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Intermountain Farmers Association v. Jim Fitzgerald : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT FOR THE STATE OF UTAH

INTERMOUNTAIN FARMERS
ASSOCIATION,

Plaintiff & Appellant,

vs.

JIM FITZGERALD,

Defendant & Respondent.

CASE NO. 14723

BRIEF OF RESPONDENT

Appeal from a Judgment of the Third Judicial
District Court of Salt Lake County
Honorable Gordon R. Hall, Judge

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IN THE SUPREME COURT FOR THE STATE OF UTAH

INTERMOUNTAIN FARMERS
ASSOCIATION,

Plaintiff & Appellant,

vs.

JIM FITZGERALD,

Defendant & Respondent.

CASE NO. 14723

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a money judgment in favor of defendant and respondent ("defendant" herein) on his counterclaim. The case was brought by plaintiff and appellant ("plaintiff" herein) to recover \$41,625.00, interest and reasonable attorney's fees it claimed defendant owed on an open account for feed (R.7). Defendant filed a counterclaim for injuries and death sustained by his dairy cows alleging that the injuries to and the death of defendant's cows and resulting damages to the defendant were caused by the feed purchased by defendant from plaintiff. Defendant claimed that during two separate periods of time he purchased and fed to his dairy cows dairy feed manufactured by plaintiff. Defendant claimed that during both periods of time and due to the negligence of plaintiff, the dairy feed

was deficient in usable protein, inconsistent in usable

protein contaminated by diethylstilbestrol, and contained excess urea and that this negligence caused defendant's dairy animals to be in poor health or die or produce less milk resulting in a loss to the defendant of \$498,633.11*. In addition, defendant claimed \$100,000 for punitive damages (R. 23-28 and Ab. 39).

DISPOSITION OF CASE BY LOWER COURT

After a nine day jury trial, during which over 150 exhibits were received in evidence, the jury returned a verdict on special interrogatories in favor of plaintiff on its complaint in the amount of \$44,175.00 and in favor of defendant on his counterclaim in the amount of \$226,330.57. No punitive damages were awarded (R. 140). The judgment on jury verdict was entered by the Honorable Gordon R. Hall on May 19, 1976 (R. 141). Thereafter, appellant filed a motion for judgment notwithstanding the verdict and in the alternative for new trial (R. 148). These motions were denied by the trial court (R. 190). The judgment in favor of plaintiff and against defendant was not appealed; however, plaintiff filed an appeal based upon the judgment entered against plaintiff and in favor of defendant (R. 194).

RELIEF SOUGHT ON APPEAL

Plaintiff seeks an order reversing the judgment in favor of defendant on the counterclaim as a matter of law and the award of attorney's fees on the judgment in plain-

*At trial defendant moved, pursuant to Rule 15(b) of the Utah Rules of Civil Procedure, to amend the prayer of the counterclaim to conform to the evidence. The court allowed the amount of damages claimed, and the awarded Utah State Library and 220).
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tiff's favor. In the alternative, plaintiff seeks a new trial.

STATEMENT OF FACTS

A. References.

References hereinafter to the testimony at trial are to the transcript (Tr.), to the abstract prepared and filed by plaintiff pursuant to the order of this court (Ab.), and to exhibits by their respective numbers. Other references are to the record (R.).

B. Definitions.

Lactation - This term describes the milking cycle of a dairy animal. A lactation consists of the period of time the dairy cow is in milk and the period of time the cow is dry. During one lactation, the average dairy animal will produce milk for 305 days and will be dry for 60 days. The period in milk and the dry period together constitute a lactation (Ab. 15).

Dry Period - The period of approximately 60 days prior to the time the dairy cow gives birth to a calf during which she does not produce milk. During this period of time the body of the cow rests and rebuilds preparatory to her period of milk production (Ab. 14 and 15).

In Milk - The period during a lactation in which the dairy

cow produces milk. The period begins when the cow gives birth to a calf and continues for approximately 305 days thereafter (Ab. 14).

Rumin - One of the four chambers of the stomach of a dairy animal. The rumen is the largest compartment with one opening through the esophagus and the other opening to the true stomach. Feed consumed by the cow goes first into the rumen. The rumen has contractions that begin in the front and go to the rear and then go from the rear to the front. This movement is important to digestion. In the rumen fermentation takes place. It is this portion of the stomach that gives the dairy animal the name of a ruminant animal (Ab. 92 and 93).

Bloat - A condition that occurs in the rumen when gases that are given off in the rumen cannot escape through the esophagus. Bloat can be observed when the left flank of the dairy animal expands so that the left side of the animal is much larger than the right side. The expansion of gases in the rumen causes tearing of the tissues of the walls of the rumen and in severe cases causes pressure to the diaphragm sufficient to suffocate the dairy cow (Ab. 60).

Frothy Bloat - Bloat caused by the consumption of green or young alfalfa which causes high surface tension

that does not readily break up. This results in froth. The animal bloats because the gases accumulating in the rumen cannot get away from the froth. In order to relieve the animal, it is necessary to give it some kind of surface agent that will reduce surface tension thereby permitting the gas to escape. If the surface agent is ineffective, it is necessary to puncture the bloated cow's left flank to allow the gas to escape (Ab. 108).

Dry Bloat - Bloat caused by the immobility of the rumen.

When the rumen does not move and contract, the animal cannot expel gases that accumulate in the stomach during digestion. Insertion of a garden hose in the stomach of the dairy animal will generally relieve this type of bloat (Ab. 108).

Urea - An organic compound used in dairy feed as a substitute for natural protein. Feed grade urea contains 45% nitrogen (Ab. 92).

14% Dairy Feed - A dairy feed produced by plaintiff and purchased by defendant during all times material to this case. The 14% dairy feed involved in this case was mixed by plaintiff in the Draper or Spanish Fork plants (Ab.7). The ingredients of 14% dairy feed are: rolled corn, rolled barley and either 32% dairy concentrate pellets manufactured by plaintiff or 32% cattle supplement

pellets manufactured by plaintiff (Ab.4). These ingredients are mixed together and coated with molasses. According to its label, this dairy feed contains 14% protein (Exhibit 3). During all times material to this case, plaintiff mixed 300 or 350 pounds of either 32% dairy concentrate pellets or 32% cattle supplement pellets by formula with enough of the other ingredients to produce one ton of 14% dairy feed (Ab. 4 and 27).

32% Dairy Concentrate Pellets* - An ingredient in 14% dairy feed manufactured by plaintiff for dairy cattle. The pellets contain urea, soybean meal, salt, minerals, cottonseed meal and bran (Exhibit 148). According to its label, this pellet contains 32% protein (Ab. 75 and Exhibit 148).

32% Cattle Supplement Pellets* - An ingredient manufactured by plaintiff for beef cattle. The pellets contain the same ingredients as the 32% dairy concentrate pellets but in a proportion designed for beef cattle. In addition, the cattle supplement pellets contained diethylstilbestrol (Ab. 39 and Exhibits 5, 6, 7, 87, 88, 90, 97, 149 No. 70-7280).

*NOTE: The dairy concentrate pellets and the 32% cattle supplement pellets were manufactured only at plaintiff's Draper plant and were then shipped to plaintiff's other plants where they were mixed in the 14% dairy feed formula (Ab. 6 and 7).

According to its label, this pellet contains 32% protein (Ab. 75).

Diethylstilbestrol (sometimes referred to as "stibestrol") -

A hormone used in feed for beef cattle so they will mature and gain weight quickly (Ab. 10).

This hormone should never be fed to dairy animals because it has birth control effects and prevents conception (Ab. 39).

C. Defendant's Education and Experience with Dairy Animals.

Defendant was born and raised on a dairy farm in Draper, Utah. At age fourteen, he was responsible for dairy cows on his father's farm. He attended college and obtained a degree in physics with a minor in mathematics. After a period of time working for the United States government and teaching school, defendant decided to engage in dairy ranching. In June of 1970 defendant purchased a herd of 80 dairy cows (Ab. 130). Between June of 1970 and May of 1976, defendant increased his dairy herd to 300 cows (Ab. 129). The dairy herd was kept on property in American Fork from January 1971 to July 1972 and, thereafter, on defendant's farm in Elberta, Utah (Ab. 134).

As a result of his upbringing and education, defendant was aware that dairy cows are finely bred for high milk production (Tr. 627 L. 27-30) and are creatures of habit (Tr. 533 L. 4). He was aware that after a herd of

high production dairy cows is acquired, it is up to the dairy farmer to maintain an optimum level of milk production by keeping climatic conditions as stable as possible, eliminating contagious diseases in the herd, keeping the breeding habits of the cows as consistent as possible and insuring that the diet of the cows is nutritionally balanced and consistent (Tr. 28 L. 9 and Ab. 59 and 93).

D. Normal Milk Production Curve.

The normal milk production curve of a herd of dairy cows is herd average production in January, February, and March; peak production in April, May, and June; lower production during the hot summer months, and then back up to herd average production in December (Ab. 136 and 137). During the extremely cold weather, a cow uses energy to keep its body warm as opposed to putting that energy toward milk production. Over a full year, normal herd average fluctuation is approximately five pounds (Ab. 102).

In an effort to provide his cows year-round comfort so that they will produce the most milk possible, the defendant, in 1972, constructed a large insulated barn with individual stalls for each cow. This facility allowed the cows to be comfortable year-round and, in addition, allowed grouping and rotation of each cow according to her stage of milk cycle (Ab. 131 and 132).

E. Determination of Diet.

The grouping of cows according to their milk production cycle is important in maintaining a consistent diet because the cow's stage of milk production determines her diet. This need is met by the organized barn constructed by defendant. Dry cows are placed in dry pen I where they are fed alfalfa, corn silage and approximately five pounds per day of 14% dairy feed. When cows are three or four weeks from calving they are moved to dry pen II where they receive a gradual increase of 14% dairy feed. After calving, the cows move from the maternity pen to the sick pen to the freshening pen and through a series of five other pens (Ab. 132 and 133).

In each of these pens, cows are fed 14% dairy feed at varying levels determined by the point in their production cycle. For 240 days after calving, cows are at the height of their milk production cycle and during this period receive approximately 32 pounds of 14% dairy feed per day. In the period that follows, milk production decreases and to correspond therewith consumption of 14% dairy feed is decreased from 32 pounds per day to five pounds per day (Ab. 133).

Cows in their dry period are fed five pounds of 14% dairy feed per day. Cows in milk are fed 14% dairy feed while in the milking parlor; before and after they are milked they are fed alfalfa and corn silage (Ab. 135).

F. Reproduction Relates to Milk Production.

Just as a consistent diet is important to high milk production, so is a consistent breeding program. The amount of milk produced by the dairy animal has a direct relationship to reproduction in that the cow should calve once a year for the milk secreting cells to regenerate. If the cow is calving once a year, she will produce significantly more milk than if she is milked continuously. Good management calls for calving every 12 to 13 months. If a cow is unable to conceive, her milk production goes down and it becomes necessary to replace her (Ab. 15 and 106).

G. Diet of Defendant's Cows.

Defendant fed his cows alfalfa because it is low in energy and high in protein. This allows the dairy cow to give high milk production and also maintain her body tissue. Corn silage, being high in energy and low in protein, was fed to defendant's dairy herd to furnish the cows energy for movement and existence as well as for support of milk production. The defendant fed his cows 14% dairy feed in an effort to balance their nutritional and dietary needs (Ab. 135).

H. Feeding Controlled.

Defendant's cows were never allowed to graze in pasture land where their consumption could not be regulated. They were control fed in enclosed mangers and consumed only

alfalfa, corn silage, 14% dairy feed and water (Exhibits 74 and 75, Ab. 133 and 134). All alfalfa and corn silage consumed by defendant's cows was raised by defendant on his farm in Elberta, Utah. Before the cows were moved to the farm in Elberta, alfalfa and corn silage were brought from Elberta to the cows in American Fork, Utah (Ab. 133 and 134).

After defendant's cows were moved to Elberta, Utah, they all consumed water from the same six inch well on defendant's farm (Ab. 131).

I. Average Consumption and Weight.

While in American Fork, defendant's high producing dairy cows consumed approximately 32 pounds of 14% dairy feed per day (Ab. 134). While in Elberta, defendant's high producing dairy cows consumed approximately 32 pounds of 14% dairy feed per day when milked two times per day (Ab. 134) and 36 pounds of 14% dairy feed per day when milked three times per day (Ab. 135). During the period of time material to this case the average weight of defendant's dairy cows was 1,300 pounds (Ab. 160).

J. Consistent Milking and Health Care.

In 1972, defendant installed automatic milkers in the milking parlor area of the barn (Tr. 981 L. 28) and, to insure against the spreading of contagious diseases among the herd, the defendant requested Dr. Donald Roper, a veter-

inarian, to observe and treat the herd on a regular basis (Ab. 58).

K. Best Evidence of Condition of Dairy Animals.

The best evidence as to the condition of dairy animals is visual examination and milk production records. (Ab. 65). Dairy cows in good health are fat and their hair lays down and is shiny and slick (Ab. 140). A steady increase in average milk production of a herd of dairy cows over a period of years is an indication that the general health of the herd is good (Ab. 65).

L. Computer Records Kept.

During all times material to this case, defendant was a member of the Dairy Herd Improvement Association ("DHIA" herein), a national organization that at least once a month tests dairy animals owned by its members. Milk production of the dairy cows is tested to enable the dairy farmer to improve his dairy herd. Test results are fed into a computer where they are organized into various catagories. The catagorized test results are then given to the dairy farmer monthly in the form of a computer printout (Exhibits 17 through 57, inclusive).

The DHIA monthly computer printout gives the dairy farmer such information as the pounds of milk produced daily by the cows in milk, how much milk an individual cow produces during a 24 hour period, the butterfat content of the milk produced, the numbers of days each cow is in milk

during a lactation period, breeding dates, when a cow dies and the cause of death, whether a particular cow was in milk or dry on the day of the test, if and when a cow is sold, the average production of the herd and a comparison of individual cow production to herd average production (Ab. 14 and 15).

M. Condition Deteriorated During First Period of Use.

Immediately prior to the first time defendant began feeding his cows 14% dairy feed manufactured by plaintiff, the herd average milk production was 44 pounds per head per day and defendant's cows were fat, their hair was slick and shiny, they looked good and were in very good physical shape (Ab. 140). Prior to buying plaintiff's 14% dairy feed, defendant had no bloat problem with his cows (Ab. 136). After defendant's dairy animals started consuming the 14% dairy feed manufactured by plaintiff, they lost weight, acted sick, had droopy, dull and sunken eyes, walked as if they were in pain, were generally difficult to handle and their hair stood up and was dull on the ends (Ab. 140).

These conditions started in February of 1971 when defendant began feeding his herd 14% dairy feed manufactured by plaintiff and continued through February of 1972 when defendant ceased purchasing 14% dairy feed from plaintiff the first time. During this same period of time, the milk production of defendant's herd fluctuated five or six

pounds per head daily (Ab. 140) and cows bloated and died (Ab. 36).

Between February of 1971 and February of 1972 when defendant's cows were being fed plaintiff's 14% dairy feed, 19 cows died of bloat and 43 cows became bloated but did not die and thereafter were sold by defendant because their milk decreased to the point that it cost defendant more to feed the cow than she produced in milk. Defendant's records show that prior to being bloated, these cows were high milk producers and as a result of the stress caused by bloat, their milk production drastically decreased (Exhibits 20 through 57, inclusive).

N. Milk Production Decreased During First Period of Use.

Between September of 1971 and December of 1971, the period of time that milk production would normally increase, milk production of defendant's herd decreased to a low of 37 pounds per head per day (Ab. 106, 136, 137, 140 and Exhibit 136).

The milk production by month beginning in February 1971, when defendant first began using 14% dairy feed manufactured by plaintiff, was as follows:

<u>Month</u>	<u>Herd Average Pounds Per Milk Per Head Per day</u>
February, 1971	44 lbs.
March, 1971	42 lbs.
April, 1971	48 lbs.
May, 1971	46 lbs.

June, 1971	47 lbs.
July, 1971	48 lbs.
August, 1971	45 lbs.
September, 1971	44 lbs.
October, 1971	43 lbs.
November, 1971	40 lbs.
December, 1971	37 lbs.
January, 1972	40 lbs.

O. Condition Improved During Period of Non-Use.

In February of 1972, the defendant discontinued feeding his cows 14% dairy feed manufactured by plaintiff and began using feed manufactured by Richey Feed Company (Tr. 1015 L. 11).

Between March and December of 1972, when defendant's cows were not being fed plaintiff's 14% dairy feed, defendant's cows gained weight, their hair coat again became slick, they looked better (Ab 141). They did not have bloat problems except on one occassion in June of 1972 when defendant ran out of hay and fed his cows some green alfalfa that had not dried (Ab. 141 and 142).

The type of bloat from which defendant's cows suffered in June of 1972 was frothy bloat whereas the bloat that occurred when the cows ate plaintiff's 14% dairy feed was dry bloat (Ab. 142).

P. Milk Production Increased During Period of Non-Use.

Beginning in March of 1972, the milk production of

defendant's cows began to climb (Tr. 1015 L. 16). The milk production by month was as follows:

<u>Month</u>	<u>Herd Average Pounds Per Milk Per Head Per Day</u>
March, 1972	46 lbs.
April, 1972	46 lbs.
May, 1972	49 lbs.
June, 1972	46 lbs.
July, 1972	53 lbs.
August, 1972	49 lbs.
September, 1972	51 lbs.
October, 1972	48 lbs.*
November, 1972	46 lbs.*

Q. Condition Deteriorated During Second Period of Use.

Defendant again began buying 14% dairy feed from plaintiff in December of 1972. Immediately thereafter dry bloat again occurred in defendant's herd (Ab. 142). On New Years Eve 1972 a cow bloated. Thereafter during all of the months of 1973 and during the year of 1974 until September, defendant's cows suffered with and/or died of dry bloat (Ab. 143). During this period of time 23 cows died of bloat and 102 were sold by defendant because their milk production dropped to a point that the milk produced did not equal the cost of feeding (Ab. 145, 146, 147, 189, 190 and 191).

*This decline in milk production was a result of an attempt by defendant to feed his dairy animals a pelletized feed manufactured by Brookfield. Defendant's cows would not eat the pelletized feed and he quit using it in December of 1972 (Ab. 141).

R. Milk Production Decreased During Second Period of Use.

During the second period of time defendant's cows consumed plaintiff's 14% dairy feed, between December of 1972 and July of 1974, milk production fluctuated eratically with a general downward trend (Ab. 142 and 143). The milk production by month was as follows:

<u>Month</u>	<u>Herd Average Pounds</u>		
	<u>Per Milk</u>	<u>Per Head</u>	<u>Per Day</u>
December, 1972			42 lbs.
January, 1973			46 lbs.
February, 1973			47 lbs.
March, 1973			44 lbs.
April, 1973			44 lbs.
May, 1973			47 lbs.
June, 1973			44 lbs.
July, 1973			42 lbs.
August, 1973			43 lbs.
September, 1973			33 lbs.
October, 1973			38 lbs.
November, 1973			41 lbs.
December, 1973			51 lbs.*
January, 1974			49 lbs.
February, 1974			49 lbs.
March, 1974			51 lbs.

*At this time defendant began milking his cows three times per day.

April, 1974

**

May, 1974

52 lbs.

June, 1974

54 lbs.

S. Condition Improved Again with Non-Use.

July of 1974 was the last month defendant purchased plaintiff's 14% dairy feed. In August of 1974, he began feeding his dairy animals feed purchased from Grow Best of Orem, Utah. In August and September of 1974, the condition of defendant's dairy animals continued to deteriorate; thereafter, their condition improved. The cows began to look better and their milk production increased (Ab. 145).

Milk production increase began in October of 1974 and continued through January and February of 1975 at which time defendant's dairy herd had a sudden onset of dry bloat. Three cows died and several suffered from bloat but did not die (Ab. 145). Defendant immediately went to the Grow Best office and learned that the Grow Best company had increased the amount of urea in the dairy feed to 240 pounds per ton contrary to instructions from defendant that Grow Best was to use a large amount of soy bean meal for protein and no urea. At that time the management of Grow Best agreed to reduce the urea content of the feed delivered to defendant to 30 pounds per ton. Since that time, defendant's dairy animals have had no problems with bloat and milk pro-

**No report was available from DHIA for this month.

duction has steadily increased (Ab. 145).

The Salt Lake County DHIA Annual Reports (Exhibits 58, 59, 60, 61 and 62) compare 34 dairy herds in Salt Lake County on the DHIA program (Ab. 22). These reports show that the milk production of defendant's dairy cows was above Salt Lake County average in 1971, 1972, 1973 and 1974. However, in 1975 defendant's herd, reported as "McKarren Dairy" in the report (Exhibit 62), performed much better than average as follows:

- a. 3rd highest in milk production in Salt Lake County.
- b. 3rd highest in butterfat production in Salt Lake County.
- c. Largest average increase in milk production in Salt Lake County.
- d. Largest average increase in buttermilk production in Salt Lake County.
- e. Seventy-three cows producing more than 20,000 pounds of milk for 12 months (Ab. 25 and Exhibit 62).

T. Conditions Observed by Experienced Milker.

Edward Aragon worked for the defendant between May of 1971 and July of 1972 and between April and October of 1973. Mr. Aragon was an experienced milker having first milked cows when he was 14 years old. He milked cows when in school and periodically thereafter for eight or nine years. With his experience he was aware that a dairy cow is

a creature of habit requiring the milker to milk the cows at precisely the same time every day, keep mangers clean and keep the cows healthy (Ab. 66). Mr. Aragon instituted a program of consistent feeding and milking times. He fed the cows every two hours or more to get more protein into them (Ab. 67).

Two or three weeks after Mr. Aragon instituted these programs, milk production increased. Immediately thereafter, however, Mr. Aragon observed a 200 pound per day loss of milk even though he fed the cows consistently, kept the manger clean and was doing everything he could to keep the cows content. Milk production of the herd fluctuated, sometimes 500 to 600 pounds per day. In all of his milking experience, Mr. Aragon had never observed this great of a fluctuation in milk production without being able to find the cause (Ab. 67).

During the first period he worked for defendant, Mr. Aragon observed two or three of defendant's cows acting as though they had trouble with muscle coordination. He observed cows that had a hard time standing up or that staggered and fell. He also observed during this period that defendant's cows were restless and uneasy (Ab. 69).

All during the second period of time Mr. Aragon worked for defendant, defendant's cows were consuming plaintiff's 14% dairy feed. Mr. Aragon observed that defendant's cows were uneasy, flighty and nervous, the same conditions

he had observed when he previously worked for defendant, but this time the conditions were worse. He observed cows go into convulsions (Ab. 70 and 72). During this period of time he also observed the bloated condition of defendant's dairy animals (Tr. 610 L. 12).

Mr. Aragon had a specific recollection of a high milk producing cow on one occasion stagger and fall and then appear to be completely normal. Two days later, the same cow showed the same symptoms (Ab.69).

U. More Observations.

Dallas Shermer, a milker employed by defendant during periods when defendant was using plaintiff's 14% dairy feed, observed that in December of 1972 and January of 1973, defendant's dairy animals looked rough, their hair stood up and milk production was off. He noticed that they didn't eat as they had previously (Ab. 82).

During April, May, and June of 1973, months when defendant was using plaintiff's 14% dairy feed, Mr. Shermer observed the bloated condition of defendant's dairy animals. On one occasion during this period of time, 20 to 25 cows were bloated at one time (Ab. 84). In June of 1973, Mr. Shermer treated three cows for bloat by inserting a hose down their throat and pushing on the side of the cow where she was bloated. This condition became periodic. For two or three days there would be no bloated cows and then

two or three would become bloated. This continued through the summer of 1973 (Ab. 84).

Mr. Shermer observed that the cows that had bloated but not died would thereafter stand with their head dropping down and would lose weight. They did not move around much and they did not come in to be milked as they had done before the bloating occurred (Ab. 85). During this same period of time, Mr. Shermer noticed that defendant's dairy animals had excessive saliva. He observed defendant's dairy animals shaking, regurgitating, having convulsions, moving as if they hurt when they walked, and being in a general state of uneasiness (Ab. 85). Mr. Shermer observed some of defendant's dairy animals die of dry bloat in January of 1974 (Ab. 86).

V. Still More Observations.

Harvey Cook, a milker employed by defendant, observed 15 to 20 head of defendant's herd bloat in February or March of 1974 (Ab. 89 and 90). In January of 1974, Mr. Cook was bringing cows in to have them milked when he observed a cow fall over and die of bloat (Ab. 90).

W. Attempts to Determine the Problem.

In the early summer of 1974, defendant asked Dr. Donald Roper, the veterinarian for defendant's herd, to analyze defendant's feeding program. In May of 1974, Dr. Roper came to defendant's farm and observed that defendant

was feeding the herd alfalfa, corn silage and commerical grain (plaintiff's 14% dairy feed). After observing the dairy animals and analyzing the feed he suspected that urea was the cause of the bloat (Ab. 63). He, however, dismissed plaintiff's 14% dairy feed as being the problem because of the production and quality controls exercised by dairy feed manufacturers (Ab. 62).

In April or May of 1974, defendant was in plaintiff's Spanish Fork plant to purchase a product called bloat guard. He asked the plant manager, Blaine Loveless, if urea could cause cows to bloat. He also asked Mr. Loveless how much urea was in the 14% dairy feed defendant purchased from plaintiff. A week later, Mr. Loveless told defendant that not more than 3% of the protein in the feed was urea (Ab. 143).

Between January and July, 1974, defendant had conversations with Mr. Loveless about the low milk production, the breeding problems and bloat of defendant's dairy cows (Ab. 39). Following one such conversation, Mr. Loveless asked Curtis Solomon, an employee of plaintiff working at the Spanish Fork plant, to go to defendant's farm and see what could be done about the problems defendant had reported (Ab. 40). Pursuant to these instructions, Mr. Solomon went to defendant's farm in March of 1974. He observed defendant's dairy animals to be very thin and in poor health (Ab. 40 and Ex. 76). He observed the hair on defendant's dairy

animals to be rough and heavy like a winter coat which, to Mr. Solomon, evidenced a nutritional or sub-clinical disease (Ab. 40 and 41). He observed that the animals had dull eyes and that they were breathing heavily for not being exercised (Ab. 41).

Based upon the diet of defendant's cows, alfalfa, corn silage and 14% dairy feed manufactured by plaintiff, Mr. Solomon concluded that the milk production of defendant's herd should have been 10 pounds per head per day higher (Ab. 42).

Mr. Solomon, in his capacity as an employee of plaintiff, suggested that defendant run tests on all feed and water consumed by his dairy animals in an effort to ascertain what was causing their poor state of health (Ab. 41). No test samples were taken, however, on this occasion.

Mr. Solomon returned to defendant's farm approximately 30 days later looking for the improvements in defendant's herd that normally come with spring weather but found that the condition of defendant's herd had not improved (Ab. 42). On that occasion, Mr. Solomon took samples of defendant's first cutting of alfalfa, the corn silage and the water being consumed by defendant's dairy animals. Mr. Solomon also took a sample of the 32% pellet, an ingredient in the 14% dairy feed manufactured by plaintiff, and sent

all samples to Woodson-Tenant Laboratories in Des Moines, Iowa (Ab. 42).

The samples were taken and sent by Mr. Solomon because he was looking for a nitrate-nitrite problem in the water and feed. However, when the test results came from Woodson-Tenant Laboratories, nothing in the reports suggested that the condition of defendant's dairy animals was a result of nitrate-nitrite in the feed or water (Ab. 42, Ex. 79, and 80). The tests showed defendant's alfalfa, corn silage and water to be normal (Ab. 48 and 109).

The tests showed that the 32% pellet contained 24% protein rather than 32% (Ab. 42 and 48, Exhibit 79). Mr. Ladin, chief chemist for Woodson-Tenant Laboratory and former quality control chemist for Pillsbury Feed Co., supervised the analysis performed and indicated that a 2% to 3% variance in protein content is acceptable in the industry but that an 8% variance is not (Ab. 48 and 49).

Mr. Solomon showed this report to Mr. Loveless and told him that something should be done to check into why the 32% pellet was 8% low in protein (Ab. 43).

Mr. Solomon went to defendant's farm immediately after receiving the report from Woodson-Tenant Laboratories. Mr. Solomon told defendant that there was no nitrate-nitrite problem in the feed as he had previously thought and that other possibilities would be either disease in the animals or a urea or toxic problem of some type.

During December of 1974, Bryan Draper, a salesman for Moorman Manufacturing Co., took samples of defendant's alfalfa and corn silage. These samples were sent by Mr. Draper to Edward S. Babcock & Sons for testing (Ab. 127). The test results, Exhibits 82 and 83, showed that the alfalfa and silage samples were normal and that cows consuming the same would have no harmful effects as a result of such consumption (Ab. 50 and 109).

X. Symptoms of Excess Urea Consumption.

The symptoms of milk production fluctuations, loss of weight, hair that stood up and was dull on the ends, dull sunken eyes, walking as if in pain, uneasiness, restlessness, lack of muscle coordination, excess saliva, regurgitation, and erratic behavior indicate that between February of 1971 and February of 1972 and between December of 1972 and July of 1974 (periods when defendant's cows were fed plaintiff's 14% dairy feed), defendant's dairy animals consumed feed that contained inconsistent amounts of protein or protein equivalent from non-protein nitrogen and/or feed that contained toxic amounts of protein equivalent from non-protein nitrogen (Ab. 107).

During times material to this case, the costs of natural protein escalated. As an economy measure, plaintiff began using in its dairy feed a synthetic substance called urea as a substitute for natural protein (Ab. 32). Urea was

developed by the Germans as a means of providing protein and has been accepted in the United States from an economy standpoint. Urea is not a protein but provides nitrogen which enables bacteria to synthesize protein.

Only ruminant animals such as the cow, the sheep and the goat can utilize urea effectively because the stomach of the ruminant animal has four compartments, each serving a particular function. The largest is the rumen. Feed eaten by the cow passes into the rumen where it ferments as it moves back and forth in the different sacks of the rumen. As fermentation occurs in the rumen, gas is produced; the gas is expelled through the esophagus of the dairy animal with each cycle or movement of the rumen. For this reason, the dairy cow is known as a continual or silent belching animal. Between 50 to 70 quarts of gas are produced in the stomach of a cow every hour and the gas is expelled through the cow's continuous belching process (Ab. 92 and 93).

Billions of protozoa and bacteria reside in the rumen. The bacteria can use nitrogen to synthesize protein but a consistent acid condition or PH suitable for the population of bacteria must be maintained.

When urea is utilized in feed as a substitute for natural protein, the bacteria in the rumen converts the urea into ammonia. The micro organisms of the cow use this ammonia to synthesize amino acids and form its own protein

(Ab. 93). The protein passes from the rumin to the cow's true stomach and then into the small intestine where it is digested as regular protein (Ab. 93 and 94).

While the use of urea in feed for dairy animals is accepted in the United States, limitations exist in the amount of urea that can be used in dairy feed since there is a limit to how much ammonia the bacteria in the rumin can utilize. If the limit is exceeded, the ammonia becomes toxic to the dairy cow. When excessive ammonia accumulates in the rumin, the ammonia is taken into the blood stream and then to the liver. If the liver has the capacity to convert the ammonia back to urea, it is either excreted through the urine or cycled back through saliva resulting in no harm to the cow. However, if the liver cannot handle the excessive ammonia, it affects the nervous system of the cow. The rumin contracts because of nerve action but when the nerve function stops, the rumin does not contract, and the continuous belching to release stomach gases stops. As a result, the stomach gases continue to build due to fermentation in the rumin, the animal's stomach gets bigger and bigger and, because of pressure against the diaphragm, the cow suffocates (Ab. 94).

Other symptoms of excessive amounts of ammonia in the rumin include loss of coordination, slobbering, uneasiness, dullness, staring expressions, heavy breathing, muscle and skin tremors, regurgitation, convulsions, frequent

urination and defecation, failure to stand, prostration, circulatory collapse, distended leges and bleeding in the true stomach, the small intestine, the esophagus and the lining of the interior heart (Ab. 94 and 95).

Symptoms of accute toxicity are that the cow refuses to move, refuses to eat, has chronic bloat, is listless, appears to be in very thin condition and is not very productive and the hair looks very lusterless (Ab. 97).

Symptoms of chronic toxicity affects milk production (Ab. 97).

Y. Toxicity of Urea.

Consumption by a 1,300 pound cow of .56 to .86 of a pound of urea per day is toxic level. At the .56 of a pound per day level, the cow shows symptoms of uneasiness and uncoordination. At the .86 of a pound per day level, bleeding and eventual death due to bloat occurs.

When urea is used in feed for dairy animals, there must be a period of acclimation to allow the cow's digestive system, particularly the liver, to adjust to the urea. The adjustment is necessary because with urea in the feed, the amount of bacteria in the rumin increases, producing larger quantities of ammonia to be absorbed by the liver. If the cow receives a large dose of urea without any adaptation, it is very poisonous resulting in death and/or severe bloat (Ab. 96 and 97).

Feed grade urea contains 45% nitrogen. One pound

of urea produces 2.81 pounds of protein equivalent (Ab. 97). Therefore, the protein equivalent of 100 pounds of feed grade urea is 281 pounds so far as the ruminant animal is concerned. Using this formula, 1.42 pounds of urea is used to provide 4% protein equivalent in 100 pounds of feed. Therefore, if a dairy feed containing 4% protein equivalent per 100 pounds is consumed by a cow at the rate of 32 pounds per day, the animal would consume .45 of a pound of urea per day, a nontoxic level, inasmuch as the toxic level is between .56 and .86 pounds of urea per day (Ab. 98).

Z. Plaintiff's Awareness of Urea Dangers.

Plaintiff used urea in its dairy feed and was well aware of its limitations. Plaintiff knew that excess urea in dairy animal feed caused a decline in milk production, poisoned dairy cows and caused cows to bloat (Ab. 30 and 32). For these reasons, the employee of plaintiff who mixed the ingredients for 32% dairy concentrate pellets, 32% cattle supplement and 14% dairy feed used a formula prepared by plaintiff, which formula if followed insured that the dairy animal feed did not contain urea in excess.

The formulas were prepared by plaintiff so that the 32% cattle supplement and the 32% dairy concentrate pellets would contain no more than 20% urea and so that the 14% dairy feed would not contain more than 4% urea. In each case, the urea would not be more than 1/3 of the total protein in the 32% cattle supplement, 32% dairy concentrate

pellet or the 14% dairy feed.

The formula was so written because plaintiff was aware that if urea constituted more than 1/3 of the total protein in the feed, the feed would be harmful to dairy animals (Ab. 30). For this reason, plaintiff knew that weighing and measuring of urea in dairy animal feed is very important (Ab. 30).

AA. Plaintiff's Awareness of Need for Consistency.

Plaintiff was aware that a dairy animal is bred for milk production capabilities and that dairymen take great pains to breed the finest bulls and the finest cows in an effort to obtain the finest possible dairy cow. Plaintiff knew that with such a substantial breeding effort, it is important that the dairy animal receive a diet of protein that is very consistent (Ab. 77 and 78).

BB. Plaintiff Lacked Quality Controls.

In spite of this knowledge, plaintiff has no quality control measures to determine whether its pellets or feed contained the amount of protein shown on the feed label or that the feed it manufactures and distributes contains an amount of protein that is consistent (Ab. 74). The only chemical analysis performed on any feed produced by plaintiff is the analysis performed by the Utah Department of Agriculture, Office of State Chemist (Ab. 5 and 29).

By the time a state analysis is reported on dairy feed manufactured by plaintiff, all feed sampled and reported upon has been sold by plaintiff and consumed by the

dairy animals owned by the farmer who purchased the feed. For this reason, when plaintiff receives a report from the State indicating that a particular feed was found to contain excess protein equivalent of non-protein nitrogen or that the sample contained excess protein or that the sample is deficient in protein, nothing can be done to rectify the feed (Ab. 74 and 79).

It is impossible for plaintiff to determine the protein content or the protein equivalent of non-protein nitrogen in a 32% cattle supplement pellet or a 32% dairy concentrate pellet unless a chemical analysis of the pellet is performed. Looking at the pellet with the human eye does not disclose its protein or urea content (Ab. 37). During all times material to this case, none of plaintiff's plants had any facility to perform a chemical analysis on any of the 32% pellets manufactured by plaintiff (Ab. 37 and 74).

CC. Analysis by State Chemist.

The Utah State Department of Agriculture, Office of State Chemist, performs chemical analyses of feed samples and issues reports thereon to insure compliance with commercial feed laws and regulations of the State of Utah. Copies of the report are furnished to the inspector who submitted the sample, the plant which manufactured the sample and other parties involved, such as distributors or customers (Ab. 5). Tests by the state chemist are performed

to see that the feed contains the content guaranteed by the manufacturer (Ab. 5).

Commercial feed laws in Utah require that certain information be placed on a feed label and every commercial feed and feed ingredient sold in the State of Utah must be registered with the Department of Agriculture. Plaintiff filed a label for 32% dairy concentrate pellets, 32% cattle supplement and 14% dairy feed for the period of March 1973 to August 1974.

Exhibit 2 is a report of analysis prepared by the State of Utah, Department of Agriculture. The report is on 32% dairy concentrate pellets sampled on September 29, 1971, at plaintiff's Logan plant by inspector Johnson, an employee of the State of Utah, Department of Agriculture. Each report bears two dates, the date the report is prepared which is placed in the upper right hand corner on the date line and the date the sample was taken at the plant which is shown opposite the plant location. On Exhibit 2, the report was prepared on November 11, 1971, and the feed sample was taken on September 29, 1971.

Each report of analysis also sets forth in the guarantee column, those percentages guaranteed by the label on the feed and, opposite therefrom, the percentages found by the office of the state chemist after the chemical analysis is complete.

The first column of the report indicates the

ingredients that were analyzed, including crude protein, protein equivalent derived from non-protein nitrogen, crude fat, crude fiber, calcium, phosphorus and salt. Crude protein can exceed the guarantee without violation; but if crude protein in the sample falls short of the guarantee, there is a violation. If protein equivalent derived from non-protein nitrogen exceeds the guarantee, however, there is a violation; if the non-protein nitrogen falls short of the guarantee, there is no violation.

It is the policy of the state chemist to notify the producer of the feed if the non-protein nitrogen or urea content of the feed exceeds 1/3 of the crude protein of the sample (Ab. 9). It also a policy of the office of state chemist to notify the producer of feed if the sample tested contains less crude protein than the percent guaranteed by the feed label as was the case with Exhibit 2.

The reports of analysis on 14% dairy feed, 32% dairy concentrate pellets and 32% cattle supplement clearly show that plaintiff produced feed for dairy animals containing inconsistent quantities of crude protein and inconsistent quantities of urea as well as excessive urea sufficient to cause symptoms in dairy animals observed by defendant, Edward Aragon, Dr. Roper, Dallas Shermer, Harvey Cook and Curtis Solomon and sufficiently excessive amounts of urea to cause the decrease in milk production as testified by defendant and as shown in his DHIA records.

DD. Opinion of Dr. Gardner.

Dr. Robert Gardner, a professor of animal science at Brigham Young University, testified at the trial as an expert witness. Based upon defendant's DHIA records, the physical condition of defendant's cows during periods of use and non-use of plaintiff's 14% dairy feed, the results of chemical analysis of defendant's water, alfalfa and corn silage, and the results of chemical analysis of plaintiff's 14% dairy feed, 32% cattle supplement pellets, 32% dairy concentrate pellets sampled by the Utah State Chemist during periods of use by defendant's herd of plaintiff's feed, Dr. Gardner concluded that:

1. Milk production fluctuations of defendant's herd between February of 1971 and February of 1972 and between December of 1972 and July of 1974 were not due to seasonal changes, disease in the herd, hoof trimming or other factors but were a result of the consumption by defendant's cows of feed containing inconsistent protein and excess urea (Ab. 102, 103, 104, 107, 97, and 101).
2. Incidents of reduced conception in defendant's herd between February of 1971 and February of 1972 and between December of 1972 and July of 1974 were not due to seasonal changes, disease in the herd or other factors but were a result of the consumption by defendant's cows of feed containing

inconsistent protein and excess urea (Ab. 105 and 106).

3. Incidents of bloat, both accute and chronic, in defendant's herd between February of 1971 and February of 1972 and between December of 1972 and July of 1974 were a result of the consumption by defendant's cows of feed containing excess urea (Ab. 96, 98 and 116).

EE. Damages Sustained by Defendant.

Defendant claimed that as a result of the use of plaintiff's 14% dairy feed 42 of his dairy animals died of bloat. He identified each cow by number, date of death, cause of death and the replacement cost of each cow. The damage claimed by defendant on this count totalled \$33,812 (Ab. 145, 146 and 147).

It was claimed by defendant that as a result of using plaintiff's 14% dairy feed many of his productive dairy cows suffered stress from bloat and, thereafter, were non-productive. These cows were sold for beef. Each cow sold was identified by number, her status in the herd before the stress was given, the reason for the sale was stated and the loss sustained by defendant by the sale was given. The damages claimed by defendant on this count totalled \$63,400 (Ab. 188, 189, 190, 191 and 192).

Defendant claimed that as a result of using plaintiff's 14% dairy feed 60 of his dairy cows would not become

pregnant causing their milk production to become retarded. For any period of time beyond 305 days that the 60 cows were in milk, their milk production decreased. Defendant claimed he was damaged in an amount equal to the cost per day to maintain these 60 cows beyond the 305 days they were in milk. Defendant identified each cow by number, stated the number of days each cow was in milk and identified the cost to maintain each cow beyond the 305 day in-milk period. The damages claimed on this count totalled \$56,332.60 (Ab. 187 and 188).

It was claimed by defendant that as a result of the use of plaintiff's 14% dairy feed defendant's dairy animals suffered from stress due to bloat resulting in a decline in milk production. The losses claimed were identified by year, month and amount. Losses claimed by defendant totalled \$125,867.79 (Ab. 147, 148 and 149).

Defendant claimed that as a result of the use of plaintiff's 14% dairy feed he had to acquire medication for the herd, hire extra men to care for sick cows, milk three times per day and purchase semen to artifically inseminate cows that would not get pregnant, all at an expense of \$20,000 (Ab. 192 and 193).

It was claimed by defendant that as a result of the delivery by plaintiff of feed deficient in usable protein, defendant overpaid plaintiff \$12,870 for feed delivered between February of 1971 and February of 1972 and the

defendant was overcharged \$44,500 for feed delivered between December of 1972 and July of 1974 (Ab. 161 and 162).

Defendant also claimed that punitive damages of \$100,000 should be awarded because prior to February of 1971, plaintiff had been informed by the Utah State Chemist that its feed was deficient in protein, was inconsistent in protein and contained excess urea and that in disregard of these warnings plaintiff continued to manufacture and sell feed deficient in protein, inconsistent in protein content and containing excess urea (Exhibit 149 (No. 70-5624), 149 (No. 70-6721), 149 (No. 70-7280) and R. 26).

LEGAL ARGUMENT

POINT I. PLAINTIFF IS ENTITLED TO AN AWARD FOR REASONABLE ATTORNEY FEES.

Defendant agrees that plaintiff is entitled to an award of reasonable attorney fees. At trial it was stipulated that plaintiff was entitled to such an award and an agreement was reached to the effect that plaintiff's counsel would prepare and submit to defendant's counsel a summary of the hours spent to prosecute plaintiff's claim. If defendant did not dispute the summary, an award based thereupon would enter. If there was a dispute, it was agreed that a hearing would be held on the question of the reasonableness of plaintiff's attorney fees. Defendant stands ready and willing to proceed as agreed.

POINT II. ON APPEAL, EVIDENCE IS VIEWED IN THE LIGHT MOST FAVORABLE TO THE RESPONDENT.

This court has repeatedly held that it will not redetermine facts found by the fact finder in the lower court if, in the light most favorable to the respondent, the evidence is sufficient to sustain such findings, Gibbons & Reed Co. v. Guthrie, 123 Utah 172, 256 P. 2d 706 (1953), and, that if there is substantial evidence to support the judgment of the lower court, this Court will affirm, Glazier v. Larsen, 26 Utah 2d 429, 491 P. 2d 226 (1971). Predicated upon these standards the jury verdict must stand in that substantial evidence was produced by defendant to support the negligence of the plaintiff, proximate cause and the damages sustained by defendant.

POINT III. THE QUESTION OF PLAINTIFF'S NEGLIGENCE WAS PROPERLY SUBMITTED TO THE JURY.

The question of the negligence of plaintiff was properly submitted to the jury by the trial court based upon the standard set by this court. The standard consistently applied is that negligence is a question for the jury unless all reasonable men must draw the same conclusion from the facts presented. Singleton v. Alexander, 19 Utah 2d 292, 431 P. 2d 126 (1967). The following evidence, viewed in the light most favorable to defendant, clearly shows that evidence of plaintiff's negligence was produced sufficient to require the case to be submitted to the jury and to support the jury

finding of negligence:

A. The testimony of Robert Turley, manager of plaintiff's Draper plant, shows that plaintiff knew that for dairy animals to give maximum milk production they must receive a diet that is very consistent (Ab. 77 and 78).

B. The testimony of Egill Olafsson, the manager who prepared plaintiff's dairy feed formulas, shows that urea is toxic in dairy feed if the protein derived from urea exceeds one-third of the protein in the feed (Ab. 30).

C. The testimony of Mr. Olafsson shows that he knew excess urea in dairy feed caused milk production to drop and caused cows to bloat (Ab. 32).

D. The testimony of Mr. Olafsson shows he prepared the 14% dairy feed formula so that not more than one-third of the protein therein was derived from urea (Ab. 32).

E. The testimony of Mr. Olafsson shows that he received and reviewed all reports of chemical analysis from the office of the Utah State Chemist showing the results of the chemical analysis of dairy feed produced and sold by plaintiff (Ab. 126).

F. Exhibit 149, comprising chemical reports of analysis number 70-5204, 70-6721 and 70-7280, shows that plaintiff's employees knew prior to February of 1971 that plaintiff produced and sold dairy feed containing less crude protein than was guaranteed on the feed label and dairy feed containing more protein equivalent from non-protein nitrogen than was guaranteed on the label. This exhibit also shows

that prior to February of 1971, plaintiff's 32% cattle supplement pellets contained diethylstilbestrol (Exhibits 14(No. 70-7280).

G. Exhibits 2, 106, 107, 117, 130(No. 71-1415), 87, 109 and 96, lab reports from the State of Utah Chemist, and Exhibit 79, a lab analysis prepared by Woodson-Tenant Laboratories, show that during the periods defendant purchased 14% dairy feed from plaintiff, plaintiff produced and sold dairy feed that contained less crude protein than was guaranteed by the feed label.

H. Exhibits 116, 130(No. 71-9876), 130(No. 71-9067), lab reports from the State of Utah Chemist, show that during the periods defendant purchased 14% dairy feed from plaintiff, plaintiff produced and sold dairy feed that contained more protein equivalent from non-protein nitrogen than was guaranteed by the feed label.

I. 14% dairy feed is mixed pursuant to formula. The mixer relies upon the fact that the 32% dairy concentrate pellets or the 32% cattle supplement pellets consistently contain 32% protein and if they do not, the finished product, 14% dairy feed, cannot consistently contain 14% protein (Ab. 77).

J. Defendant constructed an organized barn so that his cows could be on a consistent diet planned according to each cow's milk production cycle (Ab. 132 and 133). This effort was totally thwarted when plaintiff manufactured

and delivered to defendant 14% dairy feed inconsistent in protein (Ab. 103 and 104).

K. The testimony of Mr. Olafsson and Mr. Turley shows that all 32% cattle supplement pellets and all 32% dairy concentrate pellets came from a common source -- plaintiff's Draper plant (Ab. 7 and 73).

L. The testimony of Mr. Turley shows that plaintiff knew that consistent protein intake by dairy animals is important to consistent milk production (Ab. 78).

M. The testimony of Mr. Loveless, Mr. Olafsson and Mr. Turley shows that plaintiff did not have any inhouse chemical analysis facilities at Draper, Spanish Fork or any other plant to analyze the feed it produced to insure the feed met the guarantee on the label (Ab. 29, 37 and 74).

N. The testimony of Mr. Loveless, Mr. Olafsson and Mr. Turley shows that plaintiff relied upon the State of Utah, Department of Agriculture, Office of State Chemist, to conduct all tests (Ab. 74, 29 and 37).

O. The testimony of Mr. Turley shows that by the time plaintiff received reports from the Utah State Chemist, all feed covered by the report had been sold and delivered by plaintiff to its customers (Ab. 74).

P. Exhibits 5, 6, 7, 87, 88, and 90 show that during the first period of use by defendant of plaintiff's 14% dairy feed, 32% cattle supplement pellets manufactured by plaintiff contained diethylstilbestrol (Ab. 39).

Q. The testimony of Mr. Loveless shows that plaintiff was aware that diethylstilbestrol is a birth control item, that a dairyman would not want to have a birth control substance in dairy feed and that he could not explain how diethylstilbestrol got in the 32% cattle supplement pellets (Ab. 39).

R. Mr. Loveless knew that 32% cattle supplement pellets were prepared for beef cattle feed but, in spite thereof, he used those pellets in 14% dairy feed (Ab. 36 and 37). Plaintiff's Spanish Fork plant sold a lot of beef cattle feed and only had one bin for pellets so plaintiff granted permission to use beef cattle pellets in the dairy feed mixed by the Spanish Fork plant, where defendant bought feed (Ab. 37 and 38).

S. The testimony of Curtis Solomon, an employee of plaintiff from December of 1973 until July of 1974, shows that he informed the president of plaintiff that some quality control methods should be instituted by plaintiff but the suggestion was rejected (Ab. 43).

T. Mr. Olafsson testified that the employee of plaintiff who mixed the 14% dairy feed tested by the State Chemist on August 15, 1974, (see Exhibit 12) made a mistake (Ab. 29).

U. Mr. Turley testified that the employee of plaintiff who mixed the 32% cattle supplement pellets shown in Exhibit 128 made two mistakes, the first when he put the

component ingredients together and the second when he added urea to that mixture (Ab. 77).

V. Mr. Turley would not have allowed the 32% supplement shown in Exhibit 123 to be sent out had he known it contained 39% protein (Ab. 79).

This evidence shows that there is substantial evidence established by the record to support the jury's finding that plaintiff was negligent.

POINT IV. PROXIMATE CAUSE IS A JURY QUESTION.

This Court has repeatedly held that proximate cause is a jury question, Farmers Grain Cooperative v. Fredricks, 7 Utah 2d 180, 321 P. 2d 926 (1958). The following evidence, viewed in the light most favorable to defendant, shows that substantial evidence of proximate cause was produced clearly sufficient to support the jury's finding that a causal relationship existed between the negligence of plaintiff and the damages sustained by defendant:

A. The testimony of defendant shows that prior to consuming plaintiff's 14% dairy feed, defendant's dairy cows were fat, their hair was slick and shiny, they looked good and were in very good physical condition (Ab. 140).

B. The testimony of defendant shows that after defendant's cows consumed plaintiff's 14% dairy feed they lost weight, acted sick, had droopy, dull and sunken eyes, walked as if in pain, and their hair stood up and was lusterless on the ends (Ab. 140).

C. The testimony of defendant shows that prior to consuming plaintiff's 14% dairy feed, the herd average milk production was 44 pounds per head per day (Ab. 140).

D. The testimony of defendant shows that after consuming plaintiff's 14% dairy feed, milk production decreased to 37 pounds per head per day (Ab. 106 and Exhibits 106 and 20 through 54, inclusive).

E. The testimony of defendant, supported by DHIA records, shows that after consuming plaintiff's 14% dairy feed, defendant's cows died of bloat, suffered stress from bloat and could not become pregnant (Exhibits 20 through 57, inclusive).

F. The testimony of defendant shows that these same cows gained weight, stopped bloating, increased their milk production and looked better during the period of non-use of plaintiff's 14% dairy feed (Ab. 141).

G. The testimony of defendant, Dallas Shermer, Harvey Cook and Curtis Solomon, supported by DHIA records, shows that these same cows again lost weight, began to bloat and had a decrease of milk production during the second period of use by defendant of plaintiff's 14% dairy feed (Ab. 40, 41, 85, 89 and 142 and Exhibits 20 through 54, inclusive).

H. Defendant's testimony, supported by the DHIA records, shows that after defendant ceased using plaintiff's 14% dairy feed the last time, bloat ceased and milk production increased (Ab. 145).

I. The testimony of defendant shows that his dairy cows have eaten the same alfalfa and corn silage since 1970, have consumed the same water, have been milked by the same milkers and milking equipment and have been housed in the same barn and manger since 1972 (Ab. 131, 133 and 134).

J. The testimony of defendant shows that after he stopped feeding his cows plaintiff's 14% dairy feed the last time, the cows did not bloat again until Grow Best Feed Company furnished feed containing excess urea (Ab. 145).

K. The testimony of Ed Aragon, an experienced milker who worked for defendant during the periods defendant's cows ate plaintiff's feed, shows that he milked, fed and cared for defendant's cows consistently and to the best of his ability and, in spite thereof, milk production dropped, cows bloated and the general health of the herd deteriorated (Ab. 67).

L. A dairy cow that calves once a year produces significantly more milk than a cow that is milked continuously (Ab. 106). In spite of this, plaintiff put diethylstilbestrol in its 32% cattle supplement pellets and allowed the Spanish Fork plant to use these pellets in 14% dairy feed (Ab. 37 and 38).

M. Dr. Roper, the veterinarian for defendant's herd, observed the herd during the second period the cows ate plaintiff's 14% dairy feed. He suspected that the cows

were suffering from urea toxicity but dismissed the possibility because of the quality control facilities he assumed plaintiff utilized (Ab. 62).

N. During both periods of time during which defendant's cows ate plaintiff's 14% dairy feed, Mr. Aragon and Dallas Shermer, milkers, observed uncoordination, slobbering, uneasiness, dullness, regurgitation, convulsions, bloat, abdominal bleeding and death, among defendant's dairy animals (Ab. 69 and 85).

O. The testimony of Dr. Robert Gardner shows that symptoms of urea toxicity in dairy cows include uncoordination, slobbering, uneasiness, dullness, regurgitation, convulsions, bloat, abdominal bleeding and death (Ab. 96 and 97).

P. The testimony of defendant and Curtis Solomon, John Ladin, Sherman Babcock and Dr. Gardner shows that chemical analyses were run on defendant's corn silage, alfalfa and water (Exhibits 79, 80, 82 and 83) and each was found to be within normal limits (Ab. 48, 42, 50, and 109).

Q. The testimony of defendant shows that his cows weighed an average of 1,300 pounds and consumed an average of 32 pounds of 14% dairy feed per day during the times material to this case (Ab. 160).

R. The testimony of Dr. Gardner shows that, in his opinion, a 1,300 pound cow would show signs of toxicity

by a daily consumption of .57 pounds or more of urea per day (Ab. 96).

S. The testimony of Dr. Gardner shows that, in his opinion, a 1,300 pound dairy cow would suffer a decrease in milk production by a daily consumption by .40 pounds of urea per day (Ab. 100).

T. The testimony of Mr. Olafsson shows that during the period of time material to this case the plaintiff mixed 300 or 350 pounds of either 32% dairy concentrate pellets or 32% cattle supplement pellets with other ingredients to produce one ton of 14% dairy feed (Ab. 4).

U. Exhibits 12, 103 and 116 are reports of analysis on feed produced by plaintiff during the period of use by defendant of plaintiff's 14% dairy feed.

V. The testimony of Dr. Gardner shows that, in his opinion, if 300 pounds of 32% cattle supplement shown on Exhibit 116 were used to make 14% dairy feed and the 14% dairy feed was consumed by a 1,300 pound cow at the rate of 32 pounds per day, the cow would receive .56 pounds of urea per day, which would decrease milk production (Ab. 98 and 100).

W. The testimony of Dr. Gardner shows that, in his opinion, if 32 pounds of the 14% dairy feed shown on Exhibit 103 were fed to a dairy cow on February 4, 1972, and 32 pounds of the 14% dairy feed shown on Exhibit 99 were fed to a dairy cow on February 7, 1972, and 32 pounds of the 14% dairy feed shown on Exhibit 96 were fed to a dairy cow

on February 10, 1972, and 32 pounds of the 14% dairy feed shown on Exhibit 98 were fed to a dairy cow on February 11, 1972, the cow would suffer chronic effects from urea and a decline in milk production would occur (Ab. 103 and 104).

X. The testimony of Dr. Gardner shows that, in his opinion, bloat caused by excess urea consumption is a dry bloat and bloat caused by green chopped hay is frothy bloat (Ab. 108).

Y. The testimony of defendant and Dallas Shermer shows that the bloat suffered by defendant's cows during the period they consumed 14% dairy feed manufactured and sold by plaintiff was dry bloat (Ab. 84).

Z. The testimony of Dr. Gardner shows that, in his opinion, the decline in defendant's milk production as shown on the DHIA records was not caused by weather, hoof trimming, sickness or any other usual cause of milk production variation (Ab. 107).

AA. The testimony of Dr. Gardner shows that, in his opinion based upon reasonable scientific probability, the death of defendant's cows due to bloat, the decline in milk production of defendant's dairy herd and the retardation in reproduction among defendant's dairy cows during the periods the dairy cows consumed plaintiff's 14% dairy feed were caused by the consumption of inconsistent amounts of protein and excessive amounts of urea (Ab. 107).

POINT V. THE QUESTION OF DAMAGES IS A JURY DETERMINATION.

As to the damages sustained by defendant, the rule

is that if the evidence of damage, viewed in the light most favorable to the prevailing party, is substantially definite and complete, the jury verdict will stand. Park v. Moorman Manufacturing Co., 121 Utah 339, 241 P. 2d 914 (1952).

A summary of the evidence as to damages is as follows:

A. Defendant testified that during periods of use of plaintiff's 14% dairy feed 42 cows died of bloat. Based upon the replacement cost of these cows, defendant testified that he lost \$33,812 as a result of these deaths (Ab. 145, 146 and 147).

B. Defendant testified that during periods of use of plaintiff's 14% dairy feed cows suffered stress from bloat and as a result were non-productive. These cows were culled from the herd and sold for beef. The difference between the value of the cow as a high milk producer and the value of the cow for beef represented the loss sustained by defendant which he testified was \$63,400 (Ab. 188, 189, 190, 191 and 192).

C. Defendant testified that during periods of use of plaintiff's 14% dairy feed, 60 cows could not get pregnant causing their milk production to decrease. Defendant testified that he was damaged in the amount of the cost to maintain these 60 cows beyond the 305 days each cow was in milk. These losses totalled \$56,332.60 (Ab. 187 and 188).

D. Defendant testified that as a result of the

use of plaintiff's 14% dairy feed, defendant's cows suffered from stress caused by bloat resulting in a decline in milk production. The losses claimed were identified by year, month and amount and were supported by DHIA records (Exhibits 26 through 54, inclusive). These losses totalled \$125,867.79 (Ab. 147, 148 and 149).

E. Defendant testified that during periods of use of plaintiff's 14% dairy feed, he had to buy medication, hire extra men, purchase semen to artificially inseminate cows that could not get pregnant. These expenses totalled \$20,000 (Ab. 192 and 193).

F. Defendant testified that plaintiff sold and delivered to defendant dairy feed deficient in protein and that defendant overpaid \$12,870 for feed during the first period of use and on the same basis was overcharged \$44,500 for feed delivered during the second period of use. The testimony of defendant as to protein deficiencies is supported by Exhibits 2, 5, 79, 87, 106, 107, 109 and 117.

This evidence clearly shows that substantial and sufficient evidence is established by the record to support the jury's award to defendant of \$226,330.57.

POINT VI. ANALAGOUS UTAH CASES SUPPORT DEFENDANT'S CONTENTION THAT THE JURY VERDICT SHOULD BE AFFIRMED.

The contention of defendant that the evidence produced at trial was sufficient to sustain the jury verdict is supported by the decision in Farmers Grain Cooperative

v. Fredricks, 7 Utah 2d 180, 321 P. 2d 926 (1958). In that case the grain cooperative sued to foreclose a note and mortgage executed by a turkey grower to secure advances of feed. The turkey grower counterclaimed for breach of warranty and negligence claiming nutritional deficiency in the feed purchase by him from the cooperative. The jury returned a verdict for the grower on his counterclaim and the cooperative appealed. Justice Worthen writing for the court held that evidence was sufficient to justify the inference that the feed was deficient and that such deficiency proximately caused the grower's damage.

The evidence at trial was all testimony as to the condition of the poults prior to the time they ate the feed in question, the conditions under which they were raised, the nutritional condition of the flock and the symptoms the birds exhibited.

No analysis was ever made at any time of any of the feed.

The evidence showed that after using the feed of the cooperative, abnormal death losses occurred in the flock which was diagnosed by the head of the Department of Veterinary Science at Utah State University. Thereafter, no analysis was made of any of the birds that died or did not gain weight.

The evidence upon which the grower relied for his claim was:

1. Testimony that the turkey grower's flock had cankerous mouths and dry feathers, which indicated the turkeys were not getting the required nutrition.

2. Testimony that birds that suffer from malnutrition will be slowed down in their growth and will need more food to reach prime condition.

3. Testimony that a turkey weakened by malnutrition will be undersized and will not mature rapidly nor put on as much weight as turkeys that have not been so weakened.

4. Testimony of turkey growers who did not use the cooperative's feed that turkeys raised by them were in better condition than the turkeys raised by the turkey grower.

Based upon this testimony, the Supreme Court of Utah was of the opinion that:

...there was ample competent evidence to justify the inference by the jury that the feed was deficient and proximately caused the defendant's damage. This court has held that the question of proximate cause is a jury question.
p. 929

A similar factual situation existed in Park v. Moorman Mfg. Co., 121 Utah 339, 241 P. 2d 914 (1952). Park brought an action against Moorman for breach of warranty as to fitness for Park's purpose of poultry feed concentrate. The jury verdict was in Park's favor and Moorman appealed claiming that there was insufficient evidence to justify the inference that Park's loss was the proximate result of the

use of either the feed produced by Moorman or the method of feeding propounded by Moorman.

To support his claim, Park relied upon the following:

1. Testimony by Moorman's veterinarian that the feed or the feed plan could have caused Park's loss.

2. Other poultry growers testified that they used the feed and had undesirable results.

3. Testimony that Park's chickens were far below other chickens on the plan and that such condition came within a significant period after Moorman's feed and plan were adopted.

4. Testimony that there were no harmful substances in the feed and that the feed contained all the substances purportedly contained in it.

5. Park had fed the hens in accordance with Moorman's instructions and the death and loss of production was the result of Moorman's "self-feeding system".

The Supreme Court of Utah, Justice McDonough writing for the court, ruled as follows:

Appellant further contends that the evidence in this case is insufficient to justify the inference that plaintiff's loss was the proximate result of the use of either the feed or the method of feeding or both. The record contains testimony of defendant's own veterinarian that the feed or plan could have caused plaintiff's loss. There was further testimony of other witnesses who had used the feed and had undesirable results. The inferences drawn by officers of defendant company and by buyers from plaintiff that the chickens on defendant's feed and plan were far below the other

chickens on the other plan, and that such condition came within a significant period after defendant's feed and plan were adopted is further evidence of proximate cause. This question of proximate cause is likewise a jury question. Taking the evidence most favorable to the plaintiff, there is substantial evidence established by the record to support the jury's implied finding as to proximate cause of the loss. p. 920

In the Farmers Grain case, supra, testimony was produced to show that turkeys raised by other growers were in better condition than those raised by the turkey grower. The defendant in the instant case produced more convincing evidence because in his herd were cows that would not eat plaintiff's 14% dairy feed. All cows were on the same farm, were milked by the same milkers, were kept in the same barn. All ate the same food and drank the same water. The only difference was that some of defendant's cows refused to consume plaintiff's 14% dairy feed.

One cow that would not eat plaintiff's 14% dairy feed was "Midge". Defendant's testimony (Ab. 158 and 159) supported by the DHIA Individual Cow Record on Midge, part of Exhibit 19, shows that while milk production of cows that ate plaintiff's 14% dairy feed was erratic, the milk production of Midge followed a normal lactation to production (Tr. 1092 line 21). Exhibit 19 shows that Midge produced as follows:

1st lactation	12,280 lbs.
2nd lactation	16,880 lbs.
3rd lactation	21,210 lbs.
4th lactation	22,080 lbs.

5th lactation 21,040 lbs.

By comparison, cow No. 19 ate plaintiff's 14% dairy feed and had a very abnormal and erratic production curve (Ab. 158). Her production was as follows:

1st lactation 14,240 lbs.

2nd lactation 16,570 lbs.

3rd lactation* 10,930 lbs.

4th lactation* 16,020 lbs.

The recent case of Utah Cooperative Association v. Egbert-Haderlie Hog Farmer, Inc., 550 P. 2d 196 (Utah 1976), is supportive of defendant's contention that issues in this case were properly submitted to the jury. In the Utah Cooperative case, suit on an open account was brought to recover for the sale of livestock feed. The buyer counter-claimed alleging that the feed was contaminated. After a trial on the issues raised by the counterclaim, the trial court directed a verdict in favor of the seller and the buyer appealed. The Utah Supreme Court reversed the order of the trial court directing a verdict and remanded the case for a new trial. This Court held the case should have been submitted to the jury and in so ruling held:

It is not necessary that the defendant show absolute certainty that the source of infection among the hogs arose from the ingredients supplied by the plaintiff, but it is sufficient if there is substantial evidence to support the likelihood that the infection came from that source. We are

*These lactations were during periods of use of plaintiff's 14% dairy feed (Ab. 158).

of the opinion that in this case there were circumstances shown in the evidence from which a jury could reasonably find that the contamination contained in the feed came from the components furnished by the plaintiff or that the contamination was a result of plaintiff's preparation of the feed and that contamination resulted from the process (p. 198).

POINT VII. NO PREJUDICIAL ERROR WAS COMMITTED BY RECEIVING IN EVIDENCE REPORTS OF ANALYSIS.

An element in determining negligence as well as willful and wanton conduct is whether or not the person charged had prior notice of his unlawful conduct. Based upon this sound legal principle, the trial court properly received in evidence reports of analysis prepared by the Department of Agriculture, Office of State Chemist, on 14% dairy feed, 32% cattle supplement pellets and 32% dairy concentrate pellets manufactured by plaintiff before, during and after the periods of use by defendant..

On this point the Supreme Court of Oregon held that in order to charge one with willful and wanton conduct under the circumstances, it must be shown that he had actual knowledge of the present or impending danger to the person injured, Falls v. Mortensen, 207 Oregon 130, 295 P.2d 182 (1955). Likewise, the Washington State Supreme Court held that to be guilty of willful and wanton misconduct, the person charged therewith must have had knowledge, or its equivalent, of the danger and probable injury, Adkisson v. City of Seattle, 42 Wash. 2d 676, 258 P.2d 461 (1953).

The Utah Supreme Court rendered a decision in the case of Fowler v. Medical Arts Building, 112 Utah 367, 188 P.2d 711 (1948), that is decisive on the question. In this case a small boy was killed in an accident on an elevator of the Medical Arts Building. A jury awarded plaintiff a substantial verdict and the defendant appealed. At trial the mother of the deceased boy testified that when they got on the elevator it started with a jerk causing the small boy to lose his balance, fall, get caught in the elevator shaft and die. The plaintiff called two witnesses who each testified about riding on the elevator on which the small boy was killed within a week prior to the accident and that on such occasions the elevator, being operated by an employee of defendant, stopped and started with a jerk.

The defendant argued on appeal that testimony of these two witnesses was not admissible evidence and that the receipt thereof was reversible error. Defendant cited cases to the effect that evidence of negligence on one occasion may not be proven by showing similar acts of negligence on previous occasions. In ruling that no error was committed by the trial court, the Supreme Court wrote:

...One of plaintiff's witnesses testified of an incident within a week of the accident and the other testified of an incident which occurred on the Tuesday prior to the accident which occurred on Friday. Defendant's evidence showed that no repairs had been made in the meantime.... The fact that it started with a jerk on these previous occasions and that no repairs were made

in the meantime, increases the probability that it so started at the time of this accident... This evidence was clearly admissible to show that the corporate defendant had knowledge through its employees, the operators of the elevators on those prior occasions, that the elevator was out of repair (p. 713).

A similar factual situation exists in the case before this Court.

A. Plaintiff's employees knew that inconsistent protein in dairy feed was harmful to dairy animals (A. 78).

B. Plaintiff's employees knew that feed for dairy cows should not contain diethylstilbestrol (Ab. 39).

C. Plaintiff received reports of analysis from the Utah State Chemist (Ab. 126).

D. Reports received by plaintiff prior to the first time defendant used plaintiff's 14% dairy feed showed that the 32% cattle supplement pellets used at the Spanish Fork plant as an ingredient in 14% dairy feed contained diethylstilbestrol. Exhibit 14(No. 70-7280).

E. Reports received by plaintiff prior to the first time defendant used plaintiff's 14% dairy feed showed that plaintiff's feed contained inconsistent protein and excess urea. Exhibit 149(No. 70-5204), 149(No. 70-6721), 149(No. 70-7280).

F. No changes were made by plaintiff to improve the consistency of its feed (Ab. 74).

Defendant's evidence clearly shows that prior to the use by defendant of plaintiff's 14% dairy feed, plain-

tiff had knowledge that its feed was harmful yet no quality controls were thereafter implemented by plaintiff. This evidence increases the probability that plaintiff's feed contained diethylstilbestrol and excess urea and was inconsistent in protein during periods of use by defendant. On this basis, reports of analysis on samples taken prior to February of 1971 were clearly admissible.

Reports on both 32% cattle supplement pellets and 32% dairy concentrate pellets were properly admitted into evidence because testimony was produced to show that in mixing 14% dairy feed plaintiff's Spanish Fork plant used 32% dairy concentrate pellets when it ran short of 32% beef cattle supplement pellets (Ab. 44).

The record clearly indicates the consistency of the rulings by the trial court. While reports of analysis were received in evidence for all periods, the court refused to allow defendant's expert, Dr. Robert Gardner, to give an opinion as to the toxic effects of the urea content or the effect on defendant's dairy animals of feed containing inconsistent amounts of protein unless the report of analysis showed a feed sampling date during periods of use by defendant of plaintiff's 14% dairy feed (Tr. 710 and 711).

As an example, the trial court would not allow Dr. Gardner to testify relative to the toxic effects of the 14% dairy feed tested by the State Chemist on August 15, 1974, (Exhibit 12) because defendant ceased buying feed from

plaintiff in July of 1974 (Tr. 710 and 711).

No confusion existed by allowing these exhibits in evidence because each exhibit clearly showed the date the sample was taken. This allowed jurors to easily ascertain whether that sample was taken during a period of use by defendant of plaintiff's 14% dairy feed. The reports clearly identify the feed or supplement tested and show from which plant the sample was taken. Each report bears the date it was issued by the Utah State Chemist.

POINT VIII. NO PREJUDICIAL ERROR WAS MADE IN THE INSTRUCTIONS TO THE JURY

The definitions of misbranded and adulterated feed were given to the jury by instructions 16 and 17, respectively, and the jurors were instructed that if they found plaintiff misbranded feed sold to defendant or manufactured and sold to defendant adulterated feed, this conduct constituted negligence as a matter of law (R. 117 and 118).

These instructions were properly given because evidence was presented upon which the jury could find that misbranded and adulterated feed had been sold by plaintiff to defendant. As to misbranded feed, Exhibit 79 shows that the label on the 32% pellet distributed by plaintiff in June of 1974 was false and misleading because the pellet contained only 24% protein (Ab. 48). Exhibits 130(No. 71-558), 130(No. 71-1415), 130(No. 71-9460) and 109 show that during periods of use by defendant plaintiff's feed was deficient

in protein; Exhibits 4, 130(No. 75-4584), 130(No. 71-9067), 128(No. 72-7090), 116, 105 and 123 show that 32% dairy concentrate pellets contained excessive protein. In addition, Exhibits 130(No. 71-9876), 130(No. 71-9067), 128(No. 72-4090) and 116 show that during use by defendant, plaintiff's feed contained excess urea.

As to adulterated feed, Exhibits 5, 6, 7, 87, 88 and 90 show that during the first period of use by defendant of plaintiff's 14% dairy feed, 32% cattle supplement contained diethylstilbestrol. Mr. Loveless, plant manager at Spanish Fork, testified that he had no explanation as to how diethylstilbestrol got into the 32% pellet (Ab. 39).

Instructions 16 and 17 were given without curative language as to justification or excuse. This did not constitute prejudicial error because no evidence was presented by plaintiff to show justification or excuse. Plaintiff's whole defense was that it did nothing wrong.

At trial plaintiff took exception to instructions 16 and 17. The exception to instruction 16 was based upon a failure to distinguish periods of use and non-use of plaintiff's feed and the exception to instruction 17 was that the statute cited was not applicable to a civil case. The objections to instruction 16 and 17 set forth in plaintiff's brief were not raised at trial.

Instruction 20 very clearly explained to the jury that certain exhibits were offered and admitted into evidence as bearing upon the question of notice to the plain-

tiff as to deficiency in its feed and the jurors were instructed that said exhibits should not be considered for any other purpose or as bearing upon any other issue (R 121).

Not only was the giving of instruction 20 not prejudicial error by the trial court, plaintiff's objection thereto on appeal is untimely. Plaintiff did not take exception to jury instruction 20 at trial (Ab. 221); therefore, the content of said instruction cannot now be raised as prejudicial error.

As to instructions 16, 17 and 20, it is clear under Utah law that an assignment of error cannot be raised in the first instance on appeal. This principle was set forth in Cordner v. Clinger's, Inc., 15 Utah 2d 85, 387 P. 2d 685 (1963), where the Court held that a party cannot raise objections to instructions for the first time on appeal.

POINT IX. IT WAS NOT IMPROPER FOR DEFENDANT TO READ FROM SUMMARIES

During the course of the trial more than 140 exhibits were introduced in evidence by defendant in support of his counterclaim. Most of these exhibits consist of many pages. Exhibit 19 comprises over 300 individual cow records. Exhibits 17 through 54 each comprise five worksheets showing the test day, test run and results, a one-sheet computer print-out known as the Herd Summary and a three-page computer print-

out entitled "Dairy Herd Improvement Records". In addition to these exhibits, defendant brought to the trial a large cardboard box containing milk receipts from Beatrice Foods-Meadow Gold Dairy and a large folder containing his tax returns.

In an effort to shorten the presentation of evidence, defendant prepared a summary of the DHIA records and the Beatrice Foods-Meadow Gold Dairy receipts to show milk losses (Exhibit 139); a summary of the DHIA records and defendant's tax records to show his losses as a result of selling his dairy cows for beef (Exhibit 146); a summary of the DHIA records and his barn record to show which cows died and the date and cause of death (Exhibit 138); a summary of DHIA records to show which cows became retarded in milk production (Exhibit 163); a summary of DHIA records and defendant's grain receipts to show wasted grain (Exhibit 162); a graph illustrating the rolling herd average as reported in DHIA records (Exhibit 165); a graph showing pounds of milk produced by month as recorded in DHIA records (Exhibit 166); a graph showing protein content of 32% dairy concentrate pellets by test date and test result as shown on the reports of analysis of the Utah State Chemist (Exhibit 144); a graph showing protein content of 32% cattle supplement by test date and test result as shown in the reports of analysis of

the Utah State Chemist (Exhibit 144); a graph showing protein content of 32% cattle supplement by test date and test result as shown in the reports of analysis of the Utah State Chemist (Exhibit 143); a graph showing urea content of 32% cattle supplement by test date and test result as shown on the reports of analysis of the Utah State Chemist (Exhibit 142); a graph showing protein content of 14% dairy feed by the test date and test result as shown in the reports of analysis of the Utah State Chemist (Exhibit 140); a graph showing urea content of 14% dairy feed by test date and test result as shown in DHIA records (Exhibit 141). Of all of these summaries and graphs only Exhibit 166 was received in evidence. The offer of the other exhibits was refused on the ground that they represented evidence already admitted and constituted merely another way of presenting the same evidence.

Defendant contends that all of the summaries, graphs and charts should have been received in evidence and plaintiff has nothing to complain about by the court allowing defendant to refer to and read from Exhibits 162, 163, 138, 146 and 139.

The Montana Supreme Court in the case of McCollum v. O'Neil, 128 Mont. 584, 281 P.2d 493 (1955), held that when documents are voluminous and made up of very detailed statements, the use of a summary is proper and that no reversible error was committed by the trial court in admitting

the summaries in evidence. The Court went on to say:

This method of getting before the jury the result of the examination of books of account and records is to be commended (p. 497).

This subject is treated in IV Wigmore on Evidence, Third Ed. §1230, p. 434. The rule is stated as follows:

Where a fact could be ascertained only by the inspection of a large number of documents made up of very numerous detailed statements--as, the net balance resulting from a year's vouchers of a treasurer of a year's accounts in a bank ledger--it is obvious that it would often be practically out of the question to apply the present principle by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered in the shape of the testimony of a competent witness who has perused the entire mass and will state summarily the net result. Such a practice is well established to be proper.

Most Courts require, as a condition, that the mass thus summarily testified to shall, if the occasion seems to require it, be placed at hand in court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or that the material for cross-examination may be available. (Emphasis added.)

The Utah Supreme Court showed its concurrence with Wigmore and the Montana Supreme Court on this subject in its decision in Sprague v. Boyles Bros. Drilling Co., 4 Utah 2d 344, 294 P.2d 689 (1956). In that case an action was brought by a general contractor against the subcontractor for breach of contract by which the subcontractor agreed to break rocks into proper size for use by the general contractor. On

appeal, the subcontractor claimed that the trial court erred in receiving work sheets containing a compilation and computation of figures and computation of expenses incurred by the general contractor when the subcontractor pulled off the job. In ruling that the trial court did not commit error in overruling the objection and receiving the evidence, the court said:

It has been held, and we believe the ruling to be a salutary and expedient one, that where original book entries, documents or other data are so numerous, complex, or cumbersome that they cannot be conveniently examined by the fact trier, or where it would materially aid the court and the parties in analyzing such material, that a competent person who has made such examination may present such evidence. This is subject to the limitation that the evidence must be shown to be developed from records, books or documents, the competency of which has been established, and the records must be available for examination by the opposing parties and the witness subject to cross-examination concerning such evidence. The evidence here presented conformed to the above requirements. Mrs. Sprague testified to the manner of keeping the books; she explained the exhibits and the underlying data, consisting of payroll records, invoices, vouchers and cancelled checks, all of which were present in court for inspection and she was there for cross-examination with respect to all of such matters. The trial court did not commit error in overruling the objection and receiving the evidence.

In the instant case, defendant was present in court and was cross-examined by counsel for plaintiff. All records referred to were in court and were made available to defendant (Tr. 1051, Ab. 148).

Fully supportive of this position is Rule 70(1)(f)

and (2) of the Utah Rules of Evidence.

Plaintiff has no grounds to complain because defendant referred to and read from the summaries. The summaries themselves were not allowed in evidence and the jurors only took into the jury room those portions of the summaries that they recalled from defendant's testimony. It would have been far better for defendant's case had the summaries been allowed in evidence to be read, considered and used by the jurors in their deliberations as to the amount of defendant's damages.

In addition to the foregoing, the record clearly shows that at trial plaintiff did not object to defendant referring to and reading from the summaries (Tr. 1042 L. 20 through Tr. 1047 L. 13; Tr. 1158 L. 15 through Tr. 1167 L. 7; Tr. 1157 L. 15 through Tr. 1158 L. 14; Tr. 1157 L. 15 through Tr. 1071 L. 9; Tr. 1074 L. 14 through 1076 L. 3; Tr. 1050 L. 14 through Tr. 1053 L. 27).

In its brief, plaintiff refers to an objection made at Tr. 1083, Ab. 157. The record clearly shows that a discussion took place between the trial judge and defendant's counsel. At no time did plaintiff's counsel record an objection.

Assuming arguendo that this evidence was improper (the authorities hereinabove cited clearly show the evidence was properly allowed), it is clear under Utah law that a

verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, "by reason of the erroneous admission of evidence unless (a) there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection...." Rule 4. Utah Rules of Evidence.

This court has repeatedly held that when a party does not raise objections below when he had notice and opportunity to object, he may not be heard to complain for the first time on appeal. Huber v. Newman, 106 Utah 363, 145 P.2d 780 (1944).

CONCLUSION

In view of the foregoing, it is submitted by defendant that no reversible error was committed by the trial court and that substantial evidence is contained in the record to support the jury verdict in defendant's favor on his counterclaim. For these reasons the jury verdict should be affirmed and the reasonableness of plaintiff's attorney fees should be determined at the trial court level.

Respectfully submitted,

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DELIVERY CERTIFICATE

The undersigned certifies that three copies, one copy each, of the foregoing brief of respondent were delivered to J. Thomas Greene, Dorothy C. Pleshe and DeLyle H. Condie, attorneys for appellant, this 17th day of May, 1977.

Thomas R. Blonquist