

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

THOMAS E. DUBS,
Plaintiff,

vs.

JANET McPEAK and
WILLIAM HYDE, whose real and
true name is BILL HYDE,
Defendants.

Case No. 10665

JOURNAL ENTRY
ON TRIAL

DATE OF TRIAL: October 18-19, 1999.

APPEARANCES:

For plaintiff: Harry R. Meister with plaintiff.
For defendant: Leland K. Kovarik with defendants.

SUBJECT: Jury Trial.

PROCEEDINGS:

On Monday, October 18, 1999, the jury trial commenced. After viewing the juror orientation video and hearing introductory comments by the court, the jury panel was duly sworn for examination. The names of 12 prospective jurors and three prospective alternate jurors were duly drawn by the clerk and voir dire examination conducted by the court. There were no excuses for cause during the court's examination.

Voir dire examination was then conducted by counsel for plaintiff. There were no excuses for cause during the examination. The plaintiff passed the panel for cause.

Voir dire examination was then conducted by counsel for defendant. There were no excuses for cause during the examination. The defendants passed the panel for cause.

Peremptory challenges to the panel of 12 prospective jurors were exercised by counsel for plaintiff and counsel for defendants, and the trial jury of 6 persons was duly sworn. Counsel for plaintiff and for defendant waived further examination of the panel of three prospective alternate jurors, and counsel for plaintiff and counsel for defendant each exercised a peremptory challenge to one prospective alternate juror. The remaining alternate juror was duly sworn, and the trial jury and alternate juror (hereinafter "the

jury” unless the context otherwise requires) were duly admonished by the court and a brief recess followed.

Following the recess, preliminary instructions were given by the court to the jury. Counsel for plaintiff presented the plaintiff’s opening statement. Counsel for defendant presented the defendant’s opening statement.

Thomas E. Dubs, the plaintiff, was sworn and testified in his own behalf. During direct examination, the jury was admonished and recess was taken for lunch.

Following the lunch recess, the examination of Thomas E. Dubs resumed and was concluded. Kurt Hebbert was sworn and testified for plaintiff. Janet McPeak, one of the defendants, was sworn and testified for plaintiff. Bill Hyde, one of the defendants, was sworn and testified for plaintiff. At the close of direct examination, the jury was admonished and a brief recess was taken.

Following the recess, without objection, the plaintiff was granted leave to reopen direct examination of Bill Hyde, and the examination of the witness was concluded. Various exhibits were offered and received. The videotape deposition testimony of Dr. James Simpson (transcript marked as Exhibit 34 for purposes of the record only and tape received as Exhibit 34A for the limited purpose of being played to the jury and not to be taken to the jury room), who was duly sworn at the time of the deposition, was played to the jury.

The plaintiff rested. The jury was admonished and excused from the courtroom.

In the absence of the jury, the defendants through counsel each verbally moved for a directed verdict for failure to adduce evidence sufficient to state a prima facie case. Arguments of counsel were heard. The court denied the motion for the reasons stated on the record. The plaintiff through counsel verbally moved for a directed verdict against the defendant Janet McPeak. Arguments of counsel were heard. The court denied the motion for the reasons stated on the record.

The jury returned, and the defendants rested without additional evidence. The jury was admonished and excused for the day, with instructions to return at 9:00 a.m. on Tuesday, October 19.

An informal instruction conference was held with counsel in chambers.

Thereafter, with both counsel present, the presence of the parties was excused, and the formal instruction conference was held on the record.

All parties renewed the motions previously made at the close of the plaintiff’s case, and waived

further argument. The motions were denied. There were no additional motions for either party.

The court's proposed Instructions Nos. 1 through 11, inclusive, and the proposed verdict forms Nos. 1A, 1B, 2, and 3, were considered. There were no objections thereto by plaintiff. There were no objections thereto by defendant, except as to paragraph B of Instruction No. 8 and as to the words "and mental suffering" of Instruction 9A(4). The defendants' respective objections thereto were made on the record, arguments of counsel were heard and considered, and the defendants' objections thereto were overruled.

There were no additional requested instructions for the plaintiff or the defendants. Time limits of 40 minutes per side, with no longer time during rebuttal than used for first part of closing argument, were ordered by agreement of counsel.

All counsel stipulated to written communication between the court and jury during deliberations, and receipt of the verdict, in the absence of counsel and the absence of the parties without further notice, and counsel will be excused during deliberations. The formal instruction conference was concluded.

The trial was recessed until 9:00 a.m. on Tuesday, October 19, 1999.

On Tuesday, October 19, 1999, the jury trial resumed with all counsel and parties present. Closing arguments were presented by counsel for plaintiff and by counsel for defendants.

The written instructions were read by the court to the jury.

The court discharged the alternate juror. (Hereinafter, "the jury" excludes the discharged alternate juror.)

The cause was submitted for commencement of deliberations at 10:16 a.m., and the jury retired to the jury room. After verifying that the correct exhibits were assembled by the court reporter for delivery to the jury, all counsel were excused pursuant to the prior stipulation.

Thereafter, two questions, on one page, were received in writing from the jury and filed by the clerk. An informal instruction conference was held with counsel, with Mr. Meister present in person in chambers and Mr. Kovarik by telephone. The message from the jury was read to both counsel, together the court's proposed Instruction No. 12, and both counsel agreed to Instruction No. 12. Both counsel were again excused.

Thereafter, at 11:05 a.m., a formal instruction conference was held on the record without any

counsel or any parties present. The court recited for the record the circumstances of consultation with counsel regarding Instruction No. 12. At 11:06 a.m., the jury returned, and Instruction No. 12 was read by the court to the jury, and the cause was resubmitted at 11:08 a.m. The jury returned to the jury room.

Shortly before 12:00 noon, the court received a further question in writing from the jury. The court prepared a proposed Instruction No. 13, and consulted with each of the attorneys separately by telephone regarding the court's proposed response. Both counsel agreed to Instruction No. 13.

Thereafter, at 12:06 p.m., a formal instruction conference was held on the record without any counsel or parties present. The court recited for the record the circumstances of consultation with counsel regarding Instruction No. 13. At 12:07 p.m., the jury returned, and Instruction No. 13 was read by the court to the jury, and the cause was resubmitted at 12:08 p.m. The jury returned to the jury room.

At 12:38 p.m., with the plaintiff personally present without counsel, and without any other parties or counsel present, the jury returned and announced that it had reached verdict. The verdict form was duly filed by the clerk, and read aloud by the clerk in open court, wherein the jury found in favor of the plaintiff and against the defendants in the amount of \$51,000.00, of which \$28,361.42 was determined to be economic damages and the balance of \$22,638.58 was determined to be noneconomic damages.

Upon inquiry by the court if it was their unanimous verdict, all 6 jurors joined in an affirmative response. Further polling of the jury was waived by the plaintiff. The verdict was accepted by the court and judgment was entered accordingly by entry of a separate judgment in writing. The jury was discharged with the thanks of the court.

Dated: October 19, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 19__ by ____.
- 9 Enter judgment on the judgment record.
Done on _____, 19__ by ____.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 19__ by ____.
- : Note the proceedings, and judgment memorialized in separate form of judgment, on the trial docket by transcribing voice dictation of tape recordings made from time to time during proceedings.
Completed on _____, 19__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge