

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

DARLA SMITH,
Plaintiff,

vs.

**CARMEN BOWEN and DARRELL
BOWEN,**
Defendants.

Case No. CI01-137

JOURNAL ENTRY ON TRIAL

DATE OF TRIAL: September 9-11, 2003.

APPEARANCES:

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

For defendants: C.J. Gatz and Mark D. Fitzgerald with defendants.

SUBJECT: Jury Trial.

PROCEEDINGS:

Tuesday, September 9, 2003: The juror orientation video had been previously displayed to the panel and was not again displayed. After introductory comments by the court, the court administered the examination oath to the jury panel. The clerk drew the names of 18 prospective jurors. The court conducted voir dire examination. During the court's examination, and without objection, the court excused one prospective juror for cause. The clerk drew a replacement and the court examined the replacement. Counsel for plaintiff then conducted voir dire examination. During the plaintiff's examination, on plaintiff's motion and without objection, the court excused one juror for cause. The clerk drew a replacement juror, and the court and counsel for plaintiff examined the replacement juror. The panel was admonished and a mid-morning recess was taken.

Counsel for plaintiff resumed voir dire examination. The plaintiff passed the panel for cause. Counsel for defendants conducted voir dire examination. The defendants passed the panel for cause. Counsel for plaintiff and counsel for defendants exercised peremptory challenges to the panel of 18 prospective jurors. The court administered the trial oath to and admonished the trial jury of 12 persons, consisting of:

[deleted]

The court discharged the remainder of the panel and excused the jury for lunch. In the absence of the jury, with all counsel and plaintiff present and with the absence of the defendants excused, the plaintiff verbally moved to withdraw certain deposition exhibits from depositions that were previously received as Exhibits 1 and 2 and to mark such deposition exhibits as trial exhibits. Without objection, the court granted the objection in part and in part overruled regarding the suggested numbering of certain exhibits. The court accordingly authorized and instructed the court reporter regarding the renumbering of such exhibits and preservation of deposition exhibit numbering. The trial recessed for lunch.

Following the lunch recess, the jury returned with all counsel and parties present. The court gave preliminary verbal instructions to the jury. Counsel for plaintiff presented opening statement. Counsel Peetz departed. Counsel for defendants presented opening statement. Evidence was adduced for the plaintiff. Dr. Michael Hedlund testified upon oath. During direct examination, the court admonished the jury and declared a brief recess.

Following the recess, counsel resumed and concluded the examination. The court admonished the jury and declared a brief recess. Following the recess, the plaintiff, Darla Smith, testified upon oath. During direct examination, court admonished the jury and recessed the trial until Wednesday, September 10, 2003, at 9:00 a.m.

Wednesday, September 10, 2003: The trial resumed with all counsel and parties present, except Forrest F. Peetz who was excused from attendance. The plaintiff requested leave to interrupt the direct examination of Darla Smith to call a witness without delay. Without objection, the court granted the plaintiff's request, and Dr. Mark Ptacek testified upon oath. During cross examination, the court admonished the jury and declared a mid-morning recess. Following the recess, counsel concluded the examination. Counsel resumed the examination of Darla Smith. At the conclusion of direct examination, the court admonished the jury and declared a brief recess. Following the recess, cross examination of the witness began. During cross examination, the court admonished the jury and recessed the trial for lunch.

Following the lunch recess, with all counsel, including attorney Peetz, and parties present, the examination resumed and was concluded. Counsel for plaintiff displayed the videotape deposition of Dr. Kirk S. Hutton to the jury. The court admonished the jury and declared a brief recess. Following the recess, Wesley Smith testified upon oath. The plaintiff rested. The jury was admonished and excused from the courtroom.

In the absence of the jury, the defendant Darrell Bowen moved for dismissal of the plaintiff's petition as against him or in the alternative for directed verdict. Counsel presented or waived argument. The court denied the motion. A brief recess was taken.

Following the recess, the jury returned and the defendant adduced evidence. Counsel for defendant displayed the videotape deposition of Dr. Bernard Kratochvil to the jury. During offer of certain documentary evidence, the court admonished the jury and excused the jury from the courtroom. After hearing arguments of counsel, the court ruled upon the evidentiary issues. The jury returned, and the court received certain exhibits and refused certain exhibits. The defendants rested. The plaintiff rested on rebuttal without rebuttal evidence. The jury was admonished and excused for the day to return on Thursday, September 11, 2003, at 8:00 a.m.

An informal instruction conference was held in chambers with counsel for plaintiff, except attorney Peetz, and counsel for defendant present. Attorney Peetz was not present for the balance of the proceedings on this date.

Following the informal conference, with all remaining counsel for both parties present, and in the absence of the jury, a formal instruction conference was held in open court. Without objection, the defendants were granted leave to withdraw their rest for the purpose of making a request that the court take judicial notice of 26 U.S.C. § 104(a)(2). The request to notice 26 U.S.C. § 104(a)(2) was granted to the extent that the court notices the statute, but denied to the extent that the court declines to inform the jury thereof. The defendants renewed their rest and the plaintiff renewed her rest on rebuttal. There were no additional motions at the close of all evidence. The court's proposed instructions Nos. 1 through 9, inclusive, and the two proposed verdict forms were considered. The plaintiff did

not object to any of the instructions or the verdict forms, and has no additional requested instructions. The defendant did not object to any of the instructions or the verdict forms, except Instructions Nos. 4A(1)(a)1) and 4A(2) to preserve defendant Darrell Bowen's objection to the continued viability of the family purpose doctrine and the second and third sentences of Instruction No. 7A(4) regarding the extent of the definition of consortium. Counsel presented or waived arguments to the extent desired. The objections were overruled and the proposed instructions will be given. The defendant also requested that defendant's requested instruction No. 1 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. Time limits of 40 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. The court recessed the trial until Thursday morning.

Thursday, September 11, 2003: The trial resumed with all counsel, including attorney Peetz, and parties present. Counsel for plaintiff presented closing argument. Counsel for defendant presented closing argument. By agreement of counsel, time limits for both sides for closing argument were expanded during final argument. Counsel for plaintiff presented rebuttal argument. The written instructions were read to the jury. The cause was submitted for commencement of deliberations at 10:00 a.m. The jury retired to the jury room.

A written question was received from the jury, which was 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 held a formal instruction conference on the record with Forrest F. Peetz for plaintiff and no other appearances, and submitted proposed Instruction No. 10 with the content informally approved by counsel in chambers. There were no objections to Instruction No. 10. At 1:00 p.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 1:01 p.m.

At 1:45 p.m., with Forrest F. Peetz and the plaintiff, Darla Smith, present, but in the absence of all other counsel and parties, the jury returned and announced that it had reached a verdict. The clerk duly filed the verdict form, and read the verdict aloud in open court, wherein the jury rendered its verdict for the plaintiff in the amount of \$60,000.00. Upon inquiry by the court if it was their unanimous verdict, all 12 jurors responded in the affirmative by show of hands. Plaintiff waived further polling of the jury. The court accepted the verdict. The court discharged the jury with thanks. Judgment rendered by separate "Judgment."

Signed at **O'Neill**, Nebraska, on **September 11, 2003**;
DEEMED ENTERED upon file stamp date by court clerk.
If checked, the court clerk shall:

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

Mailed to:

BY THE COURT:

William B. Cassel
District Judge