

IN THE DISTRICT COURT OF ROCK COUNTY, NEBRASKA

SANDHILLS CATTLE FEEDING, INC.,
a Nebraska corporation,

Plaintiff,

vs.

JAMES F. BAKER and MARDRIE
BAKER, husband and wife,

Defendants,

LARRY CARLSON,

Third-Party Defendant.

Case No. CI02-11

ORDER ON POST TRIAL
MOTIONS

DATE OF HEARING: November 14, 2003.
DATE OF RENDITION: December 13, 2003.
DATE OF ENTRY: See court clerk's file-stamp date per § 25-1301(3).
APPEARANCES: See journal entry rendered following hearing.
SUBJECT OF ORDER: (1) defendants' motion to modify judgment within term, and, (2) plaintiff's and third-party defendant's motion for new trial.
PROCEEDINGS: See journal entry rendered following hearing.
FINDINGS: The court finds and concludes that:

1. The defendants' evidence improperly sought to inquire into the jury's mental processes. The motion to modify judgment within term cannot be granted. If construed as a motion to correct the form of the verdict, it comes too late after discharge of the jury. The motion must be denied.

2. However, the defendants' arguments illustrate the plain error committed by the court in the jury instructions which allowed the jury to find against both the plaintiff *and* the third-party defendant on the defendants' counterclaim. The pretrial order clearly established an *alternative* claim, either against the plaintiff *or* against the third-party defendant. The

evidence supported submission of the alternative claim, but the instruction allowing the jury to return a verdict against both the plaintiff *and* the third-party defendant was erroneous.

3. Although this plain error was not the theory of the motion for new trial, such plain error supports the motion in part. To the extent that the jury rejected the plaintiff's claim against the defendants, such error does not affect the validity of that determination. After careful consideration, this court concludes that the error impacts both the determination of liability and damages on the defendants' counterclaim. The motion for new trial should be granted in part and a new trial ordered on the defendants' counterclaim only.

ORDER: IT IS THEREFORE ORDERED that:

1. The defendants' motion to modify judgment within term is denied.

2. The plaintiff's and third-party defendant's motion for new trial is granted to the extent that a new trial is ordered on the defendants' counterclaim, and that part of the judgment concerning the defendants' counterclaim is vacated and set aside.

3. In all other respects, and in particular concerning that part of the judgment dismissing the plaintiff's claim with prejudice, the motion for new trial is denied.

4. Because of the trial judge's appointment to the Nebraska Court of Appeals, the scheduling of the new trial on the defendants' counterclaim is continued to further order of the successor district judge or the presiding judge.

5. This motion partially granting a new trial is a final, appealable order.

Signed in chambers at **Ainsworth**, Nebraska, on **December 13, 2003**;
DEEMED ENTERED upon file stamp date by court clerk.

BY THE COURT:

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 _____.

Note the decision on the trial docket as: [date of filing] **Signed "Order on Post Trial Motions" entered.**
Done on _____, 20____ by _____.

Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 20____ by _____.

Enter **partial vacation** of judgment on the judgment record.
Done on _____, 20____ by _____.

William B. Cassel
District Judge

Mailed to: