

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

DAPHNE L. DEVALL,
Plaintiff,

vs.

**DOLORES LINGLE, Real Name Unknown,
Trustee of the Marie Kiesau Trust, and
CALVIN DOBIAS,**
Defendants.

Case No. CI00-148

JOURNAL ENTRY ON TRIAL

DATE OF TRIAL: December 4-6, 2001.

APPEARANCES:

For plaintiff: William A. Wieland and Forrest F. Peetz with plaintiff.

For defendants: C.J. Gatz with defendant Calvin Dobias and without defendant Dolores Lingle.

SUBJECT: Jury Trial.

PROCEEDINGS:

Tuesday, December 4, 2001: The juror orientation video was displayed. The jury panel was excused from the courtroom.

In the absence of the panel, preliminary matters were considered. The defendants confirmed that the defendants had not withdrawn from the stipulation in paragraph 10A(5) of the pretrial order. The plaintiff's written dismissal of the defendant Calvin Dobias was filed and the matter will proceed to trial as against the defendant Lingle only. Without objection, Calvin Dobias was designated as representative of the Marie Kiesau Trust whose presence is essential to the presentation of the defendant's cause. Both parties stipulated that no alternate juror need be selected and in the event that one or more jurors must be excused during the course of trial, the matter may proceed with the remaining number of jurors. On the plaintiff's motion and without objection, the pretrial order was amended to add the issue of property damage to the plaintiff's motor vehicle as alleged in paragraph 8 of the plaintiff's petition. The parties stipulated that the following prospective jurors be excused without necessity of examination, to-wit: Lou Ann Frasch, Michael J. Hurlbert, and Timothy R. Plessel.

The jury panel returned, and after introductory comments by the court, the jury panel was duly sworn for examination. The names of 18 prospective jurors were duly drawn by the clerk. Voir dire examination was conducted by the court. During the court's examination, and without objection, two prospective jurors 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. During the plaintiff's examination, on plaintiff's motion and without objection, one juror was excused for cause and a replacement duly drawn by the clerk, and examined by the court and counsel for plaintiff. The plaintiff passed the panel for cause. Voir dire examination was then conducted by counsel for defendant. The defendant passed the panel for cause. Peremptory challenges to the panel of 18 prospective jurors were exercised by counsel for plaintiff and counsel for defendant. The trial jury of 12 persons were duly sworn and admonished, consisting of:

Timothy D. Mann	Dale A. Zwingman	Janice R. Harmon
Karla R. Peter	Daniel L. Myers	Kevin D. DeKay
Beverly A. McConnell	Joseph W. Storms	Mary S. Wettlaufer
Julius S. Hipke	Brenda A. Sterns	Marilyn E. Krobot

The jury was excused for lunch. With all counsel and parties or party representatives present, and in the absence of the jury, both parties waived any conflict arising by reason of the relationship of the official court reporter, Randall W. Fitch, and the contemplated witness, Dr. Richard Fitch. Counsel discussed with the court the stipulated matters and the plaintiff's request that the stipulations from the pretrial order be read to the jury by the court during preliminary instructions was granted without objection. The trial recessed for lunch.

Following the lunch recess, the jury returned, and preliminary instructions were given by the court to the jury. Opening statements were presented by counsel for plaintiff and counsel for defendant. Evidence was adduced for the plaintiff. A verbal stipulation was offered and received. The jury was admonished, and a brief recess was taken. Following the recess, the plaintiff, Daphne L. Devall, was sworn and testified. During direct examination, without objection, the examination was interrupted to take a witness without delay. Dr. Richard Fitch was sworn and testified. At the close of direct examination of Dr. Fitch, the jury was admonished and a brief recess was taken. Following the recess, the examination

of Dr. Fitch was resumed and concluded. The jury was admonished and a brief recess was taken. Following the recess, the direct examination of Daphne L. Devall resumed. During such resumed examination, the jury was admonished and excused for the day, and the trial recessed until Wednesday, December 5, 2001, at 9:00 a.m.

Wednesday, December 5, 2001: The trial resumed with all counsel and parties or party representatives present, except Forrest F. Peetz who was excused from attendance. The plaintiff requested leave to interrupt the direct examination of Daphne L. Devall, to call a witness without delay. There being no objection, the plaintiff's request was granted, and Dr. Wendell J. Sitz was sworn and testified. During cross examination, the jury was admonished and a mid-morning recess was taken. Following the recess, the examination of Dr. Wendell J. Sitz was resumed and concluded. The examination of Daphne L. Devall was resumed. During cross examination, the jury was admonished and recess taken for lunch.

Following the lunch recess, the examination resumed and was concluded. Additional evidence was adduced by stipulation. The plaintiff rested. The jury was admonished and excused from the courtroom.

In the absence of the jury, the defendant moved for dismissal of the plaintiff's petition as to certain elements of damages, and arguments of counsel were heard. The court construes the motion as a motion for directed verdict, and grants the motion as to the element of partial or total disability and the element of loss of future earning capacity, and otherwise denies the motion. A brief recess was taken.

Following the recess, evidence was adduced for the defendant. Calvin Dobias and Lawrence Reiman were sworn and testified. The defendant rested. The plaintiff rested on rebuttal without rebuttal evidence. The jury was admonished and excused from the courtroom.

An informal instruction conference was held in chambers with counsel for plaintiff and counsel for defendant present.

Following the informal conference, with all remaining counsel and the parties or party representatives present, and in the absence of the jury, a formal instruction conference was held in open court. The court's proposed instructions Nos. 1 through 9, inclusive, and the proposed verdict form were considered. The plaintiff did not object to any of the instructions or the verdict form, and has no additional requested instructions. The defendant did not object to any of the instructions or the verdict form, except the last clause of Instruction No. 7A(2) regarding future health care expenses to which the defendant

objected. The plaintiff specifically requested the instruction. Arguments were waived. The objection was overruled and the proposed instruction will be given. The defendant also requested that defendant's requested instruction No. 25 be given, to which the plaintiff objected. Arguments of counsel were waived. The objection was sustained, and the requested instruction was refused by the court, which endorsed the requested instruction as "refused" and directed the same to be filed by the clerk. The defendant abandoned the other requested instructions filed with a set of requested instructions at the start of the trial. At the close of all of the evidence, the defendant renewed her motion for a directed verdict on the issue of future health care expenses. Both counsel waived argument. The motion was denied. Time limits of 45 minutes per side for closing arguments were established with consent of counsel.

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, but will nevertheless attempt to reach counsel in the event of questions or a verdict. A brief recess followed for preparation of closing arguments.

Whereupon, the jury returned, with all remaining counsel and parties or party representatives present. Counsel for plaintiff presented closing argument. Counsel for defendant presented closing argument. Counsel for plaintiff presented rebuttal argument. The written instructions were read to the jury. The cause was submitted for commencement of deliberations at 6:06 p.m. The jury retired to the jury room.

At 6:15 p.m., with none of the parties, party representatives, or counsel present, the jury returned and informed the court of the desire to recess deliberations for the night. The jury was admonished and directed to return at 9:00 a.m. on Thursday, December 6, 2001, to resume deliberations. The trial recessed accordingly.

Thursday, December 6, 2001: At 9:00 a.m., the jury reassembled and resumed deliberations, with written notice to the court of the resumption of deliberations.

Written questions were received from the jury, which were endorsed by the court as "Jury's First Questions" and duly filed by the clerk. The court informally consulted with Forrest F. Peetz, one of plaintiff's attorneys, who was present in chambers, and with C.J. Gatz, defendant's attorney, who appeared

by telephone, and developed a response to the questions. The court began a formal instruction conference on the record with Forrest F. Peetz for plaintiff and no other appearances, when the second page of the jury's first questions was received from the bailiff. The court recessed the formal conference, and returned to chambers for further informal consultation with attorneys Peetz and Gatz. Thereafter, the court resumed the formal instruction conference, endorsed the second page as "Jury's Additional First Questions," and submitted proposed Instruction No. 10 with the content informally approved by counsel in chambers. There were no objections to Instruction No. 10. At 11:23 a.m., the jury returned with attorney Peetz present for plaintiff and no other appearances, and Instruction No. 10 was read to the jury and the cause resubmitted at 11:25 a.m.

At 1:14 p.m., with Forrest F. Peetz and the plaintiff, Daphne L. Devall, present, but in the absence of all other counsel, parties, or party representatives, the jury returned and announced that it had reached a verdict. The verdict form was duly filed by the clerk, and read aloud by the clerk in open court, wherein the jury rendered its verdict for the plaintiff in the amount of \$5,408.07. 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 all counsel or parties present. The verdict was accepted by the court. The jury was discharged with the thanks of the court. Judgment rendered by separate "Judgment."

Signed at O'Neill, Nebraska, on **December 6, 2001**;
DEEMED ENTERED upon file stamp date by court clerk.
If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.
Done on _____, 20____ by _____.
- If not already done, immediately transcribe trial docket entry dictated.
Done on _____, 20____ by _____.

BY THE COURT:

William B. Cassel
District Judge

Mailed to: