

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

W.D. KIPPLE,
Plaintiff,

Case No. CI99-191

vs.

JUDGMENT

**DALE MORGAN; MARY CULLEN;
CODY A. CULLEN, a minor child; and
ARTHUR J. MORGAN,
GUARDIAN/CONSERVATOR OF THE
DALE JAMES MORGAN ESTATE,**
Defendants.

DATE OF TRIAL: July 26-27 & August 1, 2000.

DATE OF RENDITION: August 1, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301).

APPEARANCES:

For plaintiff: James Widtfeldt with plaintiff.

For defendants:

Morgans: Forrest F. Peetz with defendants Dale Morgan and Arthur Morgan.

Mary Cullen: Defendant pro se.

Cody Cullen: No appearance.

SUBJECT OF JUDGMENT: Trial on the merits to court without a jury.

PROCEEDINGS: The following proceedings occurred:

July 26, 2000: A discussion was held with counsel regarding the marking of exhibits. The defendants Morgan verbally moved for leave to file an amended answer. Evidence was adduced and arguments of counsel were heard. The motion was denied. Opening statement was presented by counsel for plaintiff. Opening statements were waived by defendants. The plaintiff presented evidence. W.D. Kipple, the plaintiff, was sworn and testified. Henry Lau was sworn, but upon defendants' objection was not allowed to testify during the plaintiff's case-in-chief because of the failure to list the witness in the pretrial order. Gene W. Day, also known as Bill Day, and Paul Foran were sworn and testified. The trial was recessed until Thursday, July 27, 2000, at 2:00 p.m., or as soon thereafter as the same may be heard.

July 27, 2000: The trial resumed with all of the same counsel and parties present. The plaintiff presented additional evidence. Dale Morgan, Mary Cullen, and Arthur Morgan were sworn and testified. During direct examination of Arthur Morgan, the trial was recessed until Tuesday, August 1, 2000, at 10:00 a.m.

August 1, 2000: The trial resumed with all of the same counsel and parties present, except that defendant Dale Morgan was not personally present. The plaintiff presented additional evidence. The examination of Arthur Morgan was resumed and concluded. Gene W. Day, also known as Bill Day, having been previously sworn, was recalled and testified further. The plaintiff, W.D. Kipple, having been previously sworn, was recalled and testified further. During the examination of W.D. Kipple, an evidentiary hearing was held regarding the plaintiff's contention that Exhibit 27 had previously been furnished to opposing counsel, and the defendants Morgan's resistance thereto. Evidence was adduced and arguments of counsel were heard. The court's findings were stated on the record. Thereafter, the examination of the plaintiff was concluded. The plaintiff rested. The defendants Morgan rested without evidence. The defendant, Mary Cullen, presented evidence in defense. The defendant, Mary Cullen, having been previously sworn, was recalled and testified on her own behalf. The defendant Mary Cullen rested. The plaintiff presented rebuttal evidence. The plaintiff, W.D. Kipple, having been previously sworn, testified on rebuttal. The plaintiff rested on rebuttal. Closing arguments were presented by counsel for plaintiff and counsel for defendants Morgan, and waived by defendant Mary Cullen. The matter was taken under advisement.

FINDINGS:

The court finds:

1. Generally for the defendants and against the plaintiff.
2. The plaintiff failed to sustain his burden of proof.
3. The plaintiff did not adduce sufficient evidence regarding the proper measure of damages on his claim for damage to the property.
4. The costs of the action should be taxed to the plaintiff. All costs incurred have been advanced by the plaintiff except the costs taxed to plaintiff upon the interlocutory order entered June 15, 2000, granting defendants' motion to compel and for sanctions and taxing expenses of the motion in the amount of \$323.82.

5. The final judgment should include as additional costs the reasonable expenses of the defendants Morgan on the motion to compel and for sanctions, including an attorney's fee, as previously determined by that interlocutory order.

6. The plaintiff's request for an attorney's fee under NEB. REV. STAT. § 76-1431(3) (Reissue 1996) lacks merit and should be denied.

7. The defendants Morgan argued that an attorney's fee should be awarded to the defendants Morgan pursuant to *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983). In such circumstances, the court is required, after hearing, to make specific findings of fact sufficient to support a conclusion that there existed conduct during the course of litigation which was so vexatious, unfounded, and dilatory as to constitute or be tantamount to bad faith. Such an attorney fee must further be limited in amount so as to relate only to that part of the action necessitated by the misconduct. The court does not find such conduct in this case. The request must be denied.

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. JUDGMENT is hereby entered upon the plaintiff's petition in favor of the defendants, and each of them, and against the plaintiff for dismissal of the plaintiff's petition with prejudice to future action.

2. All costs are taxed to the plaintiff.

3. JUDGMENT is hereby entered in favor of the defendants Dale Morgan and Arthur Morgan and against the plaintiff for said additional costs of \$323.82.

4. The plaintiff's request for an attorney's fee is denied.

5. The request of defendants Morgan for an additional attorney's fee under *Holt County Co-op Assn. v. Corkle's, Inc., supra*, is denied.

6. The judgment for costs shall bear interest at the rate of 7.375% per annum from date of judgment until paid.

Signed at O'Neill, Nebraska, on August 1, 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
“Judgment” entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge