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REBEKAH HUBER, APPELLANT, V. KENT E. ROHRIG, APPELLEE.

791 N.W.2d 590

Filed December 3, 2010. No. S-10-002.

1. **Motions for Mistrial: Appeal and Error.** A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion.
2. **Judges: Recusal: Appeal and Error.** A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion.
3. **Pretrial Procedure: Appeal and Error.** On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard.
4. **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.
5. **Motions for Mistrial.** A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial.
6. ____. Events which may require the granting of a mistrial include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters.
7. **Judges: Recusal.** A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed.
8. ____: ____. A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
9. **Trial: Evidence.** The concept of "opening the door" is a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection.
10. ____: ____. "Opening the door" is a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue.
11. **Appeal and Error.** Error that does not prejudice the party does not provide grounds for relief on appeal.
12. **Pleadings: Rules of the Supreme Court: Good Cause: Pretrial Procedure.** Generally, the requirements of "in controversy" and "good cause" contained in Neb. Ct. R. Disc. § 6-335(a) are not satisfied by mere conclusory allegations of pleadings, but are fulfilled by a movant's affirmative showing that the condition to be verified by the requested examination, physical or mental, is actually controverted and that good cause exists for ordering the examination.
13. **Rules of the Supreme Court: Pretrial Procedure: Affidavits.** To obtain discovery under Neb. Ct. R. Disc. § 6-335(a), the requisite showing does not require the movant to prove the movant's case on the merits at an evidentiary hearing,

but may include a showing by an appropriate affidavit or other suitable information presented to a court whereby the court can perform its function under § 6-335(a).

14. **Actions: Negligence: Rules of the Supreme Court: Pretrial Procedure.** An allegation of negligence in a personal injury action does not put a party's mental condition in controversy for purposes of Neb. Ct. R. Disc. § 6-335(a).
15. **Courts: Rules of the Supreme Court: Pretrial Procedure.** When requesting a physical or mental examination, a movant's ability or inability to obtain the desired information without the requested examination is relevant to a court's decision whether to order an examination under Neb. Ct. R. Disc. § 6-335(a).
16. **Trial: Evidence: Juries.** A motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury. It is not the purpose of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence.
17. ____: ____: ____. A motion in limine's purpose is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself.
18. **Trial: Courts.** A court cannot err with respect to a matter not submitted to it for disposition.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Maren Lynn Chaloupka, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, for appellant.

David C. Mullin and Elizabeth A. Culhane, of Fraser Stryker, P.C., L.L.O., for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF THE CASE

This case involves a car accident in which Rebekah Huber, appellant, was a passenger in a vehicle struck by a vehicle driven by Kent E. Rohrig, appellee. Huber filed a complaint against Rohrig in the district court for Douglas County alleging that his negligence caused the accident and seeking damages for injuries she alleged resulted from the accident. Rohrig admitted liability. During discovery, Rohrig moved to compel a clinical psychological examination of Huber. Huber opposed the motion for various reasons, including the assertion that

Huber's psychological well-being was not in controversy. The district court granted the motion.

A jury trial was conducted on the issue of damages. After 1 day of trial, the district court granted Rohrig's motion for mistrial and dismissed the jury. The trial judge declined to recuse himself before the second trial. Huber sought and was denied access to the juror questionnaires prior to the second trial. The second trial was conducted, and a judgment in favor of Huber was entered awarding damages in an amount less than she sought.

Huber appeals from this second trial and assigns numerous errors. For the reasons explained below, we affirm.

II. STATEMENT OF FACTS

On January 12, 2006, Huber was riding as a passenger in a vehicle struck by a vehicle driven by Rohrig. After the accident, Rohrig was cited for driving while intoxicated. On June 21, 2007, Huber filed this action against Rohrig in which she alleged that his negligence caused the accident and sought damages therefor. In the course of proceedings, Huber made clear that her damages were for injuries consisting of chronic neck pain and cognitive deficits consistent with postconcussion syndrome. On August 8, 2008, Rohrig filed an amended answer and admitted liability.

During discovery, on August 22, 2008, Rohrig filed a motion pursuant to Neb. Ct. R. Disc. § 6-335(a) (Rule 35) to compel Huber to submit to a psychological clinical examination (hereinafter psychological examination or clinical examination). Based on her attorney's advice, Huber had previously cooperated with Rohrig's request that she submit to neuropsychological testing related to the physical origin of her claimed damages, but had refused to complete the psychological portion of the examination. It was Huber's position that a psychological clinical examination was not proper under Rule 35, because Huber's mental health was not "in controversy" and Rohrig had not shown "good cause" for needing the clinical portion of the examination. Huber noted that Rohrig had been given access to Huber's medical and educational records, the transcript of her deposition, and the results of a neuropsychological examination

performed by an expert retained by Huber. The court granted Rohrig's motion to compel and ordered that Huber complete the clinical portion of the examination.

Also during discovery, Huber took the deposition of Rohrig's medical expert, Dr. Charles Taylon. The deposition was not completed, but Taylon agreed to testify at trial. Huber's motion to compel the completion of Taylon's deposition was denied.

Shortly before the first of two trials began, Rohrig filed a motion in limine seeking to bar any mention or evidence of the fact that he was intoxicated when his vehicle struck the vehicle in which Huber was riding, as well as evidence that he had previously been arrested for drunk driving. Rohrig contended that because he had admitted liability, this evidence and evidence of alcohol use generally were irrelevant. The court sustained the motion in limine.

The first trial commenced in July 2009. After a day of trial, the court sustained Rohrig's motion for mistrial based on Huber's counsel's references to alcohol use during both voir dire and opening statements, in violation of the order in limine. Before the second trial was held, Huber moved to recuse the trial judge and the motion was denied.

Before the start of the second trial, Huber filed a motion entitled "Plaintiff's Motion for Production of Juror Questionnaires to Counsel" in which she requested an opportunity to review the juror questionnaires. The court denied the motion.

The second trial began on November 16, 2009. During voir dire and opening statements, Rohrig's counsel made some complimentary remarks regarding his client. At trial, Rohrig's expert, who had been authorized by the court to conduct the psychological examination of Huber, testified. Huber did not object to the substance of the expert's opinion testimony. The expert testified that based on the personality assessments he had performed, Huber has a tendency to magnify physical symptomology and makes an effort to present herself as having memory problems and to convince people she has a closed-head injury when in fact she does not. He stated that Huber has had personality problems and poor coping mechanisms for quite some time. The written report of Rohrig's expert, which Huber's counsel entered into evidence on cross-examination,

contained the expert's opinions and concluded by diagnosing Huber with "Major Depression, by History" and "Personality Disorder, Not Otherwise Specified, with Narcissistic, Histrionic, and Obsessive-Compulsive Features."

At trial, Huber put into evidence exhibits which showed that she had incurred various medical expenses. The exhibits were provided to the jury for deliberations.

After deliberations, the jury returned a verdict form stating that "[w]e, the jury duly impaneled and sworn . . . do find for the Plaintiff and award damages in the amount of $24,400," an amount less than the total contained on the face of Huber's exhibits. Judgment was entered, and Huber appeals.

III. ASSIGNMENTS OF ERROR

Huber assigns as error, restated and summarized, that the district court erred when it (1) granted Rohrig's motion for mistrial at the first trial, (2) denied Huber's motion for recusal, (3) excluded evidence and did not allow impeachment of Rohrig's character after his counsel placed Rohrig's character in issue, (4) denied Huber's motion to compel the completion of Taylon's deposition, (5) denied Huber's motion for production of the juror questionnaires, and (6) granted Rohrig's motion to compel Huber to complete the clinical interview portion of the neuropsychological examination.

IV. STANDARDS OF REVIEW

[1] A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

[2] A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion. *Mihm v. American Tool*, 11 Neb. App. 543, 664 N.W.2d 27 (2003).

[3,4] On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard. *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010). 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. *Id.*

V. ANALYSIS

1. The District Court Did Not Err When It Granted Rohrig's Motion for Mistrial

Because of comments made by Huber's attorney during voir dire and opening statements, the district court granted a mistrial. Huber claims that the district court erred when it granted Rohrig's motion for mistrial, because the effects of the challenged comments would not prevent a fair trial. Rohrig responds by arguing that the objectionable comments were prejudicial and that it was not an abuse of discretion to grant the motion and order a new trial. We agree with Rohrig.

[5,6] A motion for mistrial is directed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent a showing of abuse of that discretion. *Sturzenegger, supra*. A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial. *Genthon v. Kratville*, 270 Neb. 74, 701 N.W.2d 334 (2005). Events which may require the granting of a mistrial include egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of incompetent matters. See *id*. An abuse of discretion means that the reasons for the ruling are untenable and unfairly deprive a litigant of a substantial right and deny a just result in the matter submitted for disposition. See *Kocontes, supra*.

Before the trial proceedings began, Rohrig filed a motion in limine seeking to exclude any mention of alcohol use at the trial. The motion was granted. During voir dire, Huber's counsel questioned the potential jurors about whether they were involved with the Mothers Against Drunk Driving organization and whether any of them abstain from alcohol. Rohrig moved for a mistrial based on a violation of the order in limine. The motion was denied. During opening statements, Huber's counsel paraphrased one of the steps from the principles urged by Alcoholics Anonymous and introduced her remarks by stating "as one organization put it." Following this statement,

Rohrig renewed his motion for mistrial and the court granted the motion.

The court explained its rationale for granting the motion. The court stated that Huber's counsel's several references to alcohol created a narrative that this was a drunk driving case rather than a damage case and that the commentary violated the court's order in limine. It is clear the district court determined that the references to alcohol would have a significantly prejudicial impact on the jury. Given the context in which the ruling occurred, such determination was reasonable. See *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). The ruling of the district court was not untenable. Accordingly, we conclude that the district court did not err when it granted Rohrig's motion for mistrial.

2. The District Court Did Not Err When It Denied Huber's Motion for Recusal

Huber claims that the district court erred when it denied her motion for the judge to recuse himself. Huber supported her motion for recusal with the affidavit of her counsel. The affidavit asserted that the basis for the motion was the grant of the mistrial and Huber's counsel's belief that the district court judge was biased in favor of Rohrig due to certain rulings.

[7] A recusal motion is initially addressed to the discretion of the judge to whom the motion is directed. *State v. Hubbard*, 267 Neb. 316, 673 N.W.2d 567 (2004). A motion requesting a judge to recuse himself or herself on the ground of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. See *Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002).

[8] In discussing bias or prejudice as a matter of law, we have stated that a trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown. *Id*. Thus, we have concluded that a judge should have recused herself

in subsequent proceedings where she initially made a custody determination when no evidence had yet been presented on the issue. *Id.* It has also been concluded that a Workers' Compensation Court trial judge should have recused himself where he recited facts about the employer which were not yet in the record. *Mihm v. American Tool*, 11 Neb. App. 543, 664 N.W.2d 27 (2003).

With respect to recusal, the U.S. Supreme Court has stated that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994). The Court has also observed that a judge's ordinary efforts at courtroom administration cannot be the basis for bias or partiality. *Id.*

In the instant case, the evidence submitted in support of Huber's motion for recusal was the affidavit authored by Huber's counsel. In the affidavit, Huber's counsel complained of several rulings against Huber, and asserted that these rulings and comments by the judge about the rulings showed the judge was biased in favor of Rohrig's effort to remove alcohol use from the case and that as a result, the judge should be recused from the second trial. The ruling on the mistrial was featured in the affidavit.

As we have explained, the record shows that the trial judge's ruling on the motion for mistrial was based on his conclusion that Huber's counsel violated the order in limine excluding any mention of drunk driving and was effectively bringing liability into the action after Rohrig had admitted liability. Allegations of unfavorable rulings alone almost never establish that a judge should be recused. *Id.* In this case, a reasonable person who knew of the circumstances would not question the trial judge's impartiality. See *Gibilisco, supra*. Accordingly, we conclude that the district court judge did not abuse his discretion when he denied the motion for recusal.

3. The District Court Did Not Err When It Excluded Evidence and Prohibited the Impeachment of Rohrig's Character

Huber claims Rohrig's counsel opened the door to Rohrig's character when counsel stated during voir dire that Rohrig

was a "wonderful" veterinarian and that "no one loves pets more than Dr. Rohrig," and stated in his opening statement that he was pleased to be able to represent Rohrig at trial. Huber claims that she should have been allowed to impeach Rohrig's character and that the district court erred when it excluded certain evidence and prohibited Huber from impeaching Rohrig's character.

[9,10] The concept of "opening the door" is a rule of expanded relevancy which authorizes admitting evidence which otherwise would have been irrelevant in order to respond to (1) admissible evidence which generates an issue or (2) inadmissible evidence admitted by the court over objection. *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008). The rule is most often applied to situations where evidence adduced or comments made by one party make otherwise irrelevant evidence highly relevant or require some response or rebuttal. *Id.* "Opening the door" is a contention that competent evidence which was previously irrelevant is now relevant through the opponent's admission of other evidence on the same issue. See *id.*

The admission or exclusion of evidence is generally reviewed for an abuse of discretion. See *id.* We determine that Rohrig did not "open the door" to his character and that, therefore, the court did not abuse its discretion when it denied Huber's request to admit character evidence. The statements outlined above were not sufficient to put character at issue in this trial. The issue at trial was the amount of damages owed to Huber. The statements that Rohrig liked pets and that his attorney was pleased to represent him did not make Rohrig's character relevant or require some response or rebuttal. Rohrig's character did not become relevant to the jury's decision to determine the damages Huber had incurred. Indeed, for completeness, we note that Rohrig did not testify. Accordingly, the district court did not err when it excluded evidence offered to impeach Rohrig's character.

4. The District Court Did Not Err When It Denied Huber's Motion to Compel the Deposition of Taylon

Huber claims that the district court erred when it denied her motion to compel the completion of Taylon's videotaped

deposition testimony. During discovery, Huber did not complete the deposition of Taylon, Rohrig's medical expert, evidently due to Taylon's schedule. When the deposition could not be rescheduled, Taylon agreed to appear at the trial and testify. Notwithstanding Taylon's scheduled appearance at trial, Huber moved to compel the completion of the deposition. The motion was overruled.

On appellate review, decisions regarding discovery are generally reviewed under an abuse of discretion standard. *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010). 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. *Id*. The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *Id*.

Although we understand Huber's interest in a completed pretrial deposition, Huber has failed to show that the court's denial of her motion to compel deprived her of a substantial right. Taylon testified at trial, and Huber was afforded the opportunity to—and did in fact—cross-examine him. Huber has not established that her inability to depose Taylon deprived her of a substantial right. Accordingly, the district court did not err when it denied Huber's motion to compel.

5. The District Court Erred When It Denied Huber's Request for the Juror Questionnaires

Huber claims that the district court erred when it denied her request for the juror questionnaires, in violation of Neb. Rev. Stat. § 25-1629 (Reissue 2008). At trial, Huber explained that she wanted access to the questionnaires as an aid to effective voir dire and jury selection. At oral argument, counsel for Huber clarified that the questionnaires she requested were the questionnaires completed by jurors pursuant to Neb. Ct. R. § 6-1003.

Section 25-1629 states:

> The jury commissioner shall immediately upon deriving the proposed juror list mail a juror qualification form to each proposed juror pursuant to section 25-1629.01 and investigate the persons whose names are found on

> the list. If he or she finds that any one of them is not possessed of the qualifications of petit jurors as set forth in section 25-1601 or is excluded by the terms of section 25-1601, he or she shall strike such name from the list and make a record of each name stricken, which record shall be kept in his or her office subject to inspection by the court and attorneys of record in cases triable to a jury pending before the court, under such rules as the court may prescribe. The list as thus revised shall constitute the list from which petit jurors shall be selected, until such list shall have been exhausted in the manner hereinafter set forth or until otherwise ordered by the judge or judges. Unless otherwise ordered by the judge or judges, the jury commissioner shall immediately upon completing the revision of the list, in the presence of a judge for such district, select at random the names of eighty persons possessing the qualifications for grand jurors as set out in section 25-1601. When no grand jury list is selected, the judge or judges may at any time order the selecting of a grand jury list. This list shall constitute the list from which grand jurors shall be chosen. Any judge of the district court shall upon the request of any person entitled to access to the list of names stricken, if satisfied that such request is made in good faith, direct the jury commissioner to appear before the judge at chambers and in the presence of the complaining person state his or her reasons for striking the name specified in the request.

Section 6-1003 provides:

> The CONFIDENTIAL JUROR INFORMATION section of the Nebraska Juror Qualification Form, Part VII, shall be detachable and shall be removed by the clerks of the district and county courts or jury commissioners and stored in a confidential manner by such clerk or commissioner until the end of the jury term. No one shall be permitted access to these detached sections except as set forth in this rule. The clerk or commissioner shall deliver the detached confidential information to an approved research agent of the Nebraska Supreme Court. The Nebraska Minority and Justice Implementation Committee (NMJIC)

> and the Nebraska Racial Justice Initiative (NRJI) have been approved by the Nebraska Supreme Court as such research agents. The confidential juror information may also be maintained, stored, and transmitted to the approved research agent by electronic means by any court which possesses such capabilities.

By its language, § 25-1629 does not explicitly require that Huber be given access to the juror questionnaires. However, based on the court rule quoted above regarding the juror questionnaires, we conclude that an opportunity to review the questionnaires such as Huber sought is contemplated. See Neb. Ct. R. §§ 6-1001 to 6-1004. In particular, we refer to § 6-1003, which provides that part VII of the questionnaire should be detachable and maintained in a confidential manner. Given the language explicitly making part VII confidential, it logically follows that the remainder of the questionnaire is not confidential. Accordingly, we conclude that the information other than part VII should be made available upon request to an attorney involved in the jury trial.

Our understanding of the Nebraska provisions referred to above is consistent with the reasoning of other courts. Other courts that have addressed when such questionnaires can be given to the media have concluded that voir dire begins with the juror questionnaires and that unless good cause is established, voir dire should be open to the public. See, e.g., *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (presumptive right of access under First Amendment extends to voir dire examination of prospective jurors); *State ex rel. Beacon Journal v. Bond*, 98 Ohio St. 3d 146, 781 N.E.2d 180 (2002) (explaining that because purpose behind juror questionnaires is merely to expedite examination of prospective jurors, it follows that such questionnaires are part of voir dire process); *Copley Press v. San Diego County*, 228 Cal. App. 3d 77, 89, 278 Cal. Rptr. 443, 451 (1991) ("[t]he fact that the questioning of jurors was largely done in written form rather than orally is of no constitutional import").

[11] Based on the foregoing, the district court erred when it denied Huber's request to review the juror questionnaires.

However, error that does not prejudice the party does not provide grounds for relief on appeal. See *Agri Affiliates, Inc. v. Bones*, 265 Neb. 798, 660 N.W.2d 168 (2003). We determine that Huber was not prejudiced and that the ruling constituted harmless error, because Huber was able to conduct in-person voir dire of the jurors and was able to obtain information comparable to that provided on the juror questionnaires. Therefore, although the district court erred when it denied Huber access to the juror questionnaires, this ruling was harmless error.

6. Huber Waived Her Challenge to Rohrig's Expert's Testimony Regarding the Results of the Psychological Examination When She Did Not Object to the Introduction of the Testimony at Trial

Huber claims that the district court erred when it granted Rohrig's Rule 35 motion to compel Huber to submit to the psychological clinical interview portion of the neuropsychological examination with Rohrig's expert. Rule 35 reads in part as follows:

> Order for Examination. When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by one or more physicians, or other persons licensed or certified under the laws to engage in a health profession, or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Huber contends that her mental condition was not "in controversy" and that Rohrig did not show "good cause" for requesting the examination. Huber claims that the damages she sought were based on cognitive deficits, which included difficulties with memory and concentration, but that the damages were not based on emotional pain and suffering. Huber contends that the decision not to request damages based on emotional pain

and suffering was not an oversight but an intentional decision made in part to avoid an indepth psychological examination by Rohrig.

Huber directs our attention to a portion of the record quoted below made during her deposition in which counsel agreed to the parameters of Huber's damages claim.

> [Rohrig's counsel:] Were there any, I guess, psychological symptoms that you've had to deal with since the accident that you would relate to the accident?
>
> [Huber's counsel]: Hang on a second. Let me interpose an objection. You're aware that our Complaint does not include a claim for emotional distress, aren't you?
>
> [Rohrig's counsel]: Not off the top of my head, I wasn't.
>
> [Huber's counsel]: We have not included a claim for emotional distress.
>
> [Rohrig's counsel]: Well, let me ask you as long as I have — I mean, in terms of — I'm running into things like anxiety, things like that in the medical records. I mean, are those claims you guys are going to be making?
>
> . . . .
>
> [Huber's counsel]: The head injury symptoms that have to do with concentration, memory those things like that — I don't think you're seeing that much anxiety in the post-accident records. The — yes, we're going to be looking at the head injury symptoms that have to do with her memory, concentration, stuff that came up in [Huber's expert's] evaluation that we talked about.
>
> [Rohrig's counsel]: Okay.
>
> [Huber's counsel]: But as far as anxiety, depression, PTSD, no.
>
> [Rohrig's counsel]: Well if we're clear that there's not going to be claims made for those, I don't need to ask anything about them.
>
> [Huber's counsel]: Right, and I don't know a neater way to make a line on that other than to say that —
>
> . . . .
>
> [Huber's counsel]: . . . I don't know what is the appropriate term.

> [Rohrig's counsel]: I suppose we could say the only mental symptoms would be the cognitive —
>
> [Huber's counsel]: Thank you, as opposed to emotional.

In opposing Rohrig's Rule 35 motion, Huber directed the district court to this exchange and the fact that Rohrig had taken Huber's deposition and had the transcript thereof. Huber also advised the district court of the fact that Rohrig had access to Huber's medical and educational records.

Rohrig asserts that Huber's mental condition was "in controversy" and that he established "good cause" to perform the clinical examination. Rohrig's Rule 35 showing consisted of arguments and a letter by Huber's counsel. Rohrig argues that the district court did not err in compelling Huber to complete the clinical interview portion of the neuropsychological examination because her mental condition was "in controversy." In support of this contention, Rohrig points to the portion of Huber's complaint that alleged she experienced pain and suffering, including mental anguish. Rohrig also argues that Huber's claim that she suffered a closed-head injury brought her mental condition into controversy. Rohrig argues that he established "good cause" for requesting the evaluation based on the fact that Huber's own expert completed a neuropsychological evaluation, including a psychological clinical interview. Rohrig argues that to be on equal footing with Huber, it was necessary that he have his own expert perform a psychological examination.

[12] We recognize that it is possible that the determination that a physical or mental condition is "in controversy" and that "good cause" exists for an examination may be based on the pleadings alone. However, generally, the requirements of "in controversy" and "good cause" contained in Rule 35 are not satisfied by mere conclusory allegations of pleadings, but are fulfilled by a movant's affirmative showing that the condition to be verified by the requested examination, physical or mental, is actually controverted and that "good cause" exists for ordering the examination. See *County of Hall ex rel. Tejral v. Antonson*, 231 Neb. 764, 437 N.W.2d 813 (1989). See, also, *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234,

13 L. Ed. 2d 152 (1964); *Neuman v. Neuman*, 377 A.2d 393 (D.C. 1977).

[13] To obtain discovery under Rule 35, the requisite showing does not require the movant to prove the movant's case on the merits at an evidentiary hearing, but may include a showing by an appropriate affidavit or other suitable information presented to a court whereby the court can perform its function under Rule 35. See, *Schlagenhauf, supra*; *Anderson v. Anderson*, 470 So. 2d 52 (Fla. App. 1985). For the reasons recited below, we determine that the district court abused its discretion when it granted Rohrig's Rule 35 motion. However, we also conclude that because Huber did not object at trial to the testimony and written evidence surrounding the results of the examination, she did not preserve the pretrial ruling for appellate review.

(a) "In Controversy" Requirement

[14] In *Schlagenhauf*, the U.S. Supreme Court stated that a routine allegation of negligence in a personal injury action does not put a party's mental condition "in controversy" for purposes of the federal counterpart to our Rule 35. Various courts have addressed when a party's mental condition becomes "in controversy" for Rule 35 purposes. Courts commonly conclude that plaintiffs can be ordered to undergo mental condition examinations where one or more of the following claims are present:

> (1) a cause of action for intentional or negligent infliction of emotional distress; (2) an allegation of a specific mental or psychiatric injury or disorder; (3) a claim of unusually severe emotional distress; (4) plaintiff's offer of expert testimony to support a claim of emotional distress; and/or (5) plaintiff's concession that his or her mental condition is in controversy within the meaning of [Fed. R. Civ. P.] 35.

Stuff v. Simmons, 838 N.E.2d 1096, 1102 (Ind. App. 2005). See, also, *Turner v. Imperial Stores*, 161 F.R.D. 89 (S.D. Cal. 1995); *Gepner v. Fujicolor Processing*, 637 N.W.2d 681 (N.D. 2001).

In the course of these proceedings, Huber has not put her mental condition at issue, and Rohrig's claim that Huber's

mental condition is "in controversy" is not supported by the record. Other than Huber's generalized claims for pain and suffering contained in the complaint, Huber has not made a specific request for damages based on emotional injuries, and we are mindful that such general claims in pleadings are ordinarily not sufficient grounds to put one's mental condition "in controversy" for purposes of Rule 35. See, e.g., *Schlagenhauf, supra*; *Stuff, supra*.

In the course of these proceedings, Huber indicated that her cognitive condition, such as her memory and ability to learn and concentrate, was "in controversy"; however, she specifically excluded from the action any damages based on her emotional well-being and psychological health. At Huber's deposition, the parties acknowledged a distinction between cognitive and emotional symptoms and it was made clear that Huber was not claiming damages for emotional distress or anxiety. By placing her cognitive abilities at issue, Huber did not place all aspects of her mental health "in controversy."

Huber claimed certain cognitive issues resulted from the physical trauma of the accident, and she sought damages for those injuries. Events that occurred many years ago in Huber's past, which were the subject of the psychological clinical examination ordered by the court, were not relevant to the damages occasioned by the accident sought in this case. Huber's mental condition as understood under Rule 35 was not "in controversy," and the district court erred to the extent it found to the contrary.

(b) "Good Cause" Requirement

[15] The U.S. Supreme Court has explained that in determining whether there is good cause for an evaluation,

> "'the court must decide . . . in every case, whether the motion requesting . . . the making of a physical or mental examination adequately demonstrates good cause. The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed by [Fed. R. Civ. P.] 26(b). Thus, by adding the words ". . . good

> cause . . . ,' the Rules indicate that there must be greater showing of need under [Rule 35] than under the other discovery rules.' "

Schlagenhauf v. Holder, 379 U.S. 104, 117-18, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964). The Court added that "what may be good cause for one type of examination may not be so for another." *Id.*, 379 U.S. at 118. A movant's ability or inability to obtain the desired information without the requested examination is also relevant to a court's decision whether to order an examination under Rule 35. See, e.g., *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990) (finding good cause was not shown where defendant already had information it sought to support its position); *Stanislawski v. Upper River Services, Inc.*, 134 F.R.D. 260 (D. Minn. 1991) (concluding good cause was not shown to justify vocational examination where defendant had been allowed access to all of plaintiff's medical records, had deposed plaintiff, and had been provided with results of tests performed by plaintiff's vocational expert).

Rohrig claims that "good cause" for requesting the psychological clinical examination of Huber was shown, based primarily on the fact that Huber's expert had completed a neuropsychological examination that included a psychological clinical interview. Rohrig posits that without Rule 35 relief, he would be denied a level playing field if his expert were denied an opportunity to perform a psychological examination and Huber's expert's psychological examination were to come into evidence. However, the solution for Rohrig's dilemma was not to gain permission for an unwarranted examination, but, rather, to object to the attempted admission of Huber's expert's psychological examination at trial and, if unavailing, to appeal or cross-appeal the ruling admitting such evidence.

It was Rohrig's burden to demonstrate before the district court that he had "good cause" for seeking the Rule 35 examination. However, as Huber noted at the hearing, Rohrig did not proffer evidence other than a letter from Huber's counsel stating that Huber did not intend to submit to the psychological interview. Rohrig did not provide evidence such as an affidavit from his expert that the clinical interview was critical to completion of the cognitive testing. Nor was there evidence

that relying on the medical and other reports supplied to Rohrig by Huber would be insufficient in completing an evaluation of her cognitive abilities.

At Huber's deposition, the parties agreed that Huber's emotional health was not at issue and that the damages sought by Huber related to her cognitive deficits, which were clarified as memory loss and problems with concentration. By limiting the damages claim, Huber sought to avoid a psychological examination. Courts have sometimes characterized a psychological examination as a "'drastic measure.'" *U.S. v. DeNoyer*, 811 F.2d 436, 439 (8th Cir. 1987).

Huber claimed in this case that her cognitive issues resulted from the physical impact she suffered in the accident. Huber supplied Rohrig with the medical records in support of her case, including the neuropsychological examination completed by her expert and her educational records. Given the damages sought by Huber, Rohrig was warranted in obtaining his own testing of Huber's cognitive abilities; however, he did not establish "good cause" for an extensive psychological examination of Huber in general and for an examination delving into Huber's childhood in particular. Accordingly, we conclude that the grant of the motion to compel the examination under Rule 35 was in error, because Rohrig did not establish that Huber's psychological health was "in controversy" and did not establish that he had "good cause" for the psychological examination.

(c) Waiver

Although we conclude that the district court erred when it granted Rohrig's pretrial Rule 35 motion to compel, because Huber did not object to the admission of the evidence containing the results of the clinical examination by Rohrig's expert at trial, she has waived consideration of this ruling on appeal.

In *Olson v. Sherrerd*, 266 Neb. 207, 663 N.W.2d 617 (2003), we considered the circumstance where a trial court overruled a discovery-related pretrial motion that sought to exclude evidence. We stated that to preserve the alleged error for appeal, the movant must object when the particular evidence which

was sought to be excluded by the motion is offered during trial. We stated that if the movant does not object when the evidence is offered at trial, the issue is not preserved for appellate review. *Id*.

[16,17] In *Olson*, we likened the pretrial motion seeking to exclude evidence to a motion in limine and explained that the motion in limine is but a procedural step to prevent prejudicial evidence from reaching the jury. We explained that it is not the purpose of a motion in limine to obtain a final ruling upon the ultimate admissibility of the evidence. See *id.*, citing *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). Rather, its purpose is to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself. See *Olson, supra*. We concluded in *Olson* that these motion in limine principles applied to a pretrial motion attempting to exclude evidence as a discovery sanction, and we find that these same principles apply to the instant case.

In this case, after the grant of the motion to compel, Huber did not seek a protective or other order to prevent the information obtained through the clinical psychological examination from being displayed to the jury. At trial, Huber did not object to Rohrig's expert's testimony regarding the results of his psychological examination of Huber. For completeness, we note that the record shows Huber rather than Rohrig offered into evidence the neuropsychological report of Rohrig's expert, including the psychological evaluation portion of the examination. Further, during cross-examination, Huber questioned Rohrig's expert in depth, thereby "displaying" certain of the most sensitive aspects of his report before the jury.

[18] We have stated:

> It is well established that if, when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to

> its admissibility, that party is considered to have waived whatever objection the party may have had thereto, and the evidence is in the record for consideration the same as other evidence.

Sturzenegger v. Father Flanagan's Boys' Home, 276 Neb. 327, 342, 754 N.W.2d 406, 423 (2008). A court cannot err with respect to a matter not submitted to it for disposition. See *McQuinn v. Douglas Cty. Sch. Dist. No. 66*, 259 Neb. 720, 612 N.W.2d 198 (2007).

Because Huber did not object at trial to the testimony of Rohrig's expert pertaining to the clinical psychological examination, Huber waived her appellate challenge to the evidence discovered, based on the improper grant of the motion to compel. Because the issue was not preserved for appellate review, the substance of this assignment of error has been waived.

VI. CONCLUSION

We conclude that the district court did not err when it granted Rohrig's motion for mistrial, denied Huber's motion for recusal, denied Huber's request to put in evidence of Rohrig's character, and denied Huber's motion to compel Taylon's deposition. We conclude that it was error to deny Huber's request to review the juror questionnaires but that no prejudice resulted from this ruling. Finally, we conclude that the district court erred when it granted Rohrig's pretrial motion to compel Huber to submit to a pretrial clinical psychological examination; however, because Huber did not object at trial to the admission of the evidence obtained during the examination, Huber did not preserve the issue for appellate review and has waived her challenge to the pretrial order directing she submit to the psychological evaluation.

AFFIRMED.