

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

**LAWRENCE PRIBIL,**  
Plaintiff,

Case No. 20407

vs.

**ORDER ON MOTIONS**

**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.

**DATE OF HEARING:** November 2, 2000.

**DATE OF RENDITION:** January 30, 2001.

**DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301(3)).

**APPEARANCES:**

For plaintiff: George H. Moyer, Jr. without plaintiff.

For defendants:

Koinzan: No appearance.

Shaw & Held: Kathleen K. Rockey without defendants.

Gratten Township: John P. Heitz.

**SUBJECT OF ORDER:** Plaintiff's (1) motion for new trial and (2) motion to retax costs.

**PROCEEDINGS:** At the hearing, these proceedings occurred:

Arguments of counsel were heard. The matters were taken under advisement.

**FINDINGS:** The court finds and concludes that:

1. Although the motion for new trial recites several grounds, the plaintiff's counsel argued only that paragraph C of Instruction No. 8 ("the evidence must establish the amount of any item of damage with

reasonable certainty or that item of damage cannot be recovered”) was erroneously stated for the jury. Citing the court to the discussion in N.J.I.2d § 4.40 at 288 (2000 ed.) (“the committee understands this to be a standard to be applied by the trial judge”), the plaintiff urges that the “reasonable certainty” language should not have been included in the damage instruction. See also N.J.I.2d at 224-26 (2000 ed.). The plaintiff contends that the “reasonable certainty” determination should be made solely by the court. Further, the plaintiff urges that the language effectively modifies the burden of proof.

2. Whatever the merits of the plaintiff’s arguments in theory, this court considers prior Supreme Court precedent approving this language in a jury instruction to be binding and controlling until that court states otherwise.

3. This court first recalls that although the plaintiff objected to the particular language, the defendants, and in particular the defendants Koizan, resisted that objection, and during the informal conference the defendants insisted that the “reasonable certainty” instruction should be given. At the time, this court therefore analyzed the defendants’ request to include that language under the oft-repeated standard: (1) whether the tendered instruction is a correct statement of the law, (2) whether the tendered instruction is warranted by the evidence, and (3) whether the defendants, as the parties requesting the instruction, would be prejudiced by the court’s refusal to give the tendered instruction. *State v. Quintana*, 261 Neb. 38, \_\_\_ N.W.2d \_\_\_ (2001).

4. In the early and often-cited case of *Hopper v. Elkhorn Valley Drainage Dist.*, 108 Neb. 550, 188 N.W. 239 (1922), the Nebraska Supreme Court expressly approved a crop-damage instruction including language virtually identical to that used in paragraph C of Instruction No. 8. *Id.* at 554-55, 188 N.W. at \_\_\_. Thus, this court considered itself bound by the Supreme Court decision that such language accurately states the law.

5. This court next considered whether the requested language was warranted by the evidence. The defendants placed considerable focus upon the nature of the evidence supporting the plaintiff’s damage claim. Whether the plaintiff’s evidence supported the damage claim was hotly contested. Although this court determined that there was sufficient evidence to submit the plaintiff’s damage claim to the jury, determination of damages is particularly within the province of the jury. *Hausman v. Cowen*, 257 Neb. 852, 601 N.W.2d 547 (1999) (the amount of damages to be awarded is a determination solely for the fact

finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved).

6. Regarding prejudice, this court concluded that it was bound to include an instruction requested by the defendants and expressly approved by the Supreme Court where the evidence justified the instruction, and that failure to do so would be prejudicial. As the Supreme Court stated in *Pleiss v. Barnes*, 260 Neb. 770, \_\_\_ N.W.2d \_\_\_ (2000), in reviewing a claim of prejudice from instructions given or refused, the instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error. Thus, this court, in considering whether to give the defendants' requested "reasonable certainty" instruction, had to determine whether, in the absence of that language, the remaining instructions adequately covered the issues. No other provision of the instructions addressed the concept that claimed items of crop damages be proved with reasonable certainty. In a case where much of the dispute focused on the sufficiency of proof of damages, this court concluded that omission would prejudice the defendants.

7. Had the *Hopper* case merely discussed the "reasonable certainty" language in the context of sufficiency of the evidence, this court would not have considered that precedent as such strong support for the defendants' requested instruction. But *Hopper* expressly approved the language of the jury instruction on crop damages containing that statement.

8. Moreover, the plaintiff's argument that the language changes the burden of proof does not appear consistent with *Hopper*. This court carefully considered the plaintiff's argument that the language modified the burden of proof. However, the burden of proof was clearly set forth in Instruction No. 7. This court's Instruction No. 8 obviously related to the determination of damages. When the instructions are read together, as they must be under the *Pleiss* standard, the court considers the *Hopper* case as binding precedent that the language of Instructions Nos. 7 and 8 is an accurate statement of the law, not misleading, and adequately covers the issues, including the burden of proof and the consideration of particular items of damages.

9. A motion for new trial is to be granted only when error prejudicial to the rights of the unsuccessful party has occurred. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, \_\_\_ N.W.2d \_\_\_ (2001).

As this court concludes that no prejudicial error occurred, the plaintiff's motion for new trial must be denied.

10. The defendants did not resist the plaintiff's motion to retax costs. Although this court can discern no reason for the plaintiff's failure to comply with paragraph 11.I. of the pretrial order signed on June 8, 2000, in view of the defendants' acquiescence, to deny the motion would seem churlish. Consequently, the motion will be granted, and the interlocutory judgment entered following the trial will be modified accordingly.

11. The bifurcated issues regarding the allocation of the damages between the defendants remain for determination. This court has *not* determined that final judgment should be entered as authorized by NEB. REV. STAT. § 25-1315 (Cum. Supp. 2000). Consequently, this order, similar to that entered following the trial on the bifurcated issue of the plaintiff's damages, is interlocutory in character and does not constitute a final judgment. In order that the matter may proceed to a final determination as soon as possible, the court will order the appearance of the counsel for all parties defendant (including the third-party defendant) at a date certain to determine an appropriate schedule to proceed to trial on the remaining issues unless the defendants at or prior to that time enter into a stipulation allocating the interlocutory judgment in favor of plaintiff between the respective defendants.

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

1. The plaintiff's motion for new trial is denied.
2. The plaintiff's motion to retax costs is granted to the extent of the specific relief set forth below.
3. The interlocutory judgment entered on the jury verdict in favor of the plaintiff, Lawrence Pribil, and against the defendants, Barton Koinzan, Sandra Koinzan, Terry Held, and Genevieve Shaw, jointly and severally, is modified to the amount of \$34,920.60, together with the costs of the action, taxed in the amount of \$1,693.40. The judgment shall bear interest at the rate of 7.241% per annum from September 28, 2000, until paid.
4. The counsel for all defendants, including the third-party defendant, shall appear on **February 12, 2001, at 10:45 a.m.**, or as soon thereafter as the same may be heard, for a progression conference on the remaining issues, unless on or before such time the defendants at that time enter into a

stipulation allocating the interlocutory judgment in favor of plaintiff between the respective defendants by specific percentages or amounts.

Signed in chambers at Ainsworth, Nebraska, on January 30, 2001.

DEEMED ENTERED upon filing by 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 **modification of** judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- 9 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 denying plaintiff’s motion for new trial, granting plaintiff’s motion to retax costs and modifying the interlocutory judgment for plaintiff accordingly, and ordering counsel for defendants to appear for progression conference on [date and time from order].  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

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William B. Cassel  
District Judge