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Intermountain Farmers Association v. Jim Fitzgerald : Brief of Appellants

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.)

BRIEF OF APPEAL

Appeal from a Judgment of the
District Court of Salt Lake County
Honorable Gordon B. Smith

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IN THE SUPREME COURT FOR THE STATE OF UTAH

INTERMOUNTAIN FARMERS
ASSOCIATION,

Plaintiff & Appellant,

vs.

CASE NO. 14723

JIM FITZGERALD,

Defendant & Respondent.

BRIEF OF APPELLANT

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 APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a money judgment in favor of defendant on a Counterclaim. The case was brought by plaintiff to recover the amount due to it on an open account for sale of feed to defendant. Some months later, defendant was permitted to file an Amended Answer and Counterclaim for injuries and death to his dairy herd allegedly caused by toxic levels of urea and alleged inconsistencies and deficiency of protein in the feed.

DISPOSITION OF CASE BY LOWER COURT

After a nine day trial before a jury, Judgments on the Special Verdict of the jury in favor of plaintiff on its Complaint in the amount of \$44,175.00, and for defendant on his Counterclaim in the amount of \$226,330.57, were made and entered on May 19, 1976, by the Court, Hon. Gordon R. Hall, presiding. Thereafter, on

July 20, 1976, the lower court denied Motions by plaintiff for judgment notwithstanding the verdict and for new trial. The Judgment in favor of plaintiff was not appealed.

RELIEF SOUGHT ON APPEAL

Appellant seeks an order reversing the Judgment in favor of defendant on the Counterclaim as a matter of law, and award of attorney's fees on the Judgment in plaintiff's favor. In the alternative, plaintiff seeks a new trial.

STATEMENT OF THE FACTS

The transcript in this case is voluminous, so it has been abstracted pursuant to order of this Court. References hereinafter to the testimony at trial are to the Transcript (Tr.) and to the Abstract (Ab.) Other references are to the Record (R.).

Plaintiff as an agricultural cooperative association sold "14% Dairy Feed" to defendant on an open account. Sales were made by invoice, and the total of unpaid invoices plus interest on the running open account amounted to \$44,175.00. The invoices provided for attorney's fees, and the defendant admitted knowledge of that fact. (Tr. 971; Ab. 129) The feed was delivered to the defendant's farm from the Spanish Fork branch of Intermountain Farmers Association.

The feed plaintiff sold to defendant was always "14% Dairy Feed" comprised basically of rolled grains, plus a 32% supplement and molasses. (Tr. 223; Ab. 2) The 32% supplement which was added to the 14% dairy feed was obtained from the Draper branch of plaintiff, and was mixed at the Spanish Fork plant using

either 300 or 350 pounds per ton of the 32% supplement, depending upon the formula being used at the time.

The defendant claimed at trial that his dairy herd became beset with bloat, loss of milk production and other problems including death, and that such problems were caused by the feed purchased from plaintiff. The first seven counts of defendant's Counterclaim alleged that plaintiff's feed had a usable protein deficiency, that there was an inconsistent usable protein content, and that the feed contained excess urea. Count Eight asked for punitive damages for willfully and intentionally manufacturing and selling to defendant feed containing deficient protein and excess urea, after having been informed that its labels were false and misleading. As presented in Special Interrogatories, the jury was asked to determine whether the feed delivered by plaintiff "contained levels of urea and protein inconsistent with its guarantee." (R. 140) The "guarantee" referred to was the label or tag provided by plaintiff setting forth the chemical analysis of the feed for sale. The theory of defendant's Counterclaim was alleged negligence in mixing and providing the 14% dairy feed, not breach of warranty or "guarantee." (R. 23-28; Tr. 841; Ab. 173)

Productivity of Defendant's Dairy Herd

Defendant used plaintiff's feed less than three years in total time. (13 months between February 1971 and February 1972, and 19 months between December 1972 and July 1974) Over that three year period, defendant moved his dairy herd from American Fork to Elberta where he built a large, modern dairy complex. Defendant also increased his herd from the 80 cows he had

initially purchased in an estate settlement to approximately 300 cows. At the time defendant began feeding his cows IFA feed, the yearly average milk production per cow of his dairy herd was 372 pounds less than the Salt Lake County average. During the periods of time that defendant's cows were consuming the allegedly contaminated feed purchased from plaintiff, the milk production of defendant's herd increased steadily, and by 1974 exceeded the Salt Lake County average by 1,688 pounds per cow. The uncontradicted evidence (Exhibit 63-P) in this regard was as follows:

	Average lbs. Milk Per Year Per Cow <u>Defendant's Dairy Cows</u>	<u>Difference</u>	Average lbs. Milk Per Year Per Cow <u>Salt Lake County</u>
1970	12,584	-372	12,956
1971	14,544	+1,358	13,186
1972	14,454	+1,062	13,392
1973	14,320	+1,230	13,090
1974	14,675	+1,688	12,987
1975	15,153	+1,657	13,496

No Evidence of Harmful Feed Actually Purchased by Defendant

The uncontroverted evidence is that the defendant purchased 14% Dairy Feed from the plaintiff during two periods of time, the first, between February 11, 1971, and January 5, 1972, and the second, between December 28, 1972 and July 26, 1974.

There was no direct evidence by way of chemical test or otherwise that any of the loads of 14% Dairy Feed actually purchased by defendant during the aforesaid periods when his cows were feeding was harmful. During the time periods in question, no tests by the State Chemist were taken of feed sold at the

Spanish Fork branch. During the relevant time periods, only eleven of the 77 tests by the office of the Utah State Chemist finally admitted into evidence were analyses of 14% Dairy Feed samples, all of which were taken at locations other than the Spanish Fork branch of plaintiff.¹⁾ According to both parties' expert witnesses, Drs. Gardner and Huber, none of the chemical tests on 14% dairy feed showed an excess of urea which would cause a loss of milk production, or any other of the symptoms of toxicity complained of by defendant. (Tr. 795,877; Ab. 121,201)

Evidence of Alleged Contamination of 32% Supplement Which Could Have Been Mixed Into Feed Purchased by Defendant

There was no direct evidence that any contaminated 32% supplement or concentrate was in fact mixed into the feed which defendant purchased. Of the total of 77²⁾ chemical tests which were received into evidence, 24 represented test

1) Many tests were taken of samples of plaintiff's feed which were never admitted into evidence. Of the 77 chemical tests admitted into evidence, 26 were tests of 14% Dairy Feed. Those 26 tests may be analyzed as follows:

- . Taken before or after relevant time periods - 15 tests
- . Taken during the relevant time periods - 11 tests
- . Taken at branches of IFA other than Spanish Fork during the relevant time periods - 11 tests; before or after the relevant time periods - 12 tests
- . Taken at Spanish Fork IFA Branch during the relevant time periods - no tests; before or after the relevant time periods - 3 tests
- . Comment made by State Chemist that sample showed an excess of NPN (urea) on tests taken during the relevant time periods - none; on tests taken before or after the relevant time periods - 2 tests (neither of which was taken at Spanish Fork)

2) Many tests were taken of samples of plaintiff's feed supplement which were never admitted into evidence. Of the 77 chemical tests admitted into evidence, 51 were tests of 32% feed supplement. Those 51 tests may be analyzed as follows:

- . Taken before or after relevant time periods - 27 tests
- . Taken during the relevant time periods - 24 tests

samples of 32% supplement taken during the relevant time periods. Further, only two of the tests during the relevant time periods indicated an excess of urea, and those two tests were of samples taken at branches other than Spanish Fork.

Defendant's witness, Dr. Robert Gardner, testified that two of the 24 samples tested during the time periods in question contained sufficient excess urea to cause the type of problems complained of by the defendant. One of those chemical tests, Exhibit 130-D, test report number 9870, was an analysis of 32% dairy concentrate sampled from the St. George branch of IFA on February 18, 1971, seven days after the defendant began using plaintiff's feed. The other test, Exhibit 116-D, was an analysis of 32% cattle supplement sampled from the Draper branch of IFA on July 1974, one day before defendant quit using plaintiff's feed. No testimony or evidence was presented that the concentrate identified in Exhibit 130-D, or the cattle supplement identified in Exhibit 116-D, was in fact used in the preparation at Spanish Fork of any of the feed which the defendant's cows ate.

Evidence of Alleged Contamination of Feed at Other Times and Other Places Which Could Not Have Been Purchased by Defendant

Chemical tests which were taken at branches other than the Spanish Fork branch of IFA, at times both prior and subsequent to the periods when defendant

-
- . Taken at branches of IFA other than Spanish Fork during the relevant time periods - 26 tests; before or after the relevant time periods - 24 tests
 - . Taken at Spanish Fork IFA branch during the relevant time periods - 20 tests; before or after the relevant time periods - 1 test
 - . Comment made by State Chemist that sample showed an excess of NPN (urea) on tests taken during the relevant time periods - 2 tests (neither of which was taken from Spanish Fork); on tests taken before or after the relevant time periods - 4 tests (none of which was taken at Spanish Fork)

cows were feeding on plaintiff's feed, were admitted into evidence over objection of plaintiff's counsel. Counsel for defendant often offered these remote exhibits for the limited purpose of showing alleged knowledge or notice on the part of IFA as related to Count Eight for punitive damages. Tests taken after the periods of feeding which were admitted over objection of counsel include Exhibits 12-D, 13-D, 14-D, 15-D, 16-D, 110-D, 111-D, 112-D, 113-D, 114-D, 115-D, 125-D, 126-D, 127-D and 129-D (test report numbers 2779, 2746 and 4975) and 130-D (test report numbers 75-2833 and 75-3670). The Transcript shows the following relative to Exhibits 13 through 16:

MR. BLONQUIST: Offer 13.

MR. CONDIE: Your Honor, I would object to this. This is approximately six months from the time the feed was purchased by the defendant and is from a branch other than Spanish Fork; totally irrelevant and I don't know for what purpose it could be admissible consistent with the pleadings in this case.

MR. BLONQUIST: Briefly that there was notice given and no move upon the part of Intermountain Farmers to--I think this ties into the punitive element.

THE COURT: This is some substantial time after the period of time that we are concerned with in this case. (Tr. 271; Ab. 12)

* * *

MR. BLONQUIST: We would offer 14.

MR. CONDIE: I would object on the same grounds, Your Honor. This covers a period of time after the feed was purchased from the plaintiff and is a test from a branch other than Spanish Fork. (Tr. 272; Ab. 13)

* * *

MR. BLONQUIST: We will offer 15.

MR. CONDIE: Same objection, Your Honor. It covers a period after the time the feed was purchased and from a branch other than Intermountain Farmers Association, [sic] June 11th, 1975. (Tr. 273; Ab. 13)

* * *

MR. BLONQUIST: We would offer 16.

MR. CONDIE: Same objection, Your Honor. (Tr. 274; Ab. 13)

These exhibits and all other exhibits taken subsequent to the time defendant stopped buying plaintiff's feed were offered as solely relating to punitive damages (Tr. 502; Ab. 57), but were admitted into evidence generally over objection of counsel. (Tr. 276; Ab. 13)

Similarly, exhibits taken prior to the time periods during which defendant fed his cows plaintiff's feed were offered solely as related to the punitive damage element, but were admitted over objection of counsel. [Exhibits 4-D, 5-D, 11-D, 89-D, 90-D, 92-D, 94-D, 95-D, 99-D, 100-D, 104-D, 128-D (test report numbers 6263 and 4090), 129-D (test report numbers 9066 and 4804), 130-D (test report numbers 3333, 5204, 5624, 5722, 6722 and 9061) and Exhibit 149-D] For instance, with reference to samples taken in 1970 as set forth in Exhibit 149-D, the transcript reads:

MR. BLONQUIST: We would offer 149 which consists of four pieces of paper; 149 and then number 70-5624, 70-6271, and 70-280.

MR. CONDIE: Your Honor, I would object to their admission on two grounds; They cover a period of time not in question and number two, they cover feed which there is no testimony to support has ever been used by the defendant's cows.

MR. BLONQUIST: If you will recall, Your Honor, this issue was raised to all of the tests for the year 1970; and pursuant to Mr. Condie's objections I withdrew those exhibits. The only ones I seek to show now are just those four which go to the question of whether or not prior to the time Mr. Fitzgerald bought feed from Intermountain Farmers Association they had knowledge that their feed did not comply with the label, and it is for that limited purpose that they are offered. He objected to all of them and I believe that that was a proper objection; we are now going to the issue of knowledge and the fact that they were notified that the guarantee was not met, which I think goes to the essential elements of this case. (Tr. 817; Ab. 126)

Again, the chemical tests relating to these samples were received into evidence generally over objection. (Tr. 818; Ab. 127) This particular exhibit contained the following notation under date of May 4, 1970 from the State Chemist's office: "This label is false and misleading . . . We have encountered a number of these during this year."

Similar discussion was had resulting in ultimate receipt into evidence of other chemical tests which admittedly could not possibly have related to alleged contamination of the feed actually purchased by defendant. (Tr. 502-504; Ab. 57)

Confusion as to the Use and Purpose of Exhibits Which Could Not Show and Were Not Offered to Show that the Feed Purchased and Used by Defendant was Contaminated

The bulk of the chemical tests admitted into evidence related only to Count Eight, punitive damages. All test reports prior and subsequent to the periods in question were offered for the limited purpose of establishing plaintiff's alleged knowledge and notice justifying punitive damages. (Tr. 817; Ab. 126; Tr. 502; Ab. 57) [Exhibits 4-D, 5-D, 11-D, 12-D, 13-D, 14-D, 15-D, 16-D, 89-D, 90-D,

92-D, 94-D, 95-D, 99-D, 100-D, 104-D, 110-D, 111-D, 112-D, 113-D, 114-D, 115-D, 125-D, 126-D, 127-D, 128-D (test report numbers 6263 and 4090), 129-D (test report numbers 9066, 2779, 2746 and 4804), Exhibit 130-D (test report numbers 3333, 5204, 5624, 5722, 6722, 9061, 75-2833 and 75-3670) and Exhibit 149-D

Exhibit 12-D, a sample taken after defendant stopped purchasing feed from IFA, on August 15, 1974, was one such exhibit in the aforesaid category which could not have caused contamination in the actual feed, and could not have been a component ingredient of the actual feed used by defendant. The Court initially admitted Exhibit 12 into evidence without restriction, but at a later point in the trial apparently sustained objection as to its applicability and use for purposes other than punitive damages. The record shows the following:

MR. BLONQUIST: We would offer Exhibit 12.

MR. CONDIE: I would object to the introduction of this exhibit, Your Honor. It covers a time subsequent to the time when the defendant purchased feed from Intermountain Farmers; and is also from a branch which is not Spanish Fork.

THE COURT: 12 is received over that objection. (Tr. 270; Ab. 12)

* * *

MR. BLONQUIST: Referring Your Honor to Exhibit 12-D and it is specifically, the record will show, sampled on August 15th of 1974 which is within the time in question in this case.

MR. CONDIE: Your Honor (this) is one month after they quit using Intermountain Farmers Association feed, and therefore no cow in his dairy could have eaten this particular sample or anything like it. . . .

THE COURT: Yes. Doesn't appear to be within the time that is in question and the objection is sustained.

MR. BLONQUIST: Your Honor, I think in ruling on that the Court also ought to take into consideration the other elements of the case we have talked about earlier; that was the basis upon which the Court allowed the exhibit in at the beginning of this litigation. That was the fact that one of our charges in this case was one of the punitive or exemplary damages. And the notice that was involved certainly goes to that issue and that close in time because with that element of the case, Your Honor, I think would make the document clearly admissible.

I, also I failed to mention that in my argument I would ask the Court to reconsider in considering that ground.

MR. CONDIE: Your Honor, I'll stipulate and it is in the record that that particular document shows what it shows. If that's notice then it is notice. But I don't believe any testimony relative to these percentage questions of a feed which his cows could never have eaten is relevant.

THE COURT: The ruling will stand. (Tr. 710, 711; Ab. 99)

There was confusion as to the use and scope of exhibits other than Exhibit 12-D which were identified, objected to, a ruling reserved, admitted without restriction and later restricted in some particular. [See Exhibit 15-D; Tr. 704, 711; Ab. 98, 99; and Exhibit 129-D (test report number 9068); Tr. 900; Ab. 209.]

Against this background and confusion as to the limitations suggested in the presence of the jury, the court recognized the need for some curative instruction so as to give guidance to the jury in its deliberations. Many exhibits had been admitted and discussed before the jury for the sole purpose of showing alleged punitive damages. Without identifying the exhibits in question, the court gave the following instruction to the jury:

You are instructed that certain exhibits hereinafter enumerated have been offered and admitted into evidence by the court as bearing upon the question of notice to the plaintiff of a deficiency in its feed. You are instructed that said exhibits

should not be considered for any other purpose or as bearing upon any other issue and do not constitute proof of any other claim made by the counterclaimant in this case. (Instruction No. 20, R. 121)

Although the instruction was given as aforesaid, in fact there was no enumeration as to the exhibits referred to in the instruction. The jury was left without any guidance or instruction as to which exhibits were so restricted. Nevertheless all exhibits were taken into the jury room without notation or indication as to which were so restricted or limited.

Jury was Permitted to Regard any Evidence of "Misbranding" or "Adulteration" of Feed as Constituting Negligence Per Se

The Court gave the following instructions, which were strenuously objected to:

Section 4-18-18 of the Utah Code Annotated (1953) states as follows:

Misbranded feed. -- No person shall distribute misbranded feed. A commercial feed shall be deemed to be misbranded: If its labeling is false or misleading in any particular.

If you find from a preponderance of the evidence that plaintiff misbranded its feed sold to the defendant in violation of the statute just read to you, which is proposed for the safety of defendant and others who own dairy cows, such conduct constituted negligence as a matter of law. (Instruction No. 16, R. 117) [Emphasis added.]

* * *

Section 4-18-17 of the Utah Code Annotated (1953) reads as follows:

Adulterated feed. -- No person shall distribute an adulterated feed. A commercial feed or custom mix feed shall be deemed to be adulterated:

1. If any poisonous, deleterious or non-nutritive ingredient has been added in sufficient amount to render it injurious to health when fed in accordance with directions for use on the label.

2. If any valuable constituent has been in whole or part omitted or abstracted therefrom or any less valuable substance substituted therefor.

3. If its composition of quality falls below or differs from that which it is purported or is represented to possess by its labeling.

4. If it contains added hulls, screenings, straw, cobs, or other high fiber material unless the name of each such material is stated on the label.

If you find from a preponderance of the evidence that the plaintiff manufactured and sold feed to the defendant in violation of the statute just read to you, which is proposed for the safety of defendant and others who own dairy cows, such conduct constitutes negligence as a matter of law. (Instruction No. 17, R. 118) [Emphasis added.]

There was no curative or other instruction to indicate that any evidence whatsoever, other than some evidence of misbranding or adulteration, would be necessary in order for the jury to determine the existence of negligence. Nor were the above instructions limited to consideration of defendant's Count VIII regarding punitive damages which is the only Count raising the issue of alleged misbranding of feed by plaintiff.

Evidence of Possible Causes of the Alleged Injuries Suffered by Defendant Other than Contaminated Feed

Evidence was presented by several witnesses that reduction in milk production, bloat and other problems complained of by defendant are most generally caused by the milker and milking equipment, feeding alfalfa, legumes or clover, inconsistencies

in feeding and milking procedures , seasonal changes and weather conditions , changing the location of the herd , introducing new cows into the herd , communicable disease among the herd , and a variety of such other common place reasons . Additional evidence was presented that general poor health conditions of a herd results in low milk production .

According to defendant's own witness , Dr. Gardner , the chief causes of losses in milk production would include the following:

DR. GARDNER: Weather conditions such as seasonal changes , communicable diseases in the herd , serious malfunction of the milking equipment so it's injurious to the cows and affects their milk production . It's things -- changes of milkers -- milkers who don't completely remove the milk from the cow . If a major change in the feeding system so that you say delete grain from the ration -- semi starve the animal it has a very significant effect in depressing milk production or any poisonous or toxic factor that might be in the feed . (Tr. 788; Ab. 106)

Defendant's witness and veterinarian , Dr. Roper , also testified that there were a number of reasons for milk production fluctuation including inadequate feedings , insufficient milkings , the cows' hooves being sore , a dog chasing the cows all night , the cows being in heat or menstruating , the cows contracting pneumonia or a hardware disease , and innumerable other reasons . (Tr. 269 , 570; Ab. 65)

One of the defendant's milkers , Mr. Ed Aragon , testified that consistent feeding and milking programs are important in maintaining milk production , as is a consistent personal relationship between the milkers and the cows . Mr. Aragon readily admitted that milkers were usually to blame for milk production fluctuation stating:

MR. ARAGON: If you can't keep your production up on your cows your employer -- you can't remain with him. He can't keep you because in my experience with milkers and cows, about 90 percent milk production is a milker, the man that pulls the milk out of the cow is 90 percent of it as far as I can see. (Tr. 585; Ab. 68)

During the time period in question, Mr. Fitzgerald had employed several different milkers, including Mr. Aragon (Tr. 583; Ab. 63; Tr. 594; Ab. 69), Mr. Dallas Schrimmer, who had "very little experience as a milker" (Tr. 641; Ab. 81) and Mr. Harvey Cook. (Tr. 679; Ab. 89) At times when the herd was still located in American Fork, Mr. Fitzgerald and his wife also milked the cows. (Tr. 583; Ab. 63) In addition to the changes in milkers, defendant's herd of 80 cows was moved from American Fork to Elberta where new cows were introduced into defendant's herd until it numbered approximately 300 cows. Defendant then changed the milking program from twice a day milking to three time milking, and, correspondingly, defendant's feeding program was adjusted so that the cows' consumption of grain and hay would be markedly increased. Testimony was received that all such changes in the daily routine of a dairy herd could cause fluctuations in its milk production.

With respect to the general causes of bloat problems, Dr. Huber testified that:

. . . the most common cause of bloat is a legume-type bloat; and this bloat results from consumption of alfalfa primarily; could be in the pasture, green chop or hay form. Generally in the green chop will tend toward more bloat than the dry hay but it has been reported on a number of occasions where certain alfalfa from that are in the dry hay form and will cause bloat. (Tr. 884; Ab. 204)

During the times of purchase and use of plaintiff's 14% dairy feed, defendant also fed his cows as much as 45 pounds of alfalfa per day. Further, he admitted that he had had a severe bloat problem in June 1972 which he attributed to the green chopped alfalfa he had been feeding to his cows. (Tr. 1020; Ab. 141) In addition to the alfalfa, defendant fed his cows corn silage during the relevant times of purchase of 14% dairy feed.

Relative to general poor health conditions of a herd as resulting in milk production loss, the testimony of Curtis Solomon and Ed Aragon revealed that the defendant's cows had rough, straggley coats and dull, droopy eyes which is a symptom of infection in cows. Defendant's cows were unresponsive, hard to handle and listless, had evidence of mucus in their droppings and were "in a general poor health condition." (Tr. 426; Ab. 40) Defendant also testified that his cows suffered from udder problems, mastitis, trychosis, pneumonia and other things, in addition to the problems with bloat that he is claiming losses for. (Tr. 1145; Ab. 184)

Attempted Negation of Possible Causes of Alleged Damage to Defendant's Herd -- Other than Contaminated Feed

Defendant and his employees testified that during the two periods of time in question the dairy herd suffered from such various problems as uneasiness, regurgitation, excessive salivation, bloat, staggering, abortion of their calves, general poor health and dull eyes. (Tr. 1013-1014; Ab. 140; Tr. 426; Ab. 40; Tr. 590-597; Ab. 69, 70; Tr. 647-648, 654-667; Ab. 82-87) The only testimony presented linking such symptoms to the consumption of excessive amounts of

urea by dairy cows was that of defendant's witness, Dr. Robert Gardner, and to a limited extent, that of defendant's veterinarian, Dr. Roper. (Tr. 695; Ab. 94-95; Tr. 560; Ab. 63)

In an attempt to eliminate other feed stuffs fed by defendant to his cows as causative of the damages, evidence was presented showing that the alfalfa, corn silage, barley and water used by defendant on his farm in Elberta were tested and analyzed in 1974, at the Woodson-Tenant Laboratories (Tr. 462-467; Ab. 48-49) and Edward S. Babcock & Sons Laboratories (Tr. 473-479; Ab. 50-51). All elements tested were claimed by defendant's expert witnesses to be within normal ranges for each such element, but no tests were requested or made as to the urea (NPN) content, which at trial was asserted to be the prime claimed toxic problem.

A pellet claimed by Curtis Solomon to be a 32% pellet manufactured by plaintiff was also analyzed by Woodson-Tenant Laboratories (Tr. 451; Ab. 45) and was shown to have a 24% protein content (Tr. 466; Ab. 48), but again no test to determine the urea (NPN) content of the pellet was requested or conducted. (Tr. 468; Ab. 49)

In attempting to negate other factors as possible causes of defendant's problems, a wholly hypothetical approach was employed. (Tr. 738-742; Ab. 106-107) Referring to defendant's milk production as reflected on Exhibit 136, a chart prepared by defendant, Dr. Gardner testified as follows:

Q (By Mr. Blonquist): So my question is, do you have an opinion as to whether that decline is related to weather conditions?

A (By Dr. Gardner): Yes. I do.

Q Would you please tell the jury what your opinion is?

A According to experience I have, the observations made on dairy herds, this is not a seasonal change as far as the depression of milk production.

Q And that's for the reason you have stated?

A Right. (The cows usually start increasing their milk production during the fall months.)

Q Doctor, I would like you to assume . . . there was one sick cow in the herd. Do you have an opinion as to whether the sickness of the herd would be responsible for the decline?

A Yes.

Q What is that opinion?

A Obviously not a problem if it had been only one cow been diagnosed as sick.

Q Assume for a moment, Doctor, during that period that the owner had the hoofs of their herd trimmed; do you have an opinion as to whether that would cause the decline shown?

A Yes.

Q What is that opinion?

A If the herd was all trimmed at once you would expect maybe a period of two weeks where for the animals to recover if the hoofs have been trimmed so close as that they were tender and painful for the cow to walk; otherwise, you couldn't expect a prolonged problem. So I wouldn't in this case, the evidence would suggest there was not a hoof trimming problem.

Q Doctor, assume that during this period the same person milked the cows during that time; did you have an opinion as to whether or not that decline would be responsible to the milker, responsible for that decline?

A Yes.

Q What is that opinion?

A I would discount that as an observation to the probable cause of this decline.

Q You would discount it, but not eliminate it, sir?

A Not eliminate it.

Q Doctor, if, during this period in question the herd consumed 14 percent dairy feed that had an inconsistent ingredient of protein equivalent from non-protein nitrogen; by that I mean high one month and low the next; do you have an opinion as to whether or not the decline shown on that exhibit would be a result of the inconsistencies in protein equivalent from non-protein nitrogen?

A Yes, if I know what the inconsistency is.

Q All right. Doctor, do you have an opinion as to whether or not the decline shown there would be a result of excess urea in the feed, if the feed consumed by the cows during that month contained 350 pounds of a 32 percent concentrate that contained 26.8 percent protein equivalent derived from non-protein nitrogen, consumed by the animal at the rate of 32 pounds per day?

A Is this being offered to the cows every day during that period?

Q Well, no. With no acclimation but at the outset and then inconsistent amounts from that time on?

A Yes. I have an opinion.

Q What is that opinion?

A I think it's very probable for this to have a toxic effect on these cows and also reduce their milk production.
(Tr. 738-742; Ab. 106-107)

There was absolutely no evidence offered to support the hypothetical assumptions suggested by counsel to the expert witness. No actual evidence was offered or received as to weather conditions, sickness among the herd or hoof trimming. Apart from the hypothetical assumptions which were presented to the jury,

no evidence was before the jury as to the aforesaid matters. The most damning evidence of the assumptions entertained by the expert witness, relating to alleged consumption of high protein and inconsistencies, was really set forth in the question by counsel (which in substance and effect constituted his "testimony"), and was never tied to fact or evidence.

Irregularities Concerning Evidence Relating to Damages

Counsel for defendant prepared certain exhibits which were a composite in summary form of several items, including matters allegedly compiled from internal revenue records and other sources never offered or received in evidence. These exhibits related fundamentally to damages:

Exhibit 146-D - "Cows Sold for Beef" - Claimed damage of \$63,400.00

Exhibits 161-D and 162-D - "Reasons Cows Ate More Grain" Claimed damage of \$159,638.00

Exhibit 163-D - "60 Retarded Cows" - Claimed damage of \$98,600.00

Exhibit 138-D - "Death Losses" - Claimed damage of \$33,812.00

Exhibit 139-D - "Milk Losses" - Claimed damage of \$136,330.55

All of the aforesaid exhibits were refused after substantial discussion before the jury. (Tr. 1153-1156; Ab. 186-187) The defendant Fitzgerald thereafter was permitted to testify, holding in his hand each of the aforesaid exhibits, and reading the materials verbatim into the record. As to the matter of cows allegedly culled from the herd and sold for beef because of the mal effects of plaintiff's feed.

Mr. Blonquist on several occasions attempted to introduce Exhibit 146-D. The Court admonished that the defendant Fitzgerald should not read from the document:

THE COURT: Now, Mr. Blonquist, you are asking him again now to read from this proposed exhibit.

MR. BLONQUIST: Yes, Your Honor.

THE COURT: The Court would not permit him to do that because he is reading from a document that has been marked as an exhibit which has not yet been received.

MR. BLONQUIST: Correct.

THE COURT: And at such time as it is received, the exhibit will speak for itself and there's no need for this witness to read that document to the Court.
(Tr. 1081; Ab. 156)

Objection was made that the exhibit was based in part upon records not in the courtroom (Tr. 1083; Ab. 157), and after some discussion the court sustained the objection. (Tr. 1084; Ab. 157) The matter was again argued later and the objection again sustained. (Tr. 1153-1156; Ab. 186-187)

Notwithstanding the prior rulings, defendant was thereafter permitted to take the refused exhibits and read them verbatim into the record. This was done without further objection of counsel, on the supposition that all rights had been reserved. Defendant Fitzgerald was permitted to take the documents and "start at the front and go clear through." (Tr. 1158; Ab. 188) At first this recitation by defendant appeared to be accomplished from memory, but a comparison of the record to the refused exhibits makes it clear that the information from the exhibits was read verbatim into the record. (Tr. 1042-1084; 1157-1167; Ab. 145-147, 187-192) The court suggested a procedure to expedite testimony by requesting

that defendant refer only to certain columns on Exhibit 146 (Tr. 1162-1163; Ab. 190), and with this apparent judicial sanction, counsel for defendant acknowledged that Fitzgerald had "just completed reading."

Similarly, other exhibits relating to defendant's damages were not only summaries of DHIA records previously admitted into evidence and of defendant's oral testimony, but also based upon alleged income tax returns (which were repeatedly referred to, but never presented in court or admitted in evidence). The court properly refused the proposed exhibits on the basis that such exhibits were summaries of records not previously introduced into evidence. (Tr. 1156; Ab. 187) For instance, as to Exhibit 139-D, Mr. Fitzgerald admitted that the death losses being asserted had been set forth for tax purposes "in my tax folders there." (Tr. 1051; Ab. 148) Those tax folders were never offered or admitted. In arriving at the values for alleged loss of milk production, Mr. Fitzgerald said:

. . . I have in my tax folders, a ticket from each month from the company I sold my milk to, which gives the value they paid me for the milk for that month.

Q And do you have those with you?

A Yes. There, in that whole bunch of brown envelopes right in front of you.

MR. BLONQUIST: (Indicating.)

MR. CONDIE: You're referring to Count Number Two now?

MR. BLONQUIST: Count Number Four.

MR. CONDIE: Thank you.

THE WITNESS: This is a ticket from Beatrice Foods-Meadow Gold Dairies which has so many pounds of milk at \$9.52 carton weight and that's a hundred pounds. I have one of these for each of the months for every year I produced milk. (Indicating.)

MR. BLONQUIST: All right. The use of the DHI record on those Beatrice Food stubs were then used by you in the preparation of the computation that you are about to give, is that correct?

A That's correct.
(Tr. 1051; Ab. 148)

Relating the aforesaid to how he had computed his damages, Mr. Fitzgerald again referred to the tickets, brown folders, and other records which were never introduced as being the basis for the alleged damages.

. . . After I had taken the number of cows times the loss per day and got a total number of pounds lost that month; I took that figure, times the figure off of these things you just referred to in the tax notices that invoice slip of how much I got for milk for that month, and I come up with a figure at the end of that of the total loss in dollars per month that I had lost on milk losses for that month. (Tr. 1052; Ab. 148)

The court reserved its ruling as to admissibility of each of the exhibits which had been constructed from records above described, and finally rejected all of the exhibits. (Tr. 1156; Ab. 187)

Notwithstanding such background, defendant was thereafter permitted to testify and read from each of the refused exhibits, and in closing argument, counsel for the defendant referred to the pile of Beatrice Food tickets which were stacked upon counsel table as evidence of defendant's damages. That all of this was confusing to the jury is evident from the fact that during the deliberations the jury sent a note to the judge requesting identification of the exhibit numbers which related to the Beatrice Foods tickets and damages. Judge Hall communicated to the jury that in fact those tickets had never been introduced as exhibits.

Evidence of Calculation of Damages

Evidence presented relating to defendant's damages as set forth in his Court claim is as follows:

COUNT I. "Cow Deaths." Defendant testified that 42 of his cows died as a result of the consumption by those cows of feed negligently manufactured by plaintiff, at a loss of \$33,600.00. (Tr. 1042-1048; Ab. 145-147) Defendant derived this figure by searching his memory and tax records which never were introduced into evidence. (Tr. 1042-1049, 1149; Ab. 145-187) Thereafter, defendant admitted that he did not have any records which would show the cause of death for the cows he is claiming damages for. (Tr. 1122-1131; Ab. 180, 181) The DHIA records, as admitted into evidence, indicate that twenty-two of defendant's cows died during the periods of time in question. (Tr. 333; Ab. 22) The DHIA records do not reflect the cause of death. Mr. Withers did, however, testify that under various circumstances a cow could come into a herd and die prior to being included on the DHIA records. (Tr. 356-361; Ab. 25-26) Defendant's hired milkers testified as to even fewer cows that died of bloat. Mr. Aragon who worked for the defendant from May 1971 to July 1972 (Tr. 583; Ab. 63) and again from April 1973 to October 20, 1973 (Tr. 594; Ab. 69) testified that he remembered three cows having died from bloat during a bad onset of bloat, when 7 or 8 cows had bloated; this was between May 1971 and July 1972 at American Fork. (Tr. 610; Ab. 72) Another milker, Dallas Schrimmer, who worked for the defendant from September 1972 to August 1974 and from April 1975 to the present (Tr. 641; Ab. 81) testified only as to two cows which died of bloat during his employ at defendant's dairy.

(Tr. 661-663; Ab. 86) Likewise, Harvey Cook, who milked defendant's cows from January 1, 1974, to the present (Tr. 679; Ab. 89) testified as having seen only two cows in defendant's dairy herd die of bloat. (Tr. 680; Ab. 90)

COUNT II. "Cows Sold for Beef because of Non-Productivity." The defendant testified that it was necessary for him to "cull" 136 cows at a loss of \$63,400.00 because such cows were no longer productive. Approximately one-half of the 136 cows sold for beef were so sold because they could not get pregnant. The remaining cows were sold due to "stress" and "bloat." (Tr. 1076-1080; Ab. 155-156; Tr. 1133-1142; Ab. 182-183; Tr. 1158-1167; Ab. 188-192) Defendant expressly testified that the information which he compiled on proposed Exhibit 146, was taken from the DHIA records (Tr. 1133; Ab. 182) which indicated the cow number, production level, and percentage of the herd. Defendant also stated that he had no records which show why any particular cow was culled during the time periods he used plaintiff's feed. (Tr. 1140; Ab. 183) Thereafter defendant testified that in listing the cows he sold for beef, he reviewed the DHIA records, his memory, and "other sources which (he) deems to be reliable." (Tr. 1158; Ab. 188) The DHIA records for the periods of time in question indicate that a total of only 87 cows were sold for beef. (Tr. 334; Ab. 22)

COUNT III. "60 Retarded Cows." Defendant testified that he incurred damages of \$98,600.00 due to the additional costs required to maintain his cows beyond the normal lactation period. In determining his measure of damages, defendant multiplied the number of days beyond 305 days each cow was in lactation, by \$4.00 per day for the first period of his feeding plaintiff's feed and \$5.10 per

day for the second period of his feeding plaintiff's feed. Defendant stated that the daily values represented his cost of labor, feed, housing, utilities, etc. (Tr. 1065-1069; Ab. 152-153; Tr. 1074-1076; Ab. 154-155; Tr. 1157-1158; Ab. 188) Mr. Gerald Withers, defendant's witness, testified that a lactation period is based on 305 days, although, it is not unusual for a cow to milk more or less than 305 days. (Tr. 302; Ab. 17) Defendant, however, claiming that his cows could not get pregnant because of plaintiff's feed, computed his damages on a per day maintenance charge for each day in lactation over 305 days. In addition, defendant's witness Dr. Gardner, testified that there is conflict of opinion among leading authorities on the subject as to whether urea (NPN) has any relationship whatsoever to the reproductive process, calving, retained placentas and natural abortions. (Tr. 735; Ab. 104-105)

COUNT IV. "Stomach Upset and Stress Resulting in a Decline in Milk Production." Defendant claims that as a result of feeding plaintiff's grain to his dairy herd, the cows suffered stomach upset and stress, causing a decline in milk production and damages in the amount of \$124,053.00. There was testimony by expert witnesses Gardner (Tr. 714-715; Ab. 100) and Huber (Tr. 862; Ab. 198) that under test conditions if a cow consumed .4 pounds of urea per day, such amount of urea would be sufficient to cause a decline in milk production. Both Drs. Gardner and Huber testified that none of the State Chemist reports on 14% dairy feed contained a sufficient amount of urea to cause the problems in declining milk production defendant complained of. (Tr. 795; Ab. 121; Tr. 877; Ab. 202) Defendant states that he used a chart (Exhibit 136) and the DHIA records to determine

his milk production losses per month and then he multiplied the total number of pounds of milk lost per month by invoice figures, such as the Beatrice Foods-Meadow Gold Dairy receipt, which he claims he maintained for his tax records, to determine the value of his claimed loss of milk production. The tax receipts and invoice-receipts were never introduced into evidence. In addition, the poundage figures as to defendant's claimed loss of milk production are unsupported.

COUNT V. "Increased Costs to Maintain Production Level." Defendant testified that he incurred additional expenses as a result of the consumption of plaintiff's feed in the amount of \$20,000.00. He testified that his claimed damages included the increased costs of milking three times a day, extra labor costs, the cost of extra utility use, such as gas and electricity, the costs of additional wear and tear on machinery, the cost of bloat guard, and the cost of artificial insemination. (Tr. 1061-1062; Ab. 151; Tr. 1109-1110; Ab. 163-164; Tr. 1168-1169; Ab. 192-193) No receipts, invoices, cancelled checks, business records, utility bills, etc. were introduced into evidence to support his claim for \$20,000.00 in increased costs and expenses incurred as a result of feeding plaintiff's grain. A large part of defendant's claimed damages with respect to converting to three-times milking was based upon percentages in an article he had read in a Dairy Herd Management magazine. (Tr. 1062; Ab. 151) The Dairy Herd Management magazine article which defendant relied upon was not offered into evidence.

COUNT VI. "Cows Ate More Grain." Defendant claims that his dairy herd consumed a greater volume of feed to compensate for the protein deficiency of plaintiff, resulting in \$64,000.00 of damages. Defendant testified that he was feeding his cows additional grain in an attempt to increase their production, but

that because the cows were sick, they could not utilize the grain they ate and their milk production was lower. (Tr. 1103; Ab. 162) In calculating his damages, defendant testified that the United States Department of Agriculture publishes a ratio of the pounds of milk produced per pounds of grain consumed. During the periods of time in question, one pound of grain was necessary for a cow to produce three pounds of milk according to the ratio published by the U. S. Department of Agriculture. No evidence of such published ratio was offered at trial. Defendant determined that, on the average, each cow in his herd consumed 26 pounds of grain per day by averaging the number of pounds of grain he ordered from plaintiff and dividing that amount by the number of cow days. (Tr. 1111; Ab. 164) Defendant admitted that the 26 pounds of grain consumed per cow "on the average" was calculated only with respect to a three month period during which defendant purchased 280 tons of grain, not with respect to the total time that he was purchasing plaintiff's feed. The consumption of grain by dry cows, calves and springing heifers is not included in the calculation of the 26 pound average figure. Defendant admits the average would be lower if such grain consuming cows were included in his computations. (Tr. 1152; Ab. 186) Further it must be noted that there is controversy as to how many pounds of grain defendant's cows consumed daily. The consumption of grain varied anywhere from 5 to 32 pounds of grain per cow per day. (Tr. 1152; Ab. 186) Defendant determined the amount of grain per day necessary to support his actual milk production using the 26 pounds figure (Tr. 1111; Ab. 164) and computed his damages therefrom.

COUNT VII. "Overpayment to Plaintiff due to Protein Deficiency in Feed." Defendant claims \$57,420.00 in damages due to an overpayment for feed

deficient in crude protein. In calculating his damages, defendant averaged the crude protein content reflected on the State Chemist reports on 32% cattle supplement and 32% concentrate from 1970-1975. Upon determining a percentage deficiency in protein, defendant multiplied that figure by the cost of protein per ton, and then arrived at a figure which he considers to be an overpayment to IFA because of a protein deficiency. (Tr. 1093-1102; Ab. 160-162) Thereafter, defendant admitted that in averaging the claimed deficiency in crude protein he did not offset excesses of protein against deficiencies nor did he average out the protein content of 14% dairy feed, during the time period in question, which is the type of feed purchased by defendant. (Tr. 1152; Ab. 186)

LEGAL ARGUMENT

POINT I.

INSTRUCTION TO THE JURY AND RECEIPT OF EVIDENCE RELATING SOLELY TO THE ISSUE OF ALLEGED PUNITIVE DAMAGES RESULTED IN CONFUSION TO THE JURY AND PREJUDICIAL ERROR

Evidence which admittedly could not be used to show contamination of the feed purchased by defendant Fitzgerald bearing upon the seven substantive Counts of the Counterclaim was admitted time and time again over objection of counsel. On several occasions, counsel for defendant Fitzgerald stressed in front of the jury the relevance of such evidence as bearing solely upon the issue of punitive damages in connection with notice and knowledge. (Tr. 502; Ab. 57; Tr. 817; Ab. 126) The court apparently acquiesced in the limitations asserted by counsel for Fitzgerald, but in many instances that was not clear and many of the exhibits in dispute were admitted into evidence generally. (See Tr. 270; Ab. 12; Tr. 710, 711; Ab. 99.)

The adverse cumulative effect of such evidence undoubtedly was very damaging. The jury refused to return a verdict on punitive damages, but assessed enormous general damages. The admission of particular exhibits months before and months the relevant time period, and concerning feed sold at other places, undoubtedly contributed to the large jury award. Examples of "tainted" exhibits which well could have unduly influenced the jury, all well beyond the time period and consequently relevant, if at all, only to punitive damages, are Exhibits 12-D, 13-D, 15-D, and 149-D. One of the test reports within Exhibit 149-D on a small sample of 32% Dairy Concentrate pellets taken at St. George on May 4, 1970, reads that: "This label is false and misleading." It was never made clear to the jury as to that sample, or any of the aforesaid exhibits, that such could not be considered in making determinations of negligence, proximate cause, or assessment of damages other than punitive. (See pp. 9-12 of this Brief, supra.)

The court recognized at the conclusion of the trial upon submission of the case to the jury that some of the exhibits could be confusing to the jury. In this regard, Judge Hall acknowledged that the jury ought not to be allowed to speculate or give weight to certain exhibits on the issues of excess urea, inconsistent protein, deficiency in crude protein, negligence or otherwise than specifically as related to the question of notice and punitive damages, and gave the following instruction:

You are instructed that certain exhibits hereinafter enumerated have been offered and admitted into evidence by the court as bearing upon the question of notice to the plaintiff of a deficiency in its feed. You are instructed that said exhibits should not be considered for any other purpose or as bearing upon any other issue and do not constitute proof of any other claim made by the counterclaimant in this case. (Instruction No. 20) [Emphasis added.]

The court failed thereafter to enumerate the exhibits so restricted. (See pp. 11-12 of this Brief, supra)

The aforesaid instruction could only have contributed more to the confusion of the jury. It was an insufficient curative instruction and could not have helped the jury to identify which exhibits they were being told not to consider as proof of other than punitive damages.

A. The Admission of Exhibits Remote in Time and Place was Error Because of the Risk of Confusion

In Rule 6 of our Rules of Evidence, it is recognized that evidence may be admitted for one purpose only, but that the court has a duty to restrict such evidence to its proper scope and to instruct the jury accordingly. In this regard, it is Hornbook law that evidence incompetent for one purpose may be proper for another purpose. (19 Am. Jur.2d, Evidence, § 262) However, since the jury may erroneously use evidence proper for only a restricted purpose for other purposes, it is error to receive such in the first place if the risk of confusion is so great "as to upset the balance of advantage of receiving it." (Id.) This proposition, that initial receipt of such evidence may constitute error as a matter of law where the circumstances of confusion are probable, has been recognized by many courts, including the Supreme Court of the United States. Thus, in Waldron v. Waldron, 156 US 361 (1894), the Court stated:

There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case in its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the Court. (Id. at 383) [Emphasis added.]

Accord, Shepard v. USA, 290 US 96 (1933), where in a criminal case, but with equal applicability to civil cases, the Court said:

It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. . . . When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out. Thayer, Preliminary Treatise on Ev. 266, 516; Wignore, Ev. Sections 1421, 1422, 1714. (290 US at 104) [Emphasis added.]

B. Failure to Instruct with Clarity as to the Restricted Use Constituted Prejudicial Error

This Court has long recognized the danger inherent in receipt of evidence which was admissible only for a special purpose, and early adopted the universally followed rule:

When evidence is introduced which is not admissible except for a special purpose, the jury should be instructed upon the request of the party prejudiced thereby, to limit its use to that purpose only; and a refusal to so instruct upon request is reversible error, when the evidence, if not explained, is such as might be misapplied so as to exercise an improper influence upon the jury in respect to the main issue to the injury of the party against whom the evidence was adduced. Neilson v. Nebo Brown Stone Co., 25 Utah 37, 69 Pac. 289 (1902).

This is a well settled rule in both civil and criminal cases. Where, as in this case, objection was made to receipt of the challenged exhibits, the court has a duty to issue proper instructions limiting the use of the evidence in question to proper issues:

Evidence which is incompetent as to one issue, but admissible as to another, cannot properly be considered for its bearing on the former issue. Such evidence should be offered by a party and received by the court ONLY for the specific purpose for which it is competent. The court should limit its application by proper instructions at least where requested to do so or when objection is made to the introduction of evidence. 29 Am. Jur.2d, Evidence, § 263 at 311. [Emphasis added.]

But the damning effect of the situation in the case at bar is even worse and stronger than in the cited authorities. Here, the court recognized the necessity for a curative instruction, and undertook to set forth an admonition to the jury in order to guide it in Instruction 20 and to require exclusion of "certain exhibits" from consideration "for any other purpose" than the question of notice per the punitive damage issue. But this Instruction did not help. It further confused. What exhibits were so excluded? Even if the jury could recall the maze of testimony over the nine day trial, the circumstances as to how the prejudicial exhibits were received into evidence, after objection, only would have added to the confusion.³⁾

3) Previous admission of remote exhibits into evidence, often without admonition at the time of receipt into evidence as to the purpose received, had to be confusing. For instance, some of the most objectionable exhibits were introduced, objected to, and received generally. (See Exhibits 4-D, 5-D, 11-D, 12-D.) Others were introduced, objected to, ruling reserved and later admitted into evidence generally. [Exhibits 13-D, 14-D, 15-D, 16-D, 89-D, 90-D, 92-D, 94-D, 95-D, 99-D, 100-D, 104-D, 110-D, 111-D, 112-D, 113-D, 114-D, 115-D, 125-D, 126-D, 127-D, 128-D (test numbers 6263 and 4090), 129-D (test numbers 9066, 2779, 2746, 4804) and 130-D (test numbers 3333, 5204, 5624, 5722, 6722, 9061, 75-2833 and 75-3670).] In other instances, objectionable exhibits bearing conceivably only upon punitive damages were introduced, objected to, ruling reserved, admitted into evidence, and later in discussion or in connection with testimony of some other witness, restricted to the issue of notice or knowledge. The court ultimately sustained objection as to general use of Exhibit 12-D. (Tr. 710, 711; Ab. 99) A similar restriction was also placed on Exhibit 15. (Tr. 704, 711; Ab. 98, 99) In discussions before the jury during the offering of remote exhibits, after objection by counsel for plaintiff, defendant's counsel expressly stated that such exhibits were offered for the sole purpose of showing notice or knowledge as it relates to the punitive element of defendant's claim. [See Exhibits 2 through 16 at Tr. 271; Ab. 12; Exhibits 89 through 130 at Tr. 502, 504; Ab. 57; and Exhibit 149-D at Tr. 817; Ab. 126] (See pp. 6-12 of this Brief, supra.)

POINT II.
INSTRUCTION TO THE JURY ON THE ISSUE OF
NEGLIGENCE CONSTITUTED PREJUDICIAL ERROR

This case was pleaded and evidence presented solely on the theory of alleged negligence. The Amended Counterclaim set forth seven counts of negligence, each claiming damages "as a direct, legal and proximate result" of "feed negligently produced." Count VIII also repeated the allegations of negligence, but was for punitive damages because of alleged "willful and intentional" conduct of selling feed after being informed that the label was "false and misleading." At the conclusion of the case in chief, in argument in response to Motion for Directed Verdict, counsel for defendant made it abundantly clear that the sole theory of recovery was negligence, and that the relevant considerations were (1) negligence, (2) causation, and (3) damages. (Tr. 840-851; Ab. 173-178) However, in submission of the case to the jury, in the Special Interrogatories and the Special Verdict and in instructions, there was an apparent switch in that the jury was asked to determine (as the sole basis for any possible liability) whether the feed delivered by plaintiff "contained levels of urea and protein inconsistent with its guarantee." (R. 140) Then, as though the case were based upon warranty or some theory of absolute liability, the court instructed that if the jury were to determine from a preponderance of the evidence (keep in mind that there was no direct evidence and that such preponderance had to be based upon an inference both as to negligence and causation from the circumstances - see Point III. A, at pp.39-40 of this Brief, infra) that the feed in question was manufactured in violation of the statute, there was negligence per se as a matter of law. (See the Court's Instructions 16 and 17 at pp. 12-13, of this Brief, supra.)

**A. Submission of the Case to the Jury on the Theory of Guarantee
Was Confusing and Constituted Error**

This court has recognized the applicable general rule that submission of the case to the jury must be confined to the issues pleaded and the evidence presented:

Instructions should be confined to the issues presented by the pleadings and the evidence. It is improper to give an instruction announcing a naked legal proposition, however correct it may be, unless it bears upon and is connected with the issues involved; and unless, further, there has been received some competent evidence to which the jury may apply it. Such an instruction tends to distract the minds of the jury from the real question submitted to them for determination. . . .

In determining the scope of its instructions, the court must keep in mind the issues made by the pleadings in the cause; and the general rule is that all instructions must be confined to those issues, and the evidence in support thereof, and that no instruction should be given which tenders an issue that is not supported by the pleadings or which deviates therefrom in any material respect. Davis v. Midvale City, 56 Utah 1, 189 Pac. 74 (1920).

Plainly, the guarantee and strict liability theories set forth in the Instructions and Special Interrogatories were not the theories on which defendant pleaded his cause of action or presented evidence.

**B. Violation of Statute does not Necessarily Constitute Negligence
Per Se and May be Considered Only as Evidence of Negligence**

As Instructions 16 and 17 were given, the question of negligence was virtually taken away from consideration by the jury, and it was instructed as a matter of law to find negligence to exist if they were to determine that the statutes in question were violated in any particular. This court has limited the effect of statutory violation in negligence cases to very narrow circumstances, and has stressed that while violation of a statute may be prima facie evidence of negligence, such does

not constitute negligence as a matter of law. Determination of negligence is a question of fact, not law. In Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62 (1964), this court noted that violation of a safety standard set by statute or ordinance may be regarded as prima facie evidence of negligence, but is subject to justification or excuse if the evidence is such that it reasonably could be found that the conduct was nevertheless within the standard of care in the circumstances. In an early case, the Supreme Court of Utah noted that when a statute is violated the effect thereof in terms of negligence presents a question of fact:

Whether to do so (violate a statute) constitutes negligence is dependent upon the facts and circumstances of the case and generally, is a question of fact, not law. White v. Shipley, 48 Utah 496, 160 Pac 441 (1916) at 444. [Emphasis added.]

To the same effect is Klafta v. Smith, 17 Utah 2d 65, 404 P.2d 659 (1965). In that case, the Utah Supreme Court reversed the lower court's ruling that the defendant was liable as a matter of law for the violation of a statute which required loaded vehicles to be securely fastened so that the cargo would not fall on the highway. In Klafta, this Court expressly held that the alleged violation of that statute did not constitute liability as a matter of law, and reiterated the principle that violation of a statute is at most prima facie evidence of negligence subject to justification or excuse.

The farreaching and prejudicial effect of Instructions 16 and 17 (as to which strenuous exception was taken) cannot be overestimated. To begin with, in order to find violation of the statutes relating to misbranding, the jury would have had to infer from questionable (incompetent?) circumstantial evidence that the

feed actually delivered or sold to Fitzgerald was contaminated, by reason of ingredients presumably mixed after shipment from a branch of plaintiff other than Spanish Fork. There is serious question as to the legal sufficiency of such evidence as a matter of law in any event. (See pp. 40 of this Brief, infra.) But arguendo, if it was proper to permit the jury to infer or speculate as to the toxicity of the specific or actual feed which was eaten by Mr. Fitzgerald's cows, was it proper to direct the jury to find negligence to exist as a matter of law if there was a violation of the statute in any particular at any time relating to the feed in question or any component ingredient thereof? Jury Instructions Nos. 16 and 17 effectively took consideration as to the standard of care away from the jury and set up the statutes as the sole measure of the standard of care and of negligence. Other than possible violation of the statutes, ⁴⁾ many other considerations were before the jury which could have preponderated against a determination of negligence if the jury had been allowed to weigh and consider all relevant evidence. ⁵⁾

4) Note that there was never presented any direct evidence that the statutes were ever violated during the time periods in question. The jury would have had to infer violation. Several exhibits which were remote in time (such as exhibits 12-D, 13-D, 15-D and 149-D) were the most likely source of such an inference. But those exhibits were (or should have been) confined to punitive damages. By Instructions 16 and 17 the Court invited the jury to look at all admitted evidence (including evidence which had been limited solely to punitive damages) in determining the possible violation of the statutes. Such constituted prejudicial error in that the jury was directed to look at "tainted" exhibits admittedly not bearing upon the issue of negligence.

5) The jury had before it much evidence from which a determination against the existence of negligence, based upon a preponderance thereof, could have been made if the issue of negligence hadn't been removed as a matter of law. For instance, the jury should have been allowed to weigh and consider the following matters in determining whether IFA's acts and conduct fell below the proper standard of care:

It is submitted that Instructions 16 and 17 invaded the province of the jury and in effect erroneously misconceived the case as one of warranty or absolute liability for statutory violations.

. Of the 77 State Chemist Reports admitted into evidence, 35 were of feed samples taken during the relevant time periods, and only two indicated a presence of excess urea (NPN). (Six test reports indicated an excess of urea (NPN) in the 42 samples before and after the relevant time periods.) Accordingly, there was much more affirmative evidence of properly manufactured feed than of possible contamination. (See also footnotes 1 and 2 at pp. 5-6 of this Brief, supra.)

. Blair Thomas testified that he purchased 14% dairy feed from plaintiff's Spanish Fork branch during the same time periods that defendant was using IFA feed, without any of the symptoms complained of by defendant appearing in his dairy herd. (Tr. 920-922; Ab. 214-215)

. Ferris Fitzgerald testified that he fed each of his cows approximately .7 pounds of urea per day, without any of the symptoms complained of by defendant. (Tr. 778, 796; Ab. 117, 121) Defendant's cows would not have consumed that much urea per day even if they ate only the feed reflected on the State Chemist Reports showing the greatest urea concentration.

. Exhibits 58-P - 63-P indicate that during the time period that defendant was feeding his cows plaintiff's feed, the yearly milk production of his dairy herd increased from 12,584 pounds of milk per cow (372 pounds of milk per cow less than the Salt Lake County average) to 14,675 pounds of milk per cow (1,688 pounds of milk per cow more than the Salt Lake County average).

POINT III.
EVIDENCE OFFERED AND RECEIVED WAS INSUFFICIENT
AS A MATTER OF LAW TO PROVE THAT PLAINTIFF'S
NEGLIGENCE PROXIMATELY CAUSED DEFENDANT-
COUNTERCLAIMANT'S DAMAGES

Defendant had the burden to show from a preponderance of evidence (1) that plaintiff manufactured and sold to defendant feed which was harmful and defective, in that it contained an excess of urea, a deficiency in crude protein, or inconsistent protein levels contrary to the general duty owed by plaintiff to all dairymen who purchased its feed, to sell feed which would not harm dairy animals; (2) that there was a causal connection between the alleged harmful feed and the deaths, sickness and loss of production among defendant's dairy herd; and (3) that defendant suffered damages as a result of feeding his cows such harmful and defective feed, and the amount of such damages. Each of the foregoing elements must be established by prima facie evidence before the case could be submitted for jury consideration. But defendant's case was built entirely upon circumstantial evidence in order to create inferences. Circumstantial evidence presented was relied upon not only to create the inference of negligence but also to create the inference of causation.

It is submitted that as to each element there was an insufficiency of proof as a matter of law.

A. Plaintiff's Motion for Directed Verdict Should Have Been Granted as a Matter of Law

At the conclusion of defendant's evidence on the Counterclaim, plaintiff moved for a directed verdict. (Tr. 829; Ab. 165) This matter was extensively argued. (Tr. 829-850; Ab. 165-178) It is submitted that at the time this motion was filed, the evidence before the jury of negligence, proximate cause and damages was

clearly insufficient as a matter of law. The trial court was inclined to grant the motion and commented as to the non-existence of clinical tests relating to the feed in question. (Tr. 840, 850; Ab. 78) The matter was thereafter argued upon the basis of two Utah cases thought by the court to be controlling and the motion was denied. The cases in question were Farmers Grain Coop. v. Fredrickson, 7 Utah 2d 180, 321 P.2d 926 (1958) and Park v. Moorman Mfg. Co., 121 Utah 339, 241 P.2d 914 (1952). It is submitted that the court misapplied those cases to the facts of this case, and erred in failing to distinguish those cases and regarding them as controlling. Those cases, and other relevant authorities, are discussed in detail in connection with Point III. D of this Brief concerning insufficiency of evidence as relating to proximate cause.

As to law supporting the proposition that the motion for directed verdict should have been granted, this Court has recognized that a directed verdict is proper where the proof fails to disclose any controversy as to controlling facts or where there is a lack of proof supporting one or more of the material elements of the cause of action asserted. Flynn v. W. P. Harlin Construction Co., 29 Utah 2d 317, 509 P.2d 356 (1973).

B. Insufficiency of Circumstantial Evidence to Create Inference of Negligence

It is submitted that the evidence presented as to the non-punitive counts bearing upon negligence was insufficient as a matter of law to create the inference of negligence.⁶⁾ Arguendo, however, that the jury could have inferred negligence

⁶⁾ Defendant failed to establish a prima facie case of negligence with respect to plaintiff's breach of duty in the following particulars:

1. No direct evidence was introduced to show that the IFA 14% dairy feed consumed by defendant's cows, contained an excess of urea (NPN), a deficiency of protein or an inconsistency in the amounts of protein. In fact both expert witnesses Drs. Gardner and Huber stated that none of the feed analyzed in the State Chemist Reports on 14% dairy feed during the time periods in question would cause the type of problems complained of by defendant. (Tr. 795; Ab. 121; Tr. 877; Ab. 202)

2. If the State Chemist Reports prior and subsequent to the pertinent time periods in question were admitted solely for the purpose of notice as related to Count VIII on punitive damages, such reports could not have been considered for establishing a prima facie case of negligence as to Counts I through VII. Such remote exhibits cannot be used to infer that the feed that defendant's cows ate was necessarily defective, harmful, or substandard merely because, at various points in time before and after defendant used plaintiff's feed, the State Chemical Reports indicated that there were feed samples taken from branch offices of IFA other than Spanish Fork which differed from the contents of the feed as set forth on the label and that plaintiff had notice thereof.

3. Disregarding all remote State Chemist Reports, only two such reports (Exhibits 116-D and 130-D, test number 9870), show excessive amounts of urea (NPN) sufficient to cause the problems complained of only if certain assumptions are made relative to the weight of the cow, the amount of grain consumed, the lack of intake of other food matter, the absence of an acclimation period, the use of 350 pounds of the 32% supplement per ton of 14% dairy feed, and the absence of such factors as seasonal changes, disease among the herd, hoof trimming, and a variety of other possible causes of the problems complained of by defendant. (Tr. 707, 736, 751, 902; Ab. 98-105, 110, 209) Furthermore, those two State Chemist Reports cover only a very limited time period, in comparison to the nearly three year period during which defendant fed IFA feed to his cows. Exhibit 130-D (test number 9870) is a sample of 32% dairy concentrate taken at the St. George branch of IFA a few days after defendant began using plaintiff's feed and Exhibit 116-D is a sample of 32% cattle supplement taken at the Draper branch of IFA one day before defendant quit feeding IFA feed. There is no evidence that this 32% ingredient was mixed with 14% dairy feed that defendant's cows ate, and that even if it was mixed into 14% dairy feed, there is no evidence that such 32% supplement was so mixed into the feed defendant purchased throughout the entire period of time in question. In addition, there is testimony that an excess in urea (NPN) in the supplement does not necessarily follow through into the 14% dairy feed when mixed. (See Tr. 797-798; Ab. 122 and see Exhibits 99-D and 100-D, 101-D and 103-D, and 112-D and 124-D.)

4. Defendant asserted that the test reports from the State Chemist's Office plainly show that IFA was negligent, that IFA breached its statutory duty under the Commercial Feed Laws, and therefore breached its duty owed to defendant,

from all of the evidence (as distinguished from being directed to find negligence as a matter of law - see Point II. of this Brief, supra), it is submitted that the jury could not legally infer from that same evidence the existence of proximate cause. In substance and effect, this amounts to building an inference upon an inference.

C. Inference Based Upon Inference

An inference which is based solely and entirely upon another inference and which is unsupported by any additional fact or any other inference from other facts is an inference upon an inference and is universally condemned. Generally, what is meant by the rule forbidding the basing of one inference upon another is that an inference cannot be based upon evidence which is too uncertain or speculative or which raises merely a conjecture or possibility.

The Utah Supreme Court recognized the basic principle that an inference cannot be based upon an inference as early as 1916 in Denver & R.G.R. Co. v. Ashton-Whyte-Skillicorn Co., 49 Utah 82, 162 Pac. 83 (1916), wherein this Court held:

As the record now stands, however, the presumption of defendant's negligence must be based upon another presumption, namely that the cars were in the actual control and management of the defendant when they escaped. This would result in basing one presumption upon another which would be violation of an elementary rule of evidence. Id. at 85.

The rule is well stated in Splinter v. City of Nampa, 74 Idaho 1, 10, 256 P.2d 215, 220 (1953):

as an individual purchaser of its feed. (Tr. 843-846; Ab. 173-175) The State Chemist Reports outside of the pertinent time periods were introduced solely for the purpose of notice; if such notice was in fact established, such notice, alone, is insufficient, as a matter of law, to establish a probability of negligence with respect to the manufacturing of the feed that defendant purchased.

Circumstantial evidence is competent to establish negligence and proximate cause. Facts, which are essential to a liability for negligence, may be inferred upon circumstances which are established by evidence. But, where circumstantial evidence is relied upon, the circumstances must be proved, and not themselves be left to presumption or inference. (Citations.) This court has held that inference cannot be based upon inference, nor presumption on presumption. (Citations.)

The underlying principle applicable here is that a verdict cannot rest on conjecture; that where a party seeks to establish a liability by circumstantial evidence, he must establish circumstances of such nature and so related to each other that his theory of liability is the more reasonable conclusion to be drawn therefrom, and that where the proven facts are equally consistent with the absence, as with the existence, of negligence on the part of defendant, the plaintiff has not carried the burden of proof and cannot recover. (Citations.) [Emphasis added.]

See also: Annot., 95 A.L.R. 162, 181-192 (1935); Wigmore on Evidence, Third Ed. Vol. IX, at 299 (1940).

The following principles are pertinent in applying the prohibition of inference upon inference in this case:

Inference Must be Reasonably Certain and Probable.

A presumption of fact or inference cannot be raised from some proven fact unless a rational connection exists between such fact and the ultimate fact presumed. A fact can be regarded as the basis of an inference only where the inference logically flows from the fact. An inference must reasonably be drawn from and supported by the facts on which it purports to rest, and must be made in accordance with correct and common modes of reasoning. Holland v. Columbia Iron Mining Co., 4 Utah 2d 303, 193 P.2d 700 (1956). Accord, Schmidt v. Pioneer United Dairy, 60 Wash 2d 271, 373 P.2d 764 (1962); Downs v. Longfellow Corp., 351 P.2d 999 (Okla. 1960).

Premises for Inference Must be Based upon Fact

A presumption or inference of fact must not be drawn from premises which are uncertain, but must be founded on facts established by direct evidence.

In this respect, this Court recently held in Lindsay v. Gibbons and Reed, 27

2d 419, 497 P.2d 28 (1972) that:

(A) finding of causation cannot be predicated on mere speculation or conjecture, and the matter must be withdrawn from the jury's consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the defendant. [Milligan v. Capitol Furniture Co., 8 Utah 2d 383, 387, 335 P.2d 619 (1959).] Jurors may not speculate as to possibilities; they may, however, make justifiable inferences from circumstantial evidence to find negligence or proximate cause. In such instances, circumstantial evidence is sufficient to establish a prima facie case of negligence, if men of reasonable minds may conclude that there is a greater probability that the conduct relied upon was the proximate cause than there is that it was not. [Alvarado v. Tucker, 2 Utah 2d 16, 19, 268 P.2d 968 (1954).]

In the instant action, there was a mere choice of probabilities as to why Mr. Lewis was in the wrong lane of traffic, and there was no basis in the evidence upon which the jury could believe that there was a greater probability he was misled into the opposing lane rather than for some other reason. 497 P.2d at 31. [Emphasis added.]

Inference Cannot be Inconsistent with Direct and Uncontroverted Contr Evidence

A fact cannot be established by circumstances which are perfectly consistent with direct, uncontradicted and unimpeached testimony that the fact does not exist.

Bulatao v. Kauai Motors, Ltd., 49 Haw. 1, 406 P.2d 887 (1965).

Circumstances Must be More than Merely Consistent

A fact is not proven by circumstances which are merely consistent with its existence. Arterburn v. St. Joseph's Hospital and Rehabilitation Center, 551

P.2d 886 (Kan. 1976); Bottjer v. Hammond, 200 Kan. 327, 436 P.2d 882 (1968).

D. Insufficiency of Circumstantial Evidence to Create Inference of Proximate Cause

In this case, it was essential for the defendant to rule out other possible causes of the damages before the jury should be allowed to infer (speculate?) that the feed (which the jury had already been instructed was negligently manufactured, was toxic or would cause a decline in milk production if the jury should find or infer violation of statutes in any particular) was the cause of the damage. There had to be ruled out other possible causes, such as: weather; contamination of other feed and food being eaten by the animals; ineffective and inefficient milking techniques and milkers; inconsistent feeding and milking procedures; communicable disease among the herd; changing locations of the herd; and general poor health among the herd. (See pp. 13-16 of this Brief, supra.) There was absolutely no evidence presented to negate weather conditions, milking procedures, hoof trimming, or sickness and disease among the herd as causes of the damage. As a matter of fact, in apparent substitution for competent evidence, counsel for defendant only proffered hypothetical questions and assumptions set forth in those questions as the basis for supposedly negating hoof trimming, milking techniques and procedures, weather conditions and seasonal changes, and sickness. The only "evidence," which surely was not competent evidence, as to those matters is fully set forth at pp. 16-20 of this Brief, supra.

Furthermore, there was no certain evidence that, even if plaintiff's feed was somehow determined to be defective, the consumption of that feed would cause the problems complained of, unless the jury was further to assume that the cows

each weighed 1300 pounds, each ate 32 pounds of grain per day, that the cows ate nothing else, and that all of the 14% dairy feed that they consumed during the entire time period in question was manufactured using 350 pounds of that specific 32% supplement reflected on Exhibits 116-D or 130-D (test number 9870). (Tr. 707, 736, 751, 901; Ab. 98, 105, 110, 209) [Those were the only test reports from which the jury could have inferred that toxic components were mixed into the actual feed purchased.] Moreover, even if the jury did make the above assumption it would then have had to assume that the weather conditions were normal, that there was no sickness among the herd, that the cows never had their hooves trimmed too closely, that the cows did not eat anything other than the 14% dairy feed, and that all feedings and milkings were uniformly conducted each day over the entire period of time in question by the same milker. (Tr. 738-742; Ab. 106-107; Tr. 788; Ab. 106; Tr. 569, 470; Ab. 65; Tr. 585; Ab. 68; and Tr. 884; Ab. 204) (See also pp. 16 of this Brief, supra.)

Uncertain and speculative testimony plainly cannot be the basis for so essential a determination as causation. Defendant is bound to remove the issue of proximate cause from the realm of speculation by establishing facts affording a logical basis for the inference which he claims. It is submitted that in this case the evidence presented failed to meet this standard required to submit the matter to the jury. (57 Am. Jur.2d, Negligence, § 141) Consideration of relevant Utah cases demonstrates this principle, and show distinctions which place the case at bar outside the parameter of permissible inference for establishment of proximate cause by circumstantial evidence.

In Utah Cooperative Association v. Egbert-Haderlie Hog Farms, Inc.,

550 P.2d 196 (Utah 1976), a suit was brought on an open account to recover for the sale of livestock feed whereupon the buyer counterclaimed alleging that the feed was contaminated. This Court noted that the feed supplied to defendant was off-color and malodorous, unlike previous food shipments; that a chemical analysis of the food samples taken from defendant's "weather tight" feed bins showed a presence of salmonella; and that defendant's veterinarian diagnosed salmonella poisoning of his hogs. Based upon such direct foundational evidence, the court held that sufficient evidence had been presented from which a jury could reasonably find that the contamination was a direct result of plaintiff's preparation of the feed, and that contamination resulted from the processing. In so holding, the Utah Supreme Court reversed the lower court's directed verdict in favor of the seller of the feed and noted:

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. Id. at 198 [Emphasis added.]

Unlike the Utah Coop case, where the feed defendant actually purchased was found to contain salmonella, no direct evidence was introduced in this case regarding a deficiency in crude protein or excess in urea in the actual IFA feed defendant purchased. Furthermore, in the case at bar no professional diagnosis was made as to the problems with Fitzgerald's herd or as to cause of such problems. Based on the standards set forth in Utah Coop, the evidence presented in the case at bar was insufficient to support the likelihood that defendant's claimed problems were linked to the Intermountain Farmers feed.

Likewise, this Court in Farmers Grain Coop. v. Fredrickson, 7 Utah 2d 180, 321 P.2d 926 (1958) held that the evidence was sufficient to justify an inference that the feed in question was deficient and that such deficiency proximately caused the grower's damage. In that case, the grain cooperative sued to foreclose a note and mortgage executed by a turkey grower, who in turn counterclaimed for breach of warranty and negligence claiming nutritional deficiency in the feed sold to him by the cooperative. But in the Farmers Grain case, there was careful elimination of all other possible or probable causes of the damages by direct and competent evidence. Such negating causation was absent in the case at bar.

The distinctions between the Farmers Grain case and the present case before the Court are numerous and of critical importance. The evidence which was found by this Court in the Farmers Grain case to be competent evidence, from which the jury could infer that the feed was deficient and that such deficiency proximately caused the turkey grower's damages, even though no actual analysis of the feed was made, included the following:

- * All feed eaten by defendant-counterclaimant's turkeys was purchased by the plaintiff-feed manufacturer.

- * There was a "control" group of all other turkey poults from the same two hatches as defendant's poults, and from which a distinct contrast could readily be drawn when compared with defendant's poults. All poults in this "control" group were received by the turkey growers in good condition, as were defendant's poults; none of the poults in the control group were fed Farmers Grain feed; all of the poults in the control group had normal growth rates and no physical problems, whereas

defendant's turkeys had dry feathers and cankerous mouths, and were stunted in their growth.

* Six poults from the same hatch, including defendant's poults were examined at the Department of Veterinary Science at Utah State University; only defendant's poults showed a nutritional deficiency.

* An expert witness testified that defendant's brooding conditions were ideal and that based on his examination of the poults he suspected vitamin deficiency.

* All other turkey growers who purchased poults from the same hatches as defendant, none of whom used Farmers Grain feed, testified that they had no problems with their turkeys.

The evidence presented in the instant case, however, was insufficient to provide such a basis from which the jury could reasonably infer that the IFA feed which defendant purchased was defective. In the case at bar, the following distinguishing evidence was presented:

* Plaintiff's feed constituted less than one-half of the total matter consumed by defendant's cows each day. Defendant's cows also ate alfalfa and corn silage in substantial quantities. (Tr. 1014; Ab. 135)

* There was no control group to compare with the defendant's herd as to conditions, feed, or physical problems. However, Exhibits 57-P through 63-P show a comparison of defendant's milk production per cow with other Salt Lake County herds. That comparison shows that in 1970 before defendant began using plaintiff's feed, the milk production of his herd was less than the Salt Lake County average and that the production of his herd increased steadily and by 1974 exceeded the Salt Lake County average by 1,688 pounds. (See pp. 3-4 of this Brief, supra.)

* No autopsies or examinations were ever performed on defendant's cows to determine what the specific problems with his cows were. (Tr. 1121-1122; Ab. 120 180)

* Blair Thomas and Ferris Fitzgerald, other dairy farmers in defendant's locality, testified as to their use of plaintiff's feed without adverse effects. (Tr. 1178, 796; Ab. 117, 121; Tr. 920-922; Ab. 214-215) See footnote 5, p. 38 of this Brief, supra.

A factual situation similar to that in the Farmers Grain case 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 of poultry feed concerned. Moorman appealed the jury verdict in favor of Park, 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 feeding plan propounded by Moorman. In affirming the jury verdict, the Utah Supreme Court reasoned 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 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. Id. at 920. [Emphasis added.]

The evidence presented in Park v. Moorman, supra was direct and persuasive in excluding other possible causes of damages, leaving the only reasonably likely inference that the feed in question was the culprit. In the instant case, however, a much different situation is presented. Here, the evidence presented was insufficient to raise either the inference that plaintiff's feed was deficient or the inference that it proximately caused defendant's claimed damages. Dairy-farmers Ferris Fitzgerald and Blair Thomas, testified that they had used plaintiff's feed many years, including during the time periods pertinent to the present suit, but never experienced any adverse effect. (Tr. 922; Ab. 215; Tr. 930; Ab. 218)

Unlike the situation in Park v. Moorman, supra, defendant did not introduce any witnesses who could testify that they had problems when they used plaintiff's feed. Furthermore, Exhibits 57-P - 63-P, reflect yearly comparisons between the defendant's dairy during the material times in question, and the average of Salt Lake County herds, which indicate that defendant's herd was constantly increasing its production in relation to the other herds in the test area. (Directly opposite from the situation in Moorman.) As noted, defendant failed to introduce evidence to show, for example, that weather conditions and seasonal changes, changes in the herd's location, hoof trimming, disease and other obvious possible explanations did not cause a reduction in milk production of the dairy herd and the other symptoms of Fitzgerald's herd. (See pp. 13-20 of Brief, supra) Defendant's expert stated in his examination that if a cow was fed excessive amounts of urea, in the grain, the symptoms of such toxicity would be apparent from one-half hour up to three or four hours after the consumption of excess urea, whereas defendant and his help testified that his

cows were bloating from 8 to 12 hours after consuming the grain. (Tr. 780-781; Ab. 117)

The Utah Court has recognized that use of circumstantial evidence to create an inference of proximate cause is suspect and subject to scrutiny. Denver & R.G.R. Co. v. Ashton-Whyte-Skillicorn Co., 49 Utah 82, 162 Pac. 83 (1916); Lindsay v. Gibbons and Reed, 27 Utah 2d 419, 497 P.2d 28 (1972). In the case at bar, the circumstances which supposedly would create the inference of proximate cause cannot stand the light of day. The circumstances could just as well be used to create an inference that any number of things may have caused the alleged problems and damages of defendant. For instance, several witnesses testified that there were various milkers involved with defendant's cows, that the cows changed locations and that these factors could cause milk production loss. (Tr. 78; Ab. 106; Tr. 583; Ab. 63; Tr. 585; Ab. 68; Tr. 594; Ab. 69; Tr. 641; Ab. 81; Tr. 679; Ab. 89. See also pp. 13-16 of this Brief, supra.) Defendant's expert was asked to assume the directly contrary hypothesis that only one milker was involved. (Tr. 739; Ab. 107) Isn't there hereby created the logical and reasonable likelihood that changes in milkers and locations caused milk production loss? Isn't that inference just as likely as that the plaintiff's feed caused the milk production loss, particularly when the unrefuted evidence showed actual increase in milk production of defendant's cows during the periods the animals were eating plaintiff's feed as compared to previous when other feed was used? (See Exhibit 63-P and pp. 3-4 of this Brief, supra.) Similar analysis could demonstrate the reasonable likelihood and plausibility of other factors as causative of the other problems asserted by plaintiff, such as the effects of sickness in the herd, weather conditions, hoof trimming and other

E. Insufficiency of Circumstantial Evidence to Create Inference of Damages

A universally recognized principle governing the recovery of damages is that "damages must be certain, both in their nature and in respect to the cause from which they proceed." This principle has been modified to allow the recovery of damages where they are proved with only reasonable certainty; however, damages are not recoverable when the trier of facts must rely upon evidence which leaves those damages uncertain or speculative. Recognizing this principle, the Utah Supreme Court in B. T. Moran, Inc. v. First Security Corporation, 82 Utah 316, 24 P.2d 384 (1933) stated that:

There is no finding of any fact on which damages in any specific amount can rest. . . . The element of damages is so speculative, and the cause of damages so uncertain on the record before us, as to afford no basis for a judgment in favor of the defendant. Id. at 389, 390.

Accord: Security Development Co. v. Fedco, Inc., 23 Utah 2d 306, 462 P.2d 706 (1969); Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d 121 (1965); and Telluride Power Co. v. Williams, 172 F.2d 673 (10th Cir. 1949).

In the case at bar, no competent evidence was introduced upon which the jury could reasonably base an award of damages. The testimony of the defendant as to his damages was wholly unsupported, and in fact was soundly contradicted by many of defendant's own witnesses and exhibits. (See pp. 24-29 of Brief, supra.)

Item: Defendant testified that 42 of his cows died of bloat caused by urea, causing a loss of \$33,000.00. (Tr. 1042-1050; Ab. 145-147) Even assuming that there was a causal connection (a point steadfastly denied), the DHIA records admitted in evidence showed only 22 of defendant's cows as having died during the time

in question (Tr. 333; Ab. 22), and defendant's milkers could testify only as to seven cows that died of bloat. (Tr. 610; Ab. 72; Tr. 661; Ab. 86; Tr. 680; Ab. 90)

Item: Defendant claimed that he had to sell 136 cows for beef because they became unproductive as a result of consuming plaintiff's feed. (Tr. 1076-1080; Ab. 155-156; Tr. 1133-1142; Ab. 182-183; Tr. 1158-1167; Ab. 188-192) The DHIA records admitted in evidence show that only 87 of defendant's cows were sold for beef during the pertinent time periods. (Tr. 334; Ab. 22)

In several instances, the testimony of defendant as to alleged damages was based upon documents never admitted into evidence or excluded from evidence:

* Values defendant placed on the cow deaths were allegedly taken from his tax records, which were never introduced into evidence, and the only exhibit reflecting such losses, Exhibit 138, was refused admission into evidence by the lower court. (See p. 20 of Brief, supra.)

* Defendant referred to his unintroduced alleged tax records to determine the losses he sustained by reason of the sale of his cows, but the only exhibit which set forth the defendant's claimed losses, Exhibit 146, was refused admission into evidence. (See p. 20 of Brief, supra.)

Perhaps the most uncertain of all "evidence" as to damages was the unsupported claims by defendant as to which the jury was left to speculate:

Item: Defendant testified that he incurred \$98,600.00 in additional expense and costs in order to maintain his cows beyond the normal lactation period. (Tr. 1065-1069; ab. 152-153) No receipts, bills, cancelled checks, or bookkeeping records were introduced to support defendant's claim.

Item: Defendant claimed with respect to Count V, that he sustained alleged increased costs to maintain his production level, as to Count VI that he sustained additional costs for the greater volume of grain consumed, as to Count VII that there was over payment because protein was deficient. In none of these instances, however, were the exhibits prepared by defendant regarding his claimed losses admitted for jury consideration because they were prepared from documents not evidence, such as the Dairy Herd Management article and the U.S.D.A. grain-milk ratios relied on by defendant in computing his damages. (See pp. 27-28 of this Brief, supra.) Such exhibits were rejected by the Court.

* Defendant claimed \$124,053.00 in damages for loss of milk production. Defendant prepared Exhibit 139 as to his milk losses from his alleged tax records and the alleged Beatrice Foods-Meadow Gold Dairy receipts which were not offered or introduced into evidence. (See pp. 22-23 of Brief, supra.) Exhibit 139 was refused admission into evidence, but defendant nevertheless was permitted to read from the refused exhibit verbatim to the jury. (See pp. 22-23 of Brief, supra.)

No competent evidence on which to determine the amount of damages, if any, was presented to the jury, and it is submitted that the evidence relating to the award of over \$226,000.00 in damages was legally insufficient.

POINT IV.
PREJUDICIAL ERROR WAS COMMITTED
IN THE ADMISSION OF EVIDENCE

The errors assigned herein have to do with prejudicial admission of exhibits, testimony based upon documents and matters not in evidence, conduct of defendant in reading from exhibits which had been excluded or refused, and things of that

A. Prejudicial Admission of Exhibits

It is submitted that admission into evidence of exhibits which were remote in time and place, over strenuous and consistent objection of counsel, constituted prejudicial error. This embraces all chemical tests and exhibits referred to at pp 6-9 of this Brief, which includes exhibits prior and subsequent to the relevant times. The aforesaid exhibits were offered as related solely to notice (punitive damages) , before the matter of negligence had been established or proved (which it never was). Proof of negligence was and is a foundational necessity before the matter of punitive damages can be gone into. But in this case, the opposite procedure was employed: proof admittedly and pointedly pertinent only to punitive damages was introduced, and then the jury was allowed to speculate and infer that very evidence could be the basis for a finding of negligence. This is bootstrapping at its worst.

In Menefee v. Blitz, 181 Ore. 100, 179 P.2d 550, 561 (1947), the court held

When the admissibility of an item of evidence is dependent upon the submission of preliminary proof in the form of "a foundation" or, to use a different term a condition precedent, the party who offers the dependent testimony must submit the preliminary proof or establish the condition precedent before the dependent fact can be deemed admissible. See Wigmore on Evidence, 3rd Ed., § 654, and 32 C.J.S., Evidence, § 838, p. 768. The reception of dependent evidence in face of the fact that the preliminary proof was never submitted constitutes error: 5 C.J.S., Appeal and Error, § 1725, p. 990. [Emphasis added.]

The admissibility of the aforesaid exhibits of alleged similar prior acts injected collateral issues into the case and constituted error.

In negligence actions, the courts have generally ruled inadmissible, on the issue of negligence or of contributory negligence at the time of the injury complained of, evidence of similar prior acts of negligence of the defendant or the plaintiff on other

occasions. To admit evidence of prior acts of negligence would, it is said, inject collateral issues into the case and have a tendency to confuse the minds of the jury. 29 Am. Jur.2d, Evidence, § 315 at 361.

B. Testimony Based upon Documents and Matters Not in Evidence

Rule 70 of the Utah Rules of Evidence prohibits proof of the content of a writing, other than by the writing itself, except in certain circumstances not applicable in this case. That rule was violated in the extreme by permitting Mr. Fitzgerald to read and testify from rejected exhibits as to the content of Internal Revenue records, magazine articles and the like, which were referred to as the basis of the testimony, but never marked as exhibits or introduced into evidence. (See discussion infra, at pp. 20-23 of this Brief.)

A prime example of the prejudicial effect and grave injustice which came about as a result of reference to non exhibits was the Beatrice Food ticket fiasco. (See pp. 22-23 of this Brief.) This was so egregious that the jury wanted to look at what it thought was a key set of damning exhibits, i.e., the Beatrice Food tickets, but had to be told at the direction of the judge in an unrecorded communication at the jury room that the tickets had never been introduced as exhibits. (See p. 23 of the Brief, supra.)

The law is clear that testimony such as was given by defendant, not based upon the personal knowledge of defendant, has no probative value and constitutes error. Thus in Watson Land Co. v. Rio Grande Oil Co., 61 C.A. 2d 269, 142 P.2d 950, 953 (1943) the court stated:

The testimony of defendant's president, that the oil his company was producing had a gravity of less than 14, had no probative value, in view of facts that, as revealed by his subsequent answers, he did not speak of his own knowledge,

but based his statement on the "run tickets" of the refineries which bought the products of his wells, and there was no showing of the basis on which the run tickets were computed.

C. Conduct of Defendant in Reading from Exhibits Excluded or Refused

In determining the losses defendant claims to have sustained, he prepared various summaries and charts containing detailed information as to how he arrived at his losses. (See pp. 20-23 of this Brief, supra.) These summaries included: Exhibits 138-D - "Cow Deaths"; Exhibit 139-D - "Milk Losses"; Exhibit 146-D - "Cows Sold for Beef"; and Exhibit 163-D - "60 Retarded Cows." Each of these exhibits were compiled through use of the DHIA records, (admitted in evidence) defendant's alleged tax records, (not admitted in evidence), his memory, and "other sources which he deems to be reliable." (Tr. 1042-1048; Ab. 145-147; Tr. 1074-1080, 1133-1142, 1158-1167; Ab. 155-156, 182-183, 188-192; Tr. 1065-1069; Ab. 152-153; Tr. 1074-1076; Ab. 154-155; Tr. 1157-1158; Ab. 188; Tr. 1050-1053; Ab. 148-149) The DHIA records were previously received into evidence, but did not contain all the information contained on the proposed exhibits, such as cause of death, reason culled, value of cow, or value of lost milk production, if any. The defendant's alleged tax records were never introduced nor offered into evidence, even though his alleged tax records supposedly contained such information as cow deaths, and cause of death, cows sold for beef, and the reason for such sale, and losses thereby sustained, and receipts for the sale of milk to dairies, such as the Beatrice Foods-Meadow Gold Dairy receipts. (See pp. 20-23 of Brief, supra.) The aforesaid information from the alleged tax records was crucial to the claimed values in connection with loss of milk production. Each of the aforesaid exhibits

were offered into evidence, but the Court reserved ruling thereupon until after cross-examination by the plaintiff. (Exhibit 138-D; Tr. 1049; Ab. 147; Exhibit 146-D; Tr. 1077; Ab. 155; Exhibit 139-D; Tr. 1054; Ab. 149; Exhibit 163-D; Tr. 1079-1081; Ab. 156) The Court thereafter properly sustained plaintiff's objection as to each said exhibit and refused admission of Exhibits 138-D, 139-D, 146-D, and 163-D into evidence. (Tr. 1153-1156; Ab. 186-187)

Although the aforesaid exhibits were refused, the unsubstantiated information contained in those exhibits was nevertheless presented directly to the jury, for its full consideration, by way of defendant's verbatim reading of those exhibits. A comparison of the proposed exhibits to defendant's testimony with respect to cow deaths, sale of cows for beef, retarded cows and loss of milk production readily confirms the fact the defendant read from the refused exhibits. (Exhibit 138-D; Tr. 1042-1048; Ab. 145-147; Exhibit 139-D; Tr. 1076-1080, 1133-1142; 1158-1167; Ab. 155-156, 182-183, 188-192; Exhibit 146-D; Tr. 1065-1069; 1074-1076, 1157-1158; Ab. 152-153, 154-155, 189; Exhibit 163-D; Tr. 1050-1053; Ab. 148-149)

With respect to defendant's reading of Exhibit 146-D "Cows Sold for Beef" a discussion was held between the court and defendant's counsel during which the court, recognizing the questionable propriety of such conduct, refused to permit Mr. Fitzgerald to read from that proposed exhibit or the notes he used in the preparation thereof. (Tr. 1081-1085; Ab. 156-158) Notwithstanding, after Exhibit 146-D was refused admission into evidence, the court permitted the defendant to "Start at the front and go clear through" that exhibit, (Tr. 1158; Ab. 188) reading all the information from that refused exhibit directly into the record.

The court, noting that the milk production information contained on the refused exhibit could be searched out from the DHIA records, suggested that the defendant read only the cow number, percentage of the herd and the loss sustained category from the exhibit, (Tr. 1162-1163; Ab. 190) i.e., the very information from defendant's alleged tax records not introduced into evidence which was the basis for the court's refusal to admit the exhibits into evidence. (Tr. 188-189; Ab. 187)

The information contained in proposed Exhibits 138-D, 139-D, 146-D and 163-D, deemed insufficient by the court to be admitted as exhibit evidence, was nevertheless before the jury, for its evaluation by reason of defendant's sole testimony. The jury was at no time admonished to disregard that information read to them by the defendant from the exhibits refused into evidence.

CONCLUSION


Based upon the foregoing, it is submitted that substantial error was committed in the long and confusing trial of this case. Evidence admitted or limited to the narrow issue of punitive damages was permitted to be considered by the jury for all purposes. Circumstantial evidence relating to one or perhaps two samples of allegedly contaminated feed out of many samples of unadulterated feed was regarded by the court as justifying a virtual direction that the issue of negligence was established as a matter of law. Incompetent evidence was admitted upon which inferences were constructed--with the result that an inference of negligence became the basis for an inference of proximate cause. Testimony directly from excluded or refused exhibits was permitted, as was testimony based upon hearsay records never offered or admitted into evidence. The evidence

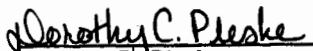
on damages was speculative and uncertain. In short, it is submitted that under the totality of the circumstances, it would be manifest injustice not to reverse the verdict of the jury.


This Court should reverse the judgment in favor of defendant on the Counterclaim and direct the trial court to grant plaintiff's Motion for Directed Verdict. Attorney's fees should be added to the judgment in favor of plaintiff as a matter of law. In the alternative, this Court should vacate the verdict and remand the case for new trial.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF-APPELLANT

DATED: February 28, 1977.

MAILING CERTIFICATE

Hand-delivered

~~Mailed~~ two copies of the foregoing this 28th day of February 1977, to Thomas R. Blonquist, 431 South Third East, Salt Lake City, Utah, 84111, attorney for respondent, postage prepaid.

Dorothy C. Pleshe