

1977

# Intermountain Farmers Association v. Jim Fitzgerald : Reply Brief of Appellant

Utah Supreme Court

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## Recommended Citation

Reply Brief, *Intermountain Farmers Ass'n v. Fitzgerald*, No. 14723 (Utah Supreme Court, 1977).  
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IN THE SUPREME COURT FOR THE STATE OF UTAH

INTERMOUNTAIN FARMERS  
ASSOCIATION,

Plaintiff and Appellant,

vs.

JIM FITZGERALD,

Defendant and Respondent.

REPLY BRIEF OF APPELLANT

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

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F I E

SEP

IN THE SUPREME COURT FOR THE STATE OF UTAH

INTERMOUNTAIN FARMERS  
ASSOCIATION,

Plaintiff and Appellant,

vs.

JIM FITZGERALD,

Defendant and Respondent.

CASE NO. 14723

REPLY 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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POINT I

DEFENDANT HAS FAILED TO RESPOND TO THE ARGUMENTS  
RAISED IN PLAINTIFF'S BRIEF.

In its brief, plaintiff-appellant Intermountain Farmers Association raises three major issues relating to the prejudicial nature of errors made by the lower court with respect to (1) admission of certain exhibits and testimony into evidence and failure of the lower court to instruct the jury properly as to the restricted and limited purpose and use thereof; (2) erroneous instruction by the lower court as to the theory on which the case was submitted and applicable standards of law on the issue of negligence; and (3) insufficiency as a matter of law of the circumstantial evidence presented to create inferences as to negligence, proximate cause and damages. Defendant has failed to meet such arguments raised by plaintiff head-on, but rather has attempted to inundate this Court with "facts" in an apparent attempt to demonstrate a sufficiency of evidence to justify the jury in resolving factual issues as a matter of weight. There remains unanswered the aforesaid legal issues relating to the competency of evidence before the jury, and the legal issues arising from the lower court's erroneous and confusing instructions in connection therewith.

POINT II

DEFENDANT HAS EXAGGERATED AND MISSTATED ESSENTIAL FACTS  
FROM WHICH THE JURY COULD HAVE ARRIVED AT ITS VERDICT.

Counsel for respondent apparently has taken the familiar tack that here is a case where sufficient evidence was before the jury to support its verdict, so this Court should not review and examine the evidence or appeal.

The trouble with this approach is that in setting forth the evidence which supposedly was sufficient for the jury verdict, counsel for respondent has literally created a straw man by describing matters and things which in fact were not before the jury. Rather than directly answering the assigned prejudicial errors of law, respondent has chosen to emphasize an alleged strong factual basis for the verdict. However, as is demonstrated in appellant's initial brief, this is strictly a case which was constructed from circumstance rather than direct evidence. Accordingly, the jury had to infer (speculate?) such things as the existence of negligence during the time period in question from evidence relating to other than the time period, which evidence was offered solely on a theory of punitive damages. Because of this, an examination of the actual competent evidence before the jury is particularly important in this case. Such procedure is well recognized as properly within the realm of appellate review. Charlton v. Hackett, 11 Utah 2d 389, 360 P.2d 176 (1961). That very dubious and only indirect evidence was before the jury from which inferences of negligence, proximate cause and amount of damages had to be constructed is apparent from the strained and often exaggerated and erroneous statements made by counsel for respondent in the lengthy parade of "facts" set forth in his brief. Examples of the scarce and fragmentary evidence, which had to be confusing to the jury, offered solely on the issue of punitive damages but admitted generally and never identified as to restricted use or purpose by the Court, are set forth in appellant's brief (pp. 6-9, 29-32, 56). Now, counsel for respondent wants to make it appear that massive evidence was before the jury from which a proper verdict could have been rendered. In trying to convince this Court that such was the case, it is strange indeed that from

the voluminous and lengthy transcripts of the long and tedious trial, counsel has been unable to set forth a summary of competent and direct evidence, but rather has set forth in his brief a curious recitation of "facts" which actually were not before the jury. In large part, these "facts" are a collection of exaggerations, half truths and misstatements, even though such recitation goes to the very matters from which at best the jury had to construct inferences in order to arrive at its verdict. There follows a delineation of some of the crucial "evidence" which counsel for respondent claims was before the jury:

A. Erroneous statements that certain State Chemist reports on plaintiff's feed were taken during the time periods relevant to the present suit, when in fact they were not.

Defendant purchased and used IFA feed from February 11, 1971, to January 5, 1972, and again from December 28, 1972, to July 26, 1974. Those are the only relevant time periods during which purchases of alleged contaminated feed could have caused damage to defendant's cows. Chemist reports as to the feed which may have been consumed during this period were crucial. Despite the aforesaid defined parameters of relevancy with respect to time periods, counsel for defendant consistently and erroneously has represented in his brief that certain State Chemist reports on plaintiff's feed were taken during the time periods that defendant was using plaintiff's feed, when in fact such State Chemist analyses were not conducted during such time periods. Examples of such erroneous representations include:

\* Exhibit 96, a State Chemist report on 14% dairy feed, was not taken during the periods defendant used plaintiff's feed, contrary to the representations

of Paragraph G at page 41 of respondent's brief. Such exhibit was the only one cited by defendant in said paragraph which analyzed the 14% dairy feed which he used.

\* Exhibit 130 (No. 71-9067), a State Chemist report on 32% dairy concentrate, was taken prior to the time defendant began using plaintiff's feed, contrary to the representations of Paragraph H at page 41 of respondent's brief.

\* Of the six exhibits which defendant represents contained diethylstilbestrol during his first period of use of plaintiff's feed in Paragraph P at page 42 of respondent's brief, three exhibits (Exhibits 5, 88 and 90) were in fact taken by the State Chemist before or after defendant used plaintiff's feed.

\* In Paragraph U at page 48 of his brief, defendant represents that Exhibits 12, 103 and 116 are reports of analysis on feed produced by plaintiff during his use of the same. In fact, Exhibit 12 was taken before defendant began using plaintiff's feed, and Exhibit 103 was taken between the two periods of use by defendant of plaintiff's feed.

In his argument with respect to the misbranding of feed at page 61 of respondent's brief, defendant made the following erroneous representations:

\* Defendant claims that Exhibit 79, the Woodson-Tenant lab test, "shows that the label on the 32% pellet distributed by plaintiff in June of 1974 was false and misleading." Such pellet, as sent to the Woodson-Tenant laboratory, was in fact not labeled, and the laboratory, in conducting its analyses, relied solely on the representation of the former employee of plaintiff Curtis Solomon, that such pellet was a 32% protein pellet. (Ab. 44, 45.)



\* Of the four exhibits cited by defendant at page 61 of respondent's brief as showing plaintiff's feed was deficient in protein during his periods of use of plaintiff's feed, Exhibit 130 (No. 71-9460) was not taken during such time periods, contrary to defendant's representations.

\* Of the seven exhibits cited by defendant at page 62 of respondent's brief as showing that plaintiff's feed contained excess protein during the time periods relevant to the present suit, only three, Exhibits 116, 105 and 132, were taken during such time periods.

\* Of the four exhibits cited by defendant at page 62 of respondent's brief as showing that plaintiff's feed contained excess urea, during the time periods relevant to defendant's use of plaintiff's feed, only two, Exhibits 116 and 130 (No. 71-9076) (sic), were taken during such time periods.

In his argument with respect to "adulterated feed" at page 62 of respondent's brief, of the six exhibits cited by defendant as containing diethylstilbestrol during his use of plaintiff's feed, only three, Exhibits 6, 7 and 87, were taken during such time periods.

From the foregoing, it is evident that counsel for defendant is attempting to present to this Court a much more substantial and favorable picture of the evidence than what in fact was presented at trial.

B. Erroneous statements that "records" supported defendant's testimony at trial, when in fact such were never admitted in evidence.

In respondent's brief, counsel has repeatedly claimed that "the records show . . ." and support defendant's testimony with respect to how many cows died of bloat, how many cows were culled due to the repercussions of such alleged bloat, the value of each of the cows, the value of lost milk

production and other claims relevant to defendant's Amended Counterclaim. (Respondent's brief at pages 14, 16, 34, 36, 37 and 45.) In fact, the DHIA records which defendant now relies upon so extensively do not show the cause of death, the reason a cow was culled from the herd, the value of a cow sold, or the reason for or value of a decline in milk production as has been inferred by defendant in his brief. (Ab. 180, 183, 186 and 187.) Furthermore, the other "records" relied upon by defendant in support of his testimony include his internal revenue records, receipts for the sale of milk to dairies, such as the Beatrice Foods-Meadow Gold Dairy receipts, his barn records, grain receipts and "other sources which (he) deems to be reliable." (Respondent's brief at page 64.) (Tr. 1158; Ab. 188.) Such records were never offered or received into evidence, yet defendant nevertheless is now relying on such records to support his claims, just as was done in proposed Exhibit 138-D - "Cow Deaths," Exhibit 139-D - "Milk Losses," Exhibit 146-D - "Cows Sold For Beef," and Exhibit 163-D - "60 Retarded Cows," all of which were refused admission into evidence after defendant read the contents of each into the record.

C. Erroneous statements as to grain consumption by defendant's cows.

At pages 9 and 47 of respondent's brief, counsel claims that defendant's cows consumed an average of 32 pounds of grain per day. This is a crucial matter in connection with justification for the large damage award. The actual testimony of the defendant reveals that while he maintained his farm at American Fork, the consumption of 14% dairy feed by his cows could be broken down into three different groups: High producing cows consumed at most 32 pounds of grain per day; a second group of cows consumed approximately 22 to 25 pounds

of grain per day; and a third group consumed approximately 10 to 15 pounds of grain per day. (Ab. 134, 135.) Thereafter, when the defendant began milking his cows three times each day, the high producers consumed at most 36 pounds of grain per day, the medium producers consumed only 12 pounds of grain per day, and the dry cows consumed as little as five pounds of grain per day. (Ab. 135.)

In spite of the aforesaid testimony, counsel for defendant, in his brief, now claims that the cows consumed an average of 32 pounds of grain per day. (Respondent's brief, page 47.) An example of how this boot strap "evidence" permitted the jury to speculate is that counsel was permitted to use the inflated "average" figure at trial as a basis for hypothetical questions presented to his expert witness, Dr. Gardner. (Ab. 98, 102, 105, 106.)

D. Exaggeration as to evidence concerning the impact of diethylstilbestrol (DES) at trial.

During the eleven day trial of this matter, mention was made, in passing, only twice to diethylstilbestrol (DES), as is evidenced in the almost 1200 page transcript. (Ab. 10, 39.) Yet, based on such a casual reference to DES at trial, defendant has now developed the finding by the State Chemist of DES in certain reports of analysis on plaintiff's feed as a major point and source of support for his position. (Respondent's brief at pages 2, 6, 7, 42, 46, 59 and 62.) In fact, defendant now represents that he specifically made a claim for damages due to the alleged negligence of plaintiff in producing dairy feed "inconsistent in usable protein contaminated by diethylstilbestrol, . . ."; however, no claim for contamination by DES is made by defendant in his Amended Counterclaim.

The evidence shows that of the 77 State Chemist reports admitted into evidence, none of the reports of analyses on 14% dairy feed and 32% dairy concentrate pellets showed a finding of DES. The eight test reports which indicated a finding of DES in 32% cattle supplement, 32% cattle supplement medicated, and 32% beef cattle supplement, also indicated that a DES content was guaranteed by the label of each such feed sample tested. Furthermore, only three of eight test reports, Exhibits 6, 7 and 87 were taken during the time periods relevant to this suit, and none of the eight test reports were on feed samples from the Spanish Fork branch of plaintiff, where defendant purchased his feed.

E. Other erroneous representations made by defendant in his brief include the following:

\* In Paragraph I at page 46 of respondent's brief, defendant claims that "his cows have been milked by the same milkers since 1972." In fact, defendant's cows were milked by three different milkers during this time period, one of which admittedly had "very little experience as a milker." (Ab. 63, 68, 81, 89.)

\* In comparing a non-grain consuming cow in his herd, "Midge," to a grain-consuming cow, "Cow No. 19," at pages 55 and 56 of his brief, defendant has failed to point out that Midge, who he claims has a normal production cycle and Cow No. 19 had lactations of different length and that Midge milked as much as 416 days during her third cited lactation while the length of lactation of Cow No. 19 did not exceed 305 days. (Ab. 158, 159, 152-155.)

\* In charting the "Herd Average Pounds of Milk Per Head Per Day" on page 17 of respondent's brief, defendant has mistakenly included the full

month of December, 1972 as reflecting production during his use of plaintiff's feed, when, in fact, defendant first purchased plaintiff's feed on December 28, 1972. Likewise, defendant has failed to show his production for July of 1974 on the chart even though he did not purchase his last load of plaintiff's feed until July 26, 1974.

\* At page 19 of respondent's brief, defendant compares the production of his herd to that of the Salt Lake County Average. In so doing, defendant fails to point out that prior to using plaintiff's feed, his herd produced less than the Salt Lake County average and that the most substantial increases in his production occurred when he was using plaintiff's feed. (Exhibit 63-P.) And contrary to his representation as to the increase in the milk production of his herd in 1972 after he quit using plaintiff's feed, Exhibit 63 shows that the in production increase by defendant's herd in 1972 was comparatively a much lesser increase than had occurred during the years that defendant fed plaintiff's feed.

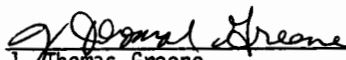
\* At page 65 of respondent's brief, defendant states that the summary exhibits prepared by him were refused admission into evidence on the ground that "they represented evidence already admitted and constituted merely another way of presenting the same evidence." However, a simple reading of the Transcript in this case makes it readily apparent that plaintiff's counsel objected to the exhibits because they were summaries of evidence not previously admitted and the Court sustained counsel's objection on that basis. (Ab. 186, 187, Tr. 1153-1156.) In fact, it is probable that if such summary exhibits had been summaries of evidence already introduced, the Court would have admitted them into evidence.

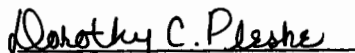
CONCLUSION

It is submitted that prejudicial error was committed at the trial, as is set forth in appellant's initial brief. The exaggerated attempt in respondent's brief to delineate a supposedly massive factual basis for the jury verdict only underscores the injustice which arose from permitting the jury to create inferences or to speculate from a base of exhibits and evidence which were incompetent for such purpose. Curative jury instructions were not given, and confusing and erroneous instructions were delivered. Respondent's brief attempts to bolster and enlarge a fragile base of questionable circumstantial evidence from which the jury verdict had to be constructed. This court should consider the limits of permissible inference from such evidence, exclusive of exaggeration, and certainly unembellished by misstatement. In the interests of justice this case should be reversed.

Respectfully submitted,

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DATED: September 9, 1977

MAILING CERTIFICATE

*Hand delivered*

~~Mailed~~ two copies of the foregoing Reply Brief of Appellant  
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*Dorothy C. Pleske*