

1987

Mountain States Telephone and Telegraph Company v. George Baker d/b/a Baker Construction and Gordon Hansen : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO.

870168-CA

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

---oooOooo---

MOUNTAIN STATES TELEPHONE : **BRIEF OF APPELLANT**
AND TELEGRAPH COMPANY,

Plaintiff-Respondent,

v.

Docket No. 870168-CA

GEORGE BAKER d/b/a BAKER
CONSTRUCTION,

Defendant-Appellant,

and

GORDON HANSEN,

Defendant-Respondent.

---oooOooo---

Appeal from the Judgment of the Fifth Circuit Court, Salt Lake Department
The Honorable Maurice D. Jones Presiding

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Court of Appeals

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Plaintiff-Respondent,	:	
v.	:	Docket No. 870168-CA
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CONSTRUCTION,	:	
Defendant-Appellant,	:	
and	:	
GORDON HANSEN,	:	
Defendant-Respondent.	:	

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IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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MOUNTAIN STATES TELEPHONE	:	
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Defendant-Appellant,	:	
and	:	
GORDON HANSEN,	:	
Defendant-Respondent.	:	

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PARTIES

The only parties to this action are those named in the caption, although Plaintiff-Respondent Mountain States Telephone and Telegraph Company transacts business as "Mountain Bell."

JURISDICTION

This Court has jurisdiction of this matter pursuant to Section 78-2a-3(2)(C), Utah Code Annotated (1953 as amended).

NATURE OF PROCEEDING

This is an appeal from the final judgment of the Circuit Court in a civil action to recover for damages to a telephone cable.

ISSUES PRESENTED

1. Did the trial court err in receiving, as the only evidence of Plaintiff's damages and without proper foundation, a computer-generated document reflecting computer calculations?

2. Did the trial court err in denying Appellant Baker's motion to dismiss at the close of Plaintiff's case inasmuch as Plaintiff had presented no evidence of negligence and no admissible evidence of its damages?

3. Are the trial court's Findings of negligence on the part of Appellant supported by any substantial credible evidence or are they clearly erroneous?

4. Are the trial court's Findings as to Appellant's damages supported by any credible evidence or are they clearly erroneous?

5. Is the trial court's Finding of no negligence on the part of Defendant-Respondent Hansen supported by any credible evidence or is it clearly erroneous?

DETERMINATIVE AUTHORITY

Sections 54-8a-4, 54-8a-6, and 54-8a-8, Utah Code Annotated (1953 as amended), are relevant to this action. The computer-generated exhibit, in light of the foundation offered for it, was inadmissible pursuant to Rules 804 and 402 of the Utah Rules of Evidence. These statutes and rules are reproduced in the Addendum, infra at A-2 - A-6.

DISPOSITION IN TRIAL COURT

This action was filed by Plaintiff-Respondent on January 6, 1987. (R. at 1.) Defendant Baker filed a pro se answer on his own behalf on February 2, 1987. (R. at 11.) Defendant-Appellant Baker was subsequently granted leave by the trial court to file a formal Answer and Crossclaim on March 18, 1987. (R. at 57.) Defendant-Respondent Hansen filed an Answer to the Crossclaim on March 30, 1987. (R. at 46.)

The matter proceeded to trial before the Circuit Court, sitting without a jury, on the afternoon of April 3, 1987. The Circuit Court ruled against Defendant-Appellant Baker on all issues (R. at 176-177), and signed without alteration Findings of Fact, Conclusions of Law, and Judgments submitted by counsel for both Plaintiff and Defendant-Respondent Hansen. (R. at 60 and 66, 61 and 66, and 61 and 67.) This appeal followed. (R. at 69.)

STATEMENT OF FACTS

Defendant-Appellant George Baker is a licensed contractor. On Friday, November 16, 1984, Mr. Baker's company was contacted by Defendant-Respondent Hansen and informed that Mr. Hansen's sewer line was backed up and that raw sewage was overflowing in his basement and running down his gravel driveway. (R. at 150.) Mr. Hansen informed Mr. Baker's company that the situation was an emergency and that he wanted a backhoe and an operator immediately. (R. at 150.) The Hansen household consisted of four members and it would have been an

impossibility for them to live in their house Friday, Saturday, Sunday, and into the following week without being able to run water down the drains or flush any of the toilets. (R. at 158.) Mr. Hansen considered the matter one of great urgency and stayed home from work in order to resolve the problem. (R. at 158.) Mr. Baker's company offered to send a full crew and contact the "Blue Stakes" program (R. at 117); however, Mr. Hansen insisted that he knew where all the utilities were on his property (R. at 117) and rejected a "full crew," noting that he would do the hand digging (R. at 150).

When Roger Duvall, the backhoe operator dispatched to Mr. Hansen's residence, arrived, he noted that Mr. Hansen had already excavated and exposed a break in the sewer pipe in the Hansen driveway. (R. at 132.) Mr. Duvall checked the pipe by inserting a garden hose and determined that there was an additional stoppage further down the line. (R. at 133.) Mr. Hansen and Mr. Duvall walked down the sewer line and found another location where raw sewage was bubbling up through the ground. (R. at 133.) Mr. Hansen requested Mr. Duvall to go ahead and excavate in the vicinity of this second location, agreeing that he would use the hand shovel himself. (R. at 135.) Mr. Duvall explained to Mr. Hansen that he would be digging in front of the backhoe in order to locate the sewer pipe or any buried utilities and that Mr. Duvall would then scoop dirt from the trench with the backhoe to the depth of the shovel blade, and that the process would be repeated. (R. at 135.)

In this process, Mr. Duvall discovered, before damaging it, a dark cylindrical object. (R. at 138.) Mr. Duvall asked Mr. Hansen what the object was and Mr. Hansen inspected it and reported that it was a "tree root." (R. at 138.) At trial, Mr. Hansen acknowledged that he had told Mr. Duvall that the object was a tree root. (R. at 153.) Mr. Duvall again questioned Mr. Hansen as to what the object was and Mr. Hansen responded that it was a tree root and to "tear it out." (R. at 138.) Mr. Duvall proceeded to dislodge the object, became suspicious when he encountered more resistance than would be expected from a tree root, again stopped the backhoe to inspect the object, and determined that it was a telephone cable. (R. at 139.)

Mountain States Telephone and Telegraph Company was called and repaired the cable. Both Mr. Hansen and Mr. Baker refused to pay Mountain States' claim for the damage to the cable.

At trial, Mountain States called two witnesses: an administrative reports clerk and the supervisor of the repair. Neither witness offered any testimony of any negligence on the part of the backhoe operator. The only evidence as to its damages offered by Mountain States, over the objection of Mr. Baker, was a computer-generated document. The administrative reports clerk testified that she had typed in the number of hours reported by the repair supervisor and that the computer had generated a "bill" for the repairs. She admitted that she had no idea as to the actual supplies

used, the cost of the tools or supplies used, or the formulas or calculations used by the computer in generating the "bill."

The trial court overruled Defendant Baker's objection to the computer-generated "bill," denied his motion to dismiss at the conclusion of Plaintiff's case even though Plaintiff had presented no evidence of any negligence, and entered a judgment of no cause of action on his cross-claim against Defendant-Respondent Hansen.

SUMMARY OF ARGUMENT

The only evidence submitted by the Respondent utility in support of its claim was a computer-generated "bill" prepared by its "claims office." That document consists almost entirely of amounts calculated, as opposed to retrieved, by computer. As such, it is hearsay. The foundation laid for the document was not sufficient to render it admissible under the business records exception. A Plaintiff in a tort case may not prove its unliquidated damages through the admission of computer-generated calculations, particularly where, such as in the present case, the foundation witness is unable to provide any explanation as to the formulas, calculations, or methods employed by the computer in generating the document.

While a utility whose facilities have been damaged through negligence is entitled to recover the reasonable and ordinary cost of repairing those facilities, it is not entitled to prove its damages based upon average costs or accounting estimates. Moreover, it is entitled to recover

only those indirect overhead expenses proximately related to the defendant's conduct.

Appellant Baker's motion to dismiss should have been granted because the Respondent utility failed to offer any evidence of any negligence on the part of Appellant's backhoe operator and because the unrefuted evidence at trial demonstrated that an emergency circumstance existed because raw sewage was flooding Respondent Hansen's basement and bubbling up through the ground. Utah law does not require that a utility be notified before excavation is commenced if an emergency exists. Utah law imposes a prima facie presumption of evidence only if an excavation is made without the required notice being given. In this case, notice was not required because an emergency existed and, moreover, any presumption of negligence was rebutted by the unrefuted evidence of the care and caution with which Appellant Baker's employee operated the backhoe.

The trial court also erred in dismissing Appellant Baker's crossclaim against Respondent Hansen. It was Respondent Hansen who insisted that the Blue Stakes program not be contacted and who stated that he knew where all the utilities on his property were located. It was Respondent Hansen who declined Appellant Baker's offer to provide a full crew, agreeing that he would, instead, do the manual shoveling and act as "spotter" himself. Moreover, Appellant Baker's backhoe operator located the communications cable and asked Respondent Hansen what it was before it was damaged. Respondent Hansen examined the object, reported that it was

a tree root, and instructed Defendant Baker's employee to "tear it out." Only then was the cable damaged. Under these circumstances, the trial court erred in dismissing the crossclaim of Appellant Baker against Respondent Hansen.

ARGUMENT

POINT I. THE COMPUTER CALCULATED "BILL" WAS INADMISSIBLE AND THERE WAS NO ADMISSIBLE EVIDENCE OF DAMAGES.

The only evidence of the damages claimed by Plaintiff in this action is found in a computer-generated "bill" received over Defendant's objection (R. at 94-95) as Exhibit P-1 (reproduced infra at A-26). Such foundation as was laid for this exhibit was provided by Plaintiff's witness, Ann Nielsen. She testified that she was "an administrative reports clerk" for Plaintiff's "area claims office" and that her work consisted of dealing with damage claims, investigating the claims, "billing the claims," and following up on the claims if payment was not received. (R. at 87.) She testified that, in the normal course of her duties, she prepared billings that were sent out to people whom she "felt caused the damage." (R. at 88.) She went on to testify that repair supervisors provided her with what is called a Form 3886, which lists the number of man hours spent on any particular repair. (Exhibit P-2, reproduced infra at A-27.) She inputs these hours to a computer and "the computer then gives us a total for the bill, and then prints the bill." (R. at 91.) She was also permitted to testify, without further foundation, over the objection of Defendant Baker,

that the \$2,060.33 total reflected on the exhibit represented "the actual costs incurred by Mountain States Telephone" in connection with the repair of the cable at issue. (R. at 93.)

Ms. Nielsen acknowledged that she did not know what rate of pay the employees who repaired the cable at issue received, that she did not know what supplies were actually used in connection with the repair of the cable, that she did not know what tools were used on the job, that she did not know what the tools used had cost, that she did not know whether Mountain Bell had lost any revenue as a result of the cable being out of service, that she did not know which customers' service was interrupted and, generally, that she had no independent knowledge of anything except the man hours reported, which she had faithfully input to the computer. (R. at 96-98.) In fact, the witness's total ignorance of what the document was, how it was calculated, and what it demonstrated is graphically manifest by her testimony that "we did not charge for overtime hours." (R. at 89.) In fact, it was the unrefuted testimony of Plaintiff's employee who supervised the repairs, Gary Newkirk, that his employees received "right around \$14.00 an hour" regular time and \$21.00 per hour overtime. (R. at 110.) In the exhibit, however, 44 hours are billed at an average rate of \$37.25 per hour, approximately three times the crew's actual regular rate of pay.

A. The Computer-Generated "Bill" is Hearsay and Inadmissible.

It is of critical importance to note, at the outset, a fundamental distinction with respect to the computer-generated printout at issue in this case: It does not consist of information retrieved by Plaintiff's computer; instead, it consists almost entirely of information calculated by Plaintiff's computer. In other words, the question is not whether Plaintiff's Exhibit 1 is admissible for the purpose of demonstrating that 44 man hours were worked on this project¹, but whether it is admissible for proving the reasonable value or reasonable cost of those repairs. While relatively few cases have dealt directly with the admissibility of computer-generated calculations as opposed to computer-generated printouts of retrieved information, the courts have consistently noted that the foundation necessary for such calculations is substantially greater than for mere retrievals. For example, in Illinois v. Bovio, 118 Ill.App.3d 836, 455 NE.2d 829 (1983), the trial court's admission of computer calculations was held to be erroneous. On appeal, the Court noted that the foundation offered for the calculations did not demonstrate that the computer

¹Actually, the testimony of Gary Newkirk, who supervised the repairs, was that he and four other men worked nine overtime hours each and his time sheet (Exhibit 2) demonstrated that two other individuals worked four hours each regular time some three days later. While these figures are not reconcilable with, and are indeed inconsistent with, Plaintiff's Exhibit 1 which reflects 44 overtime hours, Appellant does not contest for the purposes of this appeal the number of hours worked. The reasonableness of the hours worked is subject to challenge, particularly in view of the fact that Mr. Newkirk's nine hours consisted entirely of "supervising" and procuring coffee, hot food, and other non-essential items. (See, R. at 107.)

equipment was standard and that there was little evidence concerning the method of preparation of the data to attest to its trustworthiness. The Court held:

Systems, like the one apparently in question, which perform calculations must be scrutinized more thoroughly than those systems which merely retrieve information. . . . No testimony established that the computer program at the data center was standard, unmodified, and operated according to its instructions. On the basis of these gaps in the foundation requirement, we hold that the trial court erred in admitting the bank statement in evidence. . . .

455 NE.2d at 833-34 (citations omitted). In the case presently before this Court, the foundation offered for Respondent's computer calculations was even less complete in that the only witness called to offer that foundation had absolutely no information concerning the nature of the program or the formulas or rates that it utilized. She knew only that she had typed in the number of man hours accurately.² Under these circumstances, the proffered foundation was totally insufficient.

Similarly, in Illinois v. Morman, 97 Ill.App.3d 556, 422 NE.2d 1065 (1981), the Court placed emphasis upon the fact that a computer printout consisted merely of information retrieved (as opposed to calculated) by a

²As noted, the witness's "knowledge" of the accuracy of the data that she input is highly questionable. She testified that the computer had treated all of the hours as regular time although the evidence demonstrated that the computer treated all of the hours as overtime. Moreover, Mr. Newkirk testified that 45 hours of overtime and eight hours of regular time had been devoted to the project, whereas the computer obviously based its calculations upon 44 hours of overtime and no regular hours. Such discrepancies, while mathematically insignificant, demonstrate the lack of trustworthiness inherent in Respondent's computer operations.

car rental company's computer in holding that it was admissible. In so holding, the Court noted:

[T]he fact that the Avis computer was used to retrieve information rather than perform calculations necessitates less scrutiny into the nature of the computer. . . .

422 NE.2d at 1073.

In a case squarely on point, a utility's computer-generated damage calculations were held to be inadmissible to prove the value of damage to the utility company's facilities in Dayton Power & Light Company v. Hershner, No. 1101 (Ohio Ct. App., filed March 27, 1981).³ In that case, a motorist negligently collided with a utility pole. The utility company filed suit for damage to its pole. In support of its Motion for Summary Judgment, the utility submitted an extensive affidavit by the assistant supervisor of its accounting department. Attached to the affidavit were "work order cost summaries" similar to the computer-generated "bill" received in this case as trial Exhibit 1 but with much more detail. The affidavit demonstrated that the work order cost summaries were prepared monthly in the ordinary course of the utility's business and utilized sound accounting principles. The affidavit went on to explain that the calculations were based upon the utility's cost experience "over a long period of time." In ruling that the foundation for these computer-generated calculations was inadequate, the Court held:

³This unreported opinion, as retrieved via Lexis, is reproduced infra at A-7.

This Court recognizes that in today's business world, computers and computerized bookkeeping have become commonplace, and that the business records exception to the hearsay rule is intended to bring the realities of the business world into a court of law.

In this case, however, DP&L is attempting to prove by computer printout its unliquidated damages. This can be contrasted to the use of computer printouts to show a liquidated amount due, such as on an account. Because of the difference between what the two types of computer printouts are intended to prove, this Court is not passing on a computer printout's introduction into evidence pursuant to [the business records exception] in general. Rather, we confine ourselves to computer printouts introduced for the purpose of proving unliquidated damages.

Slip Op., infra at A-9. Having made the fundamental observation that the proffered evidence consisted of information calculated rather than retrieved by computer, the Court noted that the foundational affidavit also recited that the summary had been prepared in the ordinary course of business and "accurately reflects the cost incurred in the replacement of the pole." The Court ruled, however, that:

These mere conclusions on the part of the foundation witness that the records were made in the ordinary course of business are not a sufficient foundation for the printouts' introduction into evidence.

Specific proof must be presented that the computer records were made in the ordinary course of business. This would include testimony that the printouts were routinely made rather than specifically prepared for trial, and that they were relied on by DP&L as sufficiently accurate for business purposes.

Further, the foundation witness must describe in detail any calculations or abbreviations appearing in the printout. Abbreviations in DP&L's work cost

summaries are not explained. In addition, the original source of the information contained in the printout must be shown, and the reliability and trustworthiness of the information must be established. These requirements were not met by DP&L in its efforts to prove unliquidated damages by the work cost summaries.

Slip Op., infra at A-9-10, emphasis added. For precisely the same reasons, the computer-generated calculations that form the sole basis of the damage evidence in this case are inadmissible.

Ms. Nielsen admitted that she had no information as to how the calculations were prepared and she candidly acknowledged that they were prepared solely for the purpose of submitting a bill to those parties believed by the Respondent to be liable for the damage to its facilities. Accordingly, the foundation is inadequate both because the only witness attempting to provide foundation could not explain how the amounts were calculated or the rates that had been applied to them and her testimony makes clear that they were prepared solely for the purpose of pursuing a damage claim and not in the ordinary course of business. By her own testimony, Ms. Nielsen lacked the knowledge that would enable her to provide an adequate foundation. She did not know what mathematical manipulations the computer performed, she did not know what rates were applied, she did not know what factors the computer considered. Without a foundation as to the basis of the mathematical calculations performed by the computer, the dollar figures resulting from those calculations are utterly meaningless.

While the courts have created no specific rules as to the identity or occupation of the witness attempting to lay a foundation for computer-generated evidence, the courts have wisely and consistently required that the individual have reasonably specific knowledge about the basic methods by which the documents were prepared. For example, in Monarch Federal Savings and Loan Association v. Genser, 156 N.J. Super. 107, 383 A.2d 475 (1977), the Court was required to determine the sufficiency of the foundation for computer-generated mortgage payment records. The Court held:

No specific person must be called to supply the foundation testimony for the admission of business records. However, whoever testifies must be in a position to supply the foundation [required], i.e., the regular course of business, the time of making of the record and the event recorded, the sources of information recorded, and finally, the methods and circumstances of the computer record's preparation. This Court agrees [that] a proper foundation for (computer) evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy. Thus, in providing information as to the methods of preparation, the foundation witness should also be able "to testify as to the type of computer employed, the permanent nature of the record storage, and how daily processing of information to be fed into the computer was conducted, resulting in permanent records." . . .

383 A.2d at 485-86 (citations omitted). In the case at hand, Ms. Nielsen was admittedly unable to offer any of this foundation except that she accurately input information supplied to her by other company records.

The fundamental principle embodied in each of the hearsay exceptions set forth in Rule 803 of the Utah Rules of Evidence is trustworthiness. With respect to business records, the theory is that if a business prepares a record in its ordinary manner before a claim or dispute has arisen and relies upon that record in its day-to-day operations, then there is strong practical reason to anticipate that the record will be reasonably accurate, unbiased, and worthy of credibility. None of these crucial factors are shown to be present, however, with respect to the computer-generated damage calculations proffered by the Respondent as the only evidence of its damages. Logic demonstrates that the utility has every reason to make those figures as large as possible. The "bill" was created only after the damage had occurred and for the specific purpose of billing those deemed responsible. The record was not prepared as part of the utility's ordinary, on-going billing activities, it was prepared to support and prove an unliquidated claim. Similarly, there is no evidence that the utility uses similar records, or the computer program that generates them, for any independent business purpose other than attempting to recover damage claims. Accordingly, the concept of trustworthiness which is central to the "business record exception" is entirely lacking with respect to Exhibit 1.

The trustworthiness of materials offered as business records on the basis of the business records exception has frequently been held by courts to justify the admission of documents (when demonstrated) or to require the refusal of documents (when not demonstrated). For example, in

Hiram Ricker & Sons v. Students International Meditation Society,

501 F.2d 550 (1st Cir. 1974), the Court held that:

A crucial aspect of the business-records exception is that entries be prepared as a regular part of the business Otherwise, there is no basis for the presumption of reliability which is at the heart of the exception.

501 F.2d at 554 (citations omitted, original emphasis). The Court went on to hold that calculations prepared by business employees were not admissible because they had been prepared only after the manager of the business became suspicious that the counts being provided to him by a customer were not accurate.

Similarly, in United States v. Kim, 595 F.2d 755 (D.C. Cir. 1979), a Telex message was held inadmissible as a business record even though the Defendant offering it proved that it had been received by one bank from another bank. The basis of the ruling was that while the message was a "Telex and while the bank did receive such messages in its operations, this message had been prompted by the particular matter in dispute." In so holding, the court relied upon the comments of the Advisory Committee associated with Rule 803(6) of the Federal Rules of Evidence:

[T]he telex does not fall within the business records exception [because] it was not made for a regular business purpose. In order for a document to qualify as a business record, it must have been the "regular practice of that business activity to make the memorandum" The Advisory Committee on Proposed Rules explained the reason for this requirement:

The element of unusual reliability of business records is said variously to be supplied . . . by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.

595 F.2d at 761 (citations omitted, footnote omitted). As already noted, the computer calculations offered by Respondent in this case are not relied upon by the Respondent for any independent business purpose, only for proving its damage claims. They have, accordingly, no more reliability than a printout prepared by an attorney specializing in representing plaintiffs in personal injury actions who input the client's age, injuries, occupation, and other factors into a computer which then generated a prognostication of the damages which she was entitled to recover.

Legal writers have also emphasized the need for caution in providing adequate foundation for computer-generated calculations. One writer notes:

In light of complex computer systems' susceptibility to numerous possibilities for error, the question arises whether additional safeguards should be required before computerized records are admitted into evidence

Judges and commentators who have considered the foundation accorded conventional records to be equally satisfactory for computer-generated ones have failed to account for the significant differences between the two types of evidence. . . . There is a serious risk with computer records that the judge, and perhaps even more so the jury, will be overly impressed by the computer's mystique and will unnecessarily accept its output as reliable.

....

There are at least five major classifications of electronic data processing errors. Technologists label environmentally induced errors and hardware failures as mechanical shortcomings. They consider systems design and programming errors, operating mistakes, and input errors to be human errors.

....

Programming errors in any one of the various levels are relatively common. A single mistake may be seriously compounded if a computer obediently uses an erroneous instruction several times. Programming errors are notorious for producing absurd results.

....

A number of judges have insisted that litigants seeking the admission of computer evidence under the business records exception to the hearsay rule offer an evidentiary foundation responsive to the possible errors It is these cases that set the desirable precedent, rather than those which permit entry of computer material on a basis similar to that afforded manual business records.

....

Judges who have expressed concern about the reliability of computer data have generally preferred that high ranking employees of computer departments, as opposed to accountants or comptrollers, describe the machinery and procedures.

Note, A Reconsideration of the Admissibility of Computer-Generated Evidence, 126 U. of Pa. L.Rev. 425 at 437-39, 441, 446-48 (footnotes and citations omitted). Another writer notes:

[T]he traditional foundation requirements of the business records exception to the hearsay rule are ineffective to ensure the reliability of a computer printout. A review of the case law suggests that the

courts have failed to recognize this problem and consequently have not developed an adequate test.

....

The reliability of the computer printout is the most important factor in determining whether the record should be admitted under the business records exception. . . . Selection of input data, processing input data, and programming are the primary causes of human errors. . . .

....

[A] computer printout poses a set of problems not common to a traditional record keeping system. The result is that the statutory foundation requirements developed for testing the reliability of traditional business records are inadequate when applied to computer printouts.

Note, Appropriate Foundation Requirements for Admitting Computer Printouts Into Evidence, 59 Wash. Univ. Law Quarterly 59 at 62, 75, and 78 (footnotes omitted). At the very least, computer-generated calculations must be admitted only with the foundation required by the Utah Rules of Evidence. Such foundation was clearly not established by the testimony in this case. Accordingly, the computer-generated document received as Exhibit 1 was inadmissible and the trial court erred in admitting that document.

B. There Was No Evidence of Any Proximate Causal Relationship Between Defendant Baker's Conduct and the Damages Calculated in the Computer-Generated "Bill."

It is, of course, a fundamental rule of negligence law that the defendant is liable only for those damages proximately caused by his conduct and which, but for his conduct, would not have occurred. Although there was no foundation provided as to how the dollar amount set forth in Plaintiff's Exhibit 1 were calculated, it is apparent that the document attempts to include a wide variety of indirect costs.

While some courts do allow the inclusion of some indirect expenses in the measure of damages for the loss of or damage to utility property, the cases uniformly require a showing that such costs were caused by the defendant's conduct. In other words, no court allows a utility to be more than made whole at the expense of an individual who has unintentionally damaged its facilities.

The question of the recoverability of such indirect expenses was before the court in Dayton Power & Light v. Hershner, *supra*. In holding that cost summaries more detailed than, but otherwise essentially identical with, the computer-generated "bill" relied upon by Respondent in the present case were inadequate to prove a utility's damages, the court attempted to articulate the distinction between indirect costs appropriately included for accounting purposes and indirect costs recoverable in a legal action:

[The defendant] further asserts that accounting procedures cannot establish principles of tort liability. [He] maintains that there must be a demonstration by DP&L of a proximate relationship between the company's alleged damages and [his] tort. In [his] view, there was no firsthand testimony or affidavits of any witness regarding proximate causation, and therefore DP&L has relied solely upon accounting niceties and computer-generated summaries to provide this vital link in the tort-proximate causation-damage claim of proof required in all negligence cases.

....

A public utility may recover direct expenses as damages for the negligent destruction of its utility pole. But in order for the public utility to recover indirect overhead expenses, it must come forth with evidence proving that the indirect expenses would not have been paid but for the negligence of defendant.

Slip Op., infra at A-11. In the present case, any such evidence is wholly lacking.

Another case involving damage to utility facilities directly addressing the question of the recoverability of indirect damages is Cincinnati Gas & Electric Company v. Brock, No. C-830137 (Ohio Ct. App., filed December 21, 1983)⁴ in which the utility sought recovery for a pole negligently damaged by the defendant. The trial focused on the work required to repair the damages and the accounting system used to compute the cost of those repairs. The utility presented the testimony of nine witnesses and nineteen trial exhibits. The court began its analysis with the observations that the recoverable damages were "limited to those injuries

⁴The text of this unreported opinion, retrieved via Lexis, is reproduced in the Addendum, infra at A-12.

flowing directly from, and as the proximate and natural result of, the defendant's wrong" and that the task of determining the appropriate measure of damages was complicated when the plaintiff itself made the repairs. (Slip Op., infra at A-13.) As Respondent has attempted to do in this case, the utility presented testimony at trial of its actual costs and then increased those costs by various overhead factors. In effect, the Court held that the utility could not rely exclusively upon accounting principles to prove its damages:

With respect to labor, the cost charged to the defendant was the product of the total, direct labor hours expended by the individual employees within each of several classifications of employees assigned to replace the pole times an average wage rate for each employee classification. While this may be sound accounting practice, it is not acceptable with respect to the law of damages. . . .

The method currently used to calculate labor costs gives an average cost for an employee within a certain classification rather than the actual cost of the particular employee who made the repair. The law of damages provides that only those damages proximately or directly caused by the defendant's negligence are compensable. Thus, as to this one aspect of the judgment, the damage caused by the defendant can be and should have been directly traced to the cost of a particular employee's labor, rather than the cost of some mythical "average" employee. The plaintiff failed to prove that all the elements of damage presented to the court were proximately caused by the defendant's negligence.

Slip Op., infra at A-14. The Court went on to note that, with respect to the other, "overhead," expenses, there had been no proper showing of direct or proximate causation:

[T]he law of damages is just what its name implies -- a legal concept, not an accounting concept. The two disciplines are not synonymous and their distinct purposes must not be confused. With respect to an operation such as that of the plaintiff or a manufacturer, the purpose of the accountant, as stated by plaintiff's accounting supervisor, is to take all the costs of operating a business and distribute them in a fair and equitable manner to each job done by the business. . . . While the law is concerned that all the "costs" of all torts committed against a plaintiff are recovered, the law is not concerned with whether each tortfeasor bears an equal portion of the total overhead in relation to the direct costs. To the contrary, the purpose of the law is to require the tortfeasor to pay only those costs incurred because of his actions. Accordingly, the law requires the tortfeasor to pay for those overhead costs which, with reasonable diligence by the victim, can be directly attributed with reasonable certainty to the tortfeasor.

. . . .

[T]he defendant was charged with a portion of certain costs that were directly incurred because of other accidents but not directly incurred because of the defendant's accident. Such charges are not in conformity with the rule previously stated that one is liable only for those damages that directly flow from the injury sustained. . . .

The thrust of our decision today is not that overhead costs are never recoverable. It is our purpose to point out that some overhead costs are not attributable to a particular defendant and cannot be charged to him. The question in each case to be decided by the trier of fact is: what is the amount of indirect costs (overhead) which has been proved with reasonable certainty to have been directly and proximately caused by defendant's negligence?

Slip Op., infra at A-15-17. Because of the manner in which Respondent

chose to present its trial testimony and the virtual lack of foundation for its sole damage exhibit, these critical questions cannot be addressed.

Similarly, in another case involving damage to utility facilities, the Court held in Dayton Power & Light Company v. Puterbaugh, No. 79 CA 13, (Ohio Ct. App., March 7, 1980)⁵:

[The utility] presented no evidence whatsoever that these so-called indirect overhead costs would not have been paid, notwithstanding the negligent actions of [the defendant]. No evidence was presented to show, for example, that due to [the defendant's] negligence, extra employees had to be called in to work, thereby necessitating extra payroll taxes, insurance, etc. In the absence of evidence that [the utility's] indirect costs were incurred as a result of [the defendant's] negligence, [the utility] has failed to demonstrate that the damages it seeks to recover flow directly from and as a natural, probable, and proximate result of the wrong complained of.

Slip Op., infra at A-24. The Court went on to note its agreement with the proposition that:

The supervision costs, unless directly connected with the repair of the pole and line, the store expenses, and the general overhead, are such expenses that would have been incurred and paid, without regard to the breaking of the pole. They constitute a part of the operating expenses of the plaintiff and this Court can see no relation of these costs to the negligence of the defendant. . . .

Id., infra at A-24. These observations are equally applicable to the facts of the case now before this Court. The Respondent utility made no effort whatsoever to present any evidence of any nature whatsoever as to the

⁵A copy of the unreported opinion, obtained from the Clerk of the Court, is reproduced in the Addendum, infra at A-18.

critical issue of proximate causation. Moreover, the Respondent utility in this case did not even present direct evidence of what supplies were used. Mr. Newkirk testified (R. at 110) that he kept no list of the materials that he used and Ms. Nielsen testified (R. at 96) that she had no knowledge of what supplies were used. Magically, however, the computer printout places a precise dollar value on these supplies. (See, Exhibit P-1 reproduced infra at A-26.) At best, it must be presumed that the value placed upon the supplies was based upon some perceived average supply cost but the utilization of such average values is inappropriate.⁶ The trial court erred in awarding damages based on such inappropriate evidence.

C. There Being No Admissible Proof of Damages, the Trial Court Erred in Entering Judgment.

As noted above, the only evidence of the Respondent utility's damages was the computer-generated calculations. These were admitted without proper foundation and should have been excluded under the hearsay rule. Moreover, the Respondent utility failed to present any evidence that the indirect overhead items -- that more than doubled its actual damages--

⁶It is no more appropriate in this case involving property damage to utility facilities to rely upon average costs and expenses than it would be in a personal injury action to award medical expenses, lost wages, or general damages based upon what average or typical personal injury plaintiffs sustain, allege, or recover. While such average values may be perfectly appropriate and defensible from an accounting standpoint, they are anathema to the law of damages.

were directly or proximately caused by the conduct of either of the defendants in this action.

Moreover, the evidence submitted by the Respondent utility bears little, if any, relevance to the reasonable value of the repairs necessitated by the damage to the telephone cable. Yet it is the reasonable cost of such repairs that is the measure of damage. For example, in a simple automobile accident case, the fact that the plaintiff spends \$5,000.00 repairing his vehicle has little bearing on what he is entitled to recover. He is entitled to recover only the reasonable and ordinary cost of those repairs. Accordingly, the computer-generated calculations, even if arguendo admissible, demonstrate nothing more than what the utility claims it cost to repair the damage. This evidence is irrelevant, and therefore inadmissible under Rule 402 of the Utah Rules of Evidence, on the true question of the reasonable and ordinary cost of effecting these repairs.

The total lack of relevance of the computer-generated calculations to the true question of the reasonable and ordinary cost of the repairs is demonstrated by the fact that no one knows what supplies were actually used, yet a supply expense appears in the calculation. The lack of relevance is also demonstrated by the fact that the calculations apparently include cost factors related to aerial ladder trucks, which were obviously totally unnecessary to the repair of this underground cable.⁷

⁷Mr. Newkirk testified that he and his four employees simply drove whatever company vehicles they were assigned to the job site and acknowledged that the aerial ladder trucks were not needed on this

There being no admissible evidence of any damage actually sustained by the Respondent utility, the trial court erred in entering any judgment against Appellant. Having failed to prove its damages, a no cause of action dismissal should have been entered against the Respondent utility.

POINT II. DEFENDANT BAKER'S MOTION TO DISMISS SHOULD HAVE BEEN GRANTED.

Defendant Baker moved both at the conclusion of Plaintiff's case (R. at 114) and at the end of the trial (R. at 160) for the dismissal of the Plaintiff's case upon the basis that the Plaintiff had demonstrated no negligence on the part of Defendant Baker. The trial court denied both motions.

A. Plaintiff Was Not Entitled to the Benefit of the Prima Facie Evidence Provision of Section 54-8a-6(2).

At the trial, the Respondent utility offered no evidence of any negligence on the part of either of the Defendants. The utility called only two witnesses, its records clerk, Ms. Nielsen, and its repair supervisor, Mr. Newkirk. Both admitted that they had no knowledge of how the cable had been damaged. (R. at 97-98 and 106.)

Faced with the absence of any evidence of any negligence on the part of either of the Defendants, the Respondent utility relied upon the

particular job. (See, R. at 113.)

provisions of Section 54-8a-6(2), Utah Code Annotated (1953 as amended).

That section states:

An underground facility damaged by a person who fails to comply with Section 54-8a-4 is prima facie evidence that the damage was caused through the negligence of that person.

It must be noted that failure to comply with Section 54-8a-4 is a condition precedent to the prima facie evidence provision of the statute.

Section 54-8a-4 provides, in relevant part, that:

No person, except in an emergency or while gardening or tilling private ground, may make an excavation without first notifying each public utility company

Thus, the requirement of notification to a utility is conditional. There is no requirement of notification if "an emergency" exists. In this case, the Respondent utility offered no evidence on the question of an emergency. Accordingly, it did not demonstrate any violation of Section 54-8a-4 by either of the Defendants. Consequently, it did not establish the facts necessary to trigger the prima facie evidence provision of Section 54-8a-6(2).

Accordingly, since the Respondent utility neither demonstrated any breach by either Defendant of Section 54-8a-4 nor any negligence on the part of either Defendant, the Respondent utility failed to establish a necessary element (i.e., negligence) of its case. Accordingly, the motion to dismiss at the conclusion of Plaintiff's case (R. at 160) should have been granted by the trial court.

Unfortunately, throughout the trial, the trial court demonstrated an eagerness to assist the Respondent utility by limiting the issues. For example, before the trial commenced, before opening statements had even been made, the trial court observed:

Gentlemen, before we start taking evidence, from the pleadings, it would appear that there's little question about the damage that was done to the plaintiff's property. Is that really in dispute?

R. at 81. Although Mr. Baker's counsel stipulated that the backhoe had contacted the cable, it was repeatedly made clear that the amount of that damage was in dispute. (E.g., R. at 82, 83, and 84.) Having learned that the question of damages was in dispute, the trial court then manifest an eagerness to predetermine liability:

THE COURT: Then, as far as the plaintiff's claim is concerned, is it now just a question of establishing the damages, the cost of repair?

MR. ENGLAND: I believe -- in our opinion, yes, Your Honor. We'll have testimony to the amount of the bill and so forth.

MR. PARKEN: Well, if I understand the Court's question, the Court is saying that liability is clear or obvious.

THE COURT: No, I am not talking about liability. The fact is the cable was cut, it's a question now of who is liable.

MR. PARKEN: If anyone.

THE COURT: If anyone, and it's also -- I think that's a matter that's primarily at issue between the defendant and cross-defendant.

MR. PARKEN: Well, I don't know that I agree. There's certainly an issue between the two defendants as to who should bear the responsibility, if either is liable to the plaintiff. The question --

THE COURT: Well, the -- it seems to me that this is the point we have, sir. The law requires certain things be done.

MR. PARKEN: Well --

THE COURT: -- it's stipulated that certain things were not done. The line was cut. That has all been stipulated to.

R. at 84-85. (emphasis added). Unfortunately, the trial court, before opening statements were offered, before the first witness had been sworn, and before a shred of evidence had been received, had already determined that, if a utility's line had been damaged, at least one of the defendants was to be held liable. That belief, as demonstrated by the foregoing statutes, is entirely contrary to Utah law.

Moreover, the trial court's comments in response to counsel's argument in support of the motion to dismiss demonstrate that the Court misunderstood the statutory scheme:

THE COURT: Well, the section you cite says that this section is inapplicable to an excavation made during an emergency, which involves danger to life, health or property. I think, on

the other hand, the prima facie provision is sufficient to carry on the case and I would deny plaintiff's motion for judgment and I would deny your motion at this time, sir.

MR. PARKEN: Excuse me, Your Honor. Could you tell me which statute you just read?

THE COURT: I just read 54-8a-8, sub 3.

MR. PARKEN: Okay. Well, sub 3 is not -- that's not where we're talking about, if I may.

THE COURT: I know that, but this defines -- it says that it's -- when it's -- defines emergency. It says health, life, or property, and I think I would accept that as the definition intended.

R. at 115-116. In reality, what the trial court was reading related only to a "civil penalty," which was not even sought by the Plaintiff. Moreover, the definition that the court read was clearly limited to the civil penalty section because it begins with the phrase, "This section is inapplicable to" (Section 54-8a-8(3), Utah Code Annotated (1953 as amended).) It would also seem likely that, particularly in the absence of any evidence to the contrary, raw sewage overflowing into a residential basement and running down a gravel driveway in a residential area would "involve danger to life . . . or property."

B. The Evidence Was Undisputed That an Emergency Existed and That All Backhoe Operations Were Conducted in a Careful and Prudent Manner.

Even if the trial court's refusal to dismiss Plaintiff's action for its failure to prove either its damages or any negligence on the part of either of the Defendants can be justified on the basis that the existence of an emergency is an affirmative defense under the statutory scheme, the trial court still erred because the existence of such an emergency was clearly demonstrated by the unrefuted evidence. Lyle Crawley, Defendant Baker's employee who received Defendant Hansen's telephone call for help, testified that Defendant Hansen told him that raw sewage was coming up through his driveway and that he needed immediate assistance (R. at 118). Mr. Crawley also testified that, in the ordinary course of Defendant Baker's business, such conditions were deemed emergencies and were given priority over all other types of work. (*Id.*) Mr. Crawley also testified that when he arrived at Mr. Hansen's residence, he observed raw sewage leaking from the sewer line, that it was running down the middle of his driveway, and that there was enough of a leak to constitute a real problem. (R. at 119.) Roger Duvall, the backhoe operator who went to assist Defendant Hansen, also testified that sewage breaks were given priority because "raw sewage is a health hazard." (R. at 131.) He also noted that "broken sewer lines have top priority because they're a real potential health hazard[;] broken water lines have second priority." (R. at 132.) He noted that when he arrived at

the jobsite, he noted "a cesspool of raw sewage bubbling up through the ground, I would say approximately 5 foot diameter." (R. at 133.)

Defendant Hansen also verified in his testimony the severity of the problem and confirmed that he had told Defendant Baker's company that "I had raw sewage in my basement and it was running down also in my driveway" (R. at 150.) He testified that he considered repairing the sewer line to be a matter of great urgency, that he stayed home from work to take care of it, and that it would not have been possible to live in his house over the weekend had the sewer not been cleared. (See, R. at 158.)

At trial, the Respondent utility presented no evidence to the contrary. Accordingly, the record is totally unrefuted that there was a serious problem with raw sewage running down a gravel driveway and bubbling up through the ground in a "5-foot cesspool" in a residential area. Under such circumstances, the trial court was obligated, as a matter of law, to find that an emergency existed. Accordingly, the trial court misapplied relevant law in granting to the Respondent utility the benefit of the prima facie evidence provision contained in the statute.

Moreover, the record was equally undisputed that all backhoe operations were conducted in a slow, careful, and cautious manner in accordance with usual industry practices. The backhoe operator, Roger Duvall, testified without any contradiction that he had operated a backhoe in residential areas on approximately 300 occasions (R. at 130) and that he

would dig no deeper with the backhoe bucket than had previously been explored manually with a shovel:

Question: [H]ow much dirt would you have been cutting through with each swath of the backhoe?

Answer: It would depend on how deep he went with the shovel, it would be six to eight, ten inches.

Question: But you wouldn't go any deeper than the shovel went?

Answer: No deeper than the depth of the shovel.

R. at 137. He also testified that this procedure of exploring manually with a shovel first was an acceptable and widely used one within the Salt Lake area. (R. at 137.) He testified that his backhoe could dig at various speeds but that he operated "slow and careful" at all times because he knew he was in close proximity to a clay sewer pipe, which is extremely vulnerable. (R. at 139.) Moreover, he discovered the communications cable before damaging it, asked Defendant Hansen what it was, verified that Defendant Hansen had told him it was a tree root, and proceeded only after these multiple reassurances.

In light of the strong evidence that Mr. Duvall operated the backhoe in a slow, careful, and cautious manner and the unrefuted testimony that he discovered the utilities cable before damaging it and proceeded to apply force against it only after having been (mistakenly) reassured by Defendant Hansen that it was a tree root, the Respondent utility presented not a shred of evidence of any negligence on the part of

any employee of Defendant Baker. Accordingly, since the prima facie evidence provision of the statute was inapplicable and since no evidence of any negligence on the part of the backhoe operator was presented, the trial court's Finding of negligence on the part of Defendant Baker's employee is directly contrary to the unrefuted evidence.

It should be noted that any attempt to find that the backhoe operator was negligent simply because the Blue Stakes program was not called is contrary to the statutory scheme. The statute says that the Blue Stakes program must be contacted unless an emergency exists. In this case, the evidence was unrefuted that an emergency did exist. Accordingly, failure to call the Blue Stakes program cannot constitute either negligence or negligence per se because the applicable statute did not require contact with the Blue Stakes program under the existing circumstances.

POINT III: THE TRIAL COURT ERRED IN DISMISSING DEFENDANT BAKER'S CROSSCLAIM.

If either of the Defendants was liable to the Respondent utility, then the liability should rest with Respondent Hansen. The evidence was uncontradicted that it was his decision not to contact the Blue Stakes program. Mr. Crawley testified that Mr. Hansen said that he knew "where all the utilities are on [his] property and [that] there's nothing anywhere near." (R. at 117.) Moreover, Defendant Baker's company offered to send Respondent Hansen a "full crew" (consisting of a backhoe operator and a

"laborer to spot for utility lines") but Mr. Hansen wanted to "operate the shovel" himself. (See, R. at 134-135.) The backhoe operator, Roger Duvall, testified that he explained to Mr. Hansen what was needed of him and that it appeared to him that Mr. Hansen knew what was expected of him. (R. at 135.)

Moreover, Mr. Duvall located, before damaging it, the utility cable and asked Mr. Hansen to ascertain what it was:

Mr. Duvall: As I was reaching out, Mr. Hansen had gone ahead of me with the shovel, as I came down, I started to drag the bucket towards me and I felt tension on my bucket. And I was only -- well, at this point, I think I was approximately two to, two-and-a-half-feet deep, maybe three feet deep, and I felt tension on the bucket, so I immediately backed my bucket up, and lifted it straight up-- well, as the bucket had came forward, there was -- the dirt had fallen over, ahead of the bucket, and I noticed a black --

Question: Object?

Answer: -- object going across my bucket, so I immediately backed up, I lifted the bucket and pointed to Mr. Hansen and asked him to investigate and see what it was Mr. Hansen got down with the shovel and cleaned around it, he looked up at me, and he said something, I was approximately ten feet from him in the backhoe, the backhoe was -- motor was sounding. He said something, I did not quite hear what he said, so I hollered down to him, I says, what did you say, and he says, tree root. I repeated, it's a tree root, and he said, yes, tear it out. So, I put my bucket back, I dropped it

down to that point, and I started to curl it. . . . There was an excessive amount of tension, I did not feel it was a tree root, I uncurled my bucket, lifted it up, and I looked at him and says, check it again. He got down in the trench, he looked up at me, and he says, it's some kind of a cable.

R. at 138-139.

In his testimony, Mr. Hansen acknowledged that he had been offered a crew but desired only a backhoe operator, offering to do the rest of the work himself (R. at 150), and also acknowledged that he had been asked to identify the object that Mr. Duvall had unearthed prior to the damage to that object (R. at 159). He also acknowledged that he mistakenly told Mr. Duvall it was a tree root. (R. at 159.)

Accordingly, it was Respondent Hansen who requested that the Blue Stakes program not be called; it was Respondent Hansen who stated that he did not want a full crew; it was Respondent Hansen who agreed to act as the "spotter" for the operation; and it was Respondent Hansen who mistakenly identified the telephone cable as a tree root after Defendant Baker's employee had discovered the object without damaging it. Under these circumstances, the trial court's Findings that there was no negligence on the part of Defendant Hansen and that all of the negligence was that of the backhoe operator are directly contrary to the unrefuted evidence received at trial. Thus, in the event that the trial court determined that Defendant Baker had liability to the Respondent utility, the trial court was also obligated to grant Defendant Baker judgment against Respondent

Hansen on the crossclaim since all of the negligence and fault was that of Respondent Hansen. The trial court erred in dismissing the crossclaim.

CONCLUSION

There was no admissible evidence of the damages claimed by the Respondent utility. There was no evidence of any negligence on the part of Defendant Baker's backhoe operator. There was unrefuted evidence that the raw sewage leaking from the sewer line constituted an emergency. There was unrefuted evidence that it was at Respondent Hansen's decision that the Blue Stakes program not be called, that he act as the "spotter," and that it was Respondent Hansen who mistakenly identified the communications cable prior to its damage.

Under these circumstances, a judgment of no cause of action and dismissal should have been entered against the Plaintiff. In the alternative, a judgment of indemnification should have been entered in favor of Defendant Baker against Respondent Hansen. The matter should be remanded to the trial court with instructions that a judgment of dismissal be entered against the Plaintiff.

RESPECTFULLY SUBMITTED this ____ day of August, 1987.

PARKEN & KECK

By _____
John D. Parken
Attorney for Defendant-
Appellant Baker

MAILING CERTIFICATE

I hereby certify that on the ____ day of August, 1987, I caused four (4) true and correct copies of the foregoing Appellant's Brief to be mailed, postage prepaid, to the following:

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CHAPTER 8a

DAMAGE TO UNDERGROUND UTILITY FACILITIES

Section	Section
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54-8a-2. Definitions.	54-8a-9. Association for mutual receipt of notification of excavation activities.
54-8a-3. Information filed with county clerk and recorder.	54-8a-10. Installation of fiberoptic cables.
54-8a-4. Notice of excavation with power equipment.	
54-8a-5. Marking of underground facilities.	
54-8a-6. Excavator's duties and liabilities.	
54-8a-7. Notice of damage — Repairs.	

54-8a-1. Purpose of chapter.

It is the purpose of this chapter to protect underground facilities from destruction, damage, or dislocation in order to prevent death or injury to persons, damage to private and public property, or the loss of service to the public.

54-8a-2. Definitions.

As used in this chapter:

(1) "Excavation" means any operation in which earth, rock, or other material on or below the ground is moved or otherwise displaced by means of tools, equipment, or explosives, and includes grading, trenching, digging, ditching, drilling, augering, tunnelling, scraping, and cable or pipe plowing and driving.

(2) "Underground facility" means any personal property which is buried or placed below ground level for use in the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, television or telecommunication signals, electric energy, oil, gas, or other substances, including but not limited to, pipes, sewers, conduits, cables, fiberoptic cables, valves, lines, wires, manholes, attachments, and those parts of poles below ground.

(3) "Person" means an individual, firm, joint venture, partnership, corporation, association, municipality, public agency, governmental unit, department, or agency, or a trustee, receiver, assignee, or personal representative thereof.

(4) "Business day" means any day other than Saturday, Sunday, or a legal holiday.

(5) "Cable operator" means any person who provides cable service over a cable system.

(6) "Cable service" means the transmission to subscribers of video or other programming.

(7) "Cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community. It does not include: (a) a facility that serves only to retransmit the television signals of one or more television broadcast stations; or (b) a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless the facility uses any public right-of-way.

54-8a-3. Information filed with county clerk and recorder.

Every public utility and cable operator shall file the name of every municipality, city, or town with the county clerk and recorder of a county in which it has underground facilities, and a list containing the name of the public utility or cable operator and the title, telephone number, and address of its representative designated to receive calls concerning excavation. In counties where an association as provided in § 54-8a-9 is established, the telephone number of

that association shall be filed with the county clerk and recorder on behalf of all participating public utilities and cable operators.

54-8a-4. Notice of excavation with power equipment.

No person, except in an emergency or while gardening or tilling private ground, may make an excavation without first notifying each public utility company, private culinary water company, or cable operator which may have underground facilities in the area of the proposed excavation. Initial notice shall be given by telephone or in person not less than two business days nor more than seven days before the commencement of excavation and shall include the proposed excavation's anticipated location, dimensions, and duration. If an excavation on a single project lasts more than 14 days, the excavator shall give such notice at least once each 14 days during the continuation of the project. If there is an association as provided in § 54-8a-9 in the county, a call to that association is notice to each public utility and cable operator in the county.

54-8a-5. Marking of underground facilities.

A public utility or cable operator, upon receipt of the notice required by § 54-8a-4, shall advise the excavator as promptly as practical, but in no event later than one business day after notice, of the location of its underground facilities in the area proposed for excavation by marking such facilities with stakes, paint, or in some other customary way, indicating horizontal location within 24 inches of the outside dimensions of both sides of the underground facility. Each marking shall be effective for not more than 15 days from the date it is made. No person may begin excavation before the location and marking is complete or before two business days have expired from the date of initial notification.

54-8a-6. Excavator's duties and liabilities.

(1) A person who is informed under § 54-8a-5 is not excused from excavating in a careful and prudent manner, nor is that person excused from liability for damage or injury which results from negligent excavation.

(2) An underground facility damaged by a person who fails to comply with § 54-8a-4 is prima facie evidence that the damage was caused through the negligence of that person.

54-8a-7. Notice of damage — Repairs.

A person who in the course of excavation contacts or damages an underground facility shall immediately notify the designated representative of the appropriate public utility or cable operator. Upon receipt of notice, the representative shall immediately dispatch personnel to examine the underground facility, and, if necessary, the personnel shall make repairs.

54-8a-8. Civil penalty for damage — Action by public utility, cable operator, or county attorney — Exceptions — Remedies supplemental.

(1) Any person who excavates without first complying with §§ 54-8a-4 and 54-8a-5 and who damages, dislocates, or disturbs an underground facility is, upon proof of negligence, subject to a civil penalty of up to the maximum fine for a class B misdemeanor under § 76-3-301 for the first offense and also for

each subsequent offense.

(2) Actions to recover the civil penalties under this section shall be brought either by the public utility or the cable operator whose underground facilities are damaged or by the county attorney of the county in which the damage occurs. All penalties recovered from such action shall be paid into the General Fund.

(3) This section is inapplicable to an excavation made during an emergency which involves danger to life, health, or property if reasonable precautions are taken to protect underground facilities, nor is it applicable to an excavation made in agricultural operations or for the purpose of finding or extracting natural resources or to an excavation made with hand tools on property owned or occupied by the person performing the excavation.

(4) The remedies in this section are in addition to the right of an injured public utility or cable operator to recover damages.

54-8a-9. Association for mutual receipt of notification of excavation activities.

(1) Two or more public utilities or cable operators may form and operate an association providing for mutual receipt of notification of excavation activities in a specified area. In areas where an association is formed, notification to the association is affected [effected] as set forth in § 54-8a-4. In areas where an association is formed, public utilities and cable operators with underground facilities in the area shall become members of the association or participate in and receive the services furnished by it. A public utility owned by a public agency or municipality shall participate in and receive the service furnished by the association and pay its share of the cost for the service furnished. The association whose members or participants have underground facilities within a county shall file a description of the geographical area served by the association and list the name and address of every member and participating public utility or cable operator with the county clerk and the county recorder.

(2) If notification is made by telephone, an adequate record shall be maintained by the association to document compliance with the requirements of this chapter.

54-8a-10. Installation of fiberoptic cables.

Any public utility utilizing a fiberoptic cable shall install the fiberoptic cable in a concrete multiduct conduit system or so that it can be located with standard metal detection devices.

Rule 804. Hearsay exceptions; declarant unavailable.

(a) **Definition of unavailability:** "Unavailability as a witness" includes situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of his statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) **Statement under belief of impending death.** In a civil or criminal action or proceeding, a statement made by a declarant while believing that his death was imminent, if the judge finds it was made in good faith.

(3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) **Statement of personal or family history.** (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

THE DAYTON POWER & LIGHT CO., Plaintiff-Appellee, vs.
MARION HERSHNER, Defendant-Appellant

Dayton Power vs. Hershner

Slip Opinion NO. 1101 March 27, 1981
COURT OF APPEALS, SECOND APPELLATE DISTRICT, GREENE COUNTY, OHIO

PHILLIPS, J. OPINION

Defendant-appellant, Marion Hershner, appeals to this Court from a judgment of the Xenia Municipal Court in favor of plaintiff-appellee, appellee, Dayton Power and Light Company (DP&L), in the amount of \$467.52.

On October 2, 1977, appellant's automobile collided with a utility pole owned by DP&L. In appellant's supplemental answers to DP&L's interrogatories, he indicated that he glanced in his rear view mirror, drifted off the road to his right, and hit a telephone pole. The company replaced the pole, and filed a complaint on May 23, 1978 against appellant seeking to recover the costs of repair.

DP&L filed a motion for summary judgment on the issues of negligence and damages on December 11, 1978. The motion was supported by an affidavit of Craig S. Zimmerman, assistant supervisor in DP&L's plant accounting department. Attached to the affidavit and incorporated therein were four pages labeled "Work Order Cost Summary." Paragraph nine of the affidavit states "that the total expense of \$467.52 reasonably and accurately reflects the actual cost incurred to the Dayton Power and Light Company in repairing the damage to its property."

In opposition to DP&L's motion for summary judgment, appellant filed, 1) a memorandum contra motion for summary judgment, and 2) a personal affidavit. A hearing on the summary judgment was held before the court on March 15, 1979, with appellant thereafter filing a supplemental memorandum contra the motion for summary judgment on May 4, 1979.

The trial court in its decision and entry of June 19, 1979, stated in pertinent part:

"The Court is of the opinion, after considering all the arguments and the law offered in support on both sides, that the better and logical reasoning is in favor of Plaintiff's position. Defendant's main argument is that the indirect expenses charged by Plaintiff are not directly applicable or proximate to the damages incurred to Plaintiff's property. While this is not a specious argument, and one that does have some basis in reported case law, the Court feels that true compensatory damages must include the indirect expenses found in the general and administrative categories as elements of the cost to replace the pole, and hence compensable."

The trial court sustained DP&L motion for summary judgment, and rendered judgment in favor of plaintiff DP&L in the

amount of \$467.52.

Appellant asserts as his sole assignment of error: "THE TRIAL JUDGE ERRED IN SUSTAINING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN RENDERING JUDGMENT IN FAVOR OF SAID PLAINTIFF IN THE AMOUNT OF \$467.52 IN THAT PLAINTIFF HAD NO EVIDENCE WHATSOEVER AS TO DAMAGES WHICH IS ADMISSIBLE INTO SAID EVIDENCE PURSUANT TO OHIO REVISED CODE 2317.40 (BUSINESS RECORD STATUTE) AND BECAUSE THERE WAS NO DEMONSTRATION WHATSOEVER OF PROXIMATE CAUSATION BETWEEN THE TORT OF THE DEFENDANT AND ANY OF THE DAMAGES ALLEGED."

A. Appellant's first argument is that DP&L has not presented any evidence as to its damages, as the work order cost summaries are not admissible into evidence pursuant to the business records statute, R.C. 2317.40.

Mr. Zimmerman's affidavit, filed with DP&L motion for summary judgment, stated in pertinent part:

"Affiant further on oath says:

(1) that he is employed by The Dayton Power and Light Company as an Assistant Supervisor of the Plant Accounting Department.

(2) That he is the custodian of the attached Work Order Cost Summaries (Exhibits B and C).

(3) that the Work Order Cost Summaries accumulates and/or provides a reference for the costs incurred in connection with the installation and/or removal of the Company's property. Costs for one job are kept separate from those for another job by the assignment of a unique work order number to each individual job. In the case of a job involving both the installation and removal of property, costs for the installation (construction) are kept separate from those for the removal (retirement) by the assignment of a "retirement code" in addition to the work order number.

(4) that the Work Order Cost Summaries are prepared monthly, in the ordinary course of business, pursuant to sound accounting principles, and are based on the experience of the Company over a long period of time.

(5) that the attached Work Order Costs Summaries (Exhibits B and C) are a record of the costs incurred by The Dayton Power and Light Company as a result of property damage which occurred on October 2, 1977 in Xenia, Ohio on U.S. 35 in the vicinity of Orange Street and Allison Avenue, which is the subject of Case No. 78-CV-263 in the Xenia Municipal Court.

(6) that the information contained in the attached work Order Cost Summaries was compiled at or near the time of occurrence stated in paragraph 5 above.

(7) that the costs referred to in paragraph 5 above, were accumulated on work order number 11847. Costs for the removal of the damaged property are listed on one cost summary marked Exhibit B, and costs for the installation of the new property are listed on another costs summary marked Exhibit C.

(8) that the total amount of costs actually incurred by The Dayton Power and Light Company for work order number 11847 was \$467.52.

(9) that the total expense of \$467.52 reasonably and accurately reflects the actual costs incurred to The Dayton Power and Light Company in repairing the damage to its property."

The work order cost summaries are computer printouts which list: 1) the date the information is entered, 2) a description of the entry, 3) work order number, 4) a retirement code if any, 5) a voucher or symbol number, and 6) the cost. All entries are dated 10/77, with the summaries having the date March, 1978, in the upper right hand corner of each sheet.

R.C. 2317.40 states: "As used in this section 'business' includes every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not. A record of an act, condition, or event, in so far as relevant, is competent evidence if the custodian or the person who made such record or under whose supervision such record was made testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission. This section shall be so interpreted and construed as to effectuate its general purpose to make the law of this state uniform with those states which enact similar legislation."

This Court recognizes that in today's business world, computers and computerized bookkeeping have become commonplace, and that the business records exception to the hearsay rule is intended to bring the realities of the business world into a court of law.

In this case, however, DP&L is attempting to prove by computer printout its unliquidated damages. This can be contrasted to the use of computer printouts to show a liquidated amount due, such as on an account. Because of the difference between what the two types of computer printouts are intended to prove, this Court is not passing on a computer printout's introduction into evidence pursuant to R.C. 2317.40 in general. Rather, we confine ourselves to computer printouts introduced for the purpose of proving unliquidated damages.

Mr. Zimmerman states in his affidavit that: 1) he is custodian of the work order cost summaries, 2) that the summaries were prepared in the ordinary course of business, and 3) that the summary accurately reflects the cost incurred in the replacement of the pole.

These mere conclusions on the part of the foundation witness that the records were made in the ordinary course of business are not a sufficient foundation for the printouts' introduction into evidence.

Specific proof must be presented that the computer records were made in the ordinary course of business. This would include testimony that the printouts were routinely made rather than specifically prepared for trial, and that they were relied on by DP&L as sufficiently accurate for business purposes.

Further, the foundation witness must describe in detail any calculations or abbreviations appearing in the printout. Abbreviations in DP&L's work cost summaries are not explained. In addition, the original source of the information contained in the printout must be shown, and the reliability and trustworthiness of the information must be established. These requirements were not met by DP&L in its effort to prove unliquidated damages by the work cost summaries.

However, we find no merit in appellant's contention that the record needs to be printed near the time of the act. The entry of the material is the critical issue, not when the printout of the information occurs.

Our research and that of counsel has not disclosed any decisions in Ohio concerning computer printouts. However, see generally 11 ALR 3d 1377; *Monarch Federal Sav. and Loan Assn. v. Genser* (1977), 156 N.J. Supr. 107, 383 A.2d 475.

Mr. Zimmerman did not lay the proper foundation for the introduction of the work cost summaries into evidence. His mere conclusions as to the printouts, without compliance with the above enumerated requirements, do not bring this material into evidence pursuant to Ohio's business records exception. Summary judgment should not, therefore, have been granted to DP&L as to the amount of damages, as the moving party did not present evidence showing it was entitled to judgment as a matter of law.

B. Appellant further asserts that accounting procedures cannot establish principles of tort liability. Appellant maintains that there must be a demonstration by DP&L of a proximate relationship between the company's alleged damages and the tort of appellant. In appellant's view, there was no firsthand testimony or affidavits of any witness regarding proximate causation, and therefore DP&L has relied solely upon accounting niceties and computer-generated summaries to provide this vital link in the tort-proximate causation-damage claim of proof required in all negligence cases.

This Court stated in *The Dayton Power and Light Co. v. Puterbaugh* (Miami County 1980), unreported, No. 79 CA 13: "Our decision of the within matter is limited to the facts in this particular case and does not mean that a public utility may never recover its indirect overhead expenses as an element of damages for the negligent destruction of its utility pole. We do not feel, however, that it places an onerous burden upon such utilities to come forth with evidence to show that such indirect expenses would not have been paid but for the negligence of the defendant. All that is required is that the utility prove that

the damages it seeks to recover naturally and proximately flow from the wrong complained of."

A public utility may recover direct expenses as damages for the negligent destruction of its utility pole. But in order for the public utility to recover indirect overhead expenses, it must come forth with evidence proving that the indirect expenses would not have been paid but for the negligence of defendant.

As the trial court erred in 1) allowing plaintiff DP&L's work order cost summaries into evidence as proof of unliquidated damages, and 2) permitting DP&L to recover indirect expenses without proper proof being submitted into evidence, appellant's assignment of error is sustained..

As there is nothing in defendant's affidavit, memoranda or brief which contests his liability, that part of the judgment of the trial court is hereby affirmed. The trial court's judgment in favor of plaintiff DP&L in the amount of \$467.52 is hereby reversed, and the cause is remanded for computation of damages consistent with the findings of this Court.

McBRIDE, P. J., and KERNS, J., concur.

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THE CINCINNATI GAS & ELECTRIC COMPANY, Plaintiff-Appellee,
vs. JEFFREY BROCK, Defendant-Appellant.

CG & E Co. vs. Brock

Slip Opinion

APPEAL NO. C-830137, TRIAL NO. 81 CV 36721

December 21, 1983

COURT OF APPEALS, FIRST APPELLATE DISTRICT OF OHIO, HAMILTON
COUNTY, OHIO

STATEMENT: Civil Appeal from Hamilton County Municipal Court

KLUSMEIER, J. OPINION. On November 11, 1979, defendant-appellant, Jeffrey Brock drove his car into a utility pole owned by plaintiff-appellee, Cincinnati Gas & Electric Co. Suit was filed against the defendant in the amount of \$835.46 for damages caused by defendant's negligence. The damages sought by the plaintiff represented its alleged cost to repair the pole and restore utility service.

Prior to trial, the defendant stipulated that his negligence directly and proximately caused damage to the plaintiff's utility pole and transformer. The cause thus proceeded to trial only on the question of the extent of damages. At trial, the plaintiff presented the testimony of nine witnesses along with nineteen exhibits. The defendant called no witnesses, but did offer into evidence three documents obtained from the plaintiff's records. The crucial testimony at trial related to the work required to repair the transformer and replace the pole and to the accounting system used to compute the cost of those repairs. At the close of the evidence, the court found that the plaintiff had not proved that the transformer was damaged as a result of the defendant's negligence. The court, however, did find that the plaintiff had proved that the damage to the pole was proximately caused by the defendant's negligence and that the amount of damage had also been proved. Judgment was rendered for the plaintiff in the sum of \$750.24 plus costs. The defendant timely perfected the instant appeal.

The defendant, in his sole assignment of error, contends that the court erred in granting judgment on the issue of damages because the plaintiff failed to prove that the damage had been directly and proximately caused by his negligent act. We agree in part.

Several courts in this state as well as other states have considered the issue of damages with respect to the injury or destruction of a power or telephone pole. See Cincinnati Bell, Inc. v. Hinterlong (C.P. Hamilton Cty. 1981), 70 Ohio Misc. 38, 437 N.E.2d 11 and cases cited therein. In this regard, the courts have consistently held that compensatory damages are intended to make the plaintiff whole for the wrong done to him by the defendant. From this flow two well-known corollaries -- the plaintiff is not to be placed in a better position than he would

have been in had the wrong not been done, and, damages are limited to those injuries flowing directly from, and as the proximate and natural result of, the defendant's wrong.

Neither party contends that this is not the law or that the law should in any way be altered. Instead, the parties' contention centers around the application of these general principles to a case such as this in which the cost of repair reflects the measure of damage and the repairs are actually made by the plaintiff rather than some independent third party. In the latter case, the cost of repair and, accordingly, the amount necessary to make the plaintiff whole, generally would be the amount paid by the plaintiff to the third party that repaired the damages. Where, however, the plaintiff maintains, as part of its overall operation, a division specifically for the purpose of repairing injuries to itself regardless of how the injury occurs, application of above mentioned rules of damages becomes more difficult. The difficulty comes in trying to determine whether certain portions of overhead are properly attributable to the injury caused by a particular defendant. Application of the above rules is further complicated by the fact that the plaintiff, as a public utility, computes direct costs, such as the cost of the labor expended in repairing the damaged pole, on the basis of an accounting system mandated by the Federal Energy Regulatory Commission and the Public Utilities Commission of Ohio as part of their rate supervision responsibilities.

Using that accounting system, the plaintiff computes the cost of repair with respect to pole damage cases by taking the sum of the costs of the various aspects of the repair which have been allocated to three categories or accounts: material costs, vehicle hours on the job, and man hours worked. A fixed percentage of the costs incurred with respect to each of these accounts is then added to cover "jobbing overhead" and an additional, similarly calculated amount, is added to the cost of materials to cover "stores expense."

The controversy on appeal focuses on the methods used to calculate labor costs and jobbing overhead. These two matters will be analyzed separately, but it is also necessary that we examine and rule on the other components of the court's lump sum award since the entire award is the subject of the assignment of error. Testimony at trial was offered to support the various charges itemized in the defendant's bill. Reference to the bill shows that the defendant was charged for the cost of the materials used to make the necessary repairs. This cost was then increased by the previously mentioned stores expense in order to cover the cost of disbursing the materials from the plaintiff's storage facility. An additional charge was made for the cost to the plaintiff of maintaining and using the vehicles involved in making the repairs. Upon a careful review of the record with respect to these particular costs we concur in the trial court's determination that they were proximately caused by the defendant's negligence. The same, however, cannot be said with

respect to the labor costs and the jobbing overhead.

With respect to labor, the cost charged to the defendant was the product of the total, direct labor hours expended by the individual employees within each of the several classifications of employees assigned to replace the pole times an average wage rate for each employee classification. While this may be sound accounting practice, it is not acceptable with respect to the law of damages. The plaintiff's accounting supervisor testified that the company's records would reflect which employees worked on this particular repair, the total wages paid to each employee during the year and the number of on-the-job hours per employee. With this information, the plaintiff could determine its actual cost per on-the-job hour for each employee. That amount could then be multiplied by the number of hours worked by that particular employee to arrive at the actual cost to the plaintiff of having that employee repair the damage caused by a particular defendant. The method currently being used to calculate labor costs gives an average cost for an employee within a certain classification rather than the actual cost of the particular employee who made the repair. The law of damages provides that only those damages proximately or directly caused by the defendant's negligence are compensable. Thus, as to this one aspect of the judgment, the damage caused by the defendant can be and should have been directly traced to the cost of a particular employee's labor, rather than the cost of some mythical "average" employee. The plaintiff failed to prove that all the elements of damage presented to the court were proximately caused by the defendant's negligence.

Application of the law of damages to jobbing overhead does not lend itself to easy resolution. Our research discloses that only four cases on this issue have reached the appellate courts of Ohio. *Dayton Power and Light Co. v. Hershner*, No. 1101 (2d Dist. Mar. 27, 1981); *Dayton Power and Light Co. v. Puterbaugh*, No. 79 CA 13 (2d Dist. Mar. 7, 1980); *Ohio Power Co. v. Zemelka* (7th Dist. 1969), 19 Ohio App. 2d 213, 251 N.E.2d 2; *Warren Telephone Co. v. Hakala* (11th Dist. 1957), 105 Ohio App. 459, 152 N.E.2d 718. The plaintiff in the case sub judice argues that the *Hakala* case, *supra*, stands for the proposition that indirect overhead costs can be recovered whenever such costs have been correctly calculated in accordance with sound accounting principles and that the *Zemelka* court, in dicta, expressly approved such a rule. We, however, do not read these decisions, or any of those cited above, as adopting a *per se* rule with respect to the exclusion or inclusion of overhead as an item of damage for two reasons.

First, a rule of law does not exist in the abstract. Therefore, any application of that rule to the facts of another case must be made in light of the factual setting that gave rise to the rule. To this end, we take note of the fact that the court in *Hakala*, before holding that indirect costs were

recoverable, was careful to point out that there was not only sufficient evidence to prove that the cost of repairs included direct and indirect costs, but no evidence to refute this proof. We are quite confident, however, that had there been no proof that indirect costs had been incurred as a result of the damage, the Hakala court would not have permitted their recovery regardless of how those costs had been computed. Thus, the primary question was and the question before this court is that of proximate cause, i.e., what indirect or overhead costs, if any, have been incurred because of the defendant's negligence. The method of calculation is crucial with respect to the amount of damage suffered, i.e., are the damages merely conjectural or have they been proved with reasonable certainty. It is only after proximate causation has been determined in resolution of the primary question that the method of calculation of the amount of damages has any pertinency. Thus, the plaintiff's reliance on its accounting system and the fact that it is imposed upon it by law is misplaced.

Second, the law of damages is just what its name implies -- a legal concept, not an accounting concept. The two disciplines are not synonymous and their distinct purposes must not be confused. With respect to an operation such as that of the plaintiff or a manufacturer, the purpose of the accountant, as stated by plaintiff's accounting supervisor, is to take all the costs of operating a business and distribute them in a fair and equitable manner to each job done by the business. In furtherance of this purpose, the accountant took all the overhead (indirect) costs and allocated them to each job in such a way that no one job bore any greater proportion of the cost than any other job bore to the total direct costs of all jobs. While the law is concerned that all the "costs" of all torts committed against a plaintiff are recovered, the law is not concerned with whether each tortfeasor bears an equal portion of the total overhead in relation to the direct costs. To the contrary, the purpose of the law is to require the tortfeasor to pay only those costs incurred because of his actions. Accordingly, the law requires the tortfeasor to pay for those overhead costs which, with reasonable diligence by the victim, can be directly attributed with reasonable certainty to the tortfeasor.

We realize that in some instances it may be difficult if not impossible to determine to what extent tortious conduct may have increased costs over and above the cost of every day operations. This difficulty is well demonstrated in the case at bar. The plaintiff would have incurred some costs related to pole repairs just because of the nature of its business. For example, the plaintiff would have had to employ a certain number of persons and maintain a certain number of vehicles and tools just to replace wornout poles and poles damaged by acts of nature. These costs, however, are increased when the plaintiff has to buy and maintain additional service vehicles or employ additional help in order to meet the increased demand for pole

repairs caused by the tortious conduct. Where increased costs such as these cannot, with reasonable diligence and certainty, be calculated with respect to each tortfeasor, it is fitting, as between an innocent party and a wrongdoer, that the wrongdoer be responsible for a fixed percentage of those costs calculated then in accordance with sound accounting principles. This will most often be true with respect to fixed overhead cost such as rent and property taxes which remain constant over a period of time. Other costs can be more accurately traced to a particular defendant with reasonable diligence and in a cost effective manner. Most often these costs will be variable overhead costs. At the same time, we recognize that not all variable overhead costs can be directly traced to a particular defendant. This would be true, for example, of supply and utility costs. Such costs may then be charged to the defendant in the same manner as were fixed overhead costs. In this way the legal concepts as opposed to the accounting concepts dictate the recovery that is to be had.

We must now apply these principles to the issue raised in the case at bar -- proximate cause. The defendant in this case, unlike his counterpart in Hakala, brought out on cross-examination the fact that several of the items of cost attributed to the defendant's negligence were in reality attributable to the accounting system used by the plaintiff. The matter was summarized in the following exchange between the plaintiff's accounting supervisor and defendant's counsel:

Q. When you say fairly and equitably, aren't you really saying that where Mr. Brock's [job] may have been less expensive, somebody else's job may have been more expensive, but we are averaging them out so that they are fair and equitable to all?

A. That's correct.

T.p. Vol. II, 48.

This testimony in conjunction with more detailed testimony concerning the various components of the overhead cost reflects that the defendant was charged with a portion of certain costs that were directly incurred because of other accidents but not directly incurred because of the defendant's accident. Such charges are not in conformity with the rule previously stated that one is liable only for those damages that directly flow from the injury sustained. This inequity is demonstrated by the fact that the defendant was charged with a percentage of the costs incurred by the plaintiff as a result of overall employee participation in a thrift plan when there was no evidence to show to what extent, if any, the employees working on this repair participated in that plan. While, as a matter of accounting, a portion of the total cost of the plan may be allocated to each employee, no part of that cost should be charged to the defendant, as a matter of law, if none of the employees on this job contributed to that cost. It is our conclusion that the plaintiff has failed to prove that all the

items comprising the jobbing overhead were proximately caused by the defendant's negligence.

The thrust of our decision today is not that overhead costs are never recoverable. It is our purpose to point out that some overhead costs are not attributable to a particular defendant and cannot be charged to him. The question in each case to be decided by the trier of fact is: what is the amount of indirect costs (overhead) which has been proved with reasonable certainty to have been directly and proximately caused by defendant's negligence? Where the actual costs of repair, including overhead, can be traced directly to a particular defendant, the law should encourage their revelation rather than accept an average or close approximation. In this way plaintiff is more perfectly made whole.

In accordance with our decision as it relates to the charges for labor and jobbing overhead, the judgment of the trial court with respect to damages is reversed and the cause is remanded to the trial court for proceedings not inconsistent with this decision.

Judgment appealed from is: Reversed and remanded

PALMER, P.J., and BLACK, J., CONCUR.

FOOTNOTES: PLEASE NOTE: The Court has placed of record its own entry in this case on the date of the release of this Opinion. Messrs. Rich, Pott, Wetherell, Foster & Miller, Thomas C. Foster, of counsel, 1115 Second National Building, 830 Main Street, Cincinnati, Ohio 45202, and The Cincinnati Gas & Electric Company, Legal Department, James R. Mack, of counsel, P.O. Box 960, Cincinnati, Ohio 45202, for Plaintiff-Appellee. Messrs. Dooley and Heath, James V. Heath, of counsel, 5827 Happy Hollow, Milford, Ohio 45150, for Defendant-Appellant.

IN THE COURT OF APPEALS OF MIAMI COUNTY, OHIO
THE DAYTON POWER AND LIGHT CO
Plaintiff-Appellee
vs.
DALE PUTERBAUGH
Defendant-Appellant

FILED
COURT OF APPEALS
MIAMI COUNTY, OHIO
3:00 CLOCK CASE NO. 79 CA 13

MAR 7 1980
JAN A. MOTTINGER
CLERK OF COURTS
~~OPINION AND FINAL ENTRY~~

Rendered and filed on the 7th day of March, 1980

.....
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.....
PHILLIPS, J.

This appeal comes before the Court on the sole question of whether a public utility in a negligence action may recover, as a matter of law, indirect overhead costs as an element of damages for injury to one of its utility poles. The court below held that it could so recover. Based upon the record before us, we disagree.

On October 18, 1977, Appellant's automobile collided with a utility pole owned by Appellee. As a result of the accident, electric service to Appellee's customers in the general area surrounding the accident was disrupted. Appellee promptly dispatched a crew to repair the damage and restore service to its customers.

COURT OF APPEALS
SECOND APPELLATE DISTRICT

Subsequently, Appellee filed suit against Appellant for direct and indirect overhead costs of the repairs.

On August 31, 1978, Appellee filed a motion for summary judgment. Appellant responded to said motion and after the filing of supplemental memoranda by both parties, the trial court on November 30, 1978, granted Appellee's motion for summary judgment on the issue of liability but denied same with respect to damages. Thereafter, the parties entered into stipulations which effectively narrowed the question to whether or not Appellee could recover its indirect costs for the repairs.

On February 12, 1979, the trial court filed its decision and journal entry finding that Appellee could recover its indirect overhead costs. From this decision, Appellant has perfected an appeal to this Court.

Appellant's sole assignment of error states:

THE TRIAL JUDGE ERRED IN FINDING THAT OVERHEAD EXPENSES AND GENERAL AND ADMINISTRATIVE EXPENSES, THAT IS, ALL INDIRECT COSTS, WERE CHARGEABLE AS ELEMENTS OF DAMAGE IN A TORT CASE INVOLVING THE DESTRUCTION OF APPELLEE'S UTILITY POLE.

Numerous lower court opinions have been cited by both parties. With respect to Ohio cases, the majority of opinions consist of municipal and county court decisions. The decisions are conflicting with no apparent way to reconcile some of them. In addition to Ohio cases, the parties have cited cases from various jurisdictions. However, in view of the fact that the Ohio Supreme Court has not yet addressed itself to the pending question, we do not feel constrained by any of the decisions cited by the parties. We do note such cases, however, for whatever guidance they may provide.

The measure of damages for the negligent destruction of a utility pole is the total replacement cost of the pole and the facilities attached thereto, less accrued depreciation of the damaged pole and attached facilities. 52 O. Jur. 2d, Telegraphs & Telephones, Section 45; Ohio Power Co. v. Huff, 12 Ohio Misc. 214 (Canton Municipal Court 1967); Ohio Power Co. v. Zemelka, 19 Ohio App. 2d 213 (Belmont Co. 1969). There is no disagreement between the parties that Appellee's direct costs, that is, labor and material charges, may be recovered for negligent destruction of its utility pole. The sole question before us is whether Appellee may recover its indirect costs, that is, overhead expenses such as direct payroll overhead, small tool expense, supervision and engineering, transportation, store room handling expenses and general & administrative expenses.

Based upon the fundamental rules of damages that the injured party shall have compensation for the injury sustained and that compensatory damages are intended to make whole the plaintiff for the wrong done to him, 16 O. Jur. 2d, Damages, Section 9, the lower court found that Appellee was entitled to recover its indirect costs for the repairs. The court's decision and entry stated:

As indicated by the plaintiff's exhibits and as stipulated by the defendant, the plaintiff in its accounting system applies a fixed percentage rate to its direct and material costs to arrive at an indirect cost factor. The factor consists of, but not limited to, payroll overhead, small tools expense, supervision in engineering, transportation, administrative and general expense and storeroom handling charges. Singling out administrative and general expense, hereinafter referred

to as G & A, we can assume this includes as example; all non-direct labor personnel costs, telephone costs and even the president's salary. It is accepted that all of these costs are on-going and continuing costs of doing business by any business enterprise.

In defining overhead expenses the court stated:

Overhead is a broad category that is a cost of doing business which can not be divorced from the cost of the product furnished or of the cost of operating the business enterprise. For example, Social Security taxes, unemployment taxes, fringe benefits in the form of pension plans, vacation sick pay and other contractual obligations of the corporation to its employees, and other types of continuing business expenses directly associated with the operation of the business. It must be pointed out that this overhead expense continues just as direct labor continues while the worker is in the employment of the corporation.

Further:

The third category, G & A (General Administrative as defined above) is an item which again is common to all businesses and which is an expense which must be born in either the end price charged for the firm's products or recovered from any other source of income to the business.

Fundamentally then, if a business is to remain in operation, it must provide for not only the salaries or payment of its direct labor employees and the material on which they work but have the overhead and administration of these employees in order to be able to market its product and remain competitive within its industry.

If plaintiff, Dayton Power & Light Co., had contracted to have the work done by an outside agency, the cost would be readily estimable e.g., the contract cost. There is no question that the contract cost would contain for the benefit of the contractor overhead, direct labor cost, G & A and a margin for profit.

The trial court concluded:

Not to reimburse the company for the attendant overhead and G & A that is associated with that direct

labor would be to not make the plaintiff whole but to permit him to recover less than that to which he was actually damaged.

Since plaintiff in this case has adopted a system of accounting which is uniform and capable of isolation with cost on each specific item, the court would find that in reviewing all of the applicable cases cited by the parties that overhead expenses and general and administrative expenses are properly chargeable as elements of damage; and that the plaintiff has established to the degree of certainty necessary that the direct and indirect expenses involved in the replacement of the utility poles; and accordingly, plaintiff is entitled to judgment in the amount of \$450.74 with interest from the date of this judgment as (sic) the rate of six percent (6%).

It appears that the current greater weight of Ohio authority on this question does allow recovery of such indirect, overhead costs. See: Warren Telephone Co. v. Hakala, 105 Ohio App. 459 (Trumbull County 1957); Ohio Power Co. v. Johnston, 18 Ohio Misc. 55 (Hancock County Common Pleas 1968); Ohio Power Co. v. Zemelka 19 Ohio App. 2d 213 (Belmont County 1969). However, it is also a fundamental rule that the damages recoverable:

(1) are limited to those injuries or losses which are the natural, proximate, and probable consequences of the wrong complained of, (2) must naturally and proximately flow from the original wrongful act, and (3) must be shown with certainty and not left to speculation or conjecture. 16 O. Jur. 2d, Damages, Sections 13-15.

Appellee, in its brief, recognizes and does not contest that the above statement is a fundamental precept in the law of damages. Based upon this limitation on damages, we quote with approval the following language:

Damages must be proximate and cannot be remote or speculative. There is no logical or legal connection

between the breaking of a wooden power pole by the defendant and salaries of clerks in offices, superintendents of construction, distribution superintendents, safety coordinators, general office accounting personnel, supervisors of transmission and distribution, supervisors of labor relations, etc. The salaries of these persons whose salaries are fixed, did not flow from, nor were they affected by the negligence of the defendant. These salaries and expenses would have been paid if the defendant had not broken the pole and damaged the connected facilities. Such operating expenses might be proper in fixing a rate schedule, but we do not feel that they have anything to do with damages to a power pole.

If we try to compute by a percentage, as claimed by the accountant of the plaintiff, the percentage would be the same if one, fifty, or no poles were destroyed, and would not be affected by the number of items charged to the inventory. Fixed income employees and store expenses are remote matters from the accident which the defendant had.
Ohio Power Co. v. Huff, 12 Ohio Misc. at 222.

In the instant case, Appellee presented no evidence whatsoever that these so-called indirect overhead expenses would not have been paid, notwithstanding the negligent actions of Appellant. No evidence was presented to show, for example, that due to Appellant's negligence, extra employees had to be called in to work, thereby necessitating extra payroll taxes, insurance, etc. In the absence of evidence that Appellee's indirect costs were incurred as a result of Appellant's negligence, Appellee has failed to demonstrate that the damages it seeks to recover flow directly from and as a natural, probable and proximate result of the wrong complained of. Based upon the record before this Court, we are in full accord with the statement of Justice Reynolds in Central Illinois Light Co. v. Stenzel, 44 Ill. App. 2d 388 (1963). We quote:

The supervision costs, unless directly connected with the repair of the pole and line, the store expenses, and the general overhead, are such expenses that would have been incurred and paid, without regard to the breaking of the pole. They constitute part of the operating expenses of the plaintiff and this court can see no relation of these costs to the negligence of the defendant. In so holding, this court is cognizant of the complex costs of operation of a business such as that of the plaintiff, but at the same time, this court cannot see any thread of continuity, any relation, whatsoever, between the cost of operation of the plaintiff, and the damages occasioned by the defendant breaking the pole of the plaintiff. We think the rule of damages which requires that the damages must be those that flow as the natural consequence of the negligence of the defendant must not be ignored. In doing so we are not ignoring the facts of business life, but following the law of damages....

44 Ill. App. 2d at 397-98.

Our decision of the within matter is limited to the facts in this particular case and does not mean that a public utility may never recover its indirect overhead expenses as an element of damages for the negligent destruction of its utility pole. We do not feel, however, that it places an onerous burden upon such utilities to come forth with evidence to show that such indirect expenses would not have been paid but for the negligence of the defendant. All that is required is that the utility prove that the damages it seeks to recover naturally and proximately flow from the wrong complained of.

Appellant's assignment of error is well taken.

Having found prejudicial error in the record of these proceedings, the decision of the Miami County Municipal Court will

be reversed and the case remanded for recomputation of the damage award in a manner consistent with the findings of this Court.

.....

McBRIDE, P.J., and KERNS, J., concur.

FINAL ENTRY

The decision of the Miami County Municipal Court is hereby reversed and the case remanded for further proceedings in accordance with this opinion.


PRESIDING JUDGE


JUDGE


JUDGE

Copies mailed to:

Curtis E. McIntyre
Arthur A. Ames

**Mountain Bell**

AREA CLAIMS OFFICE * 250 BELL PLAZA * Rm. 1608 * SALT LAKE CITY, UT 84130 * 800-222-7475

3887
(8-83)

DATE 11/29/84	OUR CASE NUMBER UT 5014488	REFER TO THIS NUMBER WHEN MAKING PAYMENT	Page 1
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PAYMENT IS DUE UPON RECEIPT OF THIS STATEMENT. PLEASE USE ENCLOSED ENVELOPE FOR PAYMENT.

TO Baker Construction
 Mr. George Baker
 250 West Plymouth Avenue
 Salt Lake City, UT 84115

**DESCRIPTION:**

Cost to Repair: 450 pair trunk cable
 Date of Damage: 11/16/84
 Location: 4257 Holladay Blvd, Salt Lake City
 Cause: Sewer Excavation
 A Cable Location was not Requested

ITEMIZATION

LABOR COSTS:		
5 Men 44.00 Total Hours Worked (includes appropriate taxes and overhead)		1,639.15
MATERIAL COSTS:		
Miscellaneous Supplies		239.64
MISCELLANEDUS EXPENSE:		
Motor Vehicle - Group #2 - 18.00 Hours		55.44
Motor Vehicle - Group #3 - 26.00 Hours		126.10
TOTAL		2,060.33

TEAR OFF THIS STUB AND RETURN WITH PAYMENT

FROM Baker Construction
 Mr. George
 250 West Plymouth Avenue
 Salt Lake City, UT 84115

Area Claims Office

OUR CASE NUMBER	UT 5014488
AMOUNT OF PAYMENT	2,060.33

-X CHECK, IF CHANGE OF ADDRESS

ORIGINATOR'S COPY



DAMAGE REPORT - OUTSIDE PLANT

3886
(6-82)CENTRAL (CO, WY) ACO
1005 17th St., Room 1190
Denver, CO (303) 624-4163NORTHERN (ID, MT, UT) ACO
250 Bell Plaza, Room 1608
Salt Lake City, UT (801) 331-3686SOUTHERN (AZ, NM) ACO
3003 N. Central, Room 301
Phoenix, AZ (602) 279-8503

Bell Area Claims Office (ACO) with preliminary report of damage. Complete form accurately, sign, and send to ACO within 48 hours of completed repairs. COMPLETE IN INK.

SECTION 1

GENERAL INFORMATION

NOV 28 1984

CLAIM NO. 3014488	DATE DAMAGED/TIME 11/16/84 4:00	DATE REPORTED/TIME/TO WHOM UTAH BELL CLAIMS OFFICE
COMPANY BAKER CONST.	PROPERTY DAMAGED 400 PR. CABLE	EST. DAMAGE COST \$
NON EMPLOYEE LAST DUVALL	FIRST ROGER	INITIAL
ADDRESS 250 W. PLYMOUTH AVE.		SPECIFIC LOCATION OF DAMAGE 4257 HOLLADAY BLVD.
CITY S.L.C.	STATE UTAH	ZIP 84115
TEL. NO. 272-7522 or 272-5107	BILL RECOMMENDED <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	REPAIR SUPERVISOR G. NEWKIRK
EXPLAIN (IF QUESTIONS, CALL ACO) 272-5107		TEL. NO. (PG. NO.) 237-7012
TBL TKT. NO. 8136		DATE REPAIRED/TIME 11/19/84 1:00p.m.
ENGINEER, NAME		TEL. NO.

SECTION 2

DAMAGE TO BELOW GROUND FACILITIES

CABLE SIZE 450	TYPE LEAD	PAIRS DAMAGED 300	DEPTH AT DAMAGE 24"	TYPE OF WORK IN PROGRESS <input type="checkbox"/> PLACING (NEW) <input checked="" type="checkbox"/> REPAIRING <input type="checkbox"/> REPLACING	
<input type="checkbox"/> TOLL <input checked="" type="checkbox"/> TRUNK <input checked="" type="checkbox"/> EXCHANGE	<input checked="" type="checkbox"/> BURIED <input type="checkbox"/> UNDERGROUND <input type="checkbox"/> CONDUIT	<input type="checkbox"/> PEDESTAL <input type="checkbox"/> MANHOLE <input type="checkbox"/> OTHER	<input type="checkbox"/> WATER <input checked="" type="checkbox"/> SEWER <input type="checkbox"/> ST/HWY <input type="checkbox"/> GRADING		
JOINT USE TRENCH <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO			CHANGE OF GRADE PRIOR TO DAMAGE <input type="checkbox"/> YES <input type="checkbox"/> NO		
CABLE LOC. REQ. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	DATE/TIME	LOCATE REQ. NO.	EQUIPMENT CAUSING DAMAGE BACK HOE	VEHICLE OR LIC. NO.	
REQUESTED BY			EQUIPMENT OPERATOR ROGER DUVALL	TEL. NO. 973-0681	
CABLE LOCATED <input type="checkbox"/> YES <input type="checkbox"/> NO	DATE/TIME	LOCATED BY	DEVELOPER GORDON HANSEN	SUBDIVISION	
LOCATE ACCURATE <input type="checkbox"/> YES <input type="checkbox"/> NO	EXPLAIN		PERSON ADVISED OF BILLING 277-2342		
EVIDENCE OF U.G. PLT. <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	IF YES, MARKER TYPE, DIST. & DIR. FROM DAMG.		TYPE OF EASEMENT/RIGHT OF WAY <input checked="" type="checkbox"/> PUBLIC <input type="checkbox"/> STREET <input type="checkbox"/> FRONT <input type="checkbox"/> PRIVATE <input type="checkbox"/> HIGHWAY <input type="checkbox"/> SIDE <input type="checkbox"/> DEDICATED <input type="checkbox"/> ALLEY <input type="checkbox"/> REAR		
DID LOCATOR COMPLETE 3886 <input type="checkbox"/> YES <input type="checkbox"/> NO			CUSTOMER SIGNATURE ON 3886 <input type="checkbox"/> YES <input type="checkbox"/> NO		
EXPLAIN ON NORTH SIDE OF ROAD ABOUT 25 FT. INSIDE PROPERTY					

SECTION 3

POLE AND AERIAL CABLE DAMAGE

NO. OF POLES	SIZE	CLASS	CABLE SIZE	CABLE TYPE	PAIRS DAMAGED	CABLE HGT. BEFORE DAMG.	AFTER REPAIR
POLE REPLACED <input type="checkbox"/> YES <input type="checkbox"/> NO	JOINT USE <input type="checkbox"/> YES <input type="checkbox"/> NO	WITH WHOM	DAMAGE CAUSED BY (TYPE OF VEH.)		HEIGHT OF VEH.		
CABLE STRUNG - POLE <input type="checkbox"/> TO POLE <input type="checkbox"/> TO BLDG.		<input type="checkbox"/> CROSSES <input type="checkbox"/> PARALLELS	<input type="checkbox"/> STREET <input type="checkbox"/> HWY <input type="checkbox"/> DRIVEWAY	DRIVER OR OPERATOR		TEL. NO.	

SECTION 4

LABOR (CRAFT) ALL TIME MUST MATCH EMPLOYEES TIME SHEET

DATE	NAME	GEO. LOC. CODE	ACCT. CODE	HOURS			LABOR CL. LTR.	M.V. CL. NO.	O. M. A.	FOREMAN'S NAME
				REG.	OT.	OT PD. NOT WKD				
11/16/84	N. TIMOTHY	673000	45R		9		\$	30		G. NEWKIRK
"	D. KIBB	"	"		9		"	20		" "
"	J. PETERSEN	"	"		9		"	30		" "
"	J. MITCHELL	"	"		9		"	20		" "
11/19/84	D. KIBB	"	"	4			"	30		" "
"	B. KENWORTHY		TOTAL HOURS	4	36		"	"		" "

SECTION 5

NON-EXEMPT MATERIAL - LIST PROPER NOMENCLATURE

DESCRIPTION OF MATERIAL	ACCOUNT CODE	QUANTITY

SECTION 6

MISCELLANEOUS EXPENSES

SPECIAL TOOLS AND EQUIPMENT	HOURS	SPECIAL TOOLS AND EQUIPMENT	HOURS

SECTION 7

SUBCONTRACTORS BILLS

NAME	AMOUNT
	\$
	\$
	\$

NOTES: Include names, addresses and telephone numbers of witnesses and police report, etc

SECTION 8

Employee signing report may be required to testify regarding the facts stated on this form.

SUPERVISOR - PRINT GARY W. NEWKIRK	SIGNATURE <i>Gary W. Newkirk</i>	DATE 11/26/84
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ATTACH ORIGINAL TROUBLE TICKET AND 3888 TO THIS FORM