstrate that she did understand the nature and purpose

of this lawsuit, that she did understand the effects of her actions to intervene and seek dismissal of this lawsuit, and that she did and does have the will to decide for herself whether she wishes the suit to be maintained. While the assistance of her lawyer was necessary to inform her of the intended effect and aim of the lawsuit, that goal is ultimately simple and understandable. The ultimate issue in the lawsuit would not be whether the gift is in her financial interest. Any charitable gift could be attacked as contrary to the donor's financial interest. Until tax rates approach 100%, even tax advantages only partially offset the cost of making a gift. The issue on the main case would be whether the donor had the requisite capacity to make the gift.

53. While the evidence must be carefully scrutinized to protect Mrs. Hutton from being taken advantage of financially, this court must also protect Mrs. Hutton's right to determine the disposition of her property in accordance with her own wishes. Mere age and frailty cannot be used to take that right away. Mrs. Hutton is presumed competent, and the law imposes the burden of proof on the claimed next friend to establish the contrary criteria. The court concludes that the next friend has failed to do so. Accordingly, the plaintiff lacks standing to assert the claims as a representative of Mrs. Hutton. The claims of the second amended petition purporting to represent the interests of Lucille Hutton must be dismissed with prejudice to representation of such claims by the plaintiff. Of course, the dismissal should be without prejudice to any assertion thereof by Lucille Hutton or any proper representative pursuant to law.

54. The court already noted that the allegations of the first amended petition alleging an individual claim of the plaintiff, not restated in the second amended petition, must be dismissed with prejudice.

55. Certain pleading motions or demurrers of various defendants were pending and action thereon deferred pending the disposition of these preliminary issues. The disposition of the preliminary issues renders such motions or demurrers moot, and the same should be denied as moot.

56. All costs shown on the clerk's Justice docket were incurred by the plaintiff, and should be taxed to the plaintiff.

57. All requests for attorneys' fees, express or implied, should be denied.

JUDGMENT: IT IS THEREFORE ADJUDGED that:

1. The claims of the plaintiff's amended petition purporting to make allegations on behalf of the plaintiff in her own right are dismissed with prejudice pursuant to the prior interlocutory order of dismissal, which is made final in this judgment.

2. The plaintiff's second amended petition asserted in a representative capacity on behalf of Lucille Hutton is dismissed with prejudice to future action by the plaintiff as next friend, but without prejudice to future action by Lucille Hutton or her legal representatives.

3. The pending motions and demurrers of the various defendants are denied as moot.

4. All costs are taxed to the plaintiff, Elaine K. Esposito. All requests for attorneys' fees, express or implied, are denied. All claims of all parties not otherwise expressly determined by this judgment are denied. This is a final judgment.

Signed in chambers at **Ainsworth**, Nebraska, on **July 17, 2002**;
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

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 "Judgment of Dismissal" entered.**
Done on _____, 20____ by _____.

Mail postcard/notice required by § 25-1301.01 within 3 days (**Judgment of Dismissal entered**).
Done on _____, 20____ by _____.

Enter judgment on the judgment record.
Done on _____, 20____ by _____.

William B. Cassel
District Judge

Mailed to: