

1978

# Intermountain Farmers Association v. Jim Fitzgerald : Brief in Opposition to Respondent's Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT FOR THE STATE OF UTAH

\*\*\*\*\*

INTERMOUNTAIN FARMERS )  
ASSOCIATION, )

Plaintiff and Appellant, )

vs. )

CASE NO. 14723

JIM FITZGERALD, )

Defendant and Respondent. )

\*\*\*\*\*

BRIEF IN OPPOSITION TO RESPONDENT'S  
PETITION FOR REHEARING

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

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Clerk, Supreme Court, Utah

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BRIEF IN OPPOSITION TO RESPONDENT'S  
PETITION FOR REHEARING

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POINT I

RESPONDENT FAILS TO PRESENT A SUFFICIENT  
BASIS UPON WHICH A REHEARING COULD BE GRANTED

In its Brief in Support of Petition for Rehearing, Respondent has simply rehashed and restated arguments already submitted to this Court in its prior 69 page Brief, completely failing to set forth any reason for which a rehearing could be justified. This Court has long adhered to the principle that "to justify a rehearing, a strong case must be made." Vernard v. Old Hickory M. & S. Co., 7 Pac. 408 (1885); In re MacKnight, 4 Utah 237, 9 Pac. 299 (1886); Brown v. Pickard, 4 Utah 292, 9 Pac. 573, 11 Pac. 512 (1886). In detailing the reasons for which a rehearing is justified, this Court, in Cummings v. Nielson, 42 Utah 157, 129 Pac. 619 (1913), held that:

To make an application for a rehearing is a matter of right, and we have no desire to discourage the practice of filing petitions for rehearings in proper cases. When this court, however, has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result. In this case nothing was done or attempted by counsel, except to reargue the very propositions we had fully considered and decided. . . . As a general rule, therefore, merely to reargue the grounds originally presented can be of little, if any, aid to us. 129 Pac. at 624 [Emphasis added]

Likewise, the brief decision of this Court in Ducheneau v. House, 4 Utah 481

~~129 Pac. 624~~ (1905), reads in full as follows:

The petition for rehearing states no new facts or grounds for a reversal of the judgment of the lower court. It is mainly a reargument of the case. We have repeatedly called attention to the fact that no rehearing will be granted where nothing new and important is offered for our consideration. We again say that we cannot grant a rehearing unless a strong showing therefor be made. A reargument, or an argument with the court upon the points of the decision, with no new light given, is not such a showing. The rehearing is denied. [Emphasis added.]

Respondent has failed to present any basis whatsoever upon which this Court could grant a rehearing. Although counsel for respondent painstakingly phrased the point headings of his Brief in re Rehearing so as to track the language of the Cummings case, supra, the substance of each such point heading is virtually identical to and, more often than not, a verbatim recitation of the arguments raised in his original brief.\*

\* The issue raised in Point VIII of Respondent's Brief in re Rehearing regarding whether the violation of a statute constitutes negligence per se was fully presented and argued in Appellant's brief at pp. 34-39 and in Respondent's original brief at pp. 61, 62. While the substance of Respondent's Point VIII in support of his Petition

Respondent's brief in support of his Petition for Rehearing is identical to his original brief submitted to this Court on May 17, 1977, in the following respects:

REHEARING BRIEF

Point IV Re: Negligence

1. First paragraph of Point IV at p. 6.
2. Paragraph A, p. 6.
3. Paragraph B at p. 7.
4. Paragraph C at p. 7.
5. Paragraph D at p. 7.
6. Paragraph E at p. 7.
7. Paragraph F at p. 7.
8. Paragraph G at p. 8.
9. Paragraph H at p. 8.
10. Paragraph I at p. 8.
11. Paragraph J at pp. 8, 9.

ORIGINAL BRIEF

Point III Re: Negligence

1. Cf. first paragraph at p. 39.
2. Basic content is referred to generally throughout original brief.
3. Identical to second sentence of Paragraph R at p. 43 (verbatim).
4. Identical to first sentence of Paragraph R at p. 43 (verbatim).
5. Identical to Paragraph P at p. 42 (verbatim).
6. Identical to Paragraph Q at p. 43 (verbatim).
7. Identical to Paragraph G at p. 41 (verbatim).
8. Identical to Paragraph H at p. 41 (verbatim).
9. Identical to Paragraph F at pp. 40, 41 (verbatim).
10. Identical to Paragraph M at p. 42 (verbatim).
11. Identical to Paragraph N at p. 42 (verbatim).

for Rehearing is not a verbatim repeat of his previous argument, a rehearing should nevertheless not be granted to provide Respondent with a second chance to argue a proposition which has already been fully and fairly presented to the Court for its consideration. (See also *infra* at pp. 8, 9.)



12. Paragraph K at p. 9.

13. Paragraph L at p. 9.

14. Paragraph M at p. 9.

15. Paragraph N at p. 9.

16. First sentence of Conclusion  
at p. 9

Point V Re: Causation

Paragraph A at p. 10 through  
Paragraph AA at p. 15 (i.e.,  
five pages, which include the  
entire substance of Point V).

Point VI - DHIA Records

1. Paragraphs 1-4 at pages 16, 17  
and 18 describe the DHIA records.

2. First complete paragraph at  
p. 18.

3. Second paragraph at p. 18.

4. Third paragraph at p. 18.

5. First paragraph at p. 19.

6. Second paragraph at p. 19.

7. Third paragraph at p. 19  
(Conclusion).

12. Identical to Paragraph O at p. 42  
(verbatim).

13. Identical to Paragraph T at p. 43  
(verbatim).

14. Identical to Paragraph U at pp. 43,  
44 (verbatim).

15. Identical to Paragraph V at p. 44  
(verbatim).

16. Identical to Conclusion at p. 44.

Point IV Re: Causation

1. Identical to Paragraph A at p. 44  
through Paragraph AA at p. 49  
(verbatim).

Point V - Damages

1. General summary explanation of  
DHIA records at Paragraph L  
"Computer Records kept" at p. 51.

2. Cf. Paragraph A at p. 50.

3. Cf. Paragraph B at p. 50.

4. Cf. Paragraph C at p. 50.

5. Cf. Paragraph D at pp. 50, 51.

6. Cf. Paragraph E at p. 51.

7. Identical to Conclusion of Point  
V at p. 51 (verbatim).

Point VII - Feed Cases

1. All of Point VII - pp. 19-24 (except last paragraph at p. 23 consisting of one sentence).

Point IX - Re: Rule 70

1. First paragraph of Point IX at p. 35.
2. First and second paragraph of p. 36.
3. Third paragraph at p. 36 through conclusion of Point IX at p. 40 (i.e., 4-1/2 pages).

Point X - Re: Admissibility of Reports

1. Paragraphs A-F and last paragraph at p. 42 and top of p. 43.
2. First complete paragraph at p. 43 through quotation on p. 44.
3. First complete paragraph at p. 44.
4. Last paragraph at p. 44 through first complete paragraph at p. 45.
5. Second complete paragraph at p. 45 through conclusion of Point X at p. 46.

Point III - Re: Pellets

Statement of the Case at pp. 1, 2.

Point VI - Feed Cases

1. Identical to all of Point VI at pp. 51-57 (verbatim, except rehearing brief does not include lactation chart on pp. 55-56).

Point IX - Re: Reading from Summaries

1. Identical to first paragraph of Point IX at pp. 63, 64 (verbatim).
2. Substantively identical to paragraph at pp. 64 and 65 which is more detailed in original brief.
3. Identical from 1st complete paragraph at p. 65 through conclusion of Point IX at p. 69 (verbatim).

Point VII - Re: Receipt of Reports of Analysis

1. Identical to Paragraphs A-F, p. 59 and paragraph at bottom of p. 59 and top of p. 60 (verbatim).
2. Identical to first complete paragraph at p. 58 through quotation on p. 59 (verbatim).
3. Identical to first complete paragraph at p. 60 (verbatim).
4. Identical to first and second paragraphs of Point VII at p. 57 (verbatim).
5. Identical to second complete paragraph at p. 60 through conclusion of Point VII at p. 61 (verbatim).

Paragraph K at p. 42 of original brief presents point raised at Point III of rehearing brief.

Identical to Statement of Case at pp. 1, 2 (verbatim).

Disposition of case by Lower Court  
at p. 2.

Identical to Disposition Statement  
at p. 2, absent one sentence.

Relief sought on Appeal at p. 2.

Identical to Relief Statement at p. 2  
with change in verb tense.

Respondent now asserts that, "The Court misconstrued and overlooked" or "disregarded" virtually the entire content of Respondent's Brief, as duplicated in his brief in re Rehearing. It is apparent, however, that nothing is presented by Respondent in his brief in support of Petition for Rehearing except a reargument of the very issues already carefully considered and decided by this Court. In light of case law long adhered to and in the interest of efficient judicial administration, Respondent's Petition for Rehearing should be denied.

\* \* \*

As noted above, the Points now raised in Respondent's brief are not new and constitute only a reorganized presentation of matters previously submitted to this Court. All of the matters now raised were considered by this Court in its opinion filed January 24, 1978. In that opinion, four fundamental propositions of reversible error were discussed, in the sequence and headings now set forth as Points II through V of this brief. All of Respondent's points fall within the said four major headings. Since prejudicial error was found to exist under each of the four categories, arguments bearing upon a rehearing can best be considered as to each of the four matters which were presented as reasons for reversal and dismissal of the Counterclaim.

## POINT II

### INSTRUCTIONS TO THE JURY RELATING SOLELY TO THE ISSUE OF PUNITIVE DAMAGES CONSTITUTED PREJUDICIAL ERROR

Surprisingly, this ground for the opinion of this Court was largely ignored in Respondent's Brief in Support of Rehearing. This was the first major item discussed in this Court's opinion, and was regarded as constituting such clear prejudicial error as to justify reversal "on this matter alone." Respondent broaches the subject in part at the end of his Brief at Point X, but fails to comment about or attempt to justify the erroneous jury instruction held by this Court to constitute prejudicial error. Instead, Respondent argues as a conceptual matter that in a proper case exhibits can properly be admitted into evidence for the restricted purpose of showing notice, knowledge or willfulness. In this regard, there is no quarrel with the principle of law quoted in Respondent's Brief in re Rehearing as held by this Court in Fowler v. Medical Arts Building, 112 Utah 367, 188 P.2d 711 (1948) that in a proper case evidence of prior knowledge would be admissible as bearing upon the issue of negligence. But Respondent ignores the real problem which caused the prejudicial error in this case, i.e., the confusion which came about by reason of the lack of clarification to the jury as to the restricted purposes for which various exhibits were received in evidence. Respondent implies that error as to the exhibits which were received without restriction was somehow obliterated by the lower Court's proper refusal to permit a witness to testify about alleged toxic effects prior to or subsequent to the period of use by defendant of IFA's feed. (Respondent's Brief in re Rehearing p. 45; Respondent's Brief

p. 57) But that was the very thing counsel for Respondent argued with reference to the several "tainted" exhibits. This could only have further confused the jury. Respondent fails to challenge or even comment about this Court's conclusion that:

. . . the jury reviewed all of the exhibits without restriction, when in fact some of the exhibits should have been restricted to the issue of punitive damages. The admonition of the court as provided in instruction number twenty was not sufficient to overcome the prejudicial error created by allowing such evidence in, . . . [Court's Opinion, p. 2; Emphasis added.]

### POINT III

#### **THE INSTRUCTION TO THE JURY TO THE EFFECT THAT VIOLATION OF A STATUTE AS IT AFFECTS NEGLIGENCE WAS PREJUDICIAL ERROR**

This matter was argued at length in Appellant's Brief (pp. 34-39) and in Respondent's Brief (pp. 61-62). It is amazing now in Respondent's Brief in Support of Rehearing that the alleged justification for the trial court's instructions as to negligence as a matter of law which this Court has held constituted prejudicial error rests upon testimony and exhibits admitted for the restricted purpose of punitive damages and which could not have justified a finding of negligence as to feed purchased by Respondent since such exhibits related to periods prior to or subsequent to the periods of use by defendant of IFA's feed. (See Respondent's Brief in re Rehearing, pp. 30-35; cf. Brief of Appellant, pp. 7, 8.) In the bootstrap argument of Respondent that it was proper for the Court to instruct that negligence per se existed if the statutes regarding misbranded or adulterated feed were violated, counsel for Respondent cites and relies upon evidence adduced at trial relating to Exhibits 4, 12, 13 and 15 (Respondent's Brief in re Rehearing, pp. 30-35), which exhibits related to samples of feed taken prior to or subsequent to

the periods of use by defendant of IFA's feed. [Exhibits 12, 13 and 15 were subsequent; Exhibit 4 was prior - (Sample taken on January 29, 1971, prior to the period - Chemist Report issued on May 7, 1971) See Appellant's Brief, pp. 7 and 8.]

Respondent argues that the "pivotal point" which could transform violation of a statute from negligence per se to merely evidence of negligence is the existence of evidence as to excuse or justification. But this Court has made it clear that the jury should be allowed under all of the facts and circumstances to determine the existence of such excuse or justification. Thompson v. Ford Motor Co., 16 Utah 2d 30, 395 P.2d 62 (1964) and cases cited therein (including those cases cited in Respondent's Brief in re Rehearing at pp. 26-29). Certainly under the facts and circumstances of this case the jury ought not to have been allowed to speculate that exhibits and testimony improperly admitted in evidence without restriction as to time and purpose could be regarded as conclusive evidence of statutory violations relative to contaminated feed during the period of use. Since the Court did not identify the exhibits which should have been considered on the punitive damage issue only, and since those exhibits were before the jury without restriction (including Exhibits 4, 12, 13 and 14), the Court's instructions to the effect that the jury could consider such exhibits as triggering and justifying the applicability of the negligence per se instructions was clearly prejudicial. A major source of mischief in the per se negligence instructions was that evidence which in law could not have had a bearing upon the violation might well have been the very basis upon which the jury determined that the statutes were violated.

In all events, the bald assertion by Respondent that this Court failed correctly to state the law concerning whether violation of the statutes constitutes negligence per se is clearly incorrect. The Court's opinion correctly states that "violation of a statute does not necessarily constitute negligence per se and may be considered only as evidence of negligence." Klafta v. Smith, 17 Utah 2d 65, 404 P.2d 659 (1965); Thompson v. Ford Motor Co., supra; White v. Shipley, 48 Utah 496, 166 Pac. 441 (1916).

#### POINT IV

#### PLAINTIFF'S MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED

The major part of Respondent's Brief in Support of Rehearing, including Points II through VII, is devoted to attempting to refute this Court's ruling that a directed verdict should have been granted below since the evidence offered and received was insufficient as a matter of law to prove that plaintiff's alleged negligence proximately caused the defendant's damage. All of the points now presented as grounds for rehearing were presented at length in Respondent's Brief. (See Point I, infra.) Certainly all of the matters are to be found in the carefully prepared Abstract of Trial Transcript which condenses the pertinent and material evidence contained in the nine day trial transcript. Judge Palmer's opinion reflects considerable scrutiny of both the Abstract and the Transcript, and each statement made at page 3 and elsewhere in the said opinion is rooted in obvious painstaking analysis and review. Respondent's brief in re Rehearing brashly and improperly characterizes a portion of the Court's review as having escaped or been overlooked by the "unequipped eye." To the contrary, the opinion of this Court reflects, as is stated therein: "careful reading of the transcript and the abstract . . ." To demonstrate the basis



in fact and accuracy of this Court's review of the evidence below, there is herewith supplied citations to the record in clear support of each and every contested statement. In order to do this, the statements from the opinion concerning the trial court's failure to direct the verdict below are underlined verbatim, with citations and questions from the record bracketed and added directly underneath each statement:

"Any food shown to be contaminated in the evidence was from plants other than the Spanish Fork Plant where the defendant purchased its feed from plaintiff."

[There was no direct evidence by way of chemical test or otherwise that any of the loads of 14½ Dairy Feed actually purchased by defendant was contaminated. No tests by the State Chemist were taken of feed sold at the Spanish Fork branch during the relevant time periods. Cf. Appellant's Brief, pp. 4 and 5, and citations to the record therein.]

\* \* \*

"There was no showing of any causal connection between the alleged harmful feed and the death, sickness or loss of production of the defendant's dairy cattle."

[A review of the record reveals substantial evidence of possible causes of the alleged injuries other than contaminated feed, and that such possible causation was not negated. Cf. Appellant's Brief at pp. 13-20 and citations to the record therein. Defendant's own witness testified that such causes were in fact the chief causes of losses in milk production. Tr. 788; Ab. 106. Additionally, this Court's opinion at page 2 thereof observes the anomolous situation that ". . . during the time plaintiff's feed was fed to the defendant's cattle, the defendant's cattle's milk production increased from

372 pounds less than the Salt Lake County's yearly average production per



cow to 1,657 over the yearly average of Salt Lake County production per cow. This is clearly supported by the undisputed record in this case, and certainly destroys the claim of causal connection between IFA's feed and the alleged damages to defendant's cows. Cf. Exhibit 63-P as set forth at Appellant's Brief, p. 4.]

\* \* \*

"As a matter of fact, it was more reasonable to presume that any death, sickness or loss of production was caused from the feeding of the defendant's own feed since no contaminated feed was shown to have been purchased from plaintiff's plant by the

defendant. Cf. Appellant's Brief, p. 4. On the other hand, there was evidence that 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. Cf. Ab. at p. 71, 72; Tr. at pp. 604, 604, 608. (Testimony of Ed Aragon - employee of defendant.) Appellant's Brief, p. 16. At trial, Dr. Huber testified that the most common cause of bloat results from consumption of alfalfa. Tr. 884; Ab. 204.]

\* \* \*

"In this case, there was no direct evidence in the record to justify a conclusion that the feed caused the death, diminished milk supply, or any other damage to the defendant's cattle. Circumstantial evidence presented was totally lacking."

[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. Cf. discussion of insufficiency of circumstantial evidence to create inference of negligence at Appellant's Brief, pp. 40-42.]

\* \* \*

The foregoing represents documentation as to the factual basis from the record for statements made by this Court in support of its conclusion that plaintiff's Motion for Directed Verdict should have been granted. Respondent's Points III through VII are all directed to these matters and in essence are answered by the recitation of the evidentiary basis for this Court's opinion aforesaid. However, each such Point of contention will be specifically answered.

- POINT III - Pellets manufactured at plaintiff's Draper Plant

Respondent erroneously asserts that this Court "overlooked and/or disregarded" the fact that 14% dairy feed contained a 32% pellet manufactured at plaintiff's Draper Plant. (Respondent's Brief in re Rehearing, p. 5) This Court didn't overlook that matter at all. To the contrary, this court correctly observed from the record that there was no direct evidence that the feed purchased from the Spanish Fork branch which was actually eaten by defendant's cows caused any harm. This is clear and definitely supported by the record, since there was in fact no direct evidence that any contaminated 32% supplement or concentrate was in fact mixed into the feed which defendant purchased. Cf. Appellant's Brief at p. 5, and the citations to exhibits and references therein. Furthermore, the testimony of Respondent's witness, Dr. Gardner, effectively refutes the argument here raised by Respondent to the effect that an excess of NPN or deficiency of

protein in a 32% pellet would necessarily follow through when mixed into 14% dairy feed. (Ab. 122, Tr. 799-800)

- POINT IV - Evidence in re negligent manufacture and distribution of feed by plaintiff

Respondent asserts that this Court "misconstrued and overlooked" evidence of negligence on the part of plaintiff. In support of this assertion, Respondent parades the same set of "facts" before the Court as he had in his original brief at pp. 33-44, again completely ignoring the competency of such evidence to establish negligence in this case. Actually, the opinion of this Court correctly recognized that there was "no direct evidence of the plaintiff's feed being harmful; no tests by the State Chemists of any toxicity or existence of urea in the feed bought by defendant from the plaintiff's Spanish Fork Branch." (Court's opinion, p. 2)

- POINT V - Causation

Respondent asserts that this Court "misconstrued and overlooked" facts regarding causation. Such facts claimed by Respondent to have been overlooked by this Court, read identically to those presented in Respondent's original brief at pp. 44-49. The contrary state of the record has already been documented in discussing citations to the evidence which supports this Court's statements. In this regard, the testimony of both of the expert witnesses (Dr. Gardner and Dr. Huber) shows that regardless of certain problems prior to and subsequent to the periods of use by defendant as to the IFA feed, none of the feed analyzed by the State Chemist Reports on the 14% feed during the time periods in question would cause the type of problems complained of by defendant. Cf. Tr. 795; Ab. 121; Tr. 877; Ab. 202. The evidence in the record relating to causation

and the lack of connection to IFA's feed is discussed in detail at Appellant's Brief at pp. 13-21 and pp. 39-55, and Appellant's Reply Brief, pp. 6-8.

- POINT VI - DHIA Records

Respondent argues that this Court "completely overlooked" Exhibits 17-56, the Dairy Herd Improvement Records. In fact, it is obvious that the court carefully reviewed this evidence in having observed that ". . . during the time plaintiff's feed was fed to the defendant's cattle, the defendant's cattle's milk production increased from 372 pounds less than the Salt Lake County's yearly average production per cow to 1,657 over the yearly average of Salt Lake County production per cow." The exhibit referred to by this Court to support this statement (Exhibit 63-P set forth at Appellant's Brief, p. 4) is based upon summaries of DHIA annual reports for Salt Lake County dairy herds for the years 1970-1975. (See Exhibits 58 through 62, Ab. 22-24.) To the same effect at trial, the witness Gerald Withers, who actually prepared the DHIA records, identified Exhibit 63 and testified as to the accuracy of the summary. (Ab. 22-24)

Respondent in asserting this point about DHIA records has merely prefaced each paragraph of Point V of his original brief re damages with the phrase "The DHIA records, together with the tax receipts and barn sheets, support . . ." defendant's testimony. Once again, counsel for Respondent tries to bootstrap his position by reference to items which were never received in evidence. (As pointed out in Appellant's Reply Brief, the referred to tax records, barn sheets and other records relied upon by respondent were never offered or received in evidence. (Reply brief, pp.5,6) Respondent fails to discuss the competency and applicability

of such "evidence" to support his claim for damages. The inadequacy and inapplicability of the DHIA records as evidence of calculation of damages was presented in detail in Appellant's Brief at pp. 24-29. Respondent's initial brief sets forth the Respondent's position as to this matter. (Respondent's Brief at p. 12, 63-65) Certainly this matter was fully and completely before this Court, and after due and careful review, the opinion advisedly states that such evidence did not justify the conclusion of damages to the defendant's cows. Obviously, the said records along with all other matters in the record were reviewed by this Court.

**- POINT VII - Previous feed decisions**

At pp. 47-52 of Appellant's brief the cases referred to are discussed at very great length, with a full and careful analysis to demonstrate the distinctions and inapplicability of those precedents to the facts of this case. Respondent likewise argued those cases at length in its initial brief. Respondent's Brief, pp. 51-57. Nothing new is presented in the verbatim rehash of the same cases as set forth in Respondent's present Brief in re Rehearing at pp. 19-24. (Respondent's Brief, pp. 51-57)

**POINT V**

**PREJUDICIAL ERROR WAS COMMITTED  
IN THE ADMISSION OF EVIDENCE**

Respondent's brief at Point IX sets forth the contention that this Court failed to correctly state the law concerning error which was committed in connection with exhibits admitted in evidence. The argument of Respondent which, again, is a verbatim recitation of Point IX at pp. 63-69 of his original brief, sounds like a brief in support of a cross appeal (which does not exist here) so as to

attack the Court's ruling below which excluded certain summaries. Respondent's argument seems to be that the court below erred in failing to admit the summaries, so why should we complain now since the summaries should have been admitted? (See Respondent's Brief in re Rehearing at pp. 36-38; Respondent's Brief at pp. 66-68) The argument goes on: "The summaries themselves were not allowed in evidence, and the jurors only took into the jury room those portions of the summaries that they recalled from defendant's testimony." (Respondent's Brief in re Rehearing, p. 38; Respondent's Brief, p. 68)

The foregoing argument totally misses the point of what this Court held to be prejudicial, i.e., that exhibits which were denied admission into evidence may not later be read to a jury. In the case of the summaries in question, certain foundational records themselves were never before the jury, even though ". . . defendant brought to the trial a large cardboard box containing milk receipts from Beatrice Foods - Meadow Gold Dairy and a large folder containing his tax returns." (Respondent's Brief in re Rehearing, p. 35.) (Cf. Appellant's Brief, pp. 22-23 wherein it is pointed out that the "summaries" were supposedly based upon information from certain folders, tickets, brown folders and other records which themselves were not in evidence; Appellant's Reply Brief at pp. 5-6.) The "summaries" quite properly were not admitted into evidence. The prejudicial and impermissible thing that happened at trial was that notwithstanding rejection of such "summaries," and in spite of the fact that foundational data was only referred to and not admitted in evidence, nevertheless those summary documents were read to the jury.

Respondent argues that Rule 70 of the Utah Rules of Evidence permits the admission of summaries in a proper case. The instant opinion of this Court recognized that general principle, but states that in the application of Rule 70 to the facts of this case, reading the exhibits in question after the Court had excluded them would "circumvent the very rule of law" Rule 70 was meant to enunciate. This Court correctly stated: "For though the exhibits were refused, the unsubstantiated information contained in those exhibits nevertheless was presented directly to the jury for its full consideration by the defendant's verbatim reading of the exhibits." [Emphasis added] The argument of Respondent misinterprets the ruling of this Court as to the prejudicial effect of the evidence admitted.

#### CONCLUSION

It is submitted for the reasons set forth herein that Respondent's Petition for Rehearing should be denied.

Respectfully submitted,

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MAILING CERTIFICATE

Mailed two copies of the foregoing Brief in Opposition to Respondent's Petition for Rehearing this 17<sup>th</sup> day of March 1978, to Thomas R. Blonquist, 431 South Third East, Salt Lake City, Utah 84111, attorney for respondent, postage prepaid.

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