

[8] The issue then, in the analysis of *Gilbert* type cases, is whether the defendant signed in a representative capacity. Subsequent opinions interpreting *Gilbert* have required that, to support an allegation that an endorsement was made in an agency capacity, albeit without authority, such capacity must be evidenced on the face of the check. Alternatively, at a minimum, there must be testimony of an agency relationship or of oral representations that defendant was acting in such a capacity. *United States v. Gilbreath*, 452 F.2d 992 (5th Cir. 1971); *United States v. Hill*, 579 F.2d 480 (8th Cir. 1978).

[9] Appellant first raises the *Gilbert* issue on appeal. He presented no testimony at trial as to the existence of an agency representation. Furthermore, his initials, appearing in the endorsements as they do, are insufficient evidence of an agency relationship. See *Gilbreath*, supra (similar endorsement found insufficient to establish agency).

IV. CONCLUSION

For the reasons stated hereinabove, the conviction is affirmed.

KIRORO IRONS, Appellant

v.

SUSUMU AIZAWA, Appellee

Civil Appeal No. 335

Appellate Division of the High Court

Truk District

November 25, 1983

Appeal from judgment awarding only nominal damages in action for invasion of interest in plaintiff's land, which damages were then reduced by 87.5% because of a finding that plaintiff owned only one-eighth of the land in question.

The Appellate Division of the High Court, Munson, Chief Justice, held that testimony as to amount of damages due to loss of fish catch should have been admitted, and that testimony by plaintiff as to the value of his land after the alleged damage occurred should have been admitted, and therefore judgment was reversed and case remanded.

1. Judgments—Damages

There is no requirement that the plaintiff must prove the amount of damages with absolute or mathematical certainty.

2. Torts—Damages—Particular Cases

In action for damage due to dredging operation, testimony that a certain number of fish per week were caught in waters adjacent to property, that the fish had a specified value by weight, and that since the alleged damage to the property, there were no longer any fish there, was sufficient to provide a calculable amount of damages as to the value of the loss of fishing on the property.

3. Evidence—Opinion—Generally

A party may testify as to the value of his own property.

4. Evidence—Opinion—Generally

In an action for damage to real property due to dredging operation, it was error for the trial court to refuse to allow the plaintiff to testify as to the value of his property after the dredging operation.

5. Civil Procedure—Process—Service

Process served on person by leaving summons at his alleged employer's store was not a valid service at a person's "place of business", where the person never actually worked at the store itself, and his connection to the store was therefore tenuous at best. (Rules of Civil Proc., Rule 35(c))

6. Pleadings—Capacity of Party

While it is not necessary to assert the capacity of a party to sue, nor to plead his appointment as representative, the caption should, however, show in what capacity the plaintiff is suing; otherwise a defendant would have no notice of what he is actually defending against.

7. Pleadings—Capacity of Party

Where caption of complaint named plaintiff only in his individual capacity, and complaint averred that he was the owner of the land in question in the case, and where it was not until well into the trial that defendant was first made aware that plaintiff owned the land in common with his seven brothers, trial court properly limited plaintiff's recovery to one-eighth of the damages to the land.

8. Judges—Disqualification—Not Justified

Contention that trial judge was not impartial in trying and adjudicating case was without merit, since there was no evidence to support such an allegation.

IRONS v. AIZAWA

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Before MUNSON, *Chief Justice*, MIYAMOTO, *Associate
Justice*, and LAURETA¹, *Associate Justice*

MUNSON, *Chief Justice*

STATEMENT OF THE CASE

Appellant, Kiroro Irons ("Irons"), appeals from the judgment of the Trust Territory High Court, Truk District, issued January 5, 1979, finding defendant-respondent Susumu Aizawa ("Aizawa") liable for invasion of interest in plaintiff-appellant's land, but awarding only nominal damage because of the failure of proof of actual damages. The nominal damage award was then reduced by 87.5% because the trial court found that Irons owned only one-eighth of the land in question.

FACTS

Susumu Aizawa is the owner in fee simple of a certain lot located on the shore of the lagoon of the Island of Moen in Truk Atoll. Prior to the events which gave rise to this case Aizawa had filled in a substantial portion of the lot and operated thereon a store, a gas station, and related

¹ U.S. District Court Judge, Commonwealth of the Northern Mariana Islands, designated as Temporary Associate Justice by Secretary of Interior.

facilities. In 1975 he commenced to dredge and fill an area near his store, but was advised that before he could do any further dredging and filling it would be necessary for him to obtain a permit from the Environmental Agency of the Trust Territory of the Pacific Islands.

In June of 1976, a cease and desist order was issued by the Trust Territory Environmental Protection Board prohibiting "further dredging and earthmoving operations on or in the vicinity of Susumu's Store."

On January 14, 1977, a permit was issued which authorized Mr. Aizawa to extend his lot further out into the lagoon and to augment it by filling a certain designated portion on the northern flank of the lot. The permit limited Aizawa to dredging fill material from a specified area designated in a sketch attached to the permit.

Almost immediately, Aizawa resumed dredging and filling operations and there is no doubt that he removed certain fill material from the lagoon at a point well below the high tide mark and offshort to the immediate north of his lot, causing that portion of the lagoon to become appreciably deepened.

Mr. Aizawa was directed to cease and desist his dredging and to come again before the Environmental Protection Board. After a hearing he was permitted to resume dredging and filling operations but directed to dredge fill material only from the specifically designated area indicated in the sketch attached to the permit. He was also directed not to fill the area situated directly in front of the property of Irons.

The trial court found that Aizawa did wrongfully remove materials from lands in which Irons owned an interest. However, the trial court concluded that, though a trespass had occurred, Irons had failed to prove any damages as a result thereof. The trial court thus awarded nominal damages only, in the amount of \$160.00. Moreover, the

trial court concluded that Kiroro Irons owned only a one-eighth interest in the subject property, and thus limited his recovery to one-eighth of the award plus costs.

Appellant argues that the trial court erred in awarding only nominal damages for trespass to land, contending that it was error to not allow certain evidence to be introduced showing actual damage to his property. He further argues that the court erred in dividing the damages award into eight parts, and contends that he is and always has been acting in this cause for himself and in a representative capacity for his family.

In addition, appellant alleges that the Trust Territory High Court associate justice was not impartial in trying and adjudicating this case.

ANALYSIS

The trial court found that Aizawa did in fact remove materials from lands in which Irons owned an interest, namely, tideland and the land to the reef. See Judgment of the Trial Division of the High Court, Trust Territory of the Pacific Islands, Civil Action No. 44-77 (Judgment), p. 2. The court found, however that Irons' proof of damages resulting from such a trespass was too vague and speculative to warrant more than a nominal award.

[1] There is no requirement that the plaintiff must prove the amount of damages with absolute or mathematical certainty:

Damages need be proved only with reasonable certainty, therefore, removing the notion that an exactness or mathematical certainty is required of the party seeking a damage recovery. 22 Am. Jur. 2d Damages § 22.

Courts have stated that only reasonable certainty is required in proving the fact and cause of injury, but that the amount of damages, once their cause and fact have been shown, need not be proved with the same degree of certainty. 22 Am. Jur. 2d Damages § 23.

In the instant case it is clear that Irons did not prove the amount of damages with mathematical certainty. There was, however, some testimony to the effect that the value of Irons' property had been diminished by the wrongful dredging and filling by Aizawa, and that Irons suffered additional damages as well.

Irons testified that he and his family fished in the lagoon in waters adjacent to their property, and that they caught about 20 fish per week. The stipulated testimony of Paulus Ykelap which was filed with the trial court indicated that, as an expert "in the type of fish that inhabit [sic] the lagoon adjacent to property owned by Mr. Aizawa and Mr. Irons," he would testify that these fish average one and one-half pounds each, and that the average price of such fish is fifty cents per pound. No testimony was introduced at trial or by stipulation refuting this evidence.

Irons further testified that, since the dredging operation began, he was unable to fish the area because there were no longer any fish there.

[2] This evidence is sufficient to provide an easily calculable amount of damages as to the value of the loss of fishing, which is well in excess of the nominal damages awarded by the trial court.

The trial court also concluded that where the amount of damages are not clearly set forth in the evidence, nominal damages can only be recovered. Judgment, p. 3, citing *Austin v. Bloch*, 105 P.2d 868:

Absolute certainty is never required in proving the quantum of damages, but, where the amount of damage is susceptible of proof, proof must be offered and if such offer is not offered, recovery can be had for a nominal amount only. *Id.* at 869.

[3] Here, Irons testified, over objection from opposing counsel, that the value of his land prior to the dredging was ten thousand dollars (\$10,000.00). After the objection by opposing counsel and before Irons had answered as to

the value of his property, there was a discussion between counsel and the court, wherein the admissibility of such testimony was discussed. The trial judge stated:

Well, prior to the dredging he can testify to the value, but I'm not sure he can after the dredging . . . I will allow him to answer the question prior to the dredging, but I'm going to limit you right there from asking him afterwards. So, you can ask him if he knows the value of that land prior to the dredging. *Reporter's Transcript*, at 132.

The law is well settled that a party can testify as to the value of his own property. See *United States v. 3698.63 Acres of Land, etc., North Dakota*, 416 F.2d 65, 67 (8th Cir. 1969); *Berkshire Mutual Ins. Co. v. Moffett*, 378 F.2d 1007, 1011 (5th Cir. 1967); *Righter v. United States*, 439 F.2d 1204; *Kinter v. United States*, 156 F.2d 5 (3rd Cir. 1946). The issue is generally one of weight, not admissibility.

[4] Here, Mr. Irons was not allowed to express any opinion as to the value of his property after the dredging operation. We cannot discern any difference between an owner testifying as to the value of his property before a tortious interference, and as to the value of the property thereafter. We thus find that it was error for the trial judge to refuse to allow Mr. Irons to testify as to the value of his property after the dredging operations.

Appellee makes the assertion that no questions were ever asked of Mr. Irons regarding the value of his property after the dredging operation, and that he should, therefore, not now be allowed to complain that any such testimony was disallowed. While, technically, appellee may be correct, here the trial judge clearly stated that he would limit counsel's questioning to the value of the property before the dredging, and would not allow Mr. Irons to testify as to the value thereafter. It would therefore have been futile

for plaintiff's counsel to ask Mr. Irons any questions regarding the value of his property after the dredging.

Appellant also assigns error to the trial court's finding that he had improperly served process on one Taichy Taikichy, an alleged employee of Aizawa, and that therefore his presence at trial could not be compelled. Appellant had counted on the anticipated testimony of Mr. Taikichy to prove the cumulative amount of coral and rock fill that was taken from appellant's reef area. Such testimony would have provided a quantitative measure upon which to base an award of damages.

[5] While appellant contends that service at a witness' believed place of business suffices to satisfy T.T. R. Civ. P., Rule 35(c), we do not agree. Mr. Taikichy was not an owner of the business, nor did he have a proprietary interest therein. Moreover, the summons was merely served at his alleged employer's store in Moen. Mr. Taikichy operated a crane at the dredging site; it is not seriously contended that he ever worked at the store. Moreover, Mr. Taikichy does not live on Moen, but is a resident of the Island of Tol. Thus, the alleged connection to Susumu's Store in Moen is tenuous at best, and will not suffice to validate service of process at a person's "usual place of business."

However, appellant will be afforded the opportunity to testify as to the diminished value of his property, and we feel that evidence of how much was dredged from his property should properly be considered in this determination. The court may then accord the evidence whatever weight it feels is proper.

We now turn to the question of whether the trial court properly divided the damage award into eight parts.

From all appearances, appellant Kiroro Irons brought this action in his own name for himself only. Irons contends, however, that he is and always has been, acting in

a representative capacity for himself and his seven brothers.

[6] While it is not necessary to assert the capacity of a party to sue, nor to plead his appointment as representative, the caption should, however, show in what capacity the plaintiff is suing. See 2A, Moore's Federal Practice, 2d Ed., § 9.02. Without some indication in the caption of the pleading as to the capacity in which a plaintiff is suing, a defendant would have no notice of what he is actually defending against.

Here, the caption of the Amended Complaint names Kiroro Irons only in his individual capacity, and paragraph 3 of the Amended Complaint avers that he is the owner of the land in question. It was not until well into the trial that defendant was first made aware that Kiroro Irons owns the land in common with his seven brothers.

[7] We find that notice of Irons' representative capacity was untimely and insufficient. While he need not have joined his brothers as parties, in order for this lawsuit to be a valid representative case, he would have somehow had to have noted their interest by somehow showing his representative capacity. The trial court was thus correct in limiting Irons' recovery to one-eighth of the award.

[8] Finally, appellant contends that the trial judge was not impartial in trying and adjudicating this case. We see no merit in this argument and find absolutely no evidence to support any such allegation.

For the reasons stated herein, the judgment of the trial court is reversed and the case is remanded with instructions to allow Mr. Irons to testify as to the value of the lost fish and the value of his property after the dredging operations, including how much was dredged from the property, the cost of putting the dredging material in place, and other relevant damages.