

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

**LAWRENCE PRIBIL,**  
Plaintiff,

vs.

**BARTON KOINZAN and SANDRA  
KOINZAN, husband and wife; TERRY  
HELD; and GENEVIEVE SHAW,**  
Defendants.

**BARTON KOINZAN and SANDRA  
KOINZAN, husband and wife,**  
Third-Party Plaintiffs,

vs.

**TOWNSHIP OF GRATTEN, COUNTY OF  
HOLT, NEBRASKA,**  
Third-Party Defendant.

Case No. 20407

**ORDER ON MOTIONS**

**DATE OF HEARING:** March 23, 2000.

**DATE OF DECISION:** Date of filing by court clerk.

**APPEARANCES:**

For plaintiff: George H. Moyer, Jr.

For defendants:

Koinzan: Thomas H. DeLay.

Shaw: James D. Gotschall.

Held: Kathleen K. Rockey.

Township: John P. Heitz.

**SUBJECT OF ORDER:** The following motions:

(1) defendants Koinzan's motion in limine; (2) plaintiff's motion in limine; (3) plaintiff's verbal motion for leave to file reply out-of-time to defendants Koinzan's amended answer to plaintiff's amended petition; (4) plaintiff's verbal motion for leave to file reply out-of-time to defendant Shaw's amended answer to plaintiff's amended petition; (5) plaintiff's verbal motion for leave to file reply out-of-time to defendant Held's amended answer to plaintiff's amended petition; and, (6) plaintiff's motion for summary judgment

against defendants (except third-party defendant).

**PROCEEDINGS:**

The court first considered the defendants Koinzan's motion in limine. A verbal stipulation was entered into on the record between the parties through counsel in open court. There was no other evidence adduced on the motion. Arguments of counsel were heard. The matter was taken under advisement.

The court next considered the motion of defendant Shaw to dismiss her cross-claims against the defendant Held, the withdrawal of attorney Gotschall as counsel for defendant Shaw, and the entry of appearance of attorney Rockey as counsel for defendant Shaw. These matters have been ruled upon by separate written orders.

The court then considered the plaintiff's motion in limine. Evidence was adduced for plaintiff. There was no additional evidence adduced on the motion. Arguments of counsel were heard. The matter was taken under advisement.

The court next considered the plaintiff's respective motions to file replies out-of-time. There were no objections to the motions. The motions were granted, and attorney Moyer was directed to prepare a separate order on the matter of these motions.

The court then considered the plaintiff's motion for summary judgment. Evidence was adduced for the plaintiff. Evidence was adduced by the defendants Koinzan. Evidence was adduced for the defendants Shaw and Held. There was no evidence for the defendant Grattan Township. Arguments of counsel were heard. The matter was taken under advisement.

The pretrial conference was continued until further order pending ruling upon the motions taken under advisement.

**FINDINGS:**

The court finds and concludes that:

1. Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Derr v. Columbus Convention Center, Inc.*, 258 Neb. 537, \_\_\_ N.W.2d \_\_\_ (2000). The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter

of law. *Id.* The court views the evidence in a light most favorable to the nonmoving party and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

2. The motion in limine of the defendants Koizan should be granted to the extent of the stipulation, extended to all parties and not merely to the plaintiff, and should otherwise be denied.

3. The plaintiff's motion in limine should be granted to the extent of the relief set forth below, but should otherwise be denied.

a. Rule 608 evidence may refer *only* to character for truthfulness or untruthfulness. NEB. REV. STAT. § 27-608(1)(a) (Reissue 1995). The defendants' attempt to specify "truthfulness *in insurance transactions*" violates that rule. Moreover, the attempt to insert insurance into the proceeding, relative to the plaintiff's claim, constitutes a real danger of confusion of the issues before the jury.

b. The defendants' attack, in reality, runs to the plaintiff's *honesty* rather than truthfulness. Honesty is a more expansive concept. *State v. Vogel*, 247 Neb. 209, 526 N.W.2d 80 (1995). Rule 608 allows opinion or reputation evidence only as to truthfulness or untruthfulness. Thus, the defendants' contemplated evidence goes beyond that permitted by Rule 608.

c. The deposition record received in evidence on the motion displays a lack of proper foundation for opinion testimony of Michael J. Mahony as to the truthfulness or untruthfulness of the plaintiff. He simply did not show sufficient knowledge of or experience with the plaintiff to lay foundation for any such opinion. Even under the guise of stating the basis for his opinion, the witness may not describe specific untruthful acts committed by the plaintiff. The deposition record makes it extremely unlikely that such foundation could be properly developed; however, the court will allow the defendants to attempt to do so at trial upon proper notice to the court and outside the presence of the jury.

d. The defendants may attack the plaintiff's credibility *as a witness* on cross-examination of the plaintiff by proper inquiry as to previous *claims* for crop losses due to trespassing livestock. Rule 608(2) authorizes such inquiry in the court's discretion. NEB. REV. STAT. § 608(2) (Reissue 1995). The court exercises such discretion so as to allow such inquiry as to previous claims, but to preclude inquiry as to previous *insurance* claims. Such cross examination would be the only means of addressing the topic. Specific instances of conduct may *not* be proved by extrinsic evidence. *Id.*

Consequently, the witness Mahony would not be allowed to testify regarding the prior instance of alleged dishonesty to attack the plaintiff's credibility as a witness.

4. The plaintiff's motion for summary judgment on liability is clear and undisputed except for one matter, whether the plaintiff is the real-party-in-interest. NEB. REV. STAT. § 25-301 (Reissue 1995).

5. The defendants rely upon deposition testimony of Mark Pribil, the plaintiff's son, that he farmed the ground for his father on a share basis in 1996. (E34) The plaintiff presented an affidavit that the witness was mistaken in the deposition and did not lease the ground on a share basis in 1996. (E36)

6. At one point, the Nebraska Supreme Court observed in dictum that the issue must be specially pleaded and cannot be raised by general denial. *Neill v. McGinn*, 175 Neb. 369, 377, 122 N.W.2d 65, \_\_\_ (1963). More recently, however, the Supreme Court stated that the defendants do not waive the real-party-in-interest defect by a failure to raise the defect by answer. *Rice v. Adams*, 254 Neb. 215, 575 N.W.2d 399 (1998). The Supreme Court now considers the plaintiff's status as the real-party-in-interest as an aspect of standing. *Id.* Standing is a jurisdictional component of a party's case because only a party who has standing may invoke the court's jurisdiction. *Id.* The Supreme Court accordingly reasoned that lack of standing to sue is a jurisdictional defect that is not waived by the failure to answer. *Id.* Accord, *Eli's, Inc. v. Lemen*, 256 Neb. 515, \_\_\_ N.W.2d \_\_\_ (1999).

7. It is not the province of this court on summary judgment to weigh the strength of the defendants' contention. The court views the evidence in the light most favorable to the defendants as the nonmoving parties. Consequently, the court must determine that an issue of fact exists to whether the plaintiff owned the entire crop or only a landlord's share under a lease with the plaintiff's son.

8. However, in either event, the plaintiff is a real-party-in-interest. Obviously, if the plaintiff's position is correct, he is entitled to *all* damages as the sole owner of the crops. But even if the defendants are correct, the plaintiff is the real-party-in-interest as to the landlord's share. Under a crop share arrangement, he would be the owner of a percentage of the crop as a tenant in common. Consequently, he would be entitled to sue for his share of any loss. While the plaintiff's son would be a permissible party, he would not be a mandatory party. The plaintiff's damages would be limited to the plaintiff's share of the ownership of the crop.

9. The plaintiff is therefore entitled to summary judgment on the issue of liability, and the extent

of the ownership interest as partial or total is an element of the plaintiff's claim on the matter of damages.

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

1. The motion in limine of the defendants Koinzan is granted to the extent that:
  - a. If Tom Chambers is called to testify as a witness, the respective parties will refer to the witness as a representative of the defendants Koinzan and shall not refer to the witness Chambers in his true legal capacity as the owner of Crocker Claim Service at Norfolk, Nebraska;
  - b. The parties shall not mention or infer or try to put before the jury the fact that Tom Chambers was employed by the defendants Koinzan's insurance company to investigate the loss; and,
  - c. Each of the respective attorneys shall instruct his or her respective client or clients, and any witnesses called by such attorney, not to mention the fact that the defendants Koinzan may be in some way indemnified by insurance.
2. Except to the extent granted above, the motion in limine of the defendants Koinzan is denied.
3. The plaintiff's motion in limine is granted to the extent that the defendants, and their respective counsel and witnesses, are prohibited from making any direct or indirect reference or references during voir dire, opening statement, presentation of evidence, or closing argument concerning the plaintiff's alleged reputation for dishonesty or untruthfulness in insurance transactions, except:
  - a. Upon notice to the court outside the presence of the jury, the defendants may adduce further testimony of Michael J. Mahony before the court in the absence of the jury to attempt to show proper foundation for the witness's opinion concerning the plaintiff's character for truthfulness or untruthfulness; and,
  - b. The defendants may attack the plaintiff's credibility as a witness on cross-examination of the plaintiff by proper inquiry as to previous claims for crop losses made by the plaintiff due to trespassing livestock, but shall not mention or call upon the plaintiff to mention any insurance relating to such previous claim or claims.
4. Except to the extent of the relief granted above, the plaintiff's motion in limine is denied.
5. The plaintiff's motion for summary judgment against the defendants Koinzan, Shaw, and Held finding and adjudging each of them liable to the plaintiff in damages for permitting the cattle of

defendants Koinzan to run at large in the plaintiff's corn and soybean fields is granted. The issue of the extent of the plaintiff's ownership of the crop as partial or total shall be submitted on the matter of damages if the evidence adduced at trial requires the submission of such issue to the jury.

6. The final pretrial conference is rescheduled for Thursday, **May 11, 2000**, at **1:30 p.m.**, in the District Judges' chambers, Holt County Courthouse, O'Neill, Nebraska. At the pretrial conference:

a. The parties shall prepare and submit the materials required by the previous progression order.

b. The list of issues shall be in the form of the elements of each claim or defense, and under each element, the disputed or undisputed facts alleged to show such element.

Signed in chambers at Ainsworth, Nebraska, on April 17, 2000.

DEEMED ENTERED upon the date of filing by the court clerk.

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 \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_.

Enter judgment on the judgment record.

Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_.

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

Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_.

Note the decision on the trial docket as: [date of filing] Signed "Order on Motions" entered; pretrial conference rescheduled for [date and time from body of order].

Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

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