

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

**KELLEY CALHOUN,**  
Plaintiff,

vs.

**O'NEILL VETERINARY CLINIC, P.C., a  
Nebraska professional corporation,**  
Defendant.

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**KELLEY CALHOUN,**  
Plaintiff,

vs.

**ROBERT J. OWENS,**  
Defendant.

Case No. 20441

Case No. 20442

**JOURNAL ENTRY  
ON TRIAL**

**DATE OF TRIAL:** March 27-31, 2000.

**APPEARANCES:**

For plaintiff: David W. Jorgensen and Lori Phillips with plaintiff.

For defendants:

OVC: Mark A. Christensen with Kirk Sholes and Gregg Hanzlicek,  
corporate representatives.

Owens: John P. Heitz with defendant.

**SUBJECT:** Jury Trial.

**PROCEEDINGS:**

The juror orientation video was displayed. After introductory comments by the court, the jury panel was duly sworn for examination. The names of 18 prospective jurors and three prospective alternate jurors were duly drawn by the clerk and voir dire examination conducted by the court. During the court's examination, seven prospective jurors and one prospective alternate juror were excused for cause and replacements duly drawn by the clerk and examined by the court. The panel was admonished and a mid-morning recess was taken.

Voir dire examination was then conducted by counsel for plaintiff. The plaintiff passed the panel for cause. Voir dire examination was then conducted by counsel for defendants. The defendants thereafter passed the panel for cause. Peremptory challenges to the panel of 18 prospective jurors were exercised by counsel for plaintiff and counsel for defendants. All parties waived further examination of the prospective alternate jurors, and exercised peremptory challenges to the panel of 3 prospective alternate jurors. The trial jury of 12 persons and the alternate juror were duly sworn and admonished, and excused from the courtroom for lunch. In the absence of the jury, counsel for all parties acknowledged that the defendants had jointly exercised their three peremptory challenges to the panel of 18 prospective jurors and had jointly exercised their single peremptory challenge to the panel of 3 prospective alternates. The trial was recessed for lunch.

Following the lunch recess, in the absence of the jury, the defendant OVC renewed its motion in limine regarding plaintiff's second cause of action. Arguments of counsel were heard. During the course of such argument, the defendant OVC conceded that, to the extent of any unpaid salary and to the extent of any net profits, if any, the plaintiff is entitled to have the jury instructed, as a matter of law, on the plaintiff's second cause of action, that the only element to be proved by the plaintiff to recover on the second cause of action is the nature and extent of the damages, which damages are limited pursuant to the court's ruling on the defendant's motion for partial summary judgment. The plaintiff is not thereby deemed to have waived any claim of error regarding the court's prior ruling on the defendant's motion for partial summary judgment. The renewed motion in limine was denied.

Whereupon, the jury returned, and preliminary instructions were given by the court to the jury. Opening statement was presented by counsel for plaintiff. Opening statement was presented by counsel for defendant OVC. Opening statement was presented by counsel for defendant Owens. The jury was admonished, and a brief recess was taken.

The plaintiff, Kelley Calhoun, was sworn and testified in her own behalf. During direct examination, the jury was admonished and excused from courtroom. The plaintiff's offer of proof was stated, and objection thereto sustained, and offer of proof refused during plaintiff's case-in-chief without prejudice to evidence thereon during rebuttal. A brief recess was taken.

Following the recess, the jury returned and the examination of the plaintiff continued. The direct

examination was concluded. The cross-examination of the plaintiff commenced. During such cross-examination, the jury was admonished and excused for the day, and the trial recessed until Tuesday, March 28, 2000, at 9:00 a.m.

On Tuesday, March 28, 2000, with all counsel and parties present, the trial resumed and the cross-examination of the plaintiff continued. During such cross-examination, the jury was admonished and a brief recess was taken. Following the recess, the examination of the plaintiff was concluded. The jury was admonished and recess was taken for lunch.

Following the recess, Dwight Johnson was sworn and testified for the plaintiff. During direct examination, the jury was admonished and excused from the courtroom. In the jury's absence, the plaintiff made an offer of proof, to which the defendants objected. Arguments of counsel were heard. The objection was sustained, and the offer of proof was refused, for reasons stated on the record. Whereupon, the jury returned and the examination of Dwight Johnson was concluded. Jerome Fagerland and Arthur Hysell were sworn and testified for plaintiff. The jury was admonished, and a brief recess was taken.

Following the recess, the defendants moved to call the witness William L. Gaines Jr. out-of-turn. The plaintiff does not object, and the motion is granted. William L. Gaines Jr. was sworn and testified for defendants. During direct examination, the plaintiff's request for foundational voir dire outside the presence of the jury was granted. The jury was admonished and excused from the courtroom. In the absence of the jury, foundational examination was conducted by counsel for plaintiff and counsel for defendants. The plaintiff's objection was considered, and arguments of counsel were heard. The objection was overruled. The jury returned, and direct examination continued. During the course thereof, the jury was admonished and excused from the courtroom. In the jury's absence, a hearing was held on the matter of discovery relating to Exhibit 169. Representations of counsel were made. No additional evidence was adduced. Arguments of counsel were heard. The findings were stated on the record, and the discovery objection was overruled. The jury returned and the examination was concluded. The jury was admonished and excused for the day, and the trial recessed until Wednesday, March 29, 2000, at 9:00 a.m.

On Wednesday, March 29, 2000, with all counsel and parties present, the trial resumed. Robert J. Owens, one of the defendants, was sworn and testified for plaintiff. At the conclusion of cross-examination, the jury was admonished and excused from the courtroom. The defendant OVC's offer of

proof was heard, to which the plaintiff objected. Arguments of counsel were heard. The objection was partially sustained and partially overruled, and the offer of proof was refused to the extent that the objection had been sustained. At the defendant OVC's request, the record was supplemented on the matter of the discovery objection previously raised by the plaintiff and previously overruled by the court. An exhibit was received in evidence for that limited purpose and not to go to the jury. The court made further findings adhering to the previous ruling overruling the plaintiff's discovery objection.

Following the recess, the jury returned, and without objection, the defendants' cross-examination was reopened, and the examination of Robert J. Owens was concluded. The jury was admonished and excused from the courtroom. Further hearing was held in the absence of the jury regarding the use of pleadings to be read in evidence. The plaintiff made an offer of proof. The defendant OVC objected thereto. Arguments of counsel were held. The objection was sustained and the offer of proof was refused for the reasons stated on the record. The jury returned, and the plaintiff, having been previously sworn, was recalled and testified further in her own behalf. The plaintiff rested. The jury was admonished and excused for lunch. In the absence of the jury, the defendant OVC moved for directed verdict upon the plaintiff's first cause of action in Case No. 20441, and the defendant Owens moved for directed verdict upon the sole cause of action in Case No. 20442. Arguments of counsel were heard. The respective motions were denied. A brief discussion was held on the matter of an evidentiary stipulation contemplated by the parties. The trial was recessed for lunch.

Following the lunch recess, one of the defendants, Robert J. Owens, having been previously sworn, was recalled and testified for the defendants. Jan McNichols, Viona Cuddy, and Gregg Hanzlicek were sworn and testified for the defendants. Following direct examination of Gregg Hanzlicek, the jury was admonished and a brief recess was taken.

Following the recess, the examination of Gregg Hanzlicek was concluded. Boyd W. Strobe was sworn and testified for the defendants. Kirk L. Sholes was sworn and testified for the defendants. The jury was admonished and a brief recess was taken.

Following the recess, in the absence of the jury, the defendants rested. The plaintiff moved to dismiss the defendant OVC's first counterclaim cause of action or in the alternative, to require the defendant to elect. Arguments of counsel were heard. The motion was denied. The plaintiff moved for

a directed verdict as to accounts receivable on the defendant OVC's first counterclaim cause of action, and also moved for a directed verdict as to inventory on the defendant OVC's first cause of action. Arguments of counsel were heard. Ruling upon these motions was deferred. The jury returned, and the defendants rested in the presence of the jury. The plaintiff having been previously sworn, was recalled and testified in her own behalf on rebuttal. The plaintiff rested on rebuttal. The defendants requested surrebuttal. A bench conference was held in low tones. The defendants rested on surrebuttal subject to the bench conference. The jury was admonished and excused until 10:30 a.m. on Thursday, March 30, 2000. In the absence of the jury, the defendants made an offer of proof regarding testimony of Kirk Sholes on surrebuttal. The plaintiff objected thereto. Arguments of counsel were heard. The objection was sustained, and the offer of proof was refused for the reasons stated on the record. At the close of all of the evidence, the respective defendants renewed the motions for directed verdict made at the close of the plaintiff's evidence. Further arguments of counsel were waived. The motions were denied. The plaintiff renewed the motions made at the close of the defendant's evidence. Further arguments of counsel were waived. The renewed motion to dismiss or in the alternative to require defendant to elect was again denied. The ruling upon the renewed motions for directed verdict as to accounts receivable and inventory was again deferred. After brief informal discussion regarding instructions, the trial was recessed until Thursday, March 30, 2000, for informal instruction conference at 8:00 a.m., and formal instruction conference to follow no earlier than 10:00 a.m.

On Thursday, March 30, 2000, with all counsel present, an informal instruction conference was held in chambers. Recess was taken for lunch. Following the lunch recess, with all counsel and parties present, and in the absence of the jury, a formal instruction conference was held in open court. The court overruled the plaintiff's motions for directed verdict upon which ruling was previously deferred. The defendant OVC moved for a directed verdict upon the plaintiff's second cause of action in favor of plaintiff for \$1,701.43 in accordance with the court's proposed instructions. The plaintiff objected to the motion to preserve its claims regarding the previous ruling on the defendant's motion for partial summary judgment. Arguments of counsel were waived. The court sustained the motion in accordance with the court's proposed instructions. The defendant OVC then moved for a directed verdict on liability only in favor of the plaintiff on the plaintiff's third cause of action in accordance with the court's proposed instructions. The

plaintiff objected to the motion. Arguments of counsel were waived. The court sustained the motion in accordance with the court's proposed instructions. The court's proposed instructions Nos. 1 through 18, inclusive, and the proposed verdict form were considered. The plaintiff's general objection, made to preserve the plaintiff's claims regarding the interlocutory ruling on the defendant's motion for partial summary judgment, was duly noted and overruled. The plaintiff objected to Instructions Nos. 6A(6), 7C, 7D(3), 7E, 7G(4), 10A, 10B, 12A(4), 12B(2), and 13, and objected to the giving of any instructions on the defendant's counterclaims. The defendant OVC objected to Instructions Nos. 7G(2), 7G(4), 9B, 12B(1)(b), 14A(1), and 15. The defendant Owens objected to Instructions Nos. 12B(1)(b) and 15. Arguments of counsel were heard or waived. All objections were overruled. The plaintiff submitted additional requested instructions, identified as Plaintiff's Requested Instructions Nos. 1, 2, and 3. The defendants objected to the additional requested instructions. Arguments of counsel were heard or waived. The objections were sustained, and the additional requested instructions were refused. The court endorsed the same as "refused" and directed the clerk to duly file the same. There were no additional requested instructions for the defendants. Time limits of 45 minutes per side, allocated 40 minutes to the defendant OVC and 5 minutes to the defendant Owens, for closing arguments were established. All counsel stipulated that counsel may be excused during jury deliberations, and that in their absence any written communication may take place between the court and the jury and further written instructions may be given, and the verdict may be received in the absence of counsel and the absence of the parties without further notice. The court approved the stipulation. A brief recess was taken.

The jury returned. Counsel for plaintiff presented closing argument. Counsel for defendants presented closing argument. Counsel for plaintiff presented rebuttal argument. The jury was admonished and a brief recess was taken. Following the recess, the written instructions were read to the jury. The cause was submitted for commencement of deliberations at 4:05 p.m. The court discharged the alternate juror, and the jury retired to the jury room.

The court received a written message from the jury requesting to recess deliberations overnight at 6:00 p.m. At 6:00 p.m., with no counsel or parties present, the jury returned and Instruction No. 19 regarding overnight recess was read to the jury, and at 6:02 p.m., the jury was excused to return to resume deliberations on Friday, March 31, 2000, at 8:00 a.m.

On Friday, March 31, 2000, the bailiff notified the court that all jurors were present and the jury had resumed deliberations at 7:55 a.m.

At 10:53 a.m., with none of the parties or counsel present, except attorney Heitz was 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. Upon inquiry by the court if it was their unanimous verdict, all 12 jurors joined in an affirmative response. Further polling of the jury was waived by counsel for defendant Owens. The court inquired of the foreperson if the clerk had correctly read the verdict amount on the plaintiff's third cause of action, shown as "7500" to be \$7,500.00, and the foreperson replied that the clerk had correctly read the amount. At the court's request, the foreperson amended the form to read "7500.00" to more clearly state the correct verdict. At the court's request, the foreperson also conformed a copy of the verdict form to correctly show the entire verdict, endorsed as a "conformed copy" for filing in the consolidated case file. The verdict was accepted by the court. Separate judgment will be entered thereon by the court in writing. The jury was discharged with the thanks of the court.

Dated: March 31, 2000.

If checked, the Court Clerk shall:

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

9 Done on \_\_\_\_\_, 19\_\_ by \_\_\_\_.

9 Enter judgment on the judgment record.

9 Done on \_\_\_\_\_, 19\_\_ by \_\_\_\_.

9 Mail postcard/notice required by § 25-1301.01 within 3 days.

9 Done on \_\_\_\_\_, 19\_\_ by \_\_\_\_.

9 (Trial docket entry dictated.)

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge